UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Northern Natural Gas Company Docket Nos. RP06-302-001, RP06-302-002, RP06-302-003

ORDER ON COMPLIANCE AND REHEARING

(Issued January 25, 2007)

1. On June 2, 2006 the Northern Municipal Distributors Group (NMDG) and the Midwest Region Gas Task Force Association (MRGTF) (collectively, Distributors)[1] filed a request for rehearing of the Commission's May 5, 2006 Order (May 5 Order) in the captioned proceeding.[2] The May 5 Order accepted six non-conforming service

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[1] NMDG is composed of the following Iowa municipal-distributor customers of Northern Natural Gas Company: Cascade, Cedar Falls; Coon Rapids; Emmetsburg; Gilmore City; Graettinger; Guthrie Center, Harlan; Hawarden; Lake Park; Manilla; Manning; Osage; Preston; Remsen; Rock Rapids; Rolfe; Sabula; Sac City; Sanborn; Sioux Center; Tipton; Waukee; West Bend; Whittemore; and Woodbine. MRGTF is composed of the following municipal-distributor and local distribution customers of Northern Natural Gas Company: Austin; Circle Pines; Community Utility Company; City of Duluth, Minnesota - Duluth Public Utilities; Great Plains Natural Gas Company; Hibbing; Hutchinson; New Ulm; Northwest Natural Gas Company; Owatonna; Round Lake; Sheehan's Gas Company, Inc.; Two Harbors; Virginia; and Westbrook, Minnesota; Midwest Natural Gas, Inc.; Superior Water Light & Power; St. Croix Valley Natural Gas, Wisconsin, d/b/a St. Croix Gas, Wisconsin; and Watertown, South Dakota.

[2] *Northern Natural Gas Co.*, 115 FERC ¶ 61,146 (2006).

agreements and associated amendments for service filed by Northern Natural Gas Company (Northern) related to its services with Northern States Power Company-Minnesota (NSP-MN). The Commission also accepted a tariff sheet filed by Northern to add the subject agreements to its list of non-conforming service agreements to be effective May 8, 2006.[3] As discussed below, the Commission denies the request for rehearing of the May 5, 2006 Order. Further, the instant order also accepts filings made by Northern to comply with the directives of the May 5 Order.

I. Background

2. On April 7, 2006, Northern filed six non-conforming service agreements and associated amendments for service with NSP-MN (April 7 Filing). Northern stated that these agreements contained non-conforming provisions necessary to retain NSP-MN as a major customer on its system. Northern stated that on May 17, 2004, it entered into a letter agreement with Xcel Energy Services, Inc. (Xcel), the parent company of NSP-MN to continue to be the primary service provider for NSP-MN's current and future market requirements.[4] Northern stated that this 2004 letter agreement was based on Xcel's various Requests for Proposals (RFPs) for the construction of a line to bypass Northern, and asserted that this agreement was necessary to avoid such a bypass.

3. Northern's filing included six service agreements for service under Rate Schedules TF and TFX,[5] including: (1) a TF Maximum Rate Agreement; (2) a TF Discounted Rate Agreement; (3) a TFX Maximum Rate Agreement; (4) a TFX Discounted Rate Agreement; (5) a TFX Power Plant Agreement; and (6) a TFX Carlton Agreement. Northern asserted that these agreements contained certain non-conforming provisions that were included specifically to avoid a possible bypass of a major portion of Northern's

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[3] Original Sheet No. 66D to Northern's FERC Gas Tariff, Fifth Revised Volume No. 1.

[4] Northern asserted that NSP-MN is its second largest customer, representing load of approximately 225,000 Dth per day during the months of November through March, and about 100,000 Dth per day during the months of April though October, in addition to any of NSP-MN's related load growth requirements.

[5] Northern's Rate Schedule TF provides a firm transportation service with a uniform year-round rate. Rate Schedule TFX provides a firm transportation service with a higher rate in winter (November-March) than summer (April-October).

market area.[6] In general, the non-conforming provisions in the proposed agreements include: (1) a provision to allow NSP-MN to realign its primary receipt point rights under its Rate Schedule TF and TFX service agreements from certain Market Area receipt points to the Chicago receipt point; (2) a growth option allowing NSP-MN to increase its MDQ at certain intervals over the contract term, and at specific levels, at a pre-determined rate; (3) a renegotiation provision should the Commission not approve the subject provisions; (4) a provision allowing NSP-MN to combine its power plants into one Operational Zone for the purposes of aggregating Daily Delivery Variance Charge (DDVC) and imbalance calculations,[7] and; (5) a statement that the shipper considered bypassing Northern's system.

4. On May 5, 2006 the Commission accepted Northern's six non-conforming agreements and associated amendments, subject to certain conditions.[8] The Commission also accepted Northern's proposed tariff sheet to add the subject agreements to its list of non-conforming service agreements.[9] On June 2, 2006, Distributors filed a request for rehearing of the Commission's May 5 Order.

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[6] Northern stated that the Service Agreements are to become effective on November 1, 2007, and expire on October 31, 2017.

[7] A Daily Delivery Variance Charge is a charge that Northern proposes to assess when a shipper's actual delivered quantities do not conform to its scheduled quantities. Northern's DDVC provisions are set forth in section 48 of its General Terms and Conditions.

[8] In brief, the Commission ordered Northern to: (1) clarify that the realignment provisions contained in its TF and TFX agreements do not provide NSP-MN with a special priority to change primary receipt points that would adversely affect the ability of other shippers to obtain primary point capacity under Northern's generally applicable tariff; and, (2) either remove the growth option and full service requirement provisions for NSP-MN and NSP-MN's Wisconsin affiliate from its TFX Discount Agreement, or in the alternative, offer the provisions to all shippers in a manner that is not unduly discriminatory as part of its generally applicable tariff. These conditions and Northern's filings to satisfy them are discussed below.

[9] *Northern Natural Gas Co.*, 115 FERC ¶ 61,146 (2006).

5. On rehearing, Distributors argue that the Commission erred because it ignored the fundamental issues of whether Northern's discounts and other benefits granted to NSP-MN foster unlawful discrimination, grant undue preferences, condone anti-competitive behavior, and/or foster an abuse of market and monopoly power. Distributors contend that, under the circumstances presented in this case, the Commission should exercise its Natural Gas Act (NGA) section 4 and 5 powers now to address these issues and investigate the impact of the service agreements on captive and other shippers. Further, Distributors argue that the Commission erred in failing to require Northern to post the capacity subject to the service agreements and the letter agreement to allow other shippers to bid on that capacity. Distributors argue that the Commission's Selective Discounting Policy, as recently reaffirmed,[10] does not provide adequate protections to consumers under the circumstances presented here. Distributors claim that Northern can easily shift the initial and heaviest burden of proof to those parties challenging the discount. Distributors add that the Selective Discounting Policy, as a statement of policy, is not a binding rule and its use must be justified in the particular circumstances of each case. Distributors request that the Commission either reject Northern's filing or set these issues for technical conference and formal hearing, including discovery.

6. In addition, Distributors claim that Northern's filing is inadequate because it: (1) does not comply with the Commission's filing requirements requiring Northern to provide support for its tariff filings; (2) fails to explain how the currently-existing ROFR and rollover rights have been exercised to achieve the new service agreements, and (3) fails to support Northern's claim that it granted the instant discounts and benefits in order to retain NSP-MN as a customer in the face of a *bona fide* threat of bypass.

II. Discussion

7. For the reasons discussed below, the Commission denies rehearing on all issues.

A. Impact of the Discounted Agreement on Captive and Other Shippers

8. In accepting Northern's filing, the May 5 Order noted that the accommodation Northern reached with NSP-MN was similar to two previous arrangements reached with CenterPoint Energy Minnesota Gas (Centerpoint) and Metropolitan Utilities District (MUD), other major customers on Northern's system, in what Northern stated was an

[10] Distributors cite *Policy For Selective Discounting By Natural Gas Pipelines*, 111 FERC ¶ 61,309 (2005), *order on reh'g*, 113 FERC ¶ 61,173 (2005), *appeal pending sub. nom.* IMGA v. *FERC*, (D.C.Cir. Case No. 06-1006).

attempt to keep those entities from bypassing its system.[11] Since those orders were issued, the Commission has also addressed a similar filing by Northern in regard to its retention of an additional customer, Flint Hills.[12] In both the Centerpoint and MUD proceedings, as well as in accepting the filing by Northern in regard to Flint Hills, the Commission denied objections similar to those raised in the instant proceeding by Distributors. As discussed below, the Commission, for the reasons generally espoused in those orders, will again deny the arguments raised by Distributors.

9. First, Distributors argue that the anti-competitive and discriminatory aspects of Northern's filing should be addressed now rather than later. Distributors argue that under the NGA, the Commission has the responsibility of ensuring that pipelines do not engage in undue discrimination among their customers.[13] Distributors' primary claim is that they will be required to bear the costs of the NSP-MN discounts in Northern's next rate case. Distributors argue that the Commission must define now the extent to which captive and other shippers will be required to subsidize the discounts and other benefits provided to NSP-MN.

10. Distributors argue that as more individual contracts are executed, there are fewer shippers that pay the maximum rate. They state that maximum rates are driven higher as the pipelines continue to recover the discounts and other benefits provided to favored shippers through devices such as selective discounting adjustments. Distributors argue that *Maryland Peoples Counsel v. FERC*, 761 F.2d 780 (D.C. Cir. 1985) (*MPC II*)

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[11] *Northern Natural Gas Co.*, 111 FERC ¶ 61,287 (2005) (*MUD I*), *order on reh'g* 113 FERC ¶ 61,119 (2005) (*MUD II*); *Northern Natural Gas Co.*, 110 FERC ¶ 61,321 (2005) (*Centerpoint I*), *order on reh'g*, 111 FERC ¶ 61,379 (2005) (*Centerpoint II*), *order on reh'g*, 113 FERC ¶ 61,188 (2005) (*Centerpoint III*), *appeal pending*, *Northern Mun. Distribs. Group and Midwest Gas Task Force Ass'n v. FERC*, (D.C. Cir.), Case Nos. 05-1468 and 06-1016.

[12] *Northern Natural Gas Co*., 115 FERC ¶ 61, 270 (2006) (Flint Hills Agreements).

[13] Distributors' Rehearing Request at 14, *citing*, *ANR Pipeline Co*., 98 FERC ¶ 61,181, at 61,669 (2002).

clearly prohibits such results.[14] Distributors argue that similar to the situation in *MPC II*, the Commission here avoided consideration of the discount and benefit issues and the related discrimination, preference, as well as market and monopoly power issues – failing to examine them in detail or explain why Distributors' fears concerning these issues can realistically and effectively be addressed at some later date.[15]

11. The Commission rejects these contentions. In Order No. 436, the Commission adopted regulations permitting pipelines to engage in selective discounting based on the

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[14] Distributors argue that in striking down the program in that case the court found that the Commission had ignored a fundamental duty:

> The Commission, we conclude, has not adequately attended to the agency's prime constituency -- the consumers whom the NGA was "designed to protect . . . against exploitation at the hands of the natural gas companies." *FPC v. Hope Natural Gas Co.*, 320 U.S. 591,610, 88 L. Ed. 333, 64 S.Ct. 281 (1944). Principally, the Commission has slighted its charge by failing to evaluate the anticompetitive consequences of its action. 761 F.2d at 781-2.

[15] Distributors argue that the court found that:

> We do not agree that the issue is safely deferred to another day and forum. "Consideration of antitrust and anticompetitive issues by the Commission . . . serves the important function of establishing a first line of defense against those competitive practices that might later be the subject of antitrust proceedings." *Gulf States Utilities Co. v. FPC*, 411 U.S.747, 760, 36 L. Ed. 2d 635, 93 S. Ct. 1870 (1973) (construing public interest standard under Federal Power Act); *see also Atlantic Refining Co.*, 360 U.S. at 389 ("In view of [the delay inherent in subsequent Commission proceedings], the initial certificating of a proposal under§ 7[] of the Act as being required by the public convenience and necessity becomes crucial."); *Public Systems v. FERC*, 196 U.S. App. D.C. 66, 606 F.2d 973, 983 (D.C. Cir. 1979) (FERC cannot simply defer consideration of anticompetitive effects till the adjudication of specific cases without stating its rationale for doing so). 761 F.2d at 787.

varying demand elasticities of the pipeline's customers.[16] Specifically, the Commission adopted regulations requiring pipelines to file maximum and minimum transportation rates for both firm and interruptible service and to charge rates to customers within the maximum and minimum range.[17] These regulations permit a pipeline to discount its rates, on a not unduly discriminatory basis, in order to meet competition. In Order No. 436, the Commission explained that selective discounts would benefit all customers, including customers that did not receive the discounts, because the discounts would allow the pipeline to maximize throughput and thus spread its fixed costs across more units of service. The Commission further stated that selective discounting would protect captive customers from rate increases that would otherwise ultimately occur if pipelines lost volumes through the inability to respond to competition.

12. In *Associated Gas Distributors v. FERC (AGD I)*,[18] the court upheld these selective discounting regulations. The court found that, as a general matter, the Commission could permit pipelines to offer differing discounts depending upon the differing demand characteristics of their customers. The court agreed that such discounts could benefit captive customers by enabling pipelines to obtain demand elastic customers

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[16] *See Regulations of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 436, FERC Stats. & Regs., Regulations Preambles (1982-1985) ¶ 30,665, at 31,543-45 (1985).

[17] 18 C.F.R. § 284.10 (2006). Section 284.10(c)(5)(ii)(A) of the Commission's regulations expressly permits a pipeline to "charge an individual customer any rate that is neither greater than the maximum rate nor less than the minimum rate on file for that service." Consistent with that regulation, Northern's tariff sets forth both a just and reasonable maximum rate and a minimum rate for each service. Thus, the Commission has already authorized the subject discounts through its Part 284 regulations and its approval of Northern's tariff.

[18] 824 F.2d 981, 1010-12 (D.C. Cir. 1987). *See also*, Order No. 637-A, ¶ 31,099, at 31,551-52 ("The justification for permitting this exercise of market power is to enhance efficiency by increasing throughput and to benefit those captive customers with long-term contracts by reducing, in the pipeline's next rate case, the amount of fixed costs that otherwise would be recovered through the rates paid by those captive customers"); Alfred E. Kahn, the Economics of Regulation 131-33 (1970) (price discrimination is one solution to problems of natural monopoly and declining costs).

who would "mak[e] a contribution to fixed costs that otherwise would not be made at all."[19]

13. In the 1989 Rate Design Policy Statement,[20] the Commission adopted a rate design methodology that would prevent the subsidization of the discounts by non-discounted customers and also achieve the goal set forth in Order No. 436 of maximizing throughput. Thus, the Commission held that if a pipeline grants a discount in order to meet competition, the pipeline is not required in its next rate case to design its rates based on the assumption that the discounted volumes would flow at the maximum rate, but may reduce the discounted volumes so that the pipeline will be able to recover its cost of service. The Commission explained that if a pipeline must assume that the previously discounted service will be priced at the maximum rate when it files a new rate case, there may be a disincentive to pipelines discounting their services in the future to capture marginal firm and interruptible business. This policy of permitting discount adjustments is consistent with the discussion of the court in *AGD I* suggesting that discount adjustments should be permitted.[21] Further, the Commission recently reaffirmed its

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[19] *Associated Gas Distribs. v. FERC*, 824 F.2d at 1011.

[20] *Policy Statement Providing Guidance With Respect to the Designing of Rates*, 47 FERC ¶ 61,295, *order on reh'g*, 48 FERC ¶ 61,122 (1989) (1989 Rate Design Policy Statement).

[21] On rehearing of the 1989 Rate Design Policy Statement, the Commission rejected contentions that it would lead to non-discounted customers subsidizing the discounted customers and stated that its selective discounting policy allows a pipeline to maximize throughput by lowering prices to retain and attract business by meeting competition. Further, the Commission reasoned that while the pipeline was at risk for service provided at prices below those projected in the setting of its rates, if a pipeline grants a discount in order to meet competition, the pipeline may, in its next rate case, design its rates using reduced discounted volumes instead of assuming that the discounted volumes would flow at the maximum rate, so that the pipeline will be able to recover its cost of service. 48 FERC at 61,449.

policies concerning its selective discounting program and concluded that it would not modify them.[22]

14. As discussed below, in order to obtain such a discount adjustment in a rate case, the pipeline has the ultimate burden of showing that its discounts were required to meet competition. In the case of discounts to non-affiliated shippers, the Commission has stated that it is a reasonable presumption that a pipeline will always seek the highest possible rate from such shippers, since it is in the pipeline's own economic interest to do so. Therefore, once the pipeline has explained generally that it gives discounts to non-affiliates to meet competition, parties opposing the discount adjustment have the burden of producing evidence that discounts to non-affiliates were not justified by competition. To the extent those parties raise reasonable questions concerning whether competition required the discounts given in particular non-affiliate transactions, then the burden shifts back to the pipeline to show that the questioned discounts were in fact required by competition.

15. Further, the Commission has explained the relationship of *MPC II* to cases such as presented here in previous orders and determined that the court's finding in *MPC II* did not compel the Commission to hold a hearing to examine the proposed discounts or prohibit such discounts.[23] In *MPC II*, the court addressed a situation where the Commission allowed pipelines to deny captive customers access to the spot market for the gas commodity, while providing such access to non-captive customers. The court found that the Commission had erred by failing to consider the anticompetitive consequences of its action and vacated and remanded the Commission's orders insofar as the Commission permitted pipelines to provide transportation service to fuel-switchable end users without requiring pipelines to provide the same service to LDCs and captive

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[22] *Policy For Selective Discounting By Natural Gas Pipelines*, 109 FERC ¶ 61,202 (2004) (*Selective Discounting Order), Order Reaffirming Discount Policy and Terminating Rulemaking Proceeding,* 111 FERC ¶ 61,309 (2005) (*Selective Discounting Policy*), *order denying reh'g*, 113 FERC ¶ 61,173 (2005) (*Selective Discounting Policy II*).

[23] *Centerpoint II*, 111 FERC ¶ 61,379, at P 10-15; *MUD II*, 113 FERC ¶ 61,119, at P 22, 29-30; *Centerpoint III*, 113 FERC ¶ 61,188, at P 20-22, 24-25; *May 5 Order*, 115 FERC ¶ 61,146, at P 9-11; and, *Selective Discounting Policy II,* 113 FERC ¶ 61,173, at P 30-34.

customers on non-discriminatory terms.[24] However, the instant case does not involve a situation where the Commission is permitting a pipeline to deny a service to some customers while providing the same service to other customers. Here, consistent with its policies, the Commission is permitting Northern to offer different rates to different customers depending upon their different elasticities of demand. Further, in *AGD I*, the court held that to read *MPC II* as "a rule that price differentials based on demand conditions are always unduly discriminatory would render the decision a defiant and unreasoned exception to the general pattern. The judicial acceptance of such price differentials is longstanding."[25]

16. Distributors argue that while the Commission's discount adjustment policies may be appropriate in a variety of normal circumstances, in the instant case, because the discounts and benefits are substantial and because Northern, by settlement agreement, cannot file another rate case with rates to be effective prior to November 1, 2007, such policies cannot be justified here. Distributors argue that Northern is not simply granting discounts to NSP-MN; it is granting discounts coupled with other benefits and non-conforming contract provisions, resulting in a package of substantial benefits that goes well beyond a day-to-day discount to a maximum tariff rate. Moreover, Distributors argue that the May 5 Order ignores the fact that one of the "most promising" alleged competitive alternatives being claimed by NSP-MN did not exist as of April 7, 2006 when Northern made the instant filing. They argue that there are no facts in the April 7 Filing or the supporting documents that demonstrate that NSP-MN's bypass threat was a *bona fide* threat. They assert that there are issues concerning whether there was a *bona fide* bypass threat here, and what, if anything, was required to keep NSP-MN as a Northern shipper. Distributors argue that these issues concern fact-specific issues, and that parties should be permitted to investigate those facts fully through discovery, technical conference and hearing procedures.

17. The Commission has pointed out that its regulations permit pipelines to offer selective discounts to shippers based on their varying elasticities of demand, and that this has been affirmed by the court. The Commission has also stated that it need not further examine the proposed discounts because Part 284 of its regulations expressly permit a pipeline to "charge an individual customer any rate that is neither greater than the

[24] *MPC II*, 761 F.2d at 789.

[25] *AGD I*, 824 F.2d at 1011 (footnotes omitted).

maximum rate nor less than the minimum rate on file for that service."[26] Since Northern's tariff sets forth both maximum and minimum rates for each service, the discounted rates that Northern proposes are not deviations from Northern's tariff that require Commission approval. Therefore, the Commission has already authorized the discounts through its Part 284 regulations and its approval of Northern's tariff.

18. As set forth in previous Northern Natural orders, [27] the Commission will not predetermine whether it will permit Northern, in its next NGA section 4 general rate case, to reduce its rate design volumes to account for the instant discounts.[28] The same rationale applies in the instant case. It is well established that the Commission may order proceedings in the manner it determines is most efficient.[29] In their rehearing request, Distributors do not allege that Northern's contracts with NSP-MN cause them any current harm. The discounts in the subject agreements have no effect on the rates that Distributors or any other customer other than the discounted customer currently pays.[30]

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[26] 18 C.F.R. § 284.10(c)(5)(ii)(A) (2006).

[27] *MUD II*, 113 FERC ¶ 61,119, at P 31-32; *CenterPoint III*, 113 FERC ¶ 61,118, at P 25-28.

[28] As the Commission has recently stated:

> Therefore, the Commission reaffirms its conclusion that discounts given by competing pipelines provide sufficient public benefits that we will not modify our policy to adopt a blanket prohibition on adjustments to rate design volumes to reflect such discounts. As we stated in the May 31 Order, if there are circumstances on a particular pipeline that warrant additional protections for captive customers, including a limitation on the discount adjustment to rate design volumes, those issues can be considered in individual rate cases. 113 FERC ¶ 61,173 at P 53.

[29] *See, Stowers Oil and Gas Co*., 27 FERC ¶ 61,001 (1984) and cases cited therein.

[30] In the *Selective Discounting Policy*, 111 FERC ¶ 61,309 (2005), the Commission addressed arguments similar to the situation presented here. In sum, customers argued that they were harmed because discounts resulted in increased rates for them. Distributors, referred to as Northern Municipals in the order, presented an example involving Northern where Northern gave a large discount to an existing customer, Centerpoint, to prevent it from taking its business to a new intrastate pipeline.

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19. Northern's maximum rates will remain those approved in its last general section 4 rate case, until such time as Northern proposes to change them in a new section 4 filing.[31] The record in Northern's last section 4 rate case did not, and could not, reflect the discounts Northern is providing in the instant agreements. Therefore, those rates do not include any discount adjustment with respect to the instant agreements. Since "[T]he pipeline is at risk for service provided at prices below those projected in the setting of its rates,"[32] at least until Northern's next rate case, its other customers can in no way be

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Distributors asserted that that these discounted rates would be in effect until 2019 and that Northern would attempt to recover this discount from its captive shippers. Distributors stated that no significant additional volumes would flow as a result of the discount. Moreover, they argued that, under the present policy, Northern did not have the burden of proof to show that the discounts were either necessary or reasonable. The Commission stated:

> [Distributors] does not allege that any harm has occurred to them as yet, but anticipates that the harm will occur when Northern seeks a discount adjustment in its next rate case. This harm is therefore speculative. Further, [Distributors'] statement that Northern has no obligation to show that the discounts were necessary or reasonable is not accurate. Northern has the ultimate burden of showing that this long-term discount was in fact necessary to meet competition. Further, the Commission has the obligation to assure that rates to all customers are just and reasonable and can consider mitigating measures where the rate impact on captive customers is inequitable. The circumstances described by [Distributors] do not warrant the Commission's abandoning its selective discount policy that has provided substantial competitive benefits to a large number of shippers on the national grid. 111 FERC ¶ 61,309 at P 54.

[31] *MUD II*, 113 FERC ¶ 61,119, at P 26-28 (setting forth various reasons why the Commission will examine the need for a discount adjustment to throughput only in a subsequent rate case).

[32] *Id.* at P 26, *citing,* 48 FERC ¶ 61,122, at 61,449 (1989).

considered to be subsidizing the discounts given to the discounted customer.[33] Moreover, as set forth below, because all parties will have an opportunity to contest any request for a discount adjustment to Northern's throughput in any future rate case where rates to non-discounted customers may change, nothing raised here compels the Commission to deviate from its current selective discounting policies.

20. Distributors also argue that discount issues, as well as the anti-competitive, undue preference, unlawful discrimination and monopoly issues, cannot be left for determination until some time after November 1, 2007 because competitive alternatives will no longer be available to NSP-MN. Distributors claim that attempts to delve into Northern's reasons for providing these discounts and benefits almost surely will be labeled as "twenty-twenty hindsight." Moreover, Distributors argue that if Northern continues to grant such discounts and benefits to its customers, the only shippers that will be left to address the appropriate level of maximum rates on Northern's system in a future rate case will be those unable to obtain such concessions from Northern, and the burden of responding to the pipeline's rate case will fall on those least able to bear the burden.

21. Distributors argue that at some point Northern will most likely claim that it is entitled to a discount adjustment because NSP-MN and others no longer have a competitive alternative and because Northern is bound to the discount contracts it signed. Distributors argue that they and others will be left to argue that the discount adjustment should be disallowed because, as the bypass threat was not serious, the discounts should never have been given in the first place. Moreover, Distributors argue that by the time the discount adjustments must be justified, personnel will have changed, records will have been lost or misplaced, and memories will have faded, leaving Distributors with an impossible task.

22. Distributors argue that under the Selective Discounting Policy, Northern need only claim that the discount was given to meet competition to obtain the benefit of the

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[33] Further, as the Commission stated in the *Selective Discounting Policy*:

> Moreover, a hearing in a rate case gives all the parties an opportunity to seek discovery regarding the purpose and level of any discount. Therefore, Commission Staff and other parties can use this opportunity to seek an explanation of each discount, and if the pipeline cannot support any discount, this issue can be raised at the hearing. 111 FERC ¶ 61,309, at P 62 (2005).

presumption and shift the initial, and heaviest, burden of going forward with evidence to those parties challenging the discount. Distributors argue that because the Commission is relying on a non-binding policy statement that must be justified in the particular circumstances of each case, the Commission has not offered a sufficient justification for placing this burden on the party opposing the discount instead of on the party that proposes it.[34]

23. In several recent orders,[35] the Commission has addressed Distributors' arguments regarding the burden of proof necessary for a pipeline to obtain a discount adjustment to throughput in a future rate case. These cases set forth the Commission's position regarding the burden of proof necessary for a pipeline to obtain a throughput adjustment for discounts in a subsequent NGA section 4 rate case. In brief, under the Commission's policy, in order to obtain a discount adjustment in a rate case, the pipeline has the ultimate burden of showing that its discounts were required to meet competition. In the case of discounts to non-affiliated shippers, it is a reasonable presumption that a pipeline will always seek the highest possible rate from such shippers, since it is in the pipeline's own economic interest to do so.[36] Therefore, once the pipeline has explained generally

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[34] Distributors' Rehearing Request at 26-27, *citing, Pacific Gas and Electric Co. v. FPC,* 505 F.2d 33 (D.C. Cir. 1974).

[35] *Centerpoint II,* 111 FERC ¶ 61,379, at P 18-19; *Centerpoint III*, 113 FERC ¶ 61,188, at P 17-19, 22-23, 25; *MUD II,* 113 FERC ¶ 61,119, at P 32-33; *Selective Discounting Policy,* 111 FERC ¶ 61,309, at P 59-66, *order denying reh'g*, 113 FERC ¶ 61,173, at P 100-108 (2005).

[36] As the Commission recently stated:

> The Commission does not require the pipeline to initially present detailed evidence to substantiate that each discount was granted to meet competition because it assumes that, in the case of a discount to a non-affiliate, the pipeline will always seek the highest rate for its services because it is in its own best economic interests to do so. The Commission can make assumptions about rational business behavior and a pipeline, like any other business, can be presumed to act in its own economic best interests. Contrary to the parties' assertions here, the discount adjustment does not negate that assumption. There is no rational reason for a pipeline company to sell capacity at less that the highest rate it can charge. It would not be a good business practice for a pipeline to turn down the opportunity to put money in its pocket today through a higher rate in order to take a chance

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that it gives discounts to non-affiliates to meet competition, parties opposing the discount adjustment have the burden to raise a reasonable question concerning whether competition required the discounts given in particular non-affiliate transactions. Once the party opposing the discount adjustment raises a reasonable question about the circumstances of the discount, then the burden shifts back to the pipeline to show that the questioned discounts were in fact required by competition.

24. In reaffirming its selective discounting policies, the Commission addressed similar arguments by Distributors regarding the burden of proof necessary in discount adjustment proceedings.[37] The Commission stated that:

> [Distributors] overstate the burden placed upon parties challenging a discount adjustment. Contrary to the assertions of [Distributors], the burden placed upon the opponents of the discount adjustment is not an unduly heavy burden. All the challenger of a discount adjustment must do, after the pipeline has explained generally the basis for its discounts, is produce some evidence that raises a reasonable question concerning whether the discount was required to meet competition. Thus, [Distributors'] concern that, in a rate case, "the opposing party's attempts to prove that the discounts were not necessary are invariably met with charges that they are using "twenty-twenty" hindsight to challenge the discounts" is unfounded. Contrary to [Distributors'] assertion, the opponent of the discount is not required to prove that the discount was not given to meet competition, but merely has to raise a reasonable question as to the validity of the discount and the pipeline is required to show that it was made to

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that the Commission will allow a discount adjustment in a future rate case. *See, e.g., Columbia Gas Transmission Corp.*, 848 F.2d 250, 251-54 (1985) (pipeline will seek the highest possible rate). There is no guarantee that the Commission will approve a discount adjustment and the Commission has denied pipelines this rate treatment when it has not been shown that the discounts were required by competition. 113 FERC ¶ 61,173 at P 107.

[37] *Policy For Selective Discounting By Natural Gas Pipelines*, 109 FERC ¶ 61,202 (2004) (*Selective Discounting Order*), *Order Reaffirming Discount Policy and Terminating Rulemaking Proceeding*, 111 FERC ¶ 61,309, at P 65 (2005) (*Selective Discounting Policy*), *order denying reh'g*, 113 FERC ¶ 61,173, at P 24 (2005) (*Selective Discounting Policy II*).

> meet competition. Further, the relevant inquiry is whether at the time the discount was given it was necessary to meet competition and this inquiry would not be dismissed as hindsight.[38]

25. The same rationale applies in the instant case. The Commission has also previously addressed Distributors' concern that Distributors will be unable to set forth its case because by the time the discount adjustments must be justified, personnel will have changed, records will have been lost or misplaced, and memories will have faded, leaving Distributors with an impossible task. The Commission clearly set forth the burden with regard to Distributors' concern, stating that:

> It is not an undue burden to ask the parties opposing the discount adjustment to introduce some evidence that raises a question about the need for the discount. In a rate case where the discount adjustment is challenged, all parties have an opportunity to seek discovery of all the facts surrounding each discount. Thus, discovery will provide the parties with the information necessary to determine whether a challenge to a discount adjustment is appropriate and the ultimate burden of proof on the issue will be on the pipeline. In this regard, if a pipeline is unable in response to a discovery request to explain why competition required a particular discount, the Commission would regard that fact alone to raise a sufficient question concerning whether the discount was required to meet competition to shift the burden to the pipeline to justify the discount. Thus, pipelines must keep information relevant to each discount because if they are unable to explain and justify each discount, they will not be able to meet their burden of proof.[39]

26. Therefore, the Commission has set forth the standards for discount adjustments and will reject the arguments proffered by Distributors.

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[38] 113 FERC ¶ 61,173 at P 104.

[39] *Id.* at P 105. The Commission also stated in this order that:

> To the extent a pipeline is unable during the discovery process to explain what competitive alternatives the recipient of any particular discount had or otherwise give a satisfactory explanation of why the discount was required, that fact by itself would be sufficient to rebut the presumption that competition required the discount. 113 FERC ¶ 61,173 at P 61.

B. Filing Requirements

27. Distributors argue that Northern failed to provide adequate support for its tariff filings. They assert that under 18 C.F.R. § 154.204 of the Commission's regulations, a filing addressing service agreements must include, among other things, a description of the necessity for the changes being proposed. Distributors argue that section 154.204(d) further provides:

> A filing to revise rate schedules, forms of service agreements, or the general terms and conditions, must: (d) Explain the impact of the proposed revision on firm and interruptible customers, including any changes in a customer's rights to capacity in the manner in which a customer is able to use such capacity, receipt or delivery point flexibility, nominating and scheduling, curtailment, capacity release.

28. Distributors argue that in its protest, they demonstrated that Northern failed to comply with these requirements. However, they assert that, in the May 5 Order, the Commission found that, "the regulation cited by Distributors is not applicable to the instant filing because [the regulation] relates to tariff filings to revise rate schedules, form of service agreements in the pipeline's tariff, or the pipeline's general terms and conditions of service."[40] Therefore, the Commission concluded that the regulation does not apply because Northern proposed no such changes here and sought only approval of "particular executed service agreements."[41]

29. Distributors argue on rehearing that while section 154.204 references rate schedules, forms of service agreements, and terms and conditions, 18 C.F.R.§ 154.600 requires that a pipeline filing any proposal to implement a tariff change other than a change in rate level must comply with subparts A, B, and C of Part 154, which include 18 C.F.R. § 154.204. Therefore, they argue that Northern's filing, which includes a tariff change proposal to reflect the NSP-MN agreements as a non-conforming agreement on First Revised Sheet No. 66D, is subject to these provisions.

30. The Commission continues to find that the filing requirements contained in section 154.204(d) do not apply to Northern's filing of the instant non-conforming contracts.

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[40] 115 FERC ¶ 61,146 at P 8.

[41] *Id*.

The general requirement in section 154.600 that any proposed tariff change other than in rate level must comply with subparts A, B, and C of Part 154 was not intended to impose on all filings the requirements of subparts A, B, and C that expressly apply only to specific types of filings. Section 154.204 itself, provides in subparagraph (a) that a filing to revise rate schedules, forms of service agreements, or the general terms and conditions must "adhere to the requirements of subparts A, B, and C of this Part." Sections 154.204(b) through (f) then go on to list the specific filing requirements for filings to revise rate schedules, forms of service agreements, or general terms and conditions. Thus, none of those requirements apply to the instant filing of non-conforming service agreements.

31. In any event, the Commission finds that Northern has presented the information necessary to meet the filing requirements for its proposal. In its filing, Northern presented First Revised Sheet No. 66D listing the subject agreements as non-conforming as required by the Commission's policies. In support of this tariff sheet, Northern filed the subject contracts for the Commission's review, and clearly indicated the provisions of the contracts that did not conform to its form of service agreement. Further, Northern stated that the non-conforming provisions that it had negotiated with NSP-MN did not affect the quality of service to NSP-MN, or other shippers on its system.[42] Because Northern filed the contracts and statement to support its filing, the Commission finds that Northern has adequately met the filing requirements at issue here. Since the purpose of the filing was solely to obtain approval for the non-conforming provisions of the contracts, and not the discounted rate,[43] there was no need for Northern to provide any support for the discounted rates included in the contracts. In addition, the Commission noted that while Northern met the formal filing requirements, the Commission did find that it had not adequately explained two of the non-conforming contract provisions. Accordingly, the Commission required Northern to make a compliance filing to either further explain, or to modify, these provisions. Northern's compliance with this directive is discussed below.

C. Right of First Refusal (ROFR) and Rollover Rights

32. Distributors argue that there is not enough information to determine whether Northern and NSP-MN have complied with (1) the ROFR provisions of the Commission's regulations and Northern's tariff and (2) the grandfathered rollover rights

[42] Northern April 7, 2006 Transmittal Letter at 5.

[43] 115 FERC ¶ 61,146 at P 10.

in Northern's tariff. Thus, it raises the issue of whether either of these rights is present in NSP-MN's current contracts with Northern and, if so, whether these rights have been properly exercised in the negotiation and execution of the new service agreements at issue here. [44]

33. Distributors point out that in the May 5 Order, the Commission stated that consistent with Section 58 of its tariff, Northern may agree to include ROFR rights in service agreements and negotiate rollover and other contract extension provisions. The Commission, therefore, found that the inclusion of ROFR and rollover provisions in the new contracts is a permissible conforming provision and that the decision to include such rights does not provide NSP-MN with an undue preference, nor is it unduly discriminatory.

34. However, Distributors assert on rehearing that the issue they raise is whether the new Service Agreements and the Letter Agreement are the result of a proper application of the ROFR and the grandfathered rollover rights to NSP-MN's existing TF Contract Number 23268 and the TFX Contracts that are referenced, but unspecified, in the above-quoted portion of the Letter Agreement. Distributors argue that these contracts apparently contained or were subject to ROFR rights and grandfathered rollover rights with respect to at least some portion of the capacity. Therefore, they question whether those rights were properly exercised, resulting in the Service Agreements here.

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[44] Distributors assert that the Letter Agreement included with the April 7 Filing states as follows:

> 1. Entitlements and Term.
>
> (a.) Shipper's TF Service Agreement Contract No. 23268 expires on October 31, 2007. A portion of the entitlement is subject to Shipper's grandfathered rollover right and a portion is subject to Right of First Refusal (ROFR). Certain TFX entitlement expires on October 31, 2006, March 31, 2007 and October 31, 2007 and is subject to the Right of First Refusal (ROFR) process in Northern's FERC Gas Tariff, as amended from time to time (Northern's Tariff). Shipper agrees to extend a portion of this entitlement as discussed herein. For billing purposes, the TF Full Rate Agreement will be designated as the "last through the meter." Letter Agreement, Page 1, Paragraph A.1.a (emphasis added).

35. Distributors argue that Northern has failed to support its filing by failing to specifically identify the entitlement subject to ROFR and rollover rights, and has failed to adequately explain how the new Service Agreements comply with the various rollover and ROFR requirements. In essence, they argue that Northern has failed to demonstrate that the proposed Service Agreements are the result of a proper exercise of existing ROFR and rollover rights. Distributors argue that if Northern has improperly exercised these provisions, then NSP-MN has been provided with a preference over other shippers that exercise rollover rights contained in their current contracts.

36. In the instant case, Northern and NSP-MN chose to mutually negotiate modifications in, and extensions of, the existing contracts, rather than to exercise the ROFR or rollover portions of those contracts. As discussed below, this was permissible under Commission policy, and accordingly, whether the parties complied with the ROFR or roll-over provisions is not relevant.

37. The ROFR process is designed to protect the long-term captive customers that rely on pipelines for service from the pipeline's use of its monopoly power. In the instant case, Northern has permitted NSP-MN to extend the use of the capacity that it currently holds.[45] At the same time, the ROFR right permits the pipeline an opportunity to test the market value of its capacity. However, the Commission assumes that a pipeline will always seek the highest possible rate from such shippers, because it is in the pipeline's own economic interest to do so. This permits pipelines a degree of business judgment regarding the sale of its capacity. If the pipeline is satisfied that its agreements to extend contracts with its existing customer gives it as much revenue as it could expect to obtain through marketing the capacity to third parties, it need not commit the capacity to a bidding process.

38. Northern has permitted NSP-MN to extend the use of the capacity that it currently holds under new terms, allowing it to continue the use of the capacity it currently holds. In the instant situation, NSP-MN, the existing customer, has agreed to the terms of the new contract and maintained its access to capacity without the need to avail itself of the protections provided by the ROFR process. It does not appear that the shipper had to avail itself of the grandfathered ROFR right process in order to maintain its current capacity and instead reached an agreement with Northern to extend its capacity. Therefore, the ROFR process, which is intended to protect an existing shipper from the exercise of a pipeline's monopolistic power, is not violated by this agreement between

[45] *See, e.g., MUD II*, 113 FERC ¶ 61,119, at P 44-46; *CenterPoint II*, 111 FERC ¶ 61,379, at P 41-42.

the shipper and the pipeline. Moreover, no party to the instant proceeding has indicated that it desires the capacity that Northern has permitted NSP-MN to retain at a discounted rate. Neither in their rehearing request nor in their earlier pleadings in this case have Distributors indicated any interest in bidding on the NSP-MN capacity.

39. In regard to rollover rights granted by Northern's tariff, the Commission previously found that such rights were derived from a Settlement filed by Northern in 1993 (Settlement).[46] The Commission found that Northern's Settlement states that, should a shipper under an agreement containing a grandfathered rollover right request a rollover for less than the minimum term stated in such agreement or at less than maximum rates, the contract would be subject to the ROFR process unless Northern and the party have otherwise agreed in writing.[47] The Settlement language provides that if the pipeline reaches an agreement with the shipper, the shipper may be permitted to extend its capacity without regard to whether it pays the maximum rate for the minimum period of time. In the instant case, although Distributors argue that it is unclear whether the capacity was extended pursuant to the rollover rights, it is clear that the shipper and the pipeline have reached a written agreement which would satisfy the terms of the settlement.

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[46] *MUD II*, 113 FERC ¶ 61,119 at P 48, *citing*, *Northern Natural Gas Co*., 64 FERC ¶ 61,073 (1993), *order on compliance and reh'g*, 65 FERC ¶ 61,011 (1993).

[47] Rollover of Less Than Entire Contract With Grandfathered Rollover Rights:

> The parties have agreed that should a shipper under an agreement containing a grandfathered rollover right request a rollover (i) for less than the minimum term stated in such agreement; (ii) at less than maximum rates, unless Northern and the party have otherwise agreed in writing, then the contract shall be subject to the ROFR process. However, if a shipper under an agreement containing a grandfathered rollover right requests a rollover of less than the maximum daily quantity ("MDQ"), then only that portion of the agreement for which a rollover was requested will remain subject to the grandfathered rollover right in the future. The remainder of the agreement shall be subject to the ROFR process. Settlement at Restructuring Proceeding, Article III F.4.a, pages 92-93.

D. Posting and Bidding of Capacity

40. Distributors argue that, while the Commission's policy is that capacity should go to the shipper that values it most, Northern's filing is not consistent with that principle because there has been no competitive bidding for the subject capacity. Distributors argue that beyond Commission policies and regulations, competitive bidding would show whether or not the discounts granted to NSP-MN are reasonable, whether or not there are other parties that are willing to pay more for some or all of the subject capacity, and whether the discounts and benefits granted to NSP-MN are, in fact, necessary to prevent cost shifting or harm to other shippers.

41. Moreover, Distributors argue that Northern has alleged that it would have lost load without the instant agreement. However, Distributors assert that at the same time that Northern was negotiating the instant agreement, it was also soliciting interest in the construction of facilities to expand the capacity of its Market Area. Therefore, Distributors conclude that the capacity that would have been available if NSP-MN left the system, could have been sold at maximum rates or, at least, at rates higher than reflected in the Service Agreements, and that this would have reduced or eliminated any need to build additional facilities. Distributors also argue that this also calls into question the implicit assumption in Northern's filing that there is no market for the current NSP-MN capacity.

42. Distributors argue that the May 5 Order states that Northern is entitled to allocate its capacity in a manner consistent with its tariff. However, they argue that if this statement is taken at face value, any pipeline can completely undercut the fundamental principle that capacity should go to those that value it most. Further, Distributors argue that the May 5 Order states that the Commission assumes that the pipeline will always seek the highest possible rate from non-affiliated shippers, since it is in its own economic interest to do so. However, Distributors contend that there is no way to tell that the pipeline has sought the highest possible rate without placing the capacity up for auction and that it is not always in the pipeline's own economic interest to seek the highest possible rate because the pipeline can be insulated from its failure to do so through a selective discounting adjustment in a future base rate case.

43. The Commission has responded to similar arguments in recent orders, and the findings of its May 5 Order are consistent with these prior orders.[48] First, as the

[48] *MUD II*, 113 FERC ¶ 61,119 at P 41-46; *Centerpoint I*, 110 FERC ¶ 61,321at P 23-25; *Centerpoint II*, 111 FERC ¶ 61,379 at P 32-45; *Centerpoint III*, 113 FERC ¶ 61,188 at P 26-27, 29.

Commission pointed out in these orders, in the Commission's 1989 Rate Design Policy Statement,[49] the Commission outlined its concerns with allocative and productive efficiency and stated that it is a necessary objective, but not the only objective considered by the Commission. The Commission noted that it had on numerous occasions stated that it favors placing capacity in the hands of those who value it most. However, it also assumes that the pipeline will always seek the highest possible rate from non-affiliated shippers, since it is in its own economic interest to do so. Accordingly, the Commission has not required pipelines to implement allocation mechanisms utilizing methodologies such as the Net Present Value (NPV) process which would allocate firm capacity such as at issue here,[50] to the shipper bidding the highest amount to the pipeline. Rather, the Commission has permitted pipelines to implement such an allocation methodology to the extent they believe such methodologies are necessary on their systems in order to allocate scarce capacity to the highest valued use.[51] Consistent with this policy, Northern's tariff permits it to hold open seasons for capacity based upon the NPV allocation methodology, but does not require the use of such a methodology.[52] Northern is entitled to allocate its capacity consistent with the approved provisions of its tariff, and the parties have not shown that Northern did not do so in the instant proceeding. Therefore, the Commission

[49] *Policy Statement Providing Guidance With Respect to the Designing of Rates,* 47 FERC ¶ 61,295 at 62,052-53, *order on reh'g*, 48 FERC ¶ 61,122 (1989).

[50] Since Order No. 637, most pipeline tariffs have required interruptible capacity to be allocated based upon price, when the pipeline is unable to fulfill all nominations for service. *See Sea Robin Pipeline Co.*, 81 FERC ¶ 61,041 at 61,225 (1997); *Pacific Gas Transmission Co.,* 76 FERC ¶ 61,258 (1996).

[51] Order No. 637 ¶ 31,091, at 31,294-96 (2000) (finding that, although capacity auctions can provide a wide range of benefits to the gas industry and that the Commission would attempt to facilitate the use of auctions by pipelines for the allocation of capacity, the Commission would not require pipelines to use auctions to allocate capacity).

[52] *Northern Natural Gas Co.*, 110 FERC ¶ 61,361, at P 10 (2005) ("[H]owever, the Commission has not required pipelines to sell capacity solely through open seasons. Rather, so long as the pipeline posts all available firm capacity, it may sell that capacity on a first-come, first-served basis").

has acted within its policies in permitting Northern to extend the use of the subject capacity to NSP-MN, without posting the capacity for bidding.[53]

44. Further, the Commission does not agree that, as Distributors suggest, pipelines may not seek the highest possible rates because they are insulated from their failure to seek such a rate by seeking a discount adjustment in a future rate case. As the Commission has previously stated:

> The Commission does not routinely grant pipelines a discount adjustment, but grants such an adjustment only to the extent that the discount was required to meet competition. The Commission has denied pipelines the adjustment where the pipeline has failed to meet its burden of showing that the discount was required to meet competition. For example, in *Panhandle Eastern Pipe Line Co.*, 74 FERC ¶ 61,109 at 61,401-02 (1996), *Williams Natural Gas Co.*, 77 FERC at ¶ 61,277 at 62,206-07 (1996), and *Trunkline Gas Co.*, 90 FERC ¶ 61,017 at 61,096 (2000), the Commission held that the pipeline had not met its burden to show that its discounts to its affiliates were required by competition. In addition, in *Iroquois Gas Transmission System*, 84 FERC ¶ 61,086 at 61,476-78 (1998), and *Trunkline Gas Co.*, 90 FERC ¶ 61,017 at 61,092-95 (2000), the Commission disallowed a discount adjustment with respect to discounts given to non-affiliates. In both cases, the discounts were given to long-term, firm customers. The Commission found that the parties opposing the discount adjustment had raised enough questions about the circumstances in which those long-term discounts were given to shift the burden back to the pipeline to justify the discount. The Commission then found that, when a pipeline gives a long-term discount, the Commission would expect that the pipeline would make a thorough analysis whether competition required such a long-term discount, and in both these cases the pipeline had failed to present any evidence of such an analysis. *A discount adjustment is not an entitlement and the pipelines would be ill-advised to consider it so.* 113 FERC at P 24. (emphasis added)

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[53] *TransColorado Gas Transmission Co.*, 109 FERC ¶ 61,117 (2004) (finding that pipelines are permitted to negotiate extensions to existing contracts at maximum or discounted rates without offering the subject capacity to other shippers).

45. Accordingly, the Commission denies rehearing on this issue.

E. Further Discount Provision

46. In its filing, Northern proposed a provision in several of the agreements stating that if the rates resulting from a described rate adjustment are greater than the agreed-upon discount rates, Northern shall further discount other NSP-MN contract entitlement to effectuate the value of the discounts agreed to by the parties. Northern stated that this type of discount was provided for in Section 54(B)(9) of Northern's Tariff, but that the language is technically non-conforming due to its placement in the contract.

47. Distributors argue that because Northern's tariff addresses this type of discount, there is no reason for it to be included in the Service Agreements. Distributors argue that if this language was approved as a non-conforming provision and if the tariff provision is later limited in some fashion, NSP-MN would nevertheless retain the current contract provision, and would have a competitive advantage over other similarly-situated shippers.

The May 5 Order stated that:

> Northern has submitted a provision that implements and provides the specifics of a discount that is authorized by its tariff. Accordingly, the Commission will accept this provision as conforming to the tariff. If the tariff authorizing such a discount is later changed the Commission will address the effects of the change at that time. 115 FERC ¶ 61,146 at P 40.

48. On rehearing, Distributors argue that they do not agree that this provision, as a non-conforming contract provision, is permissible under section 54(B)(9) of Northern's tariff. Distributors argue that if the provision is approved as a non-conforming provision, that provision will survive the tariff provision. Distributors also argue that although the Commission has stated that if the tariff changes later, it will address the impact of any such changes on the non-conforming provision at that time, they do not support this conclusion. Distributors argue that there is no compelling reason to approve this provision as a nonconforming contract provision, because the tariff addresses the issue, and, any future change to that tariff should apply equally to all shippers without the need for further proceedings.

49. The Commission found in its May 5 Order that the language offered by Northern was consistent with language in its tariff and that there was no substantive difference in the effect of the proposed language and the language contained in Northern's tariff,

regardless of where the language was located in the NSP-MN contract. Therefore, the Commission accepted the proposed language as "conforming to the tariff."[54] Because the Commission has accepted the proposal as conforming to the tariff and did not regard the proposal as a non-conforming provision as posited by Distributors, their argument speculating on the survival of the proposed language in the face of a tariff modification is without merit. As the Commission stated in its May 5 Order, if the tariff authorizing such a discount is later changed, the Commission will address the effects of the change at that time. Presumably, a change in the tariff may require that the provision be modified prospectively in Northern's contracts; however, as the Commission stated, it will determine any such actions at the time of the proposed modification.

III. Compliance Filings

50. On May 22, 2006, Northern filed to comply with the May 5, 2006, Order. In the May 5 Order the Commission directed Northern to: (1) clarify that the realignment provisions contained in its TF and TFX agreements do not provide NSP-MN with a special priority to change primary receipt points that would adversely affect the ability of other shippers to obtain primary point capacity under Northern's generally applicable tariff; and, (2) either remove the growth option and full service requirement provisions for NSP-MN's Wisconsin affiliate from its TFX Discount Agreement, or in the alternative, offer the provisions to all shippers in a manner that is not unduly discriminatory as part of its generally applicable tariff.

51. In its May 22 compliance filing, Northern clarifies that the realignment provisions contained in its TF and TFX agreements do not provide NSP-MN with a special priority to change primary receipt points not available to all shippers. Northern asserts that it will grant NSP-MN a realignment request only if capacity is available, as it does for other shippers. Northern states that, if capacity is not available when NSP-MN makes a realignment request, it will hold an open season to determine if any other shippers have interest in any new capacity at such point prior to any construction. Northern adds that its bid evaluation process under such circumstances will be conducted in accordance with its tariff. Northern also states that it plans to remove the growth option and full service requirement provisions for affiliates from its TFX Discount Agreement, but will do so when it executes the agreement.

[54] 115 FERC ¶ 61,146 at P 40.

52. Subsequently, on October 16, 2006, Northern filed a revised executed TFX agreement with NSP-MN removing the provisions that would have allowed Northern to offer growth options and full service requirements to NSP-MN's affiliate. Northern also included in its filing a Seventh Revised Sheet No. 66D to update the contract execution date on its list of non-conforming agreements. Northern requests a November 16, 2006, effective date for the tariff sheet.

A. Public Notice

53. Northern's compliance filings were noticed on May 24, 2006, and October 18, 2006, respectively, allowing for protests to be filed as provided by section 154.210 of the Commission's regulations. No party filed a protest or adverse comments on either compliance filing.

B. Discussion

54. The Commission finds that Northern's additional information, revised TFX agreement, and Seventh Revised Sheet No. 66D comply with the directives contained in the Commission's May 5 Order. Accordingly the Commission accepts Northern's proposed Seventh Revised Sheet No. 66D to be effective November 16, 2006, as proposed.

The Commission orders:

(A) Distributors' request for rehearing of the Commission's May 5, 2006 Order is denied.

(B) Northern's May 22, 2006, and October 16, 2006, filings are accepted as in compliance with the directives of the May 5, 2006 Order.

(C) Northern's proposed Seventh Revised Sheet No. 66D is accepted to be effective November 16, 2006, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.