126 FERC ¶ 61,155
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Northern Natural Gas Company   Docket No. RP09-233-000

ORDER ACCEPTING TARIFF SHEETS SUBJECT TO CONDITIONS

(Issued February 20, 2009)

1. On January 21, 2009, Northern Natural Gas Company (Northern) filed revised tariff sheets[1] to modify the creditworthiness provisions in its tariff. As discussed below, the Commission accepts them to become effective February 21, 2009, subject to conditions.

I. Details of Filing

2. Northern proposes several revisions to update and clarify the creditworthiness and security requirements of its tariff. Northern states these modifications will protect Northern and its shippers from exposure to potential shipper default or bankruptcy and also reduce short-term and long-term credit risk.

3. In general, Northern proposes the following changes to its creditworthiness provisions: (A) revising credit rating requirements to include credit outlook; (B) revising the options available to its shippers for paying the reservation security; (C) using NYMEX futures prices to value imbalance gas for security provisions; (D) modifying provisions for billing shippers operating under Chapter 11 bankruptcy; (E) requiring Northern to establish and own escrow accounts; (F) limiting shipper activity of non-creditworthy shippers that fail to provide adequate collateral; (G) implementing a new security provision for non-creditworthy shippers which have not otherwise provided adequate security; (H) allowing setoffs before contract termination; (I) allowing Northern to terminate as well as suspend service when a shipper does not meet payment

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[1] *See* Appendix.

obligations; and, (J) revising conditions under which an acquiring shipper may retain its contract when the releasing shipper has its contract terminated.

II. Public Notice, Interventions, and Comments

4. Notice of Northern's filing in Docket No. RP09-233-000 issued on January 23, 2008. Interventions and protests were due as provided in section 154.210 of the Commission's regulations, 18 C.F.R. § 154.210 (2008). Pursuant to Rule 214, 18 C.F.R. § 385.214 (2008), all timely-filed motions to intervene and any motions to intervene out-of-time before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt this proceeding or place additional burdens on existing parties. SEMCO Energy Gas Company (SEMCO); Nexen Marketing U.S.A. Inc. (Nexen); Sequent Energy Management, L.P. (Sequent); CenterPoint Energy Resources Corp. (CenterPoint); Indicated Shippers;[2] the Northern Municipal Distributors Group and the Midwest Region Task Force Association (NMDG);[3] and Minnesota Energy Resources Corporation (MERC) filed protests to the instant proceeding. On February 13, 2009, Northern filed an answer. On February 17, 2009, NMDG filed a response to Northern's answer. On February 17, 2009, Northern filed a correction to its answer. We will accept Northern's answer, Northern's corrected answer, and NMDG's response because they have provided information that assisted us in our decision-making process.

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[2] The Indicated Shippers include Anadarko Energy Services Company; ExxonMobil Gas & Power Marketing Company, a division of Exxon Mobil Corporation; Chevron Natural Gas, a division of Chevron U.S.A. Inc.; Occidental Energy Marketing, Inc.; BP Canada Energy Marketing Corporation; and Shell Energy North America (US), L.P.

[3] 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; Hartley; 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; Centennial Utilities; 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.

III. Discussion

5. The Commission accepts Northern's tariff sheets to become effective February 21, 2009, as proposed, subject to conditions discussed below.

A. Minimum Credit Rating Requirements

6. Under Northern's current General Terms and Conditions (GT&C), to be considered creditworthy, a shipper must meet minimum credit rating requirements of at least "BBB" from Standard & Poor's Rating Group and Fitch Ratings, and at least a "Baa3" rating from Moody's Investors Service, Inc. Northern proposes to modify this provision to require that, for a shipper given a minimum rating from any of the three credit services, the shipper's short-term and long-term outlook or credit watch must also be stable or positive as reported by the three rating firms. For Canadian shippers not rated by the three rating firms, Northern proposes that such shippers have a positive or stable outlook as reported by Dominion Bond Rating Service. Northern also proposes to remove from its tariff any current references to the Canadian Bond Rating Service.

7. Northern states that exclusive use of minimum ratings may not allow it to react to changing circumstances and volatile credit markets. Northern asserts the rating firms do not immediately revise their ratings when situations occur that threaten a shipper's ability to pay. Northern states the Commission has approved the usage of similar provisions in the past to assess creditworthiness.[4]

8. MERC urges the rejection of Northern's proposal and argues that a rating firm may place a shipper on a negative outlook for factors bearing little relationship to a company's creditworthiness, such as to assess the impact of an announced sale, merger, or acquisition.

9. Nexen and Sequent argue that Northern failed to demonstrate the need to consider the shipper's credit outlook or credit watch in addition to the minimum credit ratings. They assert no shipper on Northern's system has defaulted after a credit downgrade from the minimum credit requirements or failed to post sufficient collateral and that the Commission evaluates creditworthiness standards based upon the "particular circumstances" of each proposal. Nexen and Sequent also state that "investment grade" is a term "broadly used to describe issuers and issues with relatively high levels of creditworthiness and credit quality."[5] Furthermore, Nexen and Sequent contend that

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[4] Citing *Columbia Gas Transmission Corp.*, 119 FERC ¶ 61,041 (2007); *Columbia Gulf Transmission Co.*, 117 FERC ¶ 61,073 (2006); and *Ingleside Energy Center*, 112 FERC ¶ 61,101 (2005).

[5] Quoting Standard & Poor's *Guide to Credit Rating Essentials* at 10.

Standard & Poor's guidelines state that "updating ratings outlook or placing a rating on Credit Watch does not mean that a ratings change is inevitable."[6] Nexen and Sequent state these qualifiers simply indicate that any downgrade, if it is likely to happen at all, will happen within the next six months to two years (in the case of a negative outlook designation) or 90 days (in the case of a credit watch placement). Nexen and Sequent state that to the extent the Commission approves any credit qualifier to the Minimum Rating, the more short term credit watch placement would be more appropriate, since it is a short-term designation that resolves itself one way or another relatively quickly.

10. In its answer, Northern emphasizes that its proposal is a modest revision to its creditworthiness criteria that reasonably balances the interests of Northern and its shippers. Northern emphasizes that its proposal is limited to situations where a shipper already has a minimum credit rating of BBB- or Baa3. Northern stresses that there is a correlation between creditworthiness and outlook assessments. Northern states that its proposals are especially appropriate given the current economic circumstances. Northern states that alleged increased costs to shippers having poor credit ratings and poor outlook assessments are not a basis to reject Northern's proposal because the creditworthiness and business outlook of a shipper are entirely the responsibility of the shipper. Northern states that even if a negative outlook or credit watch does not mean that a downgrade is inevitable, it is nonetheless an objective assessment of an independent credit agency that provides additional information. Northern further emphasizes that although an announced sale, merger or acquisition may place a company on negative outlook, this is because an independent credit rating organization views the announced sale, merger or acquisition as having a possible negative effect on the company's business and creditworthiness.

11. The Commission accepts Northern's proposal, finding it reasonable to take into account a shipper's credit outlook for a shipper with minimum credit ratings. A poor credit outlook for a shipper with minimum credit rating reasonably indicates the shipper is at greater risk. The Commission previously found reasonable similar proposals to use credit outlook to assess shipper creditworthiness.[7] If the poor credit outlook is eliminated or revised, the shipper would return to a creditworthy status and would no longer have to maintain collateral.

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[6] Quoting Standard & Poor's *Guide to Credit Rating Essentials* at 14.

[7] *Columbia Gas Transmission Corp.*, 119 FERC ¶ 61,041 (2007); *Columbia Gulf Transmission Co.*, 117 FERC ¶ 61,073 (2006).

B. Permitting Shippers to Agree to Provide a Reservation Security Equal to the Highest Three Months of Reservation Charges

12. Northern's current tariff limits the reservation security to three months of rolling reservation charges under the service contract plus imbalance volumes. Northern proposes to add a tariff provision that allows a shipper to agree to provide a reservation security (either a letter of credit or prepayment) equal to the highest three months of reservation charges plus imbalance volumes. Northern contends the rolling three months provision can create an unnecessary administrative burden on shippers due to varying rates and varying firm entitlement from month to month. Northern asserts the instant proposal relieves a shipper of the burden of revising its letter of credit or cash security on a monthly basis.

13. MERC states that it does not oppose this tariff revision because it provides an additional option available to shippers. However, MERC asserts that Northern should apply the same language to the guaranty provisions set forth in GT&C section 46(a)(i) for firm service and in section 46(b)(i) for interruptible service that Northern applies to cash security and letters of credit for firm and interruptible service shippers. MERC asserts that, logically, Northern should require an identical amount of guaranty for this section that it requires for other forms of security.

14. In its answer, Northern represents that based upon its discussions with MERC, Northern is authorized to state that MERC accepts Northern's explanation regarding the proposal. Northern states that MERC has agreed to withdraw its proposed modification to the guarantee provisions of sections 46(a)(i) and 46(b)(i).

15. The Commission accepts Northern's proposed revisions to the security it requires for firm service because the proposal is consistent with the tariff provisions previously approved by the Commission.[8]

C. Valuation of Imbalance and Storage Loan Gas for Security Provisions

16. Northern proposes to revise how it values imbalance gas for security provisions pursuant to firm service agreements. Under its current tariff, Northern values imbalance gas for security purposes as the highest monetary value of monthly imbalance gas during the previous 12-month period. Under its revised tariff provision, Northern will use the highest imbalance volume during the previous 12-month period for determining the volume of imbalance gas to include in a security and assign a value to that volume up to the highest monthly basis-adjusted NYMEX futures price for the prospective 12-month

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[8] *Algonquin Gas Transmission Co.*, 114 FERC ¶ 61,149 (2006); *Egan Hub Storage*, 114 FERC ¶ 61,154 (2006).

period. Northern proposes similar provisions for valuing imbalance gas and storage gas loaned under its interruptible deferred delivery service agreements. Northern asserts this proposal addresses the risk of monthly price movements between the time a shipper defaults and fails to repay the loan and the time Northern can buy replacement gas. Northern states the proposal would also allow it to anticipate future price fluctuations when requiring security.

17. Northern also proposes that if the value of the imbalance gas loaned to a shipper decreases after the shipper provides security, the shipper may agree to Northern continuing to hold the security already provided to reduce the administrative burden of frequently-changing security requirements.

18. MERC urges the Commission to reject Northern's proposal to use NYMEX future prices, asserting that Northern should not value a short-term event (an imbalance) by looking at a 12-month period and using the highest value during the lengthy period. CenterPoint requests Northern to modify its proposal to include limitations on the frequency and scale of the periodic adjustments to the security amount. CenterPoint explains that the NYMEX futures price changes on a daily basis, potentially triggering multiple demands from Northern that a shipper increase security amounts, imposing a steep administrative burden on shippers. CenterPoint also proposes a provision to allow Northern to request additional security only if the NYMEX futures price for the prospective 12-month period increases by five percent or more. CenterPoint also suggests the Commission limit any request for additional security to no more frequently than weekly.

19. In its answer, Northern proposes to add a provision stating that the security levels for storage loaned gas and imbalance will not be revised more frequently than weekly. Based upon this change, Northern represents that CenterPoint withdraws its protests regarding this matter. In response to MERC, Northern states that because there is no set time period for imbalances to be resolved, its proposal addresses the risk of monthly price movements after the shipper has borrowed the gas and better represents the value of the shipper's loan on an ongoing basis.

20. The Commission accepts Northern's proposal to modify how it values imbalance and storage loan gas for security purposes subject to Northern refiling tariff sheets consistent with its answer. Using the highest monthly basis-adjusted NYMEX futures price enables Northern to more accurately anticipate future price fluctuations and to determine the value of collateral needed to ensure it against default. Because the collateral is to protect against future defaults, using future prices is reasonable. Northern states that in order to alleviate concerns regarding the potential for administrative burdens on shippers, it has agreed that it will not revise the security levels for storage loaned gas and imbalance gas more frequently than weekly. Accordingly, the Commission directs Northern to file revised tariff sheets, within 30 days of the date this order issues, modifying its proposal consistent with its answer.

D. Billing of Shippers Operating Under Chapter 11 Bankruptcy

21. Northern proposes to remove language from its tariff that provides an exception to the security requirement for a shipper undergoing bankruptcy proceedings. Northern proposes to eliminate the following language:

> An exception can be made for a Shipper that is a debtor in possession operating under Chapter 11 of the Federal Bankruptcy Act, but only with adequate assurance satisfactory to Northern that the billing will be paid promptly as a cost of administration under the Federal Court's jurisdiction. Northern's creditworthiness provisions shall not supersede applicable bankruptcy law.[9]

22. In support of this deletion, Northern avers the exception can be granted in a bankruptcy proceeding based upon the mutual agreement of the parties. Northern, however, asserts that the existence of this exception in its tariff could create confusion and potentially result in an inference by a court that it can impose the exception on Northern without Northern's consent, which Northern states is not its intent.

23. MERC generally agrees with the proposal to remove the potentially confusing language, but contends that Northern should keep the following sentence: "Northern's creditworthiness provisions shall not supersede applicable bankruptcy laws." MERC states Northern's tariff cannot preempt bankruptcy laws regardless of whether the provision is in the tariff or not but asserts that retaining the tariff provision is appropriate given the tariffs' requirement that a shipper confirm it is not operating under bankruptcy laws.

24. In its answer, Northern states that it is willing to modify its proposal as requested by MERC.

25. The Commission accepts Northern's revised proposal as submitted in its answer to delete the above tariff language, but to retain the sentence stating "Northern's creditworthiness provisions shall not supersede applicable bankruptcy laws." Northern is ordered to file revised tariff sheets containing this sentence as proposed by its answer.

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[9] Northern Natural Gas Company, Fifth Revised Vol. No. 1, Fifth Revised Sheet No. 285.

E. **Treatment of Escrow Accounts**

26. Under section 46 of Northern's current tariff a shipper may deposit its pre-payment security funds into an interest-bearing escrow account that the shipper establishes. Under current provisions, the shipper grants Northern access to the account for payment of services provided. Northern proposes to revise this provision to permit the shipper to designate the establishment of an interest-bearing escrow account owned solely by Northern. The shipper will be entitled to receive the interest on the cash security held in the account. Northern asserts the proposed change more accurately reflects that cash in the escrow account is security and is not a payment or a deposit. Northern also contends this revision will ensure avoidance of any potential claim a bankruptcy trustee or other creditors might make that the escrow account is an asset of the shipper.

27. SEMCO asserts that potential treatment of such escrow accounts in bankruptcy proceedings do not justify Northern's restricting a shipper's ownership of the escrow or shipper withdrawal rights. SEMCO requests the Commission direct Northern to clarify shippers' rights to withdraw all accrued interest upon demand. SEMCO states that keeping escrow in a joint account provides the most effective assurance that a shipper's rights are protected. SEMCO also asks the Commission to order Northern to specify that the interest rate must be at least the same rate that the pipeline earns and that the pipeline must be responsible for all expenses related to the maintenance of the account. SEMCO states that Northern has no claim to the accrued interest in the event of default because the principal, not the interest, is a prepayment for future services.

28. MERC believes the language should not say that a shipper "is entitled" to the interest because using the term "entitled" may imply that the shipper must take affirmative action to receive the interest. MERC states that the tariff should more clearly state that the shipper will receive the interest.

29. In its answer, Northern states that all interest from the escrow account accrues to the shipper. Northern represents that, based upon this assurance, MERC no longer objects to this provision. However, Northern claims that the Commission has stated that a pipeline may utilize the accrued interest as security.[10] Northern further asserts that it is also appropriate to utilize accrued interest in circumstances where additional security is required to replace security drawn upon or when increased security is needed due to Northern's "rolling three-month requirement" or due to storage loan valuation changes.

30. The Commission accepts Northern's proposal to modify its tariff to allow a shipper to designate the establishment of an interest-bearing escrow account owned

[10] Citing *Mississippi Hub, LLC,* 118 FERC ¶ 61,099, at P 53 (2007).

solely by Northern. Under Commission policy, a pipeline must provide its shippers with the opportunity to earn interest on collateral either by paying the interest itself or by giving the shipper the option to designate an escrow account to which, if necessary, the pipeline may gain access to payments for services provided.[11] The tariff provision proposed by Northern, which allows the shipper to designate the account and to receive interest, is consistent with Commission policy. Under Commission policy, the shipper may retrieve any interest that accrues on the principal amount whenever it chooses. The tariff provision proposed by Northern recognizes that the shipper is entitled to the interest and does not limit the shipper's access to or ability to withdraw the accrued interest in its account. Northern states in its answer that it may utilize accrued interest when increased security is required. However, the proposed tariff provision does not provide Northern with this right, and, therefore, does not provide Northern with the right to use interest for collateral.

F. Limiting Activity of Non-Creditworthy Shippers that Fail to Provide Adequate Collateral

31. Northern's current tariff allows Northern to limit PDD (Preferred Deferred Delivery) and IDD (Interruptible Deferred Delivery) withdrawals for under-secured, non-creditworthy shippers that would increase loaned gas balances. Northern proposes to add language that permits Northern to limit "shipper activities" that "create or increase Northern's credit exposure to shipper related gas loans." Northern claims it needs to include a more expansive limitation to prevent other activities that cause inadvertent extensions of credit. Northern explains in its transmittal letter that "activity" is meant to include Firm Deferred Delivery (FDD) balances, Storage Balancing Service (SBS), imbalances, storage account balance transfers, and FDD capacity release. Northern states its proposal is consistent with the Commission's position that limits a shipper's ability to borrow additional gas from the pipeline until it posts the required collateral. [12]

32. MERC states that Northern should clarify that it may only limit activity if the shipper has failed to provide adequate security to cover Northern's exposure. CenterPoint asserts GT&C section 32 already provides sufficient protection against misuse of transportation imbalances. CenterPoint requests that Northern provide assurance that the imbalances referenced in defining "activity" in Northern's transmittal letter apply only to storage services and not to transportational imbalances.

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[11] *Policy Statement on Creditworthiness for Interstate Natural Gas Pipelines and Order Withdrawing Rulemaking Proceeding*, FERC Stats. & Regs. ¶ 31,191, at P 22 (2005).

[12] Citing *Northern Natural Gas Co.*, 117 FERC ¶ 61,292 (2006).

33. In its answer, Northern clarifies that the reference to "loaned gas" on Tariff Sheet No. 285A is to storage gas and does not refer to transportation imbalances. Northern represents that CenterPoint has withdrawn its protest with regard to this matter based upon this clarification. Northern further states that MERC no longer objects to this proposal following discussions in which Northern stated that the right to limit activity applied only when the security held by Northern was inadequate.

34. The Commission accepts Northern's proposed changes, subject to Northern modifying the language in Tariff Sheet No. 285A to provide that the reference to "loaned gas" refers to storage gas. The Commission previously held that it is appropriate to restrict a non-creditworthy shipper from borrowing gas without posting appropriate collateral. [13] The clarification that the reference to "loaned gas" refers to storage gas is consistent with Northern's assurances in its answer and makes the meaning of the tariff provisions clear.

G. <u>Security Interests Relating to Non-Creditworthy Shippers That Have Not Otherwise Provided Adequate Security</u>

35. Northern proposes to include tariff language providing that non-creditworthy shippers that store gas on Northern's system that have not otherwise provided adequate security must grant Northern a security interest for its payment obligations in the Shipper's FDD, PDD, and IDD storage accounts and credits, imbalance accounts, and other rights to receive payment or delivery of gas by Northern.

36. The Commission rejects the security provision. The Commission previously held in an earlier filing by Northern that Northern could not confiscate gas owned by a shipper, because allowing the pipeline to confiscate gas does not adequately protect the rights of the shipper and other parties that may have an equal interest in the gas owned by the defaulting or bankrupt shipper.[14] However, the Commission permitted the pipeline to assert any carrier liens or special interests applicable under state law.[15] Northern has not cited to any state law that entitles it to take a superior security interest in shipper's gas, and we therefore reject this provision.[16]

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[13] *Northern Natural Gas Co.*, 117 FERC ¶ 61,292 at P 6.

[14] *See, e.g., Northern Natural Gas Co.*, 102 FERC ¶61,076, at P 60 (2003).

[15] *Id*.

[16] The inclusion of a security interest in gas owned by the shipper also could interfere with the purchase and sale of gas because it could post a cloud on title to the gas. *See* North American Energy Standards Board, Base Contract for Sale and Purchase

(continued…)

H. Revised Proposal for Setoffs

37. Northern proposes to remove the requirement that it must terminate a non-creditworthy shipper's contract before setoffs occur. Northern states it is proposing this change to avoid the risk that contract termination may not occur before an automatic stay under bankruptcy. Northern states it would provide a five day notice to the shipper to allow the shipper to cure its default. As part of this proposal, Northern inserts into its tariff a provision stating that, for purposes of setoff, gas volumes loaned to a shipper and gas volumes held by Northern on behalf of the shipper are considered mutual debts owed. In the case of a default, Northern proposes to establish the dollar value for the quantities associated with various offsetting positions. Specifically, Northern proposes to base the dollar value on the posted Midpoint Price for "Northern demarc" as published in Gas Daily.

38. Although not protesting a specific provision, Nexen and Sequent state the proposals by Northern seek to move it to the front of the creditor line in the event of bankruptcy of a "non-creditworthy" shipper. If approved, Nexen and Sequent state that these provisions will increase significantly the cost of doing business for those shippers Northern has deemed "non-creditworthy."

39. The Commission accepts this proposal subject to clarification. It is not clear from the tariff provision whether setoffs refer only to monetary amounts that Northern owes the shipper or is intended to include gas owned by the shipper. As we found previously, Northern is not entitled to a superior position with respect to shipper gas on its system. Also, it is not clear whether Northern considers it a default if a shipper is paying its bills on time, but has failed to provide an increase in collateral required under the tariff. We therefore will accept this provision subject to the condition that Northern clarify the scope of the term setoff and that Northern explain whether the tariff provision applies to a failure to post increased collateral, and if it does, why allowing a setoff relating to collateral is just and reasonable.

I. Revised Minimum Credit Rating Requirements

40. Northern proposes revisions to allow it to terminate service in addition to imposing a suspension when a shipper fails to pay part or all of a billing. Under the proposal, Northern will notify the releasing and the acquiring shipper simultaneously upon determining that the releasing shipper is in default. Northern also proposes to provide the Commission 30-days notice prior to terminating the shipper contract.

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of Natural Gas, §8.2 (Seller must warrant that it "will transfer good and merchantable title to all Gas sold hereunder and delivered by it to Buyer, free and clear of all liens, encumbrances, and claims").

41. The Commission accepts the proposed modification.

J. <u>Termination of Capacity Release Contract</u>

42. In its original filing, Northern proposes to modify its tariff so that when Northern terminates the contract of a releasing shipper, Northern may also terminate the contract of the acquiring shipper unless the acquiring shipper agrees to match the releasing shipper's contract rate. Northern requires the revision to ensure adequate compensation where the releasing shipper is paying a negotiated rate above the maximum tariff rate. Northern specifically emphasizes that such negotiated rates may occur where Northern constructed facilities for the replacement shipper and the economic feasibility test was only satisfied by a rate greater than the maximum rate. As part of this change, Northern also adds tariff language stating that the notices to the releasing and acquiring shippers may be given on the same day (i.e., the 30-day termination notice and notice to acquiring shipper regarding the rate to be paid will be tendered contemporaneously).

43. Nexen, Sequent and CenterPoint object to Northern's proposal, asserting that it is inconsistent with Commission policy, which allows the acquiring shipper to retain the releasing shipper's capacity if it agreed to pay the lesser of (1) the releasing shipper's contract rate; (2) the maximum tariff rate applicable to the releasing shipper's capacity; or, (3) some other rate that is acceptable to the pipeline. Nexen, Sequent and CenterPoint further state that Northern's proposal inappropriately transfers the risk of default from the releasing shipper to the acquiring shipper. CenterPoint states that the maximum rate is the most the pipeline could otherwise charge if it terminates the acquiring shipper and posts the released capacity for rebid. Nexen and Sequent state the acquiring shipper has no contractual privity with the releasing shipper, nor did the acquiring shipper evaluate the releasing shipper's creditworthiness, and the pipeline already receives reimbursement for its credit risk via the Commission approved return on equity.

44. Indicated Shippers assert the proposed modification violates the Negotiated Rates Policy Statement[17] by eliminating the benefits of recourse rate service for acquiring shippers. The Indicated Shippers also emphasize that the tariff language proposed by Northern applies to all capacity releases involving negotiated rate contracts with rates greater than the recourse rate, not just capacity on newly constructed facilities where negotiated rates were necessary to justify the economics of the project.

45. NMDG protest that the proposal fails to distinguish between standard capacity release and an asset management arrangement (AMA) capacity release. NMDG states

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[17] Citing *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines Regulation of Negotiated Transportation Services of Natural Gas Pipelines,* 74 FERC ¶ 61,076 (1996) (Negotiated Rates Policy Statement).

that an AMA should not obtain the capacity of a releasing LDC since LDCs have lost valuable rights to capacity they need to serve their customers.

46. In its answer, Northern proposes to modify its initial capacity release proposal. Northern proposes to retain its current tariff language permitting the acquiring shipper to retain its capacity by agreeing to pay the lower of the releasing shipper's contract rate or the maximum tariff rate, except where (1) the releasing shipper's contract rate is above the maximum tariff rate because Northern had constructed facilities for the releasing shipper and the economic feasibility test was met only through a rate greater than the maximum tariff rate; and (2) the acquiring shipper has agreed to pay a rate above the maximum tariff rate for the released capacity. In that case, the acquiring shipper would continue to pay the rate that it was already paying, which was above the maximum rate. Northern states that its revised approach is narrowly tailored to the specific instances in which it is appropriate for the acquiring shipper to pay more than the maximum tariff rate. Northern also states that the proposal in its answer is consistent with the Commission's new capacity release regulations in Order No. 712 that allow a release to be made above the maximum rate.

47. Northern represents that with these proposed changes, CenterPoint, Nexen and Sequent have authorized Northern to state that their protests regarding this issue are withdrawn. Northern states that the parties reserve the right to review and comment on any revised tariff language that Northern proposes in a compliance filing.

48. Also in its answer, Northern states that NMDG has provided no basis to prohibit an AMA from acquiring the capacity under the proposed capacity release provisions. Northern asserts that concern regarding the public service obligation would exist if the capacity is released by an LDC or a municipality that is not subject to an AMA. Northern avers that even under NMDG's proposal, if the AMA were denied capacity, the capacity would be posted and could be acquired by a shipper without any public service obligation. Northern states that the concerns of NMDG regarding a public service obligation could be addressed in the agreement establishing the AMA by providing that if the LDC or municipality becomes non-creditworthy the capacity would be recalled from the asset manager and revert back to the LDC or municipality. Northern also states that the protection of an LDC or municipalities public service obligation is a matter under the jurisdiction of state authorities, not the Commission.

49. In the response filed by NMDG on February 17, 2009, NMDG states that Order No. 712 recognizes a clear distinction between AMAs and capacity release.[18] NMDG

[18] Citing *Promotion of a More Efficient Capacity Release Market*, Order No. 712, 73 Fed. Reg. 37,058, at 37,079 (June 30, 2008), FERC Stats. & Regs. ¶ 31,271, at P 120-121 (2008), *order on reh'g*, Order No. 712-A, 73 Fed. Reg. 72,692 (December 1, 2008), FERC Stats. & Regs. ¶ 31,284 (2008) (Order No. 712).

states that that when an LDC releases to an AMA, it is not releasing unneeded capacity, but rather it is releasing capacity it needs to fulfill its public service obligation. NMDG states that if a transfer is not permitted for AMAs, and the releasing shipper becomes non-creditworthy, the releasing shipper would be treated like any other shipper that becomes non-creditworthy and not as a releasing shipper. According to NMDG, if the LDC is not treated as a releasing shipper, it would then have thirty days notice prior to termination and an opportunity to cure the defect. NMDG further states that contractual arrangements with the AMA are an insufficient remedy to its concerns because the AMA may not be willing to accept such provisions and that this could discourage the use of an AMA. NMDG asserts that although the public service obligation of an LDC may flow from state authority, the Commission cannot disregard these public service obligations.

50. The Commission accepts Northern's proposal as clarified in its answer. Our previous orders have found that the pipeline must permit the acquiring shipper to retain its capacity if the acquiring shipper agrees to pay the lesser of the releasing shipper's contract rate, the maximum rate, or some other rate acceptable to the pipeline.[19] The Commission has explained that this provision establishes a "reasonable balance" between the interests of the pipeline and the acquiring shipper.[20]

51. Northern in its answer proposes to continue to adhere to its existing tariff language, but proposes to add an exception that would require the acquiring shipper to continue to pay a rate higher than the maximum rate if both of the following conditions are met: (1) the releasing shipper's contract rate is above the maximum tariff rate because Northern constructed facilities for the releasing shipper and the economic feasibility test under its tariff entitled Northern to charge a rate greater than the maximum tariff rate and (2) the acquiring shipper has agreed to pay a rate above the maximum tariff rate for the released capacity. The exception proposed by Northern is consistent with the intent of the prior Commission decisions which sought to strike a reasonable balance between the pipeline and the acquiring shipper. In the particular case in which the pipeline has constructed facilities for which it is entitled to charge the releasing shipper more than the

[19] *Policy Statement on Creditworthiness for Interstate Natural Gas Pipelines and Order Withdrawing Rulemaking Proceeding*, FERC Statutes and Regulations ¶ 31,191, at P 48-49 (2005); *Tennessee Gas Pipeline Co.*, 106 FERC ¶ 61,117, at P 14-16 (2004); *Northern Border Pipeline Co.*, 100 FERC 61,125, at P 9-10 (2002); *Canyon Creek Compression Co.*, 100 FERC ¶ 61,283 (2002); *Kinder Morgan Interstate Gas Transmission LLC*, 100 FERC ¶ 61,366 (2002); and *Texas Eastern Texas Eastern Transmission, LP*, 101 FERC ¶ 61,071 (2002).

[20] *Policy Statement on Creditworthiness for Interstate Natural Gas Pipelines and Order Withdrawing Rulemaking Proceeding*, FERC Stats. & Regs. ¶ 31,191, at P 48-49 (2005).

maximum rate and the acquiring shipper has also agreed to pay more than the maximum rate, the acquiring shipper is still protected and is required to pay no more than the rate that it previously accepted for the capacity. However, because Northern cannot collect more than the releasing shipper is paying for the capacity, Northern will need to modify this provision to ensure that the rate charged the acquiring shipper can in no event be higher than the rate paid by the releasing shipper. Thus, the Commission accepts the provision filed by Northern subject to the condition that it revise its proposal consistent with this discussion.

52. The concern expressed by NMDG regarding AMA capacity release is without merit. NMDG is concerned about whether the replacement shipper in an AMA can obtain the capacity of a releasing shipper that has "become non-creditworthy."[21] But the tariff provision filed by Northern does not apply when a releasing shipper becomes non-creditworthy. Rather, it applies only when the releasing shipper's underlying contract and its rights to the capacity are terminated. In such a situation, the releasing shipper has no further rights to the capacity, and without this provision, Northern could resell that capacity. Thus, the releasing shipper under an AMA is in worse position under this provision than it would be if the existing tariff continued or if the pipeline resold the capacity. In fact, the releasing shipper may be better off if the Asset Manager takes over the capacity, because, depending on the provisions of the gas portion of the AMA, the releasing shipper could preserve the delivery obligation.

K. <u>Other Changes and Comments</u>

53. MERC states that, with the tightening creditworthy standards, it's important that Northern act promptly when a shipper exercises its tariff right to request a reevaluation. The Commission duly notes MERC's request. Northern did not propose to change its tariff with respect to re-evaluations, and we expect Northern to follow its existing tariff in this respect.

<u>The Commission orders</u>:

(A) The tariff sheets in the Appendix are accepted to become effective February 21, 2009, subject to conditions set forth in the body of this order.

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[21] NMDG Protest at 5 ("The intent of Northern's proposed language is clear: if a releasing shipper is deemed non-creditworthy by Northern…").

(B) Northern is directed to file revised tariff sheets and explanations consistent with this order within 30 days of the date this order issues.

By the Commission. Commissioner Kelliher is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Appendix

Northern Natural Gas Company
FERC Gas Tariff
Fifth Revised Volume No. 1

Tariff Sheets Accepted Subject to Conditions effective February 21, 2009:

Fourth Revised Sheet No. 216
Seventh Revised Sheet No. 219
Third Revised Sheet No. 284
Sixth Revised Sheet No. 285
Third Revised Sheet No. 285A
First Revised Sheet No. 285B
11 Revised Sheet No. 289