127 FERC ¶ 61,180
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

May 22, 2009

In Reply Refer To:
Northern Border Pipeline Company
Docket No. RP09-540-000

Northern Border Pipeline Company
13710 FNB Parkway
Omaha, Nebraska 68154-5200

Attention: Bambi L. Heckerman, Manager
Regulatory Affairs

Reference: Revisions to Capacity Release Provisions

Ladies and Gentlemen:

1. On April 23, 2009, Northern Border Pipeline Company (Northern Border) filed revised tariff sheets[1] to modify certain elements of its capacity release provisions set forth in section 27 of its General Terms and Conditions (GT&C). The majority of Northern Border's proposed changes involve streamlining provisions, eliminating redundant or obsolete provisions, incorporating consistencies between sections, adding cross-references, and clarifying potentially confusing provisions. Northern Border also proposes certain substantive revisions to its capacity release provisions. They include (1) cancelling Rate Schedule T-1R (Firm Capacity Release) and all attendant *pro forma* service agreements and instead requiring replacement shippers to use its general firm transportation rate schedule (Rate Schedule T-1); (2) eliminating the Offer to Release-Temporary and Offer to Release-Permanent forms from its tariff because its automated procedures no longer require use of such forms; (3) adding a provision allowing Northern Border to refuse a permanent release if it has a reasonable basis to conclude it will not be financially indifferent to the release; (4) incorporating into its GT&C specific bid evaluation methods applicable to firm rate schedules; (5) implementing a provision allowing Northern Border to market capacity for a releasing shipper for a fee; and

[1] *See* Appendix.

(6) adding a provision regarding responsibility of payment of capacity in the event a releasing shipper becomes bankrupt. Northern Border proposes corresponding changes to other tariff sections as well. Northern Border also seeks waiver of section 154.207 of the Commission's regulations regarding the effective date of the proposed tariff sheets, stating it plans to place the tariff sheets into effect no later than 120 days from the date a final order is issued in the proceeding.

2. We accept Northern Border's revised tariff sheets, subject to conditions, and will grant waiver of section 154.207 of our regulations, to allow Northern Border to make them effective within the timeframe it has proposed. We direct Northern Border to file revised tariff sheets within 21 days of the date this order issues, incorporating the tariff changes discussed below.

3. Notice of Northern Border's filing was issued on April 24, 2009. Interventions and protests were due as provided in section 154.210 of the Commission's regulations, 18 C.F.R. § 154.210. 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 filed 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. North Shore Gas Company and The Peoples Gas Light and Coke Company (North Shore) filed comments seeking revisions. Tenaska Marketing Ventures filed a protest. Nexen Marketing U.S.A. Inc. (Nexen) filed an out-of-time motion to intervene and comments also seeking revisions. On May 12, 2009, Northern Border filed an answer to the protests. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2008), prohibits an answer to a protest unless otherwise ordered by the decisional authority. In this case, we accept Northern Border's answer because it provides information that assisted the Commission in our decision-making process. We address the parties' concerns below.

4. Northern Border proposes to incorporate into section 27.11 of its GT&C a provision allowing Northern Border to "refuse to allow a permanent release if it has a reasonable basis to conclude that it will not be financially indifferent to the release." North Shore asserts this provision is too vague and leaves Northern Border with excessive discretion to reject a permanent release. It contends the Commission should reject the provision or at least direct Northern Border to clarify the limits of its discretion. In its answer, Northern Border cites cases in which the Commission has approved similar tariff language.[2]

[2] Northern Border Answer at 12 (citing *Texas Eastern Transmission, L.P.*, 82 FERC ¶ 61,118 (1998); *Northwest Pipeline Corp.*, 111 FERC ¶ 61,231 (2005); and *Algonquin Gas Transmission, LLC*, 112 FERC ¶ 61,262 (2005)).

5. We find the provision reasonable and accept Northern Border's tariff language as proposed. In *Northwest Pipeline Corporation*,[3] the Commission addressed the issue of a pipeline refusing to allow a permanent capacity release "if it has a reasonable basis to conclude that it will not be financially indifferent to the release."[4] The Commission stated that the financial indifference of the pipeline in capacity release is a reasonable factor to consider in deciding whether to permit permanent capacity release. The Commission also stated that the pipeline must have flexibility in this regard and does not have to set out in its tariff every extenuating circumstance or condition that would lead the pipeline to determine that it will not be financially indifferent to the release transaction. For the same reasons, we accept Northern Border's proposal here.

6. Northern Border proposes to add the following language as section 27.140 of its GT&C:

> In the event a Releasing Shipper, subject to proceedings under any chapter of the Bankruptcy code rejects its Agreement, the Replacement Shipper will, as of the date the Releasing Shipper ceases payment under such Agreement, be responsible for paying a rate that is no lower than the lessor [sic] of 1) the Releasing Shipper's rate or 2) the Maximum Rate.

7. North Shore, Tenaska, and Nexen object to this language. North Shore asserts that under this provision, the replacement shipper could end up paying more than what it bid for the capacity. It contends that Northern Border should not require replacement shippers to pay the new rate, but rather should give them the option to do so, arguing this strikes a fairer balance between the pipeline's and the replacement shipper's interests. Tenaska adds the proposal would unfairly penalize the replacement shipper by forcing it to keep the pipeline whole. It adds the replacement shipper should have the right to match the winning bid if the capacity if re-marketed. Nexen states that, at a minimum, the Commission should require Northern Border to revise section 27.140 of its GT&C to provide the replacement shipper with the option, if it wishes to retain the capacity, of paying the lesser of the releasing shipper's rate, the maximum tariff rate, or some other rate acceptable to both the replacement shipper and Northern Border.

8. In its answer, Northern Border explains that its proposal provides that "if the releasing shipper's contract is terminated (because it has filed for bankruptcy and rejected the service agreement under which it has released capacity), the replacement shipper will be permitted to retain capacity if the latter agrees to pay the lesser of (1) the releasing shipper's rate, or (2) the maximum tariff rate."[5] It provides a history of case law

---

[3] 111 FERC ¶ 61,231 (2005).

[4] *Id.* P 23-25.

[5] Northern Border Answer at 15.

regarding this provision and explains why its proposal is consistent with Commission policy. It also argues that the pipeline should not be required to re-market the capacity.

9. We share the concerns raised in the comments and protest. The Commission previously determined that should a releasing shipper have its contract terminated, the Commission's policy is to permit the replacement shipper the option of retaining its capacity by paying, for the remainder of the replacement shipper's contract, the lower of (1) the former releasing shipper's contract rate, or (2) the pipeline's maximum tariff rate.[6] The Commission found this strikes an appropriate balance between the interests of both parties. Here, however, the Commission and protesters interpret Northern Border's proposal to mandate that the replacement shipper keep the capacity and pay either the contract rate or maximum tariff rate, which goes beyond the Commission's policy of giving the replacement shipper the option. As North Shore, Tenaska, and Nexen contend, this could result in the replacement shipper having to pay more for service under its agreement than it contracted for, and prevents the replacement shipper from choosing between letting the capacity go if it can no longer continue to pay the rate it agreed to pay the releasing shipper, or retaining the capacity by paying the lesser of the bankrupt former shipper's contract rate or the pipeline's maximum tariff rate. Accordingly, we direct Northern Border to file revised tariff sheets clarifying that the replacement shipper has the option of choosing whether or not to retain the capacity where the releasing shipper rescinds its contract with the pipeline, instead of requiring the replacement shipper to retain the capacity by paying a rate that may be in excess of the rate it was obligated to pay the releasing shipper.

10. North Shore expresses concerns that Northern Border's tariff does not adequately address the process by which Northern Border handles segmented releases. It explains the process currently in place, and asserts that no other pipeline has so cumbersome a process. North Shore contends Northern Border should implement more efficient segmented release practices, and offers suggestions.

11. In its answer, Northern Border explains it has not proposed any changes to its segmented release provisions, and therefore the comments that North Shore raises on this issue are outside the scope of the proceeding. Northern Border explains in its answer why North Shore's proposed changes are not just and reasonable. Northern Border, however, states it is willing to make certain procedural changes to its segmented release provisions in response to comments. They include (1) modifying its firm contracting processes so that a new firm shipper is given the opportunity to concurrently execute both its transportation agreement and the related capacity release agreement; (2) adding the capacity release agreement to its list of form agreements that shippers can electronically

---

[6] *Tennessee Gas Pipeline Co.*, 106 FERC ¶ 61,117, at P 14-16 (2004); *Canyon Creek Compression Co.*, 100 FERC ¶ 61,283 (2002); *Kinder Morgan Interstate Gas Transmission, LLC*, 100 FERC ¶ 61,366 (2002).

request and execute; and (3) providing an email reminder to existing firm shippers who have not executed the capacity release agreement reiterating the need to do so. Northern Border does not include with its answer revised tariff sheets implementing these provisions.

12. In the instant filing, Northern Border does not propose any specific tariff revisions to its capacity release provisions with regard to segmented releases. Accordingly, we find North Shore's suggested tariff changes to be outside the scope of this Natural Gas Act section 4 proceeding. Should Northern Border propose to implement any changes to its segmented release provisions, it may do so in a section 4 filing in a separate proceeding.

13. North Shore proposes three editorial corrections to Northern Border's filing. First, section 27.20 (Offer Requirements) of Northern Border's GT&C provides, in part

> Except for capacity released to an AMA or marketer participating in a state-regulated access program, a Releasing Shipper may not roll over, extend or in any way continue a release to the same Designated Replacement Shipper that obtained capacity for a term of thirty-one days or less through a release which was not subject to Bid, until a minimum of twenty-eight days after the first release period has ended.

14. North Shores suggests Northern Border clarify the provision by beginning it with "Except for an AMA Release, a Releasing Shipper may not…." We will not require this change, as Northern Border's tariff is correct as currently stated.

15. Second, section 27.46 (Prearranged Release of Capacity) of Northern Border's GT&C provides, in part

> If an offer containing a Designated Shipper is made biddable by the Releasing Shipper, a Designated Replacement Shipper will, in the event that a "better bid" for released capacity is received, have the option to match the "better bid" in accordance with Subsection 27.70 hereof and acquire the released capacity.

North Shore asks whether the first mention of "Designated Shipper" refers to a designated replacement shipper. We agree with North Shore that this provision is unclear and direct Northern Border to respond to North Shore's question and clarify the tariff provision, if necessary.

16. Third, in section 27.140 (Bankruptcy) of Northern Border's GT&C, North Shore notes that Northern Border misspells "lesser" as "lessor." We direct Northern Border to correct this typographical error in its compliance filing.

17. Northern Border requests waiver of section 154.207 of the Commission's regulations,[7] which requires tariff changes to be filed with the Commission and noticed no less than 30 days, nor more than 60 days, prior to the effective date of the tariff sheets. In the instant filing, Northern Border proposes an effective date no later than 120 days from the date the Commission issues a final order in this proceeding. Northern Border states this waiver is necessary so it can program its computer system to conform to the numerous changes it proposes to its capacity release provisions. It agrees to notify its shippers and the Commission no later than 14 days prior to implementing the system changes. North Shore supports Northern Border's implementation proposal. For good cause shown, we grant waiver, and direct Northern Border to file to place the tariff sheets into effect no less than 14 days prior to implementing the tariff provisions.

By direction of the Commission.

Kimberly D. Bose,
Secretary.

cc: All Parties

[7] 18 C.F.R. § 154.207 (2008).

Appendix

Northern Border Pipeline Company
First Revised Volume No. 1

Tariff Sheets Conditionally Accepted Subject to Northern Border Motion to Effectuate

Thirteenth Revised Sheet No. 1
Seventh Revised Sheet No. 100
Sixth Revised Sheet No. 101A
Fifth Revised Sheet No. 106
Sixth Revised Sheet No. 133
Third Revised Sheet No. 179
Seventh Revised Sheet No. 181
Fourth Revised Sheet No. 204
Sixth Revised Sheet No. 213.01
Eleventh Revised Sheet No. 215
Second Revised Sheet No. 266.03
Sixth Revised Sheet No. 271
Second Revised Sheet No. 272B
Original Sheet No. 272C
Sixth Revised Sheet No. 273
Fourth Revised Sheet No. 273A
Eighth Revised Sheet No. 274
Second Revised Sheet No. 274A
Fourth Revised Sheet No. 275
Fifth Revised Sheet No. 275A
Second Revised Sheet No. 275B
Eighth Revised Sheet No. 276
Fifth Revised Sheet No. 276A
Fifth Revised Sheet No. 277
Seventh Revised Sheet No. 278
Third Revised Sheet No. 278A
Seventh Revised Sheet No. 279
Sixth Revised Sheet No. 280
Fourth Revised Sheet No. 281
Fifth Revised Sheet No. 282
Eighth Revised Sheet No. 283
Sixth Revised Sheet No. 284
First Revised Sheet No. 284.01
First Revised Sheet No. 284A
Ninth Revised Sheet No. 285
Tenth Revised Sheet No. 286
Sixth Revised Sheet No. 286A
Sixth Revised Sheet No. 286B
Fifth Revised Sheet No. 286B.01
Fourth Revised Sheet No. 286B.02
Ninth Revised Sheet No. 286C
First Revised Sheet No. 286D
First Revised Sheet No. 286E
First Revised Sheet No. 286F
Ninth Revised Sheet No. 287
Second Revised Sheet No. 288
Eleventh Revised Sheet No. 300A
Third Revised Sheet No. 300H.02
Third Revised Sheet No. 300H.03
Fourth Revised Sheet No. 419
Second Revised Sheet No. 441
Fifth Revised Sheet No. 449
Eighth Revised Sheet No. 455