

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Northern Natural Gas Company

Docket No. RP10-148-000

(Issued June 8, 2010)

Attached is the statement by Chairman Wellinghoff dissenting to an order issued on May 27, 2010, in the above referenced proceeding, *Northern Natural Gas Company*, 131 FERC ¶ 61,178 (2010).

Kimberly D. Bose,
Secretary.

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WELLINGHOFF, Commissioner, dissenting:

The Commission instituted this Natural Gas Act (NGA) section 5 proceeding on November 19, 2009 based on Form 2 data for 2008 that showed that Northern Natural Gas Company (Northern) may be substantially over-recovering its cost of service, causing Northern's existing rates to be unjust and unreasonable. The majority finds that there has been a change in circumstances and evidence making it appropriate to terminate the section 5 action against Northern. However, the majority relies only on evidence presented by the Customer Group and speculation about Northern's intention to file and ability to support a significant rate increase in a general rate case under section 4 of the NGA. This ignores evidence submitted in this proceeding by Commission trial staff that Northern continues to significantly over recover its cost of service and Northern's likely inability to support a rate increase. Further, the majority disregards the fact that it is the Commission's ultimate responsibility to ensure that rates are just and reasonable. For these reasons, I respectfully dissent.

The majority rests its determination on the Customer Group's assertion that recent revenue data provided by Northern shows that there has been a significant decrease in Northern's Field Area revenues since 2008, with no offsetting increase in Northern's Market Area revenues.¹ However, the cost of service evidence filed by our own trial staff in the section 5 proceeding suggests that, even taking into account Northern's reduced Field Area revenues, Northern may continue to over-recover its cost of service by about \$100 million under its current rates.² While the validity of trial staff's evidence

¹ While the majority states that the Customer Group provided more recent "cost and revenue data" (at P 15), in fact the Customer Group only provided updated revenue data.

² In testimony filed on May 20, 2010, trial staff contends that Northern's cost of service should be set at \$472.1 million. The revenue data included in the Appendix to the
(continued)

obviously would be tested at hearing, it creates a reason to believe that rates on Northern may be unjust and unreasonable, which is the very reason the Commission initiated the section 5 proceeding. Thus, I believe that the underlying premise supporting initiation of the section 5 has not been clearly refuted. The Commission can apply a broad view of the public interest and give due weight to consensus in a normal settlement proceeding in which a pipeline has sought a rate change. In contrast, in a NGA section 5 proceeding, it is the Commission that has initiated review of the pipeline's rates, and the Commission's obligation to ensure just and reasonable rates. Thus, the very nature of a NGA section 5 proceeding, once it has been initiated, is different. In the absence of compelling evidence that rates are no longer unjust and unreasonable, the Commission should not terminate a section 5 action. We do not have that compelling evidence in this case.

While many customers and four state commissions support or do not oppose the motion to terminate the NGA section 5 proceeding, it is inappropriate to rest our decision on that alone. In *Tejas Power Corp. v. FERC*³ the D.C. Circuit Court of Appeals remanded to the Commission the approval of a settlement which the Court concluded the Commission approved "because all of the pipeline's resale customers, which are [Local Distribution Companies (LDC)], agreed to it and no state public service Commission opposed it."⁴ In part, the D.C. Circuit stated that "[w]hile the Commission may be able to infer from the LDC's agreement that their interests are served, the public interest that the Commission must protect always includes the interest of consumers in having access to an adequate supply of gas at a reasonable price."⁵ The court reasoned that the Commission made no effort to look beyond the benefits that it foresees for the pipeline and its LDC customers in order to determine whether any benefits or harm might accrue to the LDC's downstream customers who would bear the costs at issue in that case. While *Tejas* dealt with a settlement proposed to the Commission, rather than a motion to terminate an NGA section 5 proceeding instituted by the Commission, the court's reasoning still stands. It is the Commission's duty to ensure just and reasonable rates. In this case, while many customers and four state commissions support or do not oppose the motion to terminate, there is evidence that Northern will continue to over-recover its cost

Customer Group's motion shows that Northern's estimated annual revenues for the period August 2009 through July 2010 will be \$570,942,194, or very nearly \$100 million more than the cost of service supported by trial staff. That estimate is based on actual monthly revenue figures for August 2009 through March 2010 and Northern's monthly revenue projections for the period April 2010 through July 2010..

³ 908 F.2d 998 (1990) (*Tejas*).

⁴ *Id.* at 1002.

⁵ *Id.* at 1103.

of service. As in the *Tejas* case, the burden of those cases will be passed on to the downstream gas users.

Finally, as noted by the Michigan Public Service Commission, the situation presented in this proceeding has a “fundamentally unfair aspect.”⁶ The lack of refund authority under section 5 of the NGA allows the regulated community to defeat the purpose of section 5 at least in some circumstances. Without Commission authority to set a refund effective date upon initiation of an investigation under section 5 of the NGA, a pipeline can threaten to institute a general NGA section 4 rate case and move its proposed rates into effect subject to refund prior to the date by which a Commission order could be expected to act in the section 5 case. This puts customers in a position in which they may have to pay significantly higher rates in order to continue a section 5 challenge to a pipeline’s rates, with only the possibility of a prospective rate reduction in the section 5 case and no ability to obtain refunds below the section 4 case refund floor for the retroactive period. The customers could also be forced to litigate those rates twice – both in the section 5 case and in the general section 4 rate case initiated by the pipeline. This is patently unfair and for this reason I support legislative changes providing for NGA refund authority paralleling that provided to the Commission in the Federal Power Act.

For these reasons, I respectfully dissent from today’s order.

Jon Wellinghoff
Chairman

⁶ Michigan Public Service Commission, Answer to the Motion to Terminate at 1.