132 FERC ¶ 61,021
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

Northern Natural Gas Company Docket No. RP10-841-000

ORDER ACCEPTING AND SUSPENDING
TARIFF SHEETS AND ESTABLISHING TECHNICAL CONFERENCE

(Issued July 9, 2010)

1. On June 11, 2010, Northern Natural Gas Company (Northern) filed tariff sheets[1] to incorporate provisions in its tariff governing the resale of any market-based rate storage capacity. Northern requests a July 12, 2010 effective date for the proposed tariff sheets. As discussed below, the Commission concludes that Northern has not established that the proposed tariff sheets are just and reasonable and that there are numerous issues that need to be considered further before such a determination may be made. Therefore the Commission suspends the proposed tariff sheets for five months to be effective December 12, 2010, subject to the outcome of a technical conference to examine the issues raised by Northern's proposal.

I. Background

2. On November 16, 2006, the Commission issued a declaratory order[2] authorizing Northern to charge market-based rates to the initial shippers that submitted winning bids and signed precedent agreements for Firm Deferred Delivery (FDD) Service from a planned expansion of Northern's Redfield, Iowa storage facility. The Commission noted that Northern's proposed expansion was fully subscribed with long-term contracts, some of which extended to 20 years.[3] However, Northern did not propose any customer

[1] *See* Appendix.

[2] *Northern Natural Gas Co.*, 117 FERC ¶ 61,191 (2006) (*Northern Natural*).

[3] *Id*. at P15.

protections in the event that it became necessary to remarket any of the storage expansion capacity either after contract expiration or upon bankruptcy or another event leading to turn back of the capacity; therefore, the Commission did not permit Northern to charge market based rates for any subsequent sales of the expansion storage capacity.[4] The Commission stated that, because Northern did not propose protections for future customers or replacement shippers, the maximum rate applicable to releases of storage capacity by expansion customers is the just and reasonable rate in their individual contracts with Northern and required Northern to include the maximum release rates in its tariff when Northern filed its tariff to place the facilities into service.[5]

II. Details of the Filing

Open Season for the Resale of Capacity

3. Northern's proposed tariff revisions provide the process to be utilized for the resale of market-based rate capacity only to the extent that such capacity becomes available through expiration of existing market-based rate FDD service agreements or upon bankruptcy or another event leading to turn back of the capacity. Further, Northern seeks the ability to sell such capacity either as firm service under Rate Schedule FDD or as interruptible service under Rate Schedule PDD and Rate Schedule IDD. Northern states that the proposed tariff changes include provisions to address the Commission's Order No. 678 dictates that applicants for market-based rates under section 4(f) of the Natural Gas Act must demonstrate how shippers will be protected from capacity withholding and must explain how an appropriate reserve price will be established applicable to open seasons for the resale of the capacity subject to market-based rates. Northern asserts that it is proposing transparent open season procedures for the remarketing of this capacity and establishing a reasonable reserve price.[6]

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[4] *Id.* at P 22.

[5] *Id.* at footnote 21.

[6] *See Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services*, Order No. 637, FERC Stats. & Regs. ¶ 31,091, at 31,294 (2000); *clarified*, Order No. 637-A, FERC Stats. & Regs. ¶ 31,099 (2000); *reh'g denied*, Order No. 637-B, 92 FERC ¶ 61,062 (2000); *aff'd in part and remanded in part sub nom. Interstate Natural Gas Association of America v. FERC*, 285 F.3d 18 (D.C. Cir. 2002); *order on remand*, 101 FERC ¶ 61,127 (2002); *order on reh'g*, 106 FERC ¶ 61,088 (2004); *aff'd sub nom. American Gas Association v. FERC*, 428 F.3d 255 (D.C. Cir. 2005).

4. Northern asserts that the process it proposes for posting and awarding of the market-based storage capacity will generally follow the process currently used by Northern for cost-based transportation and storage capacity. Northern states that it will post available market-based storage capacity, including the reserve price and maximum term, on its website for five days before the award of capacity. After capacity has been posted for five days, Northern will process all requests and award the market-based capacity at the reserve price, unless another price is agreed to, in accordance with its tariff.

5. Northern states that the winning bid(s) (but not all bids) in the open season will be posted, including the rate, term and any affiliate relationship. Furthermore, Northern states that if market-based storage capacity is available after requests for FDD storage service have been satisfied, Northern may process requests and award the capacity as PDD storage service at the reserve price, or other price agreed to by Northern. Similarly, if market-based storage capacity is available after requests for FDD and PDD storage service have been satisfied, Northern may process requests and award the capacity as IDD storage service at the reserve price, or other price agreed to by Northern.

Reserve Price

6. Northern proposes to establish the reserve price for capacity using one of the following methods, at Northern's discretion: (1) the highest price charged by a competing storage seller in the twelve (12) month period preceding the open season for a comparable term (for purposes of this provision, a "competing storage seller" is defined as a storage provider located in a state in which Northern has transportation facilities); (2) the highest rate charged by Northern for its comparable storage service during the previous 12 months, excluding a rate charged to a non-regulated affiliate; (3) a 100 percent load factor rate of $1.75 per Dth escalated from January 1, 2010, and on January 1 of each year thereafter by any annual positive percentage change in the third published table 1.1.9 Implicit Price Deflator for Gross Domestic Product for the third quarter by the Bureau of Economic Analysis of the U.S. Department of Commerce in the publication "Survey of Current Business" for the previous calendar year; or (4) the highest 100 percent load factor rate bid in a right of first refusal (ROFR) process conducted by Northern for market-based storage capacity. Finally, Northern reserves the right, at its sole discretion, to accept bids below the reserve price set for an open season.

ROFR Process

7. Northern proposes revisions to the ROFR provisions of its General Terms and Conditions (GT&C) that address the resale of market-based FDD service through a ROFR process at the end of the primary term of the FDD service agreements. Northern asserts that current parties holding market-based rate storage capacity have contractual ROFRs. Northern states that the tariff revisions clarify that Northern may negotiate

contractual ROFRs with market-based rate FDD shippers, but that such a ROFR is not a regulatory right.

Other

8. Northern revised the capacity release provisions of its GT&C to clarify that, for purposes of capacity release by a market-based FDD shipper, the maximum rate is the shipper's market-based tariff rate in Northern's tariff; accordingly a shipper is unable to receive more than that rate, even if the market would support a higher rate. In addition, Northern proposes to post only open season winning bid(s), not all the bids that were made in the open season, which shall remain known only to Northern.

III. Notice of Filing and Interventions

9. Public notice of Northern's filing issued on June 14, 2010. Interventions and protests were due June 23, 2010, as provided in section 154.210 of the Commission's regulations.[7] Pursuant to Rule 214,[8] 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. On June 23, 2010, Northern States Power Company-Minnesota (NSP-M), Northern States Power Company-Wisconsin (NSP-W) and Southwestern Public Service Company (SPS) (jointly the Xcel Energy Companies) and CenterPoint Energy Resources Corp. (CenterPoint) filed timely protests. On June 23, 2010, the Northern Municipal Distributors Group (NMDG), and each of its individual members,[9] and the Midwest Region Gas Task Force Association (MRGTF), and each of its individual members[10] filed timely comments (jointly NMDG/MRGTF).

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[7] 18 C.F.R. § 154.210 (2010).

[8] 18 C.F.R. § 385.214 (2010).

[9] NMDG is composed of the following Iowa municipal-distributor customers of Northern: Alton; Cascade; Cedar Falls; Coon Rapids; Emmetsburg; Everly; Gilmore City; Graettinger; Guthrie Center; Harlan; Hartley; Hawarden; Lake Park; Manilla; Manning; Orange City; Osage; Preston; Remsen; Rock Rapids; Rolfe; Sabula; Sac City; Sanborn; Sioux Center; Tipton; Waukee; West Bend; Whittemore; and Woodbine.

[10] MRGTF is composed of the following municipal-distributor and local distribution customers of Northern: Austin; Centennial Utilities; Community Utility Company; City of Duluth, Minnesota - Duluth Public Utilities; Great Plains Natural Gas Company, a Division of MDU Resources Group Inc.; Hibbing; Hutchinson; New Ulm; Northwest Natural Gas Company; Owatonna; Round Lake; Sheehan's Gas

(continued…)

IV. Protests, Comments, and Answer

Xcel Energy Companies

10. The Xcel Energy Companies are concerned that Northern's proposed methods for setting reserve prices can be manipulated to withhold capacity or extract monopoly rents. They assert that the proposed tariff provisions give Northern unfettered discretion in an initial auction to set the reserve price at any level of its choosing irrespective of the prices that shippers have been willing to bid for storage provided by other companies or for Northern's own existing market-based capacity. Xcel Energy Companies argue that the Commission should require Northern to conform its tariff to the standards required by the Commission for setting a reserve price.

11. The Xcel Energy Companies also argue that the Commission should direct Northern to establish a cost-based option to use in setting a reserve price as it has for other expansion facilities.[11] They state that, in addition to Columbia, the other two pipelines that have been granted market-based rate authority under section 4(f), Texas Gas Transmission and Southern Star Central Gas Pipeline, Inc., included cost-based rates as a method for establishing the reserve price.[12] They state that such a benchmark would ensure that Northern could always establish a reserve price that would allow it a reasonable opportunity to recover its costs, while also providing valuable information to prospective customers.

12. The Xcel Energy Companies state that the first benchmark proposed by Northern, "the highest price charged by a competing storage seller in the twelve (12) month period preceding the open season for a comparable term," is too broad and that the highest price charged by a competing storage seller should be limited to the price charged to a non-affiliate and then only for other NGA-jurisdictional market-based storage that is similar in nature to the storage services provided by Northern. For example high deliverability salt

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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.

[11] *Columbia Gas Transmission, LLC,* 126 FERC ¶ 61,237, at P 38 (2009) *(Columbia); Rate Regulation of Certain Natural Gas Storage Facilities,* Order No. 678, FERC Stats. & Regs. ¶ 31,220, at P 165 (2006) (Order No. 678).

[12] *Texas Gas Transmission, LLC,* 125 FERC ¶ 61,189, at P 22 (2008)*; Southern Star Central Gas Pipeline, Inc.,* 131 FERC ¶ 61,154, at n.28 (2010).

cavern storage would not be an appropriate rate for setting the reserve price for Northern's storage[13]

13. The Xcel Energy Companies further assert that Northern's proposed definition of a competing storage seller is far too broad because Northern operates facilities in a very large area, including Texas, where Northern's facilities could cover hundreds of miles, and any storage providers, however distant, would be considered "competing" storage. Accordingly, they ask the Commission to either direct Northern to fully support its proposal, or else suggest a more reasonable definition, such as limiting competing storage sellers to those located within 100 miles of Northern's transportation facilities. The Xcel Energy Companies further argue that Northern's term of service offered for bid can only be comparable where the term of the auction matches the term of the contract being used to establish the reserve price.[14]

14. The Xcel Energy companies also argue that Northern's second proposed benchmark - the highest rate charged by Northern for its comparable storage service during the previous 12 months, excluding a rate charged to a nonregulated affiliate, must exclude all affiliates, not just unregulated affiliates.[15]

15. The Xcel Energy Companies oppose the third proposed benchmark, which is the 100 percent Load Factor rate of $1.75 escalated from year-to-year by positive changes in the Gross Domestic Product Implicit Price Deflator (IPD). They assert that the IPD reflects increases in costs attributable to inflation and is often used as a proxy for actual increases in the costs of providing a given service. Thus, they state that the IPD is a cost-based type indicator and is incompatible with market pricing where the initial price is not cost-based. They argue that the third benchmark should at least be modified to base the initial price on the actual cost of providing the storage service.

16. The Xcel Energy Companies argue that the fourth proposed benchmark, which is "the highest 100% Load Factor Rate bid in a Northern ROFR process for market-based storage capacity," should be modified to limit the rate to the rate at which capacity was

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[13] The Commission explained in Order No. 678 at P 47: "A good alternative has been defined as one that is available soon enough, has a price that is low enough, and has a quality high enough to permit customers to substitute the alternative for the applicant's service. The burden is on the applicant to 'show how each of the substitute services in the product market are adequate substitutes to the applicant's service in terms of quality, price, and availability.'"

[14] *See Columbia*, 126 FERC ¶ 61,237 at P 40.

[15] *Id.* at P 39.

sold instead of the rate bid. They assert that only the bids submitted by non-affiliates of Northern should be considered, and that this benchmark should be subject to a reasonable time limit, as the Commission has held in other cases.[16]

17. The Xcel Energy Companies assert the Commission should require Northern to modify its tariff to require Northern, whenever it makes market-based storage capacity available, to explain the specific source and calculation of the reserve price before the bidding season opens so that prospective bidders may have an understanding of that process. The Xcel Energy Companies further note that Northern's tariff currently requires Northern to post all of the bids it receives during an open season, and that Northern is now proposing to post only the winning bid and that bid's NPV calculation. They argue that Northern would gain an unfair advantage over releasing shippers by keeping the bidding information to itself.

18. The Xcel Energy Companies also argue that a proposal that the pipeline alone may determine the maximum term for the capacity offered in auctions for market-based storage was rejected by the Commission in *Columbia,*[17] as was a proposal to permit a pipeline to accept the best offer in an auction if it is lower than the reserve price without a further auction.[18] The Xcel Energy Companies object that Northern's proposal to restrict bidders who withdraw their bids during the bid period from submitting new bids unless the new bid is at a higher rate than the withdrawn bid is one-sided in Northern's favor and unduly discriminatory. The Xcel Energy Companies also object to Northern's proposal to cap the rate for releases of market-based storage capacity longer than a year at the releasing shipper's rate, arguing that it is unduly discriminatory. They assert that all of the market-based agreements have 20-year terms and that the shippers would be prevented from taking advantage of upward changes in the value of their capacity even after many years.

19. Turning to ROFR concerns, the Xcel Energy Companies assert that their service agreements have existing ROFR rights as defined in section 52 of Northern's GT&C and that these were the ROFR procedures agreed to when they entered into their agreements. The Xcel Energy Companies argue that Northern would breach its contractual obligations by proposing non-rate changes to section 52 that would now create an inferior, ROFR procedure for market-based storage customers, when compared with the ROFR they

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[16] *Id.* at P 41.

[17] *Id.* at P 36.

[18] *Id*. at P 37.

contracted for. The Xcel Energy Companies argue that the *Mobile-Sierra* doctrine[19] does not permit pipelines to use NGA section 4 to propose changes to tariffs that are not permitted by a service agreement absent a showing that the existing service agreement is inconsistent with the public interest.

CenterPoint and NMDG/MRGTF

20. CenterPoint protests the proposed tariff sheets, asserting that the ability to choose between four different options provides Northern with the opportunity to select the method that would produce the highest reserve price, without regard to whether that would establish a reasonable reserve price. CenterPoint suggests that Northern either select one of its reserve price methodologies as its sole method, or develop an average reserve price based on the volume weighted price of each of the four methods during the previous 12 months.

21. CenterPoint and NMDG/MRGTF object to several provisions as inconsistent with *Columbia***,** including Northern accepting a bid lower than the reserve price and using affiliate transactions as the basis for the reserve price. They likewise object, as did the Xcel Companies, to the uncertain and expansive geographic scope for determining whether there are competing storage providers.

22. CenterPoint argues that Northern has not adequately explained whether customers with market-based rates will have ROFR rights under its tariff even though current customers have a five-year ROFR and Northern has also not explained how its ROFR proposal will affect current ROFR holders.

23. NMDG/MRGTF assert that the proposed tariff provision pertaining to resales should apply only to situations where the Commission previously authorized the use of market-based rates. It further asserts that to mitigate any potential abuse of market power the Commission should allow any customer, not just Northern, to initiate an auction for firm or interruptible storage. NMDG/MRGTF state that the proposed tariff does not provide that any bids for the resale of capacity will be limited to the type of capacity that was originally under contract, or whether interruptible service might be substituted for firm service. They argue that the auction must be for the same type of capacity and that the reserve price should only apply to FDD capacity, the highest quality of service. NMDG/MRGTF are also concerned, as were the Xcel Companies, that Northern has the sole discretion to set the term, that it does not define how it will determine the maximum

[19] *Citing United Gas Pipe Line Co. v. Mobile Gas Services Corp.,* 350 U.S. 332 (1956) (*Mobile*) and *FPC v. Sierra Pacific Power Co.,* 350 U.S. 348 (1956) *(Sierra).*

term, and that control over the term of any resale may grant Northern undue market power.[20]

V. Discussion

24. The Commission concludes that Northern has not shown that its proposed tariff sheets are just and reasonable, or consistent with the Commission's policies as set forth in *Northern Natural* and Order No. 678. The protests and comments raise a multitude of issues, all of which may benefit from closer examination at a technical conference. To mention some issues specifically, the Commission finds that Northern has not shown that its proposed definition of a competing storage seller is reasonably consistent with the Commission's standards or that the type or geographic scope of the gas storage services it proposes are comparable to its own. Furthermore, Northern has not established that it is reasonable to use affiliated transactions to establish a reserve price or supported its proposal for a $1.75 per Dth, 100 percent load factor cost-based reserve price, with annual escalations. Northern has also not clearly stated the time frames that will apply to its fourth proposal, the highest 100 percent load factor bid that occurs under a ROFR for its market-based storage capacity.

25. Regarding the auction procedures, Northern has not established why it should have sole discretion to determine the term of any resale, whether its protocols will adequately distinguish between the resale of market-based and cost-based storage capacity, or why capacity will first be awarded between available market-based capacity and then on a pro-rata basis to the ROFR market-based capacity. Furthermore, Northern's proposal does not appear consistent with Order No. 637's auction procedures or *Columbia*'s holding that if Northern decides to accept a bid that is less than the reserve price, it must provide all previous bidders a similar opportunity through a second auction.[21] The Commission will also further consider whether: (1) the proposed tariff provisions will apply to all expansion capacity; (2) bidders must maintain an initial bid in a subsequent open seasons; (3) Northern must make its evaluation of all bids public; (4) Northern will permit a bidder to withdraw a bid and then submit lower bid during an open season process; (5) Northern's proposed changes to its ROFR process are reasonable; and (6) its proposed changes to the capacity release provisions are appropriate.

26. For these reasons the Commission will accept the tariff sheets and suspend them for the maximum period to become effective December 12, 2010, subject to the outcome of the technical conference established in this proceeding. The Commission directs Northern to respond at the technical conference to the concerns of the parties raised in

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[20] *Citing Columbia*, 126 FERC ¶ 61,237 at P 36.

[21] *Id*. at P 37.

their respective protests to the instant filing. If Northern intends to present further materials at the technical conference, it should make them available to the Commission Staff and the parties not less than five business days prior to the conference.

VI. Suspension

27. Based upon a review of the filing, the Commission finds that the proposed tariff sheets have not been shown to be just and reasonable, and may be unjust, unreasonable, unduly discriminatory, or otherwise unlawful. Accordingly, the Commission shall accept the tariff sheets for filing and suspend their effectiveness for the period set forth below, and permit them to become effective, subject to the conditions set forth in this order.

28. The Commission's policy regarding rate suspensions is that rate filings generally should be suspended for the maximum period permitted by statute where preliminary study leads the Commission to believe that the filing may be unjust, unreasonable, or that it may be inconsistent with other statutory standards.[22] It recognizes, however, that shorter suspensions may be warranted in circumstances where suspension for the maximum period may lead to harsh and inequitable results.[23] Such circumstances do not exist here. Therefore, the tariff sheets filed in this docket are accepted and suspended for the full five months, to be effective December 12, 2010.

The Commission orders:

(A) The tariff sheets listed in the Appendix are accepted and suspended, to be effective December 12, 2010, subject to the conditions set forth in this order.

(B) The Commission's Staff shall convene a technical conference as required by this order, and report the results of the conference to the Commission within 120 days of the date this order issues.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

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[22] *See Great Lakes Gas Transmission Co.*, 12 FERC ¶ 61,293 (1980) (five month suspension).

[23] *See Valley Gas Transmission, Inc.*, 12 FERC ¶ 61,197 (1980) (one day suspension).

APPENDIX

Northern Natural Gas Company

FERC Gas Tariff, Fifth Revised Volume No. 1

Tariff Sheets Accepted and Suspended Effective December 12, 2010,

Subject to Conditions:

First Revised Sheet No. 55A
Ninth Revised Sheet No. 206
14 Revised Sheet No. 252
Original Sheet No. 253B
Original Sheet No. 253C
12 Revised Sheet No. 286
Seventh Revised Sheet No. 297
Fourth Revised Sheet No. 298
Sixth Revised Sheet No. 299
Sixth Revised Sheet No. 299A
Original Sheet No. 299B
Sixth Revised Sheet No. 447
Second Revised Sheet No. 449
First Revised Sheet No. 450
First Revised Sheet No. 451