

133 FERC ¶ 61,210
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Northern Natural Gas Company

Docket No. RP10-841-000

ORDER FOLLOWING TECHNICAL CONFERENCE
AND REJECTING TARIFF FILING

(Issued December 10, 2010)

1. This order rejects the tariff sheets Northern Natural Gas Company (Northern Natural) filed on June 11, 2010 under section 4 of the Natural Gas Act (NGA) to accomplish two purposes.¹ The first was to incorporate into Northern Natural's tariff provisions for the resale at market-based rates of certain Redfield storage capacity that was sold in 2006 pursuant to an open season auction authorized under section 4(f) of the NGA.² The June 11 tariff filing also contained more general modifications to Northern Natural's existing auction provisions for other types of capacity sales. This order rejects Northern Natural's proposal to resell any turn back of its expansion Redfield storage capacity at market-based rates. The order clarifies that the rates for any such resale may not exceed those embedded in Northern Natural's current 20 year contracts for the sale of the Redfield expansion at issue.

Background

2. This proceeding has its genesis in Northern Natural's 2006 request for a declaratory order authorizing it charge market-based rates under section 4(f) of the Natural Gas Act³ (NGA) and the Commission's regulations at sections 284.501, 284.502,

¹ See Appendix.

² *Northern Natural Gas Company*, 117 FERC ¶ 61,191 (2006) (2006 Declaratory Order).

³ Energy Policy Act of 2005, Pub. L. No. 109-58, Section 312, 119 Stat. 594, 688 (2005) (to be codified at 15 U.S.C. § 717c(f)(1)(A)) (Hereinafter section 4(f)).

and 284.505.⁴ NGA section 4(f)(1) provides in pertinent part that “the Commission may authorize a natural gas company . . . to provide storage and storage-related services at market-based rates for new storage capacity related to a specific facility placed in service after August 8, 2005, notwithstanding the fact that the company is unable to demonstrate that it lacks market power, if the Commission determines that: (A) market-based rates are in the public interest and necessary to encourage the construction of the storage capacity in the area needing storage services; and (B) customers are adequately protected.”⁵ Northern Natural proposed to expand its Redfield storage field and to charge its customers the market-based rates included in the precedent contracts Northern Natural stated were necessary to fund the Redfield expansion.

3. The Commission addressed Northern Natural’s application in a declaratory order issued on November 16, 2006.⁶ The 2006 Declaratory Order found that the Redfield storage expansion would constitute new capacity to be placed in service after August 8, 2005.⁷ The 2006 Declaratory Order also found that Northern Natural had conducted a transparent auction in which it awarded capacity to the shippers bidding the highest net present value based on the rate and contract term. The 2006 Declaratory Order further found, as required by the statute, that Northern Natural’s initial auction procedures for the open season resulted in twenty year precedent contracts at specified rates that provided consumer protection and the contracts supported the proposed expansion.⁸ The Commission thus held that the rates resulting from Northern Natural’s initial auction for the Redfield expansion reflected competitive prices, not the exercise of market power.⁹

⁴ 18 C.F.R. §§ 284.501, 284.502, and 284.505 (2010). *See* Rate Regulation of Certain Natural Gas Storage Facilities, Order No. 678, 71 FR 36612 (June 27, 2006), FERC Stats. & Regs. [Regulations Preambles] ¶ 31,220 (June 19, 2006).

⁵ Section 4(f)(1).

⁶2006 Declaratory Order, 117 FERC ¶ 61,191.

⁷ *Id.*, P 12.

⁸ In Order No. 678 the Commission recognized that a storage operator cannot exert market power as long as it does not withhold its capacity and offers a reasonable reserve price. *Rate Regulation of Certain Natural Gas Storage Facilities*, Order No. 678, FERC Stats. & Regs. ¶ 31,220, at P 163 (2006).

⁹ *See Process Gas Consumers Group v. FERC*, 292 F.3d 831 (D.C. Cir. 2002); *American Gas Ass'n v. FERC*, 428 F.3d 255 (D.C. Cir. 2005).

4. Northern Natural's market-based rates under section 4(f) for the Redfield expansion were limited to those adopted during a certificate open season auction and that had been included in the specific precedent agreements involved in its application for the Redfield expansion. In its request for a declaratory order Northern Natural did not propose as necessary, and the Commission did not grant, market based rates under section 4(f) that would apply to the resale of Redfield storage capacity.¹⁰ In fact, the 2006 Declaratory Order specifically found that Northern Natural had not proposed any customer protections in the event that it becomes necessary for it 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 2006 Declaratory Order barred Northern Natural from charging market-based rates for any subsequent sales of the Redfield expansion storage capacity that was the subject of the 2006 Declaratory Order.¹¹ Northern Natural obtained a certificate order approving construction of the new storage capacity on March 12, 2008.¹²

5. On June 11, 2010, notwithstanding that section 284.502 of the Commission's regulations requiring applicants seeking to sell market-based storage under section 4(f) to file either a certificate application or a declaratory order request,¹³ Northern Natural filed

¹⁰ 2006 Declaratory Order, 117 FERC ¶ 61,191 at n.4, stating:

Northern Natural proposed market-based rates only for the rates in the precedent agreements signed during the open season, and therefore, the use of market-based rates does not apply to sales of this storage capacity outside of these precedent agreements.

¹¹ 2006 Declaratory Order, 117 FERC ¶ 61,191, at P 22, stating:

Northern Natural, however, has not proposed any customer protections in the event that it becomes necessary for it 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, our action today does not extend to permitting Northern Natural to charge market based rates for any subsequent sales of the expansion storage capacity. (footnote citation omitted).

¹² *Northern Natural Gas Company*, 122 FERC ¶ 61,227 (2008) (Certificate Order).

¹³ *See* 18 C.F.R. § 284.502(a) (2010): Applications for market-based rates may be filed with certificate applications. *See also* 18 C.F.R. § 284.502(b) (2010): With respect

(continued...)

tariff sheets under section 4 of the NGA to establish provisions that would (1) govern the resale of the Redfield Expansion storage capacity authorized by the 2006 Declaratory and the Certificate Orders, and (2) modify certain aspects of Northern Natural's existing auction procedures for other types of capacity as well. Regarding the resale of section 4(f) storage capacity, Northern Natural's proposed tariff revisions provided that those provisions would apply to the extent that such capacity becomes available through expiration of the existing 20-year Firm Deferred Delivery (FDD) service agreements, or upon bankruptcy or another event leading to turn back of the capacity. Northern Natural stated that the proposed tariff changes included provisions to address the statutory requirement for consumer protection under NGA section 4(f).

6. Northern Natural also stated that the procedures it proposed for posting and awarding of the market-based storage capacity would generally follow those that were currently used by Northern for allocating cost-based transportation and storage capacity. Northern Natural stated that the winning bid(s) (but not all bids) in the open season will be posted, including the rate, term and any affiliate relationship. Northern Natural proposed to establish the reserve price for capacity using one of the following methods, at Northern Natural'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; (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 through a defined index; 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. Northern Natural also reserved the right to accept bids below the reserve price. Northern Natural also proposed revisions to the ROFR provisions of its General Terms and Conditions (GT&C) to address the resale of market-based FDD service at the end of the primary term of the FDD service agreements. It also proposed to post only the winning open season bid(s) rather than all the bids made during an open season.

7. Northern Natural's proposed tariff sheets were widely protested. The protesting parties asserted that there were numerous failings with the proposed standards for consumer protection, particularly the pipeline-discretionary reserve prices. All protesting parties stated that any such proposals should include a cost-based rate. They further argued that the posting and auction proposals did not clearly state the type of capacity to which the procedures would apply, that Northern Natural had improperly proposed to

to applications not filed as part of a certificate applications, (1) Applicants providing service under subpart B or subpart G must file an request for declaratory order and comply with the service and filing requirements of part 154 of this chapter. . . .

accept bids that were less than the reserve price, and that Northern Natural's proposal to modify its ROFR procedures is unreasonable. The protesting parties also objected to Northern Natural's proposal to cease posting all the bids submitted during any auction of capacity on its system. The protesting parties asserted that any consumer protection provisions adopted in this proceeding should also apply to all of Northern Natural's future market-based storage proposals.¹⁴

8. In light of the numerous protests, the Commission accepted and suspended Northern Natural's tariff sheets, to be effective December 12, 2010, and established a technical conference.¹⁵ The technical conference was held on August 19, 2010 and comments and reply comments were submitted thereafter. During the comment period Northern Natural modified its proposed reserve prices in a manner that satisfied most of the protestors subject to clarifying whether Northern Natural was required to use the lowest reserve price resulting from their application. However the parties were unable to resolve several other issues, including Northern Natural's proposals to accept bids that were less than the reserved price, to modify its ROFR protocols, and to only publish the winning bids submitted at an auction. In addition, the protesting parties continued to urge that any consumer protections adopted in this proceeding apply to any future or pending proposals by Northern Natural for market-based storage rates under section 4(f).

Discussion

9. Upon review, the Commission has identified a threshold issue that was not raised by the parties. Northern Natural proposes to now extend its original contract-limited authority by seeking market based rates for resales of that capacity for which it was not granted market based rates under section 4(f). In that context, Northern Natural's filing speaks to issues that were *not* addressed by the 2006 Declaratory Order authorizing the use of market-based rates for the Redfield expansion under section 4(f) of the NGA. This is in direct conflict with the Commission's finding in 2006 Declaratory Order that "Northern Natural proposed market-based rates only for the rates in the precedent agreements signed during the open season, and therefore, the use of market-based rates does not apply to sales of this storage capacity outside of these precedent agreements."¹⁶

¹⁴ See *Northern Natural*, 132 FERC ¶ 61,021, at P 10-23 (2010) for a detailed discussion of the protests to Northern Natural's June 11, 2010 filing.

¹⁵ *Id.* P 24-26.

¹⁶ 2006 Declaratory Order, 117 FERC ¶ 61,191 at n.4.

10. Given the limitations in the 2006 Declaratory Order, Northern Natural has not justified its proposal to change from cost-based rates for resales of Redfield storage to market-based rates for such resales. Northern Natural appears to assume that because it obtained market based rates for its initial contract rates for the Redfield capacity, it is entitled to obtain market based rates for all subsequent resales of that capacity simply by submitting a filing under section 4 to meet the consumer protection requirements of section 4(f) for such resales.

11. The Commission disagrees with this interpretation of section 4(f). Section 4(f) applies to the rate design accepted by the Commission in a Declaratory Order or certificate proceeding seeking market-based rates prior to the construction of that capacity.¹⁷ To qualify for market based rates under section 4(f), the pipeline must show that the storage capacity for which market-based rates is being sought is related to new facilities and can demonstrate that the granting of market-based rates is “necessary to encourage the construction of the storage capacity.” Northern Natural has not sought to, and cannot, satisfy these requirements with respect to its proposal to establish, for the first time, market-based rates governing resale of the Redfield expansion storage capacity that it has *already constructed*. Moreover, Northern Natural has not sought to justify market-based rates for the resale of the Redfield storage capacity under the other provisions of Commission’s regulations for establishing market-based rates pursuant to section 4 generally, which unlike section 4(f) requires the applicant to show it lacks market power.¹⁸

12. This leaves the question whether there should be a method for Northern Natural to resell the contract-based section 4(f) market-based storage authorized by the 2006 Declaratory Order in the event of bankruptcy, a default or other turn back during the 20 year term of the Redfield expansion contracts. The Commission finds it would be

¹⁷ In this case, the Commission did not grant market based rates for resales of Redfield storage capacity in the 2006 Declaratory Order and certificate proceeding, and Northern Natural is now seeking to obtain market based rates for resales for the first time. The Commission emphasizes that these facts are different from a case in which the Commission granted market based rates for resale of storage capacity pursuant to section 4(f) prior to construction, and the pipeline subsequently files under section 4 to revise aspects of its consumer protections.

¹⁸ 18 C.F.R. §§ 284.502-504. The other market based rate cases cited by Northern Natural are inapposite because all of them involved cases in which there was a grant of market based rates for resales, whereas such market-based resale authority was not granted in the 2006 Declaratory Order or certificate proceeding.

reasonable for Northern Natural in remarketing that capacity to seek to recoup the rate already set in its tariff for that contract by seeking a shipper willing to step into the shoes of the original shipper and take over the remaining term of the defaulted contract at a rate up to, but no higher than, the contract rate for that agreement.¹⁹ In remarketing such a defaulting contract through an auction procedure, the reserve price²⁰ for such an auction should be set no higher than the current maximum tariff rate governing Redfield storage. This will both permit Northern Natural to seek a shipper to step into the shoes of the defaulting shipper while ensuring that Northern Natural does not seek to withhold capacity from the market by setting a reserve price above its maximum tariff storage rate. Northern Natural may modify its tariff to so provide.

13. Northern Natural also proposes to include generic remarketing provisions for any section 4(f) storage capacity. The Commission rejects these provisions because Northern Natural has not established that all section 4(f) storage projects will be granted market based rates for resale or that the same generic set of remarketing provisions will apply equally to all storage projects granted market based rates under section 4(f). These determinations can be made in subsequent individual projects if Northern Natural applies for market based rates under section 4(f). Moreover, given this decision to reject the June 11, 2010 tariff filing provisions addressing resale matters, the Commission need not reach the numerous other issues raised by the protests. Therefore the Commission terminates the technical conference.

14. The Commission will also reject without prejudice those portions of Northern Natural's proposed tariff sheets that modified Northern Natural's ROFR procedures and the provisions of its tariff providing for the publishing of the full range of bids submitted at an auction. The provisions are too intertwined here with Northern Natural's rejected proposal for the resale of its contract-based section 4(f) market-based storage capacity, but they might be considered as totally separate matters in a separate section 4 filing,

¹⁹ 2006 Declaratory Order, 122 FERC ¶ 61,227 at P 22 n.21: "Because Northern Natural has not proposed 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 Natural." Therefore, when Northern Natural filed its tariff to place the Redfield facilities in service, it was required to include these maximum release rates as part of its tariff. *Id.* P 22. *See Kern River Gas Transmission Company*, 117 FERC ¶ 61,077, at P 335 (2006), (establishing maximum release rates based on the rate for each incremental rate schedule executed by specific customer groups for contracts of differing amounts and terms).

²⁰ The lowest price at which Northern is obligated to sell the capacity.

without any context or relation to the remarketing of capacity proposal that is rejected by this order.

The Commission orders:

(A) The tariff sheets listed in the Appendix are rejected for the reasons stated in the body of this order.

(B) The technical conference held August 19, 2010 in this docket is terminated.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

Northern Natural Gas Company
Rejected Tariff Sheets

FERC Gas Tariff
Fifth Revised Volume No. 1

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