

137 FERC ¶ 61,004
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.

Portland Natural Gas Transmission System

Docket No. RP11-2449-000

ORDER ON COMPLIANCE FILING

(Issued October 3, 2011)

1. On August 26, 2011, Portland Natural Gas Transmission System (Portland Natural) submitted revised tariff sections and a proposed settlement with EnergyNorth Natural Gas (EnergyNorth), in an attempt to comply with the Commission's previous orders regarding its non-conforming contract. We find the proposed settlement to be null and void by its own terms, and accordingly direct Portland Natural to submit another compliance filing within fifteen days of this order.

Background

2. In an October 21, 2010 order in Docket No. RP10-758-000, the Commission reviewed non-conforming contracts submitted by Portland Natural, and required Portland Natural to eliminate certain deviations or provide further explanations.¹ Most relevant here, the October 2010 Order found that a firm transportation agreement between Portland Natural and EnergyNorth contained one impermissible deviation. The agreement with EnergyNorth contained a provision in paragraph 11 that allowed EnergyNorth to reduce its maximum daily quantity by up to 400 Dth/day if Portland Natural were to contract for firm transportation to the Berlin, New Hampshire Station with any other shipper, except for Crown Vantage or its successors. We found that a "shipper's right to reduce its contract demand before expiration of its agreement is a valuable right since it can enable the shipper to avoid significant liability for future reservation charges and must be granted in a not unduly discriminatory manner."² We

¹ *Portland Natural Gas Transmission System*, 133 FERC ¶ 61,050 (2010) (October 2010 Order).

² *Id.* P 17.

accordingly directed Portland Natural to either remove the provision or offer it on a non-discriminatory basis to all shippers.

3. In a June 27, 2011 order in Docket No. RP11-1789-000, the Commission generally accepted Portland Natural's compliance filing, except with regard to its agreement with EnergyNorth.³ Portland Natural proposed to comply by adding a tariff provision that offered the same right to reduce contract demand if Portland entered into a new firm service agreement for deliveries to Berlin, New Hampshire with any shipper other than Crown Vantage and limited that right solely to 20-year firm shippers whose primary delivery point is at Berlin. The June 2011 Order found that the proposed tariff section did not comply with the Commission's previous order, holding, "Portland Natural appears to have submitted tariff language so narrowly tailored that EnergyNorth would be the only shipper which could qualify for these contract demand reduction rights, thus attempting to thwart the Commission's directive to offer such rights pursuant to generally applicable, not unduly discriminatory conditions."⁴ The Commission ordered Portland Natural to submit a further compliance filing within 30 days.⁵

Proposed Tariff Filing and Settlement

4. In its present filing, Portland Natural proposes to comply with the October 2010 Order and June 2011 Order through a settlement agreement between Portland and EnergyNorth and a tariff filing implementing the settlement. The settlement provides that paragraph 11 of EnergyNorth's service agreement will be deleted by a contract amendment. That paragraph is the paragraph regarding EnergyNorth's right to reduce its contract demand that the Commission found to be an impermissible non-conforming provision. The settlement also provides that, upon receipt of Commission approval of this settlement agreement in a final and non-appealable order, Portland Natural will pay EnergyNorth \$40,000. However, the agreement also provides that:

If the Commission finds that the ... [\$40,000 is] a discount to the reservation rate ... then this agreement shall become null and void

³ *Portland Natural Gas Transmission System*, 135 FERC ¶ 61,263 (2011) (June 2011 Order).

⁴ *Id.* P 9.

⁵ On July 27, 2010, in Docket No. RP11-1789-000, Portland submitted a request for an extension of time, until August 26, 2011, to submit the compliance filing to allow it to conclude its negotiations with EnergyNorth. On August 1, 2011, the Commission issued a notice granting Portland an extension of time to and including August 26, 2011, to submit the compliance filing required by the June 2011 Order.

... [and] each of the Parties agrees to take all steps necessary to return the other Party to its *status quo ante* and to make good faith efforts to effectuate an alternative resolution....

5. In its transmittal sheet, Portland Natural explains that all its currently effective firm transportation contracts service agreements contain a “most favored nation” clause which could be triggered if the \$40,000 lump sum payment is considered a discount. In relevant part, that clause specifies:

If Transporter discounts the applicable Recourse Rate under Rate Schedule FT for service provided to a third party pursuant to an FT Service Contract with a primary term greater than 24 consecutive months, then Shipper will be entitled to a discount, as set forth below, on a per Dth basis for all quantities contracted by Shipper under this Contract for the same period of time....

Portland Natural states that if the \$40,000 payment is considered a discount for purposes of this provision so that it would have to give a similar discount to all its firm shippers, the result would be financially untenable for it.

6. Portland Natural and EnergyNorth executed the settlement agreement on August 16, 2011. On the same date, they executed an amendment to the EnergyNorth service agreement which, consistent with the settlement, deletes in its entirety paragraph 11 of the original service agreement. In its tariff filing, Portland Natural submits a copy of the EnergyNorth agreement and the amendment, together with an updated table of contents and list of non-conforming agreements including the EnergyNorth agreement. Portland Natural requests an effective date of July 28, 2011 for its tariff filing.

Notice and Responsive Pleadings

7. Notice of Portland Natural’s Filing was issued on August 29, 2011. Interventions and protests were due September 7, 2011, as provided in section 154.210 of the Commission’s regulations.⁶ Pursuant to Rule 214,⁷ all timely filed motions to intervene and any unopposed 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 the proceeding or place additional burdens on existing parties.

⁶ 18 C.F.R. § 154.210 (2011).

⁷ 18 C.F.R. § 385.214 (2011).

8. The Shippers' Group,⁸ representing the interests of long-term firm shippers on the Portland Natural system, filed comments. The Shippers' Group argues that Portland Natural's proposed settlement does indeed trigger the most-favored nation provision of all of Portland's currently-effective long-term FT contracts. They argue that the \$40,000 payment is a discount, and therefore each Shippers' Group member should receive benefits commensurate with those Portland Natural offered to EnergyNorth. The Shippers' Group states that it is aware that such a finding would render the settlement null and void, but that its intention is not to complicate Portland Natural's attempt to comply, rather to simply enforce the most-favored nation provision.

Discussion

9. We find that Portland Natural's proposed \$40,000 payment to EnergyNorth is effectively a lump-sum discount to its tariff rate. The Shippers' Group states that Portland agreed to include the most favored nation clause in the firm service agreements of Portland's anchor shippers in return for the commitment by such shippers to provide Portland Natural the financial foundation and contractual commitments that permitted Portland Natural to proceed with the initial construction of its pipeline system. The clause serves to ensure that Portland's long-term firm anchor shippers are treated in an economically identical manner, by requiring Portland to offer all the anchor shippers the same rate reduction offered to any other shipper. The \$40,000 lump-sum payment to EnergyNorth provided for in the settlement is financially equivalent to a lower per-unit rate, when spread over the volumes covered in the EnergyNorth contract. This results in a per-unit rate for transportation which is lower than that paid by other shippers on Portland Natural's system receiving the same service and holding most-favored nation provisions in their contracts.

10. In other contexts, the Commission has treated similar lump sum payments to a shipper as a discount from the pipeline's maximum rate. For example, the Commission has held that when a releasing shipper makes a payment to a replacement shipper, that payment must be considered "a discount on the transportation rate," even if the replacement shipper is paying the maximum rate to the pipeline.⁹ As the Commission explained in *Northwest Pipeline Corp.*,¹⁰ "because the replacement shipper is receiving

⁸ For the purposes of this proceeding, the Shippers' Group consists of Bay State Gas Company, now d/b/a Columbia Gas of Massachusetts; Northern Utilities, Inc.; DTE Energy Trading, Inc.; H.Q. Energy Services (U.S.) Inc.; New Page Corporation; and Wausau Paper Mills, LLC.

⁹ *Pacific Gas Transmission Co.*, 82 FERC ¶ 61,227 (1998).

¹⁰ *Northwest Pipeline Corp.*, 109 FERC ¶ 61,044, at P 13 (2004).

payment from the releasing shipper,” it “is not truly paying the maximum rate for the capacity” and the released capacity “must be considered discount capacity.” Here, the fact the pipeline, rather than a releasing shipper, is making the lump sum payment to EnergyNorth only serves to make more obvious the fact the pipeline is giving EnergyNorth a discount from its maximum rate.

11. As Portland Natural notes in its transmittal letter, our holding that the lump sum payment constitutes a discount renders the settlement agreement null and void and requires the parties to take all steps to return the other party to its *status quo ante*. Accordingly, the Commission rejects the settlement agreement and permits Portland Natural to withdraw its filed tariff records removing the non-conforming provision from the EnergyNorth agreement, which would have otherwise been acceptable as compliant with the October 2010 Order and June 2011 Order. However, this leaves Portland Natural as still not in compliance with these orders. Given our clear directives, we once again direct Portland Natural to comply with the discussion in this order, the October 2010 Order, and the June 2011 Order, within fifteen days.

The Commission orders:

Portland Natural’s agreement with EnergyNorth is rejected as null and void. The Commission directs Portland Natural to submit a compliance filing within fifteen days of the date of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.