

138 FERC ¶ 61,010
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Portland Natural Gas Transmission System

Docket No. RP11-2449-001

ORDER REJECTING COMPLIANCE FILING

(Issued January 6, 2012)

1. On October 18, 2011, Portland Natural Gas Transmission System (Portland Natural) filed revised tariff records¹ to withdraw its previous compliance filing and a revised section 6.24 to the General Terms and Conditions (GT&C) part of its tariff² to comply with the Commission's October 3, 2011 order in this docket.³ We reject the compliance filing and direct Portland Natural to re-file in accordance with our guidance below.

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.⁴ Most relevant here, the October 2010 Order found that the FT agreement between Portland Natural and

¹ PART 1, TABLE OF CONTENTS, 1.0.0; PART 10, NON-CONFORMING AGREEMENTS, 0.0.0; 10.1-Non-Conforming Agmts, EnergyNorth Natural Gas, Inc. (#FT-1999-001), 0.0.0 to PNGTS Tariffs, FERC NGA Gas Tariff.

² Part 6.24 GT&C, Miscellaneous, 1.0.0 to PNGTS Tariffs, FERC NGA Gas Tariff.

³ *Portland Natural Gas Transmission System*, 137 FERC ¶ 61,004 (2011) (October 2011 Order).

⁴ *Portland Natural Gas Transmission System*, 133 FERC ¶ 61,050 (2010) (October 2010 Order).

EnergyNorth Natural Gas (EnergyNorth) contained one impermissible deviation. In the October 2010 Order, the Commission's discussion of the EnergyNorth provision is as follows, in its entirety:

Portland Natural's FT agreement with EnergyNorth Natural Gas grants the shipper the option to reduce its firm Maximum Daily Quantity, "in the event that Transporter enters into a ... contract for firm transportation service with any other shipper, excluding Crown Vantage ... that calls for delivery at the Berlin Station."⁵ A shipper's right to reduce its contract demand before the 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. Accordingly **we direct Portland Natural to remove this provision from the EnergyNorth Natural Gas contract** or offer it on a non-discriminatory basis to all shippers.⁶

3. Neither Portland Natural nor EnergyNorth sought rehearing of the October 2010 Order. Portland Natural proposed to comply with our ruling on the EnergyNorth agreement by adding a tariff provision that offered this right to reduce contract demand solely to 20-year firm shippers whose primary delivery point is at Berlin, New Hampshire, and continued to exclude Crown Vantage by name. In a June 27, 2011 order in Docket No. RP11-1789-000, the Commission held that, although Portland Natural had complied with other requirements in the October 2010 order, it had not complied with our ruling on the EnergyNorth agreement.⁷ The June 2011 Order explained, "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."⁸ The Commission

⁵ Portland Natural Appendix C-1 at #9; Portland Natural Contract FT-1999-001, EnergyNorth Natural Gas FT Agreement, at Article III, §11.

⁶ October 2010 Order, 133 FERC ¶ 61,050 at P 17 (emphasis added, citation to precedent omitted).

⁷ *Portland Natural Gas Transmission System*, 135 FERC ¶ 61,263 (2011) (June 2011 Order).

⁸ *Id.* P 9.

ordered Portland Natural to submit a further compliance filing. Neither Portland Natural nor EnergyNorth sought rehearing of the June 2011 Order.

4. Portland Natural submitted its next compliance filing in Docket No. RP11-2449-000 on August 26, 2011. Portland Natural filed a revised EnergyNorth agreement removing the contract demand reduction provision. However, Portland Natural also submitted a settlement agreement that included a payment to EnergyNorth, and the settlement provided that the parties' agreement to remove the contract demand reduction provision would be null and void if the Commission found that the payment would trigger the most-favored nation provisions in Portland Natural's contracts with other shippers. The Commission found that these provisions were indeed triggered, and permitted Portland Natural to withdraw that compliance filing, "which the Commission determined would have otherwise been acceptable as compliant with the October 2010 Order and June 2011 Order."⁹ Because this left Portland Natural still not in compliance with those orders, the Commission directed it to make a compliance filing within fifteen days.

Filing and Responsive Pleadings

5. In its present filing, Portland Natural withdraws its previous submission and, rather than re-filing its agreement with EnergyNorth, it files a revised GT&C section 6.24. The proposed tariff section states that the disputed paragraph 11 of the EnergyNorth agreement "is null and void," and invokes GT&C section 6.1 and paragraph 21 of the EnergyNorth agreement, which both provide that Portland Natural's tariff controls in the event of a conflict. The proposed tariff section further invokes the Commission's October 2010 Order, June 2011 Order, and October 2011 Order, and states that these orders render paragraph 11 null and void, by way of GT&C section 6.22, which states that gas transportation contracts are subject to Commission orders.

6. Notice of Portland Natural's filing was issued on October 19, 2011. Interventions and protests were due October 31, 2011, as provided in section 154.210 of the Commission's regulations.¹⁰ Pursuant to Rule 214,¹¹ 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. No protests or adverse comments were filed.

⁹ October 2011 Order, 137 FERC ¶ 61,004 at P 9.

¹⁰ 18 C.F.R. § 154.210 (2011).

¹¹ 18 C.F.R. § 385.214 (2011).

Discussion

7. In the October 2010 Order, the Commission found one provision in the EnergyNorth agreement to be unlawful, and directed Portland Natural to either “remove this provision from the EnergyNorth Natural Gas contract or offer it on a non-discriminatory basis to all shippers.”¹² Rather than remove this provision from the EnergyNorth contract, Portland Natural instead seeks to modify its GT&C to state that the unlawful provision is void. We reject the revised tariff records¹³ listed in Footnote Nos. 1 and 2, and direct Portland Natural to re-file, pursuant to our authority under section 154.203(b) of the Commission’s regulations.¹⁴

8. Portland Natural’s proposal to render its non-conforming contract compliant by modifying its GT&C contradicts section 154.109(a) of the Commission’s regulations, which limits the GT&C to only containing those “terms and conditions of service applicable to all or any of the [pipeline’s] rate schedules.”¹⁵ If we would allow pipelines to render their non-conforming contracts compliant by modifying the GT&C instead of modifying the contracts themselves, the result, over time, would be to turn an otherwise transparent and universal tariff into an opaque tangle of cross-references and special exceptions.

9. Furthermore, amending the GT&C is unnecessary in order for Portland Natural to comply. In the *Cottage Grove* line of cases,¹⁶ the Commission explained that it has exclusive jurisdiction over whether contract terms violate the Natural Gas Act or

¹² October 2010 Order, 133 FERC ¶ 61,050 at P 17.

¹³ A blank tariff record was inadvertently submitted as “PART 1, TABLE OF CONTENTS, 1.0.0.” By rejecting the blank tariff record, the most recently approved “PART 1, TABLE OF CONTENTS” will remain effective.

¹⁴ 18 C.F.R. § 154.203(b) (2011) (“Filings made to comply with Commission orders must include only those changes required to comply with the order. ... A compliance filing that ... does not comply with the applicable order in every respect may be rejected.”).

¹⁵ 18 C.F.R. § 154.109(a) (2011).

¹⁶ *LSP-Cottage Grove, L.P. v. Northern Natural Gas Company*, 105 FERC ¶ 61,326 (2003) (*Cottage Grove I*), *order on reh’g*, 109 FERC ¶ 61,390 (2004) (*Cottage Grove II*), *order on reh’g*, 111 FERC ¶ 61,108 (*Cottage Grove III*), *order on compliance*, 112 FERC ¶ 61,233 (2005) (*Cottage Grove IV*).

Commission policies, regulations, or orders.¹⁷ When the Commission finds that a material deviation is unlawful, the deviating provision is therefore null and void.¹⁸ However, the Commission does not find that the conforming remainder of the service agreement is null and void, because that would mean that there would be no current service agreement between the parties for the service the pipeline is providing to the shipper.¹⁹

10. Here, the Commission has held that the EnergyNorth contract demand reduction provision is unlawful, because it is unduly discriminatory in violation of NGA sections 4 and 5. Neither Portland Natural nor EnergyNorth have contested that holding. Therefore that provision is null and void. In these circumstances, the correct course of action for Portland is to file a revised service agreement, removing the unlawful contract demand reduction provision.²⁰ We have not found any other provision of the EnergyNorth service agreement to be unlawful, and therefore the remainder of the agreement continues to be effective. If either party to the service agreement believes that further modifications to the agreement are necessary because of the elimination of the contract demand reduction provision, and the parties are unable to reach a mutually acceptable resolution, “a court would then have jurisdiction to determine whether the contract . . . should be further modified to accomplish the intent of the parties, consistent with the Commission’s holdings concerning what provisions are lawful under [Portland Natural’s] tariff and Commission policy.”²¹

11. We clarify that the effective date of the amended agreement should be the same as the effective date of the original agreement: since EnergyNorth could not have enforced the unlawful contract term, the term was void *ab initio*. Accordingly, we direct Portland Natural to file an amended service agreement complying with this order and the Commission’s previous orders on this matter, within 15 days of the date that this order issues.

¹⁷ *Cottage Grove III*, 111 FERC ¶ 61,108 at P 45.

¹⁸ *Cottage Grove II*, 109 FERC ¶ 61,390 at P 19, 28-34, and Ordering Paragraph (B).

¹⁹ *Cottage Grove III*, 111 FERC ¶ 61,108 at P 46.

²⁰ *Cottage Grove IV*, 112 FERC ¶ 61,233 at P 9.

²¹ *Cottage Grove III*, 111 FERC ¶ 61,108 at P 45.

The Commission orders:

Portland Natural shall file an amended service agreement complying with this order within 15 days.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.