

140 FERC ¶ 61,114
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

National Fuel Gas Supply Corporation

Docket Nos. RP12-88-000
RP12-88-005

ORDER APPROVING STIPULATION AND AGREEMENT

(Issued August 6, 2012)

1. On May 22, 2012, National Fuel Gas Supply Corporation (National Fuel) filed a Stipulation and Agreement (Partial Settlement)¹, in accordance with Rule 602 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.602 (2012)), to resolve certain issues and establish procedures for resolving the remaining issues in its general section 4 rate proceeding.² The Presiding Administrative Law Judge (ALJ) certified the Partial Settlement to the Commission as uncontested on June 19, 2012.³ As discussed below, the Commission approves the Partial Settlement as fair and reasonable and in the public interest.

I. Background

2. National Fuel engages in the gathering, transportation, and storage of natural gas subject to the Commission's jurisdiction under the Natural Gas Act (NGA). National Fuel's operations are located primarily in New York and Pennsylvania, where it provides transportation and storage services to local distribution companies and other customers.

¹ Consistent with the order certifying National Fuel's May 22 Stipulation and Agreement, the settlement is deemed a partial settlement of the issues set for hearing in this proceeding.

² The remaining issues to be addressed through the procedures incorporated into the Partial Settlement include reservation charge credits, pooling points, and storage service enhancement.

³ *National Fuel Gas Supply Corp.*, 139 FERC ¶ 63,021 (2012).

In addition, National Fuel provides gathering services to Appalachian natural gas producers in Pennsylvania and New York.

3. On April 7, 2006, the New York Public Service Commission (NYPSC), Pennsylvania Public Utility Commission, and the Pennsylvania Office of Consumer Advocate filed a complaint in Docket No. RP06-298 alleging, among other things, that National Fuel's rates were unjust and unreasonable under section 5 of the NGA. By settlement agreement approved February 9, 2007, National Fuel's rates were adjusted; and the 2006 Settlement also contained a "come-back provision," requiring National Fuel to make a section 4 filing with rates to be effective December 1, 2011.⁴

4. On October 31, 2011, National Fuel filed a general rate increase under section 4 of the NGA requesting an effective date of December 1, 2011. National Fuel's application included a Base Case and a Preferred Case. The Base Case uses National Fuel's current rate design structure. The Preferred Case rate design eliminates the Niagara rate zones by rolling the costs of the Niagara facilities into National Fuel's system-wide cost of service. In the filing, National Fuel provided two sets of proposed tariffs: actual tariffs for the Base Case and *pro forma* tariffs for the Preferred Case. The Preferred Case *pro forma* tariffs were to be effective on a prospective basis. Further, National Fuel proposed new and revised non-rate tariff provisions, identical in both the Base and Preferred Cases.

5. Numerous parties objected to the substantial increase to National Fuel's rates, arguing that various aspects of National Fuel's proposals were not just and reasonable. In addition, several protesting parties contended that National Fuel was not in compliance with Article V of the 2006 Settlement, which required National Fuel to file a rate case "with rates effective December 1, 2011."⁵ Specifically, the NYPSC argued that National Fuel failed to honor the terms of Article V of the 2006 Settlement, because it did not submit the required section 4 rate case on May 31, 2011.

⁴ See *Pub. Serv. Comm'n of New York, et al. v. National Fuel Gas Supply Corp.*, 118 FERC ¶ 61,091 (2007) (2006 Settlement).

⁵ Article V of the 2006 Settlement provides:

[e]xcept as otherwise provided herein, this Stipulation establishes a 5-year moratorium prohibiting the effectiveness of any Section 5 and/or Section 4 rate change prior to December 1, 2011. The effectiveness of National Fuel's next general rate case under Section 4 of the Natural Gas Act shall not be earlier than December 1, 2011...National Fuel shall file a Section 4 rate filing with rates effective December 1, 2011.

6. On November 30, 2011, the Commission issued an order accepting and suspending National Fuel's tariff records subject to refund and hearing procedures.⁶ Specifically, the Commission accepted and suspended the tariff records reflecting the Base Case, effective May 1, 2012, subject to refund and the outcome of a hearing. The Commission stated that the issues raised in the protests could be explored at the hearing, including the issue of National Fuel's compliance with the 2006 Settlement. Finally, the Commission directed National Fuel to file revised tariff records for the reservation charge crediting provisions during *force majeure* and *non-force majeure* events, or to explain why it should not be required to do so.⁷

7. On December 30, 2011, National Fuel filed: 1) a request for rehearing of the November 30 Order; 2) an explanation why it should not be required to file actual tariff records implementing reservation charge credits prior to a decision on the issues set for hearing; and 3) revisions to the *pro forma* tariff records on reservation charge credits to be considered at trial. National Fuel's rehearing request is pending before the Commission.

8. On December 21, 2011, the ALJ established a procedural schedule, and the active parties began settlement conferences. On April 17, 2012, the active parties to the proceeding reached a settlement in principle which resolves all of the cost of service issues in this proceeding and establishes procedures for the resolution of other issues, including operational issues.⁸

9. On May 22, 2012, National Fuel filed the Partial Settlement stating that the Partial Settlement resolves or establishes procedures for the resolution of all issues set for hearing in Docket No. RP12-88-000. National Fuel requests that the Commission accept the Partial Settlement and approve it without condition or modification.

10. On May 24, 2012, the New York Public Service Commission (NYPSC) filed comments. On May 31, 2012, NiSource Distribution Companies filed comments. On June 1, 2012, National Fuel, Peoples National Gas Company, LLC (Peoples Gas), the Pennsylvania Independent Oil & Gas Association (PIOGA), National Fuel Resources

⁶ *National Fuel Gas Supply Corp.*, 137 FERC ¶ 61,171 (2011) (November 30 Order).

⁷ *Id.* P 12.

⁸ Those procedures do not require that any matters be resolved through hearing procedures or otherwise require the ALJ to rule on any non-cost of service contested issues.

(NFR) and Commission Staff also filed comments.⁹ Reply comments were filed by National Fuel on June 6, 2012. No party opposed the Partial Settlement; therefore, the ALJ certified the Partial Settlement as uncontested on June 19, 2012.

II. Partial Settlement Terms

11. Article I addresses the settlement rates and tariff provisions, which are attached to the Partial Settlement as Appendix A and Appendix A-1. Article I, Section 1 states that the settlement rates have been designed using a “black box” with a total cost of service of \$166,500,000 and are set forth in tariff sections 4.010-4.050 as shown in Appendix A and also in Appendix A-1.

12. Article I, Section 2 explains that the interruptible gathering and firm gathering settlement rates are determined by prevailing prices for Appalachian production, as shown in the table appearing in tariff section 4.040 in Appendix A.

13. Article I, Section 3 explains that, within 30 days following the Commission’s approval of the Partial Settlement, National Fuel shall file the tariff records shown in Appendix A. It also states that, apart from certain exceptions, National Fuel shall retain all revenues received after May 1, 2012, without further liability to its customers. Section 3 further provides that the parties are not barred by the Partial Settlement from taking any position on revenues received during the test period in National Fuel’s next NGA section 4 general rate proceeding. Section 3 also provides that the Partial Settlement shall not prejudice any NGA section 5 inquiry or claim by the Commission or any party concerning revenues received by National Fuel during the term of the Partial Settlement.

14. Article II addresses National Fuel’s retainage factors. Article II, Section 1 provides that National Fuel’s current fixed retainage factors will be replaced with a tracking mechanism which allows the retainage factors to be revised annually with a true-up mechanism. Article II, Section 1 lists the initial retainage factors that will take effect on June 1, 2012 and describes the operation of the true-up mechanism (Appendix A). The tariff mechanism for annually adjusting retainage factors is reflected in a new section 41 of National Fuel’s General Terms & Conditions (GT&C).

15. Article II, Section 2 states that National Fuel will establish and determine electric power cost rates associated with any future operation of compressor stations with electric motor prime movers and associated electric cost charges paid to any third party.

⁹ Commission Staff originally filed comments on May 31, 2012. On June 1, 2012, Commission Staff filed revised comments stating that the revised comments replaced and superseded the comments it filed on May 31, 2012.

16. Article II, Section 3 states that, in the event National Fuel agrees to a negotiated rate which includes a negotiated retainage factor, National Fuel shall also supplement any filing of the negotiated rate agreement under GT&C section 17.2 of its tariff with information identifying the effect of such negotiated retainage on any calculations under GT&C sections 41.4 and 41.5. In the event National Fuel files an NGA section 7(c) application with the Commission that seeks an incremental retainage factor, National Fuel shall include in that application information identifying the effect of such incremental retainage on any calculations under GT&C sections 41.4 and 41.5.

17. Article III pertains to depreciation rates. Article III and Appendix B identify annual depreciation rates that shall be utilized for book purposes for plant depreciated on a group basis.

18. Article IV pertains to the rate impact of the proposed roll-in of National Fuel's Niagara facilities. Article IV explains that the settlement rates reflect a roll-in of the Niagara facilities and the establishment of a single system-wide postage-stamp firm transportation (FT) rate. Article IV also states that, in order to mitigate the impact of the roll-in on current shippers formerly paying the Niagara FT-1 maximum reservation rate, National Fuel has offered the shippers discounts so that the reservation rate increase for those shippers is limited to the same percentage as the increase in the system-wide FT maximum reservation rate.

19. Article V contains a provision requiring National Fuel to file a future general section 4 base rate case. Article V states that National Fuel shall file an NGA section 4 general rate case by January 1, 2016, and that the Partial Settlement shall not bar National Fuel from filing an NGA section 4 general rate case, or any party from initiating a complaint under NGA section 5, before January 1, 2016.

20. Article VI pertains to post retirement benefits other than pensions (OPEB). Article VI describes how National Fuel will account for its OPEB expenses. It also provides that during the term of the Partial Settlement, National Fuel shall account for OPEB by an accrual method of accounting and shall contribute to the SFAS 106 account the necessary funds as calculated by its actuary. It also states that within 30 days after the Commission's approval of the Partial Settlement, or acceptance of the Partial Settlement as provided in section 3 of Article XI, National Fuel shall eliminate any past regulatory asset and liability balances as of May 1, 2012 related to SFAS 106. Finally, the language in the section provides that National Fuel and the parties are not barred by the Partial Settlement from taking any position in National Fuel's next NGA section 4 general rate proceeding on the treatment of OPEB costs included in National Fuel's filing.

21. Article VII pertains to deferred income taxes. Article VII, Section 1 provides that the Partial Settlement rates are intended to be consistent with Internal Revenue Service regulations with respect to normalization of any excess and/or deficiency in deferred

income taxes so that National Fuel may continue to qualify for full use of accelerated depreciation in computing its federal income tax returns.

22. Article VIII pertains to reservation charge credits. Article VIII explains that the parties are involved in ongoing discussions about National Fuel's reservation charge credit tariff provisions. National Fuel and the participants agree to meet within 45 days following the issuance of a Commission order approving the Partial Settlement to attempt to resolve all remaining issues concerning these tariff provisions. Within 45 days of that meeting and regardless of whether all issues associated with reservation charge credits have been resolved, National Fuel will file revised tariff records to amend the reservation charge crediting provisions of its tariff to be effective 30 days following such filing. That filing will reflect National Fuel's position and incorporate any agreements reached with the participants in those discussions.¹⁰ National Fuel and all such participants will have the right to take any position with respect to all issues that have not been resolved prior to the filing.

23. Article IX pertains to pooling points. Article IX provides that the participants will continue ongoing discussions regarding the establishment of liquid pooling points on National Fuel's system and sets forth a process by which National Fuel shall make and support tariff filings related to pooling points. It also states that Appendix C to the Partial Settlement summarizes the agreements in principle that have been reached by the participants regarding future tariff filing(s) that are supportive of the development of liquid pooling points. Further, Article IX provides that on or before the later of: (i) 120 days following the date of the Partial Settlement; or (ii) 30 days following the Commission's approval of the Partial Settlement without modification or condition, or upon acceptance of the Partial Settlement as provided in Section 3 of Article XI, National Fuel will make and support one or more such tariff filings (simultaneously or at different times) consistent with the agreements memorialized in Appendix C (and such other filings as National Fuel deems appropriate on the issue) and with National Fuel's commitment to develop pooling points as established on other pipelines, and related services, mechanisms, and tariff modifications, as appropriate, with the intent of developing liquid pooling points.

24. Article X pertains to storage service enhancements. Article X states that the participants are engaging in discussions relative to the enhancement of National Fuel's storage services and sets forth a process for analysis and future implementation of storage service enhancements.

¹⁰ Because of these ongoing discussions, National Fuel requests in its June 6 reply comments that the Commission defer ruling on its December 30, 2011 request for rehearing until after the expected tariff filing on reservation charge credits.

25. Article XI pertains to the non-severability of the Partial Settlement and rights of supporting and contesting parties. Article XI, Section 1 states that the provisions of the Partial Settlement are interrelated. As a result, opposition to any provision of the Partial Settlement by any party shall be deemed to be opposition to the entire integrated Partial Settlement by that party.

26. Article XI, Section 2 states that all participants filing initial comments in Docket No. RP12-88-000 directed to the Partial Settlement, shall specify whether they support, oppose, or do not oppose Commission approval of the Partial Settlement as filed. Any participant that files comments indicating that it supports or does not oppose the Partial Settlement as filed, or that does not file initial comments on the Partial Settlement, shall be deemed to be a "Supporting Party."

27. Article XI, Section 3 provides the process by which each party can indicate to National Fuel whether it elects to be bound by the terms and provisions of the Partial Settlement if the Partial Settlement is modified by a Commission order, in whole or in part.

28. Article XI, Sections 4 through 6 describe the rights and obligations of Contesting Parties.

29. Article XI, Section 7 addresses the rights of Supporting Parties related to issues raised by Contesting Parties.

30. Article XII provides that the Partial Settlement is made upon the express understanding that all participants have reached a negotiated resolution of all issues set for hearing in Docket No. RP12-88-000 and the issues that could have been raised in that proceeding. Further, Section 1 states that the Commission's order approving the Partial Settlement shall constitute approval of the negotiated resolution of these issues.

31. Article XII, Section 2 provides that the Partial Settlement resolves all issues that have been or could have been raised by the parties concerning National Fuel's compliance with the terms of the 2006 Settlement in Docket Nos. RP06-298-000 and RP06-298-003, and that the Commission's order approving the Partial Settlement shall constitute approval of the negotiated resolution of these issues by the parties.

32. Article XIII pertains to reservations and other miscellaneous provisions. Article XIII, Section 1 provides that parties shall not be bound by the Partial Settlement unless it is approved and made effective as to all of its terms and conditions. Section 2 discusses the return on equity to be used by National Fuel in certificate proceedings and for allowance for funds used during construction. This will be the return derived from a previous settlement in Docket No. RP95-31. Section 3 provides that, if the Partial Settlement is not approved and made effective, it is privileged and null and void and of

no effect, and may not be used to prejudice any participant's litigation position in any forum absent National Fuel's acceptance of it consistent with Article XI, Section 3.

33. Article XIV pertains to the term of the Partial Settlement. It states that the Partial Settlement shall become effective May 1, 2012, and except for Section 2 of Article I, shall terminate on the effective date of (1) National Fuel's next NGA section 4 rate case, or (2) revised rates in an NGA section 5 complaint.

34. Article XV establishes the standard of review. This article provides that to the extent the Commission considers any change to the terms of the Partial Settlement following its effectiveness, the standard of review for any such proposed change shall be the most stringent standard permissible under applicable law.

III. Discussion

35. The Commission and the courts encourage settlements.¹¹ Further, the resolution of the issues consistent with the provisions of National Fuel's Partial Settlement will result in a savings in time and expense for all parties involved. Accordingly, the Commission finds that the instant Partial Settlement appears to be fair and reasonable and in the public interest and therefore approves it pursuant to Rule 602(g) of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.602 (2012)). The Commission's approval of the Partial Settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.

36. Finally, National Fuel is directed to file the actual tariff records to implement the Partial Settlement within 30 days following the issuance of this order in accordance with the terms of Article I, Section 3 of the Partial Settlement.

The Commission orders:

(A) The instant Partial Settlement is approved as discussed in the body of this order.

¹¹ See e.g., *United Mun. Distribs. Group v. FERC*, 732 F.2d 202, 209 (D.C. Cir. 1984).

(B) National Fuel is directed to file actual tariff records in accordance with the discussion in the body of this order within 30 days of the date of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.