

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

November 21, 2006

In Reply Refer To:
Docket No. RP06-72-000

Mark F. Sundback
Counsel for Northern Border Pipeline Company
Andrews, Kurth LLP
1350 I Street, NW
Suite 1100
Washington, DC 20005

RE: Northern Border Pipeline Company
Docket No. RP06-72-000

Dear Mr. Sundback:

1. On September 18, 2006, you filed a Stipulation and Agreement in Settlement of Proceedings (“Settlement”) on behalf of Northern Border Pipeline Company (Northern Border), the Canadian Association of Petroleum Producers on behalf of its members; Hess Corporation, Dakota Gasification Company, Basin Electric Power Cooperative, Tenaska Marketing Ventures, BP Canada Energy Marketing Corp., ConocoPhillips Company, Coral Energy Resources, L.P., Occidental Energy Marketing, Inc., Prairielands Energy Marketing, Inc., Peoples Gas Light and Coke Company, North Shore Gas Company, Northern States Power Company-Minnesota, Northern States Power Company-Wisconsin, Natural Gas Pipeline Company of America (NGPL); and, Chevron U.S.A. Inc. On October 10, 2006, Trial Staff filed comments in support of the Settlement. The Settlement resolves all issues raised by the parties at any time in Northern Border’s general NGA section 4 rate case in Docket No. RP06-72-000. On October 20, 2006, the Presiding Administrative Law Judge certified the Settlement to the Commission as an uncontested settlement. No other comments were filed with the Commission.

2. The Settlement establishes maximum base rates for all Northern Border’s services for a period of at least three years. The settlement also resolves difficult issues regarding Northern Border’s allocation of capacity among shippers and rights of first refusal of long-term shippers who contract for a shorter path than the path Northern Border

originally posted. In this regards, Article I sets out the procedural history and states that the Settlement is an indivisible package that comprehensively resolves all matters in Docket No. RP06-72.

3. Article II sets out the various provisions relating to a filing moratorium established by the Settlement. Northern Border is precluded from making a section 4 NGA filing to change Settlement Base Rates before the third annual anniversary of the last day of the month in which the Settlement is approved by the Commission. Article II.A.2 prohibits exercise by the settling parties of their rights under NGA section 5. Article II.A.6 provides that to the extent the Commission considers a change in the terms of the Settlement during the moratorium period, the standard of review will be the public interest standard set forth in *United Gas Pipe Line Co. v. Mobile Gas Serv. Co.*, 350 U.S. 332 (1956) and *Fed. Power Comm'n v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956). Article II.B requires Northern Border to file a new NGA section 4 general rate case no later than the sixth annual anniversary of the last day of the month in which a Commission order complying with Article XII is issued.

4. Article III provides that approval of the Settlement will make the revised tariff sheets set forth in Appendix A effective on the dates indicated on those tariff sheets. Article III eliminates certain tariff sections to conform to terms of the Settlement and provides that Northern Border may propose revisions to its tariff provisions to address emerging practices that affect Northern Border's ability to market capacity in an orderly, just and reasonable and not unduly discriminatory manner. However, Northern Border is precluded from changing those sections of the settlement dealing with the methods for accepting bids and allocating capacity contained in Subsections 26.2(b)(i) and (ii) of the Settlement.

5. Article IV addresses depreciation and amortization, including negative salvage value and the amortization of regulatory items. Article V provides that rates for Rate Schedule T-1, IT-1 and T-1B services performed during the Docket No. RP06-72 Rate Period will be stated and charged on a mileage-based basis (Settlement Base Rates). The mileage-based reservation rates for the long-term Rate Schedule T-1 service west of Ventura, Iowa, will be slightly lower than those for services east of Ventura. The mileage based reservation rates for the Rate Schedule T-1 service of less than a year will vary by month, with higher rates in the winter months. Similarly, the rates for interruptible and out of path firm service vary by month.

6. Article VI sets out the right of first refusal provisions for contracts entered into on or after January 1, 2007, through the Docket No. RP06-72 Rate Period for a term of at least one year but not more than five years for a path that is shorter than the originally posted available path that includes some portion of the system West of Ventura, Iowa. If

the contract does not use Ventura as a receipt point, but is less than the path criteria included in the relevant posting, the shipper will have the right to continue service with respect to all or part of the capacity. However, Northern Border has the right not less than 6 months or not more than 18 months prior to the termination of the shipper's agreement to post the original full path capacity to the extent that it is available. If an acceptable bid is made for the full path, the shipper has the right to match the bid. If no acceptable bid is made, the shipper may extend its contract for up to five years, but nothing in the settlement requires Northern Border to accept a short haul bid for more than five (5) years. Certain existing contracts are exempted from this provision.

7. Article VII establishes a Compressor Usage Surcharge (CUS). Article VIII provides that the test period plant balance associated with, and the annual cost of service effect of, Northern Border's Chicago III Expansion project is rolled into Northern Border's pre-existing system wide costs to determine rates for service on Northern Border's system. This Article also addresses the amortization of certain existing regulatory assets and the purchase price of assets acquired from Natural Gas Pipeline Company. Article IX provides that the Btu value applicable to each receipt point on Northern Border's system will be the value listed for such point in Appendix E and how it will be calculated for any receipt point not listed in Appendix E. Article X.A provides that rates collected for service during the period May 1-December 31, 2006 will be reduced to levels shown in Appendix F, describes how such reductions will be provided, describes the rights of non-participating parties, and how refunds will be provided.

8. Article XI generally describes how the participants are bound by the Settlement. Article XI states that neither Northern Border, Staff, nor any person or party shall be bound or prejudiced by any part of this Settlement, unless it becomes effective in accordance with the provisions hereof. Article XI.C establishes that the Settlement is submitted pursuant to the terms of Commission Rule 602.¹ Article XI.C further states that upon issuance of an order referenced in Article XII which becomes final and non-appealable, and that is acceptable to Northern Border, all issues in this docket will be settled.

9. As described above, Article II.B.6 of the Settlement provides that the standard of review for any proposed future change to the settlement shall be the public interest standard. As a general matter, parties may bind the Commission to a public interest standard.² Under limited circumstances, such as when the agreement has broad

¹ 18 C.F.R. §385.602 (2006).

² *Northeast Utilities Service Co. v. FERC*, 993 F.2d 937, 960-62 (1st Cir. 1993).

applicability, the Commission has the discretion to decline to be so bound.³ In this case the Commission finds that the public interest standard should apply because it provides the parties needed certainty.

10. The Commission finds that the Agreement is fair and reasonable, and in the public interest. The Agreement is therefore approved, to become effective as proposed. Approval of the Agreement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.

By direction of the Commission. Commissioner Kelly dissenting in part with a separate statement attached.
Commissioner Wellinghoff dissenting in part with a separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

³ *Maine Public Utilities Commission v. FERC*, 454 F.3d 278, 286-87 (D.C. Cir. 2006).

UNITED STATES OF AMERICA
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Northern Border Pipeline Co.

Docket No. RP06-72-000

(Issued November 21, 2006)

KELLY, Commissioner, *dissenting in part*:

The settling parties request that the Commission apply the *Mobile-Sierra* “public interest” standard of review to any proposed future change to the settlement. In the absence of an affirmative showing by the parties and reasoned analysis by the Commission regarding the appropriateness of approving the “public interest” standard of review with respect to any future changes sought by a non-party or by the Commission acting *sua sponte*, I do not believe the Commission should approve this contract provision.

Under the Federal Power Act and the Natural Gas Act, rates, terms and conditions of service must be “just and reasonable” and not unduly discriminatory or preferential. Parties to a contract or agreement may waive their statutory rights to the “just and reasonable” standard and request that the Commission instead apply the higher “public interest” standard under the *Mobile-Sierra* doctrine,¹ with respect to future changes sought by the one of the parties after the contract or agreement has been approved by the Commission.

In some cases, contracting parties request that the Commission apply the “public interest” standard of review to any future changes sought by the Commission acting *sua sponte* or on behalf of a non-party.² Courts have found that the Commission

¹ This doctrine is named after the Supreme Court’s rulings in *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) (*Mobile*) and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Sierra*).

² Until fairly recently, the Commission did not approve agreements whereby the parties sought to bind the Commission to a “public interest” standard of review with respect to the Commission acting *sua sponte* or at the request of non-parties to change rates, terms and conditions, in order to protect non-parties. *See, e.g., ITC Holdings Corp.*, 102 FERC ¶ 61,182 at P 77, *reh’g denied*, 104 FERC ¶ 61,033 (2003); *Westar Generating, Inc.*, 100 FERC ¶ 61,255 at 61,917 (2002); *Niagara Mohawk Power Corporation*, 97 FERC ¶ 61,018 at 61,060 (2001); *Turlock Irrigation District*, 88 FERC ¶ 61,322 at 61,978 (1999); *Montana Power Company*, 88 FERC ¶ 61,019 at 61,051 (1999); and *Carolina Power & Light Co.*, 67 FERC ¶ 61,074 at 61,205 (1994).

has the authority not to accept such a request.³ In making such a request, I believe the contracting parties must affirmatively demonstrate why it is consistent with the Commission's fulfillment of its statutory responsibilities under FPA sections 205 and 206, or NGA sections 4 and 5. In conducting its initial review of agreements where the parties seek to hold the Commission and non-parties to the higher "public interest" standard of review with respect to future changes, the Commission should consider whether this standard is appropriate within the context of the particular contract or agreement. Under certain circumstances, I believe it may be appropriate for the Commission to approve such provisions, as I stated in my concurring statement in *Entergy Services, Inc.*;⁴ however, the appropriateness of such a provision has not been demonstrated under the facts of this case.

This order concludes without reasoned analysis that the "public interest" standard should apply in this case. In addition, the order implies that the case law regarding the applicability of the *Mobile-Sierra* "public interest" standard is clear. In fact, it is not. Courts have recognized that "cases even within the D.C. Circuit . . . do not form a completely consistent pattern."⁵ Furthermore, I do not agree with this order's characterization of the recent *Maine PUC v. FERC* case, as restricting the Commission's discretion regarding the application of the "public interest" standard only "under limited circumstances."

Accordingly, I respectfully dissent in part from this order.

Suedeem G. Kelly

³ See, e.g., *Maine PUC v. FERC*, 454 F.3d 278 (D.C. Cir. 2006).

⁴ 117 FERC ¶ 61,055 (2006).

⁵ See *Boston Edison Co. v. FERC*, 233 F.3d 60, 67 (1st Cir. 2000).

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WELLINGHOFF, Commissioner, dissenting in part:

The parties in this case have asked the Commission to apply the “public interest” standard of review when it considers future changes to the instant settlement that may be sought by any of the parties, a non-party, or the Commission acting *sua sponte*.

Because the facts of this case do not satisfy the standards that I identified in *Entergy Services, Inc.*,¹ I believe that it is inappropriate for the Commission to grant the parties’ request and agree to apply the “public interest” standard to future changes to the settlement sought by a non-party or the Commission acting *sua sponte*. In addition, for the reasons that I identified in *Southwestern Public Service Co.*,² I disagree with the Commission’s characterization in this order of case law on the applicability of the “public interest” standard.

For these reasons, I respectfully dissent in part.

Jon Wellinghoff
Commissioner

¹ 117 FERC ¶ 61,055 (2006).

² 117 FERC ¶ 61,149 (2006).