123 FERC ¶ 61,014
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Northern Natural Gas Company Docket No. RP08-262-000

ORDER ACCEPTING NON-CONFORMING SERVICE AGREEMENT SUBJECT TO CONDITIONS

(Issued April 4, 2008)

1. On March 7, 2008, Northern Natural Gas Company (Northern) filed for the Commission's review a non-conforming service agreement (Agreement) with Southwestern Public Service Company (SPS) that it executed on February 6, 2008. Northern also filed a revised tariff sheet[1] to become effective April 7, 2008, that adds the Agreement to its tariff list of non-conforming service agreements. We accept Northern's proposed Agreement for filing and the revised tariff sheet, effective April 7, 2008, as proposed, subject to the conditions discussed below.

I. Background

2. Section 28 of Northern's General Terms and Conditions (GT&C) provides that Northern and its shippers must deliver scheduled volumes on a uniform daily and hourly basis to points of receipt and delivery. In the Field Area, the tariff requires shippers to tender at receipt points and for Northern to deliver at an hourly flow rate of 1/24th or 4.16 percent of the daily scheduled volumes. In the Market Area, Northern's tariff provides shippers with additional flexibility, allowing Northern to deliver gas to Market Area shippers at an hourly flow rate of 1/16th or 6.3 percent of a shipper's firm entitlement.

II. Details of Filing

3. Northern states that on November 8, 2007, it entered into the Agreement with SPS whereby Northern agreed to modify certain facilities to provide new firm service for

[1] Original Sheet No. 66E to Northern's FERC Gas Tariff, Fifth Revised Volume No. 1.

SPS's power generation load under the TFX Rate Schedule for ten years. In its transmittal, Northern states the Agreement contains two non-conforming provisions. First, paragraph 5 of the Agreement provides SPS with the right to receive gas at an hourly flow rate of up to 4.16 percent of its contract entitlement rather than the confirmed volumes SPS scheduled at the primary delivery point.[2] Northern explains that it can only provide this hourly flow rate because it determined that once it modifies the delivery facilities and commences service, sufficient capacity will exist between the primary receipt and delivery points to accommodate this hourly flow rate. In addition, this provision is contingent on SPS reimbursing Northern for all costs it incurs to install electronic flow measurement and flow control equipment at the primary delivery points.

4. Second, Northern also identifies paragraph 6 of the Agreement as a non-conforming provision. Paragraph 6 requires Northern to file and support the Agreement. This paragraph also requires Northern to change its tariff to offer any provisions contained in this Agreement to similarly situated shippers if the Commission accepts the Agreement subject to this condition. If the Commission denies the revisions, Northern must execute the Agreement without the provisions set forth in paragraph 5.

III. Public Notice, Intervention and Comments

5. Notice of Northern's filing issued on March 10, 2008. Interventions and protests were due as provided in section 154.210 of the Commission's regulations, 18 C.F.R. § 154.210. Pursuant to Rule 214, 18 C.F.R. § 385.214 (2007), all timely filed motions to intervene and any 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 this proceeding or place additional burdens on existing parties. Golden Spread Electric Cooperative, Inc. and GS Electric Generating Cooperative, Inc. (collectively, Golden Spread) and Indicated Shippers[3] filed protests.

6. In its protest, Golden Spread states that the hourly flow rights established in the Agreement vary from the tariff's generally applicable hourly flow rights of 4.16 percent of scheduled volumes. Golden Spread further states that such negotiated hourly flow rights also deviate from the form of service agreement, which does not contemplate such individually negotiated terms and conditions. Thus, Golden Spread argues that the hourly flow rights offered to SPS in the Agreement provide SPS with unique service flexibility not offered to other customers. As such, Golden Spread argues that the term is a material

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[2] In addition, Northern adds that if SPS nominates a volume greater than the entitlement at the primary delivery point, and Northern schedules the higher volume, the maximum hourly flow rate is 4.16 percent of the scheduled volume.

[3] The Indicated Shippers are BP Canada Energy Marketing Corp., Coral Energy Resources, LP and Occidental Energy Marketing, Inc.

deviation from Northern's form of service agreement that permits one shipper to have a preferential right to hourly flows on a firm basis and creates a potential for undue discrimination that must be remedied by a generally applicable tariff provision that permits other shippers to enjoy the same degree of operational flexibility.

7. Golden Spread further argues that nothing in the Agreement makes Northern's service to SPS so unique, as to justify the Commission accepting the non-conforming agreement. Golden Spread disputes Northern's assertions that the hourly flow rights granted in the Agreement will not affect the quality of service to SPS or other shippers. Golden Spread also distinguishes past Commission orders that Northern cites in support of its proposal, arguing that the non-conforming provisions approved in those orders were not related to conditions of service.[4] Golden Spread also argues that, contrary to Northern's statement that this provision should not interest other customers, Golden Spread is keenly interested in discussing comparable firm rights to vary hourly usage with Northern.

8. Golden Spread also seeks additional information from Northern regarding the non-conforming service agreement. Specifically, Golden Spread argues the Commission should require Northern to submit the November 8, 2007 agreement in which Northern agrees to modify certain facilities to accommodate service to SPS so parties may examine and determine if this agreement impacts the Agreement at issue here. Golden Spread is also concerned that a provision in the Amendment to the Agreement refers to the maximum reservation charges for 30,000 Dth/day of SMS service. Golden Spread states that to the extent that the discounted rates in the Amendment, which are tied to rates under Northern's SMS Rate Schedule, link service among rate schedules, Northern should also provide those SMS agreements in this proceeding.

9. The Indicated Shippers state that Northern should offer the same flexibility to all shippers and that Northern should modify its tariff to provide the same 6.3 percent ratable take it offers in its Market Area to shippers in its Field Area. This would result in more flexibility in the Field Area for all shippers (including SPS) than what is currently being offered to SPS, according to the Indicated Shippers. The Indicated Shippers argue that to avoid undue discrimination, Northern should provide the same hourly take flexibility to all shippers in both the Market Area and the Field Area.

IV. Discussion

10. We find the Agreement executed by Northern and SPS contains an impermissible material deviation from Northern's form of service agreement that allows SPS to enjoy hourly flow rights that are not currently available to all of Northern's customers.

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[4] Golden Spread March 19, 2008 Protest at 11-12 (*citing Northern Natural Gas Co.*, 110 FERC ¶ 61,321 (2005); *ANR Pipeline Co.*, 97 FERC ¶ 61,075 (2001)).

Accordingly, we will accept the Agreement, subject to Northern's filing revised tariff sheets that offer the hourly flow right on a generally applicable basis to all similarly situated shippers and operators.[5]

11. Under section 4(c) of the Natural Gas Act (NGA), pipelines must file "all contracts which in any manner affect or relate to" the pipeline's rates and services. Section 154.1(b) of the Commission's regulations implements this provision and provides that pipelines must file all contracts related to their services.[6] Section 154.1(d) provides that any contract that conforms to the form of service agreement provided in the pipeline's tariff need not be filed, but that any contract that deviates in any material aspect from the form of service agreement provided in the pipeline's tariff must be filed.[7]

12. The Commission has previously defined a material deviation as "any provision of a service agreement which goes beyond the filling in of the spaces in the form of service agreement with the appropriate information provided for in the tariff and that affects the substantive rights of the parties."[8] Because the provisions of paragraph 5 go beyond the mere filling in of spaces on the form of service agreement and provide a level of service not generally available to Northern's other customers, we find them to be material deviations.

13. Once an agreement is found to contain a material deviation from the form of service agreement, the Commission must then determine whether to approve the non-conforming agreement. The Commission will approve only those material deviations that do not present a substantial risk of undue discrimination.[9] In *Columbia*, the Commission specifically mentioned that it would consider a provision allowing a shipper to deviate from uniform hourly flow requirements to be an impermissible material deviation.[10] Such a provision is a negotiated term or condition of service that results in one customer receiving a different quality of service than is provided to other customers under the

[5] We do not address Indicated Shippers' suggestion that Northern revise its tariff to make its Field Area hourly flow rates conform to the hourly flow rates in the Market Area, as this issue is beyond the scope of the current proceeding.

[6] 18 C.F.R. § 154.1(b) (2007).

[7] 18 C.F.R. § 154.1(d) (2007).

[8] *Transwestern Pipeline Co.*, LLC, 121 FERC ¶ 61,110, at P 12 (2007) (*Transwestern*) (citing *Columbia Gas Transmission Corp.*, 97 FERC ¶ 61,221, at 62,002 (2001) (*Columbia*)).

[9] *Id.*

[10] *Id.*

tariff. The provision in paragraph 5 allowing SPS an hourly flow right of 4.16 percent of entitlements, as opposed to scheduled quantities, would provide SPS with a different quality of service than other customers because it would provide SPS with a level of flexibility that is unavailable to Northern's other customers. Therefore, consistent with *Columbia* and *Transwestern*, we determine that the negotiated hourly flow rights provision in paragraph 5 is an impermissible material deviation.

14. Paragraph 6 of the Agreement also is a material deviation from Northern's form of service agreement, in that it requires that Northern take certain actions depending on the Commission's disposition with respect to the Agreement. However, paragraph 6 does not affect the quality of service that SPS will receive under the Agreement. Nor does it present any risk of undue discrimination against other shippers. Therefore, we find the provisions of paragraph 6 to be permissible material deviations.

15. Additionally, we deny Golden Spread's request for Northern to file the November 8, 2007 agreement. The Agreement, along with the GT&C of Northern's tariff, appears to represent the entirety of the terms under which Northern provides this jurisdictional service. However, to the extent the November 8, 2007 agreement may affect the jurisdictional service provided to SPS it would also need to be filed. Absent a clear showing that the November 8, 2007 agreement is relevant, the Commission could decline to order production of the November 8, 2007 agreement. However, out of an abundance of caution, we direct Northern to either file the November 8, 2007 agreement within thirty days of the date this order issues, or explain why it should not be required to do so. Similarly, it is not totally clear whether Golden Spread's concern that the subject TFX Service Agreement links service under Northern's SMS Rate Schedule with the service provided in the TFX Service Agreement is well founded. The TFX Agreement refers to SMS service to describe an adjustment to be applied to the base TFX reservation rates equal in amount to the maximum reservation charges for 30,000 Dth/day of SMS service. Nothing in the Agreement indicates that Northern is linking the two services by requiring SPS to agree to services beyond those represented in the Agreement. However, to the extent the price under the TFX Agreement cannot be determined absent knowledge of service taken under the SMS Rate Schedule, we direct Northern either to file any SMS service agreements relevant to pricing under the subject non-conforming TFX service agreement with the Commission, or explain why it should not be required to do so.

16. Accordingly, we accept the revised tariff sheet and Agreement, subject to Northern filing revised tariff sheets, within 30 days of the date this order issues, that make the hourly flow rights afforded SPS in the Agreement generally available to

similarly situated shippers,[11] and filing additional agreements and information, as discussed above.

The Commission orders:

The TFX Service Agreement and related tariff sheet referenced in footnote No. 1 is accepted, effective April 7, 2008, subject to Northern's filing revised tariff sheets and additional information within thirty (30) days of the date this order issues, as discussed above.

By the Commission.

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[11] Although Indicated Shippers argue that such hourly flow rights should be offered to all shippers, we recognize that operational concerns in the Field and Market Areas may necessitate limiting these hourly flow rights to similarly situated shippers. To the extent Northern places limits on those shippers to whom Northern will offer these hourly flow rights, we expect that Northern would elaborate on this issue in its compliance filing.