123 FERC ¶ 61,108
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.

Portland Natural Gas Transmission System Docket No. RP08-306-000

ORDER ACCEPTING AND SUSPENDING TARIFF SHEETS
SUBJECT TO REFUND AND ESTABLISHING HEARING PROCEDURES

(Issued May 1, 2008)

1. On April 1, 2008, Portland Natural Gas Transmission System (Portland) filed primary tariff sheets[1] to reflect a Natural Gas Act (NGA) section 4 general rate increase, to be effective as soon as a suspension period concludes with respect to the instant filing. The proposed rates in the primary tariff sheets will result in an increase of approximately $5.6 million in the cost of service and approximately 5,000 Dth/d in billing determinants underlying Portland's currently effective rates. The effect of the proposed primary tariff sheet rates is an increase in the Rate Schedule FT unit recourse rate of approximately 6 percent relative to those presently in effect. In addition, Portland's primary tariff sheets include a new Short Term Recourse Rate applicable to both short-term firm and interruptible services, along with conforming tariff changes to reflect the existence of the Short Term Recourse Rate. Portland is also proposing a crediting mechanism provision associated with Portland's proposal regarding rates for short term service.

2. Portland also filed pro forma tariff sheets to become effective on a prospective basis following a Commission order on the merits or a settlement of this proceeding. The impact of placing the pro forma tariff sheets into effect is an additional increase of about 6 percent over rates contained in the primary tariff sheets. As discussed below, the Commission accepts and suspends the tariff sheets listed in the Appendix, to be effective September 1, 2008, subject to refund and the outcome of the hearing established herein.

Details of the Filing

3. Portland states that this rate case was filed pursuant to the provisions of its Settlement Agreement in its last NGA section 4 rate case in Docket No. RP02-13-000 (Settlement).[2] That Settlement required that Portland file a rate case under section 4 no

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[1] *See* Appendix.

[2] *Portland Natural Gas Transmission System*, 102 FERC ¶ 61,026 (2003).

sooner than and no later than, April 1, 2008.[3] Portland requests that the primary tariff sheets proposed in the instant filing become effective as soon as a suspension period concludes with respect to the instant filing.

4. Portland states that it is increasing its base transportation rates and claims that Portland is facing increasingly significant risks relative to those that were in existence when Docket No. RP02-13-000 was resolved and greater risks than those currently faced by other pipelines. Portland's Primary revised rates are based on a cost of service of $69,328,446, an overall rate of return of 10.20 percent based on a capital structure of 52.24 percent debt and 47.76 percent equity with a cost of debt of 6.046 percent and a return on equity (ROE) of 14.75 percent. In addition, Portland states that the instant filing recognizes a 2 percent depreciation rate for transmission plant which satisfies the requirement of the Settlement.[4] Portland, however, has included in the instant filing a depreciation study that supports an average remaining life of 23 years, and it states that this would warrant an increase in the depreciation rates. Portland's proposed cost of service is based on a base year ended December 31, 2007, as adjusted for changes through the end of the test period ending September 30, 2008.

5. Portland states that it continues to design its rates using the Commission's straight fixed variable method for classifying costs between fixed and variable cost categories and has functionalized and allocated costs consistent with Commission guidelines.

6. Portland is also proposing to implement new Short Term Recourse Reservation Rates which are capped at 250 percent of the Long Term Firm Recourse rate plus any applicable commodity rates. Portland states that this short term transportation rate will apply to Rate Schedules IT (interruptible transportation services), PAL (park and loan), and also to Rate Schedule FT (firm transportation services) for FT contracts with a primary term of less than one year. Portland also states that, in the unlikely event that it would over-recover its approved cost of service as a result of this new proposed short term service, it is proposing a Short Term Service Revenue Crediting mechanism to its long term FT shippers. Portland proposes the Short Term Revenue Credit will be 75 percent of the Excess Revenues received during an applicable Fiscal Period which is defined as each biennial anniversary starting the first day of January following the year in which its proposal is approved. Portland further states that the revenue credit will be

[3] *Id*.

[4] *Id*.

reflected on the invoices of the eligible FT shippers within 70 days from the end of the fiscal period.[5]

Notice of Filing, Interventions and Protests

7. Public notice of Portland's filing was issued April 8, 2008, with interventions and protests due 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 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. Protests were filed by Rumford Power Incorporated (Rumford), PNGTS Shippers' Group (Shippers' Group),[8] Canadian Association of Petroleum Producers (CAPP), National Grid Gas Delivery Companies (National Grid),[9] and Calpine Energy Services, L.P. (Calpine).

8. CAPP protests Portland's proposed rates, claiming that the requested ROE is excessive and not reflective of the cost of capital in today's economic environment. In addition, CAPP protests the short-term rates Portland has proposed. CAPP claims that the proposed rates fail to comply with the Commission's directives in Order No. 637 for pipelines seeking to implement peak/off-peak rates for short-term services. CAPP notes that Order No. 637 stated that increases in rates at peak must be offset by decreases in off-peak rates.

9. National Grid states that Portland's proposed rates, terms and conditions of service, including the General Terms and Conditions, have not been shown to be just and reasonable. Therefore, it requests that the Commission establish an evidentiary hearing to investigate and consider issues raised by the filing. Specifically, the issues that

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[5] Eligible Long Term FT Shippers are those FT Shippers who have paid Portland the Rate Schedule Long Term FT Maximum Recourse Reservation Charges during the Fiscal Period used to calculate the Short Term Service Revenue Credit.

[6] 18 C.F.R. § 154.210 (2007).

[7] 18 C.F.R. § 385.214 (2007).

[8] PNGTS Shippers' Group consists of Bay State Gas Company, Northern Utilities, Inc., DTE Energy Trading, Inc., H.Q. Energy Services (U.S.) Inc., New Page Corporation, and Wausau Papers of New Hampshire.

[9] National Grid Gas Delivery Companies consist of The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery NY; KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery LI; Boston Gas Company, Colonial Gas Company, EnergyNorth Natural Gas, Inc. and Essex Gas Company.

National Grid states should be set for hearing include, but are not limited to:
(a) increases in the cost of service, including levelization and pro forma rate models; (b) range of return on equity; (c) gas plant in service; (d) depreciation and design of rates for short-term service; and (d) negative salvage allowance.

10. Rumford states that as an IT shipper it will be negatively affected by Portland's short-term rate proposal. Rumford notes that if it needs transportation service on a peak day, Portland could charge Rumford up to $2.2541 per unit under their proposed rates, as opposed to $0.90 per unit at the 100 percent load factor rate of proposed firm rates. Rumford states that it is a captive customer to Portland because it has no other transportation service to its delivery point, and that Portland therefore has market power and should not be permitted to serve Rumford at market-based rates. Additionally, Rumford notes that pipelines have the burden of proving several elements of a case for market-based rates, which it argues Portland has not done with regard to IT service to Rumford.

11. Specifically, Rumford states that, consistent with Commission policy, Portland's application for market-based rates must be sufficient to stand alone without further inquiry or support in order to be acceptable. Rumford contends that there is no stand-alone support for the proposed rates. Next, Rumford argues that Portland has failed to provide a persuasive showing that it lacks market power in the market of origin. Similarly, it argues that Portland must show that it lacks market power over the Pittsburg, New Hampshire to Rumford, Maine path. Finally, Rumford states that Portland must show that it lacks market power in the market of destination, which in this case is at the Rumford delivery point. While it acknowledges that Portland has identified one means by which Rumford may be served as an alternative to the Portland IT service—namely capacity released by firm shippers—Rumford states that Portland makes no showing that there has been or will be a substantial amount of released capacity to compete with the Portland short-term service from Pittsburg to Rumford. For these reasons, Rumford argues that the Commission should summarily reject the proposed market-based tariff sheets to the extent that they would apply to service to Rumford. In the alternative, Rumford requests that the Commission set the proposed tariff sheets for evidentiary hearing before an Administrative Law Judge.

12. Rumford also points out that Portland neglected to mention in its filing that in the Calpine bankruptcy case,[10] Calpine agreed to give Portland a general unsecured net allowed claim in the amount of $125 million plus accrued interest from December 2005 in satisfaction of Portland's damage claim (Allowed Claim) against Calpine for rejecting the long-term firm contract for delivery to the Rumford plant. Rumford continues stating that Portland as a holder of the Allowed Claim is entitled to receive a distribution of

[10] *Calpine Corporation, et al.*, Case No. 05-60200 (BRL) in the U.S. Bankruptcy Court for the Southern District of New York.

reorganized Calpine common stock in an amount sufficient to satisfy the Allowed Claim.[11] Rumford states that this information is relevant to the rate case and affects the risk that Portland alleges it faces over the next few years.

13. Shipper's Group argues that Portland has provided no legitimate basis for a waiver of the statutory notice requirement applicable to, and routinely imposed upon, major rate increases and tariff changes filed by natural gas pipelines. Shipper's Group note that Article 5.1(a) of the Settlement Agreement, provides that "[Portland] shall file a general rate case under section 4 of the Natural Gas Act *with a proposed effective date* no sooner than, and no later than, April 1, 2008" (emphasis added). Shipper's Group add that they were surprised that Portland submitted the filing without providing for any advance public notice whatsoever, despite Portland's claims to the contrary.

14. Shipper's Group further contend that Portland has provided no basis for waiver of the Commission's general policy, which requires "rate filings…be suspended for the maximum statutory period permitted by statute where preliminary study leads the Commission to believe that the filing may be unjust, unreasonable, or that it may be inconsistent with other statutory standards."[12] They argue that Portland's proposed ROE of 14.75 percent is far higher than equity returns granted by the Commission to established natural gas pipelines in the recent past.[13] Additionally, Shippers state that Portland has based its proposed firm transportation rates on a billing determinant level of 210,000 Mcf per day, despite the fact that its last Form No. 2 Annual Report discloses 3-day coincident peak day deliveries averaging 302,383 Dth per day and a single day non-coincident peak day delivery of 318,493 Dth per day. For these reasons, Shippers argue that Portland's proposed rates are not just and reasonable and warrant a full five-month statutory suspension. Shippers request the Commission apply the 30-day notice requirement together with a five month suspension and allow Portland to motion the proposed rates into effect October 1, 2008.

15. Shipper's Group also takes issue with Portland's suggestion that its depreciation rate for transmission plant should be increased. They note that the Settlement stated unequivocally that while an increase in this rate could be raised in filings subsequent to the filing Portland has now made in this proceeding, Portland would be precluded from making such a proposal in the instant filing.[14] Shipper's Group states that Portland

[11] Rumford notes that it has no knowledge regarding whether or not Portland has liquidated its Allowed Claim or its Calpine stock for cash.

[12] *Portland Natural Gas Transmission System*, 97 FERC ¶ 61,131, at 61,606 (2001).

[13] Shippers cite to *Kern River Gas Company*, 117 FERC ¶ 61,077, at P 122 (2006).

[14] *Citing* Article 5.1(a) of the RP02-13 Settlement Agreement.

should be required to adhere to its negotiated commitments, which formed the basis for the Settlement Agreement.

16. Finally, Shipper's Group note that Portland's filing fails to acknowledge that Portland has already received over $100 million in proceeds from bankruptcy settlements related to contracts with Androscoggin Energy and Rumford Power. This information, they argue, is relevant to the overall risk profile of Portland, and should undermine Portland's alleged "need" for a 14.75 percent equity return. Shippers also note that most of Portland's remaining reported capacity continues to be subscribed under long-term firm service agreements not expiring until 2019 and 2020.

17. Calpine states that Portland does not mention in its filing what type of ratemaking regime it is proposing for its short-term services, and that, in fact, its proposed short-term service rates amount to an unlawful attempt at market-based ratemaking. Calpine states that Portland has not made the market power showing necessary to support such rates. It also notes that Portland's proposed rates are not truly rates at all, but rather rate caps, which Portland has set so high that the value of the services at issue will rarely, if ever, reach these caps. While Portland provides generalized assertions with respect to market power, Calpine asserts that Portland has failed to provide the detailed market power study that serves as a prerequisite for market-based ratemaking authority. Therefore, Calpine contends that Portland's proposed rate caps for short-term services should be rejected at the threshold.

18. Furthermore, Calpine argues that the proposed rate caps would function as recourse rates in a negotiated ratemaking framework since the rate caps would represent the only rates stated in Portland's tariff. Because of this, Calpine states that Portland has failed to comply with the Commission's policy requirements regarding negotiated ratemaking. Calpine asserts that the Commission has stated that "pipelines must permit shippers to opt for use of a traditional cost of service 'recourse' rate instead of requiring them to negotiate for rates for any particular service."[15] Portland's proposal, according to Calpine, results in rate caps that do not reflect the cost of service and a "recourse rate" set at two and a half times the maximum rate for firm service.

19. Calpine also argues that Portland's filing fails to meet the Commission's standards for peak and off-peak rates and fails to comply with Order No. 637. Calpine acknowledges that Order No. 637 authorizes seasonal, peak-off-peak rates, but argues that these rates must be cost-based. However, Calpine notes Order No. 637 requires such seasonal rates to in fact be "seasonal" or varied based on pre-specified days or months of the year or other objective criteria. Calpine states that a properly designed seasonal rate should function such that any increases in rates at peak should be offset by decreases in

[15] *Natural Gas Pipeline Negotiated Rate Policies and Practices*, 104 FERC ¶ 61,134, at P 2 (2003).

off-peak rates. Calpine contends that Portland has made no attempt to establish any seasonality for its short-term service rates; instead, its proposed short-term rates are always "peak" rates.

20. Calpine further alleges that Portland misconstrues Order No. 637 by using non-traditional seasonal rates to coerce shippers into considering other, longer-term service options. Calpine argues that Order No. 637 suggested that firm shippers signing longer-term contracts should be rewarded with a lower rate, not that shippers desiring short-term contracts should be charged a higher rate.[16]

21. Calpine notes that Portland's proposal to set short-term rates at 250 percent of the long-term firm recourse rate would impose a 165 percent increase in the pipeline's IT rate and effectively result in setting that rate at a 40 percent load factor firm service rate, thus contravening the Commission's preference for a maximum IT rate set at the 100 percent load factor service rate. Calpine goes on to argue that Portland's filing fails to establish the justness and reasonableness of its proposed 14.75 percent ROE and requests a further examination through discovery, responsive testimony and evidentiary hearings. Calpine notes that Portland chose to use Master Limited Partnerships (MLP) in its proxy group despite the fact that the inclusion of this type company has been one of the more contentious ratemaking issues before the Commission.

22. Further, Calpine disagrees with Portland's assertion that it faces sufficient risk to warrant placing itself at the high end of what is already, in Calpine's view, a "high-ROE proxy group."[17] Calpine notes that the Commission has emphasized that the vast majority of natural gas pipelines are exposed to no more than average business risk "absent highly unusual circumstances that indicate an anomalously high or low risk as compared to other pipelines."[18]

23. Finally, Calpine asks the Commission to reject summarily Portland's proposed changes in the transmission depreciation—an increase from 2 percent to 3.59 percent—as a patent violation of the Commission-approved settlement in Portland's previous rate case. It notes that this settlement declared that Portland's "cost of service contained in [the current] filing shall continue to utilize the 2 percent depreciation rate for transmission plant reflected in section 3.2."[19]

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[16] Calpine cites to *El Paso*, 112 FERC ¶ 61,150 at P 55.

[17] Calpine protest at 15.

[18] *HIOS*, 110 FERC ¶ 61,043 at P 154.

[19] *Portland Natural Gas Transmission System*, Offer of Settlement, FERC Docket No. RP02-13-004, Settlement at § 5.1(a) (filed Oct. 25, 2002).

Discussion

24. The Commission finds that the instant filing raises issues that need to be investigated further. Accordingly, the Commission will establish a hearing to explore issues including, but not limited to, the following: (1) the appropriateness of the proposed cost allocation and rate design; (2) the level of the overall revenue requirement; (3) the appropriateness of the proposed 14.75 percent ROE; (4) the negative salvage value rate of return; and (5) the just and reasonableness of Portland's proposed Short Term Recourse Rate and related crediting mechanism.

25. Portland is proposing to increase its current FT recourse reservation rate by approximately 6 percent from $25.8542 per Dth to $27.4017 per Dth. In addition, Portland is proposing a new Short Term recourse reservation rate that will apply to its IT customers, PAL service and FT contracts of less than 1 year of duration. The proposed short term recourse rate for this service is $68.50442 per Dth and is 2.5 times greater than the proposed FT recourse reservation rate.[20] In addition, Portland has calculated its IT usage rate from the short term reservation rate at a 100 percent load factor to arrive at an IT usage rate of $2.2522 per Dth. Consistent with the Commission's position in *Texas Gas*,[21] the Commission finds that Portland's methodology for developing its term differentiated rates must be fully examined and supported at a hearing where cost allocation and rate design issues may be fully ventilated. The Commission is concerned that Portland has not adequately linked its costs and the rates it proposes. Portland appears to base its rates only upon its perceived value of the service to the customer; however, the Commission in Order No. 637 reasoned that value based term-differentiated rates would have some link to actual costs.[22] Since the link between costs and rates (including premiums) that Portland proposes is unclear, the Commission will allow the parties to fully consider the impact of the proposal at a hearing.

26. The Commission denies the Shipper's Group request to summarily deny Portland's *pro forma* tariff sheets. In its *pro forma* tariff proposal, Portland is proposing to place into effect on a prospective basis, following a Commission order on the merits or a settlement of this proceeding, rates that reflect the implementation of its proposed cost of service using depreciation rates of 3.59 percent for transmission plant. The Commission finds that Portland in this filing has followed the terms of the Settlement and filed in its primary tariff sheets proposed rates using the Settlement depreciation factor of

[20] *See* Statement J-2, Page 1 of 2.

[21] *Texas Gas Transmission Corporation*, 93 FERC ¶ 61,102 (2000).

[22] Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services, Order No. 637, FERC *Stats. & Regs.* ¶ 31,091 at p. 31,290 and 31,293.

2 percent. By filing these *pro forma* tariff sheets Portland is notifying its customers that it will present evidence at hearing proposing to modify the depreciation rate. Portland, as does its customers, has the right at hearing to bring up issues or make proposals on items not bound by the terms of the Settlement.

27. The Commission also denies the Shipper's Group's request that the rates be suspended through October 1, 2008. Article 5.1(a) of the Settlement Agreement states that Portland shall file a general rate case under section 4 of the NGA with a *proposed effective date* no sooner than, and no later than, April 1, 2008. Thus, pursuant to the terms of the Settlement Agreement, Portland should have made a filing on March 1, 2008. However, the Commission's order upon which Portland relied to make the instant filing, specifically states "that Portland will file a general rate case under Section 4 of the Natural Gas Act no sooner than and no later than, April 1, 2008."[23] Contrary to the Shipper's Group contention that the filing was made without any public notice, we find that the Shipper's Group and all of Portland's customers were aware that the Commission's order described the Settlement as requiring that Portland must file a general section 4 rate case on April 1, 2008. We also find that Portland reasonably made its filing consistent with the statements in the Commission's Order Approving Settlement Agreement. We, therefore, grant Portland's request for waiver of the notice requirement in this instance.

Suspension

28. Based upon review of the filing, the Commission finds that the proposed transportation rates have not been shown to be just and reasonable, and may be unjust, unreasonable and unduly discriminatory or otherwise unlawful. Accordingly, the Commission shall accept and suspend the effectiveness of the proposed transportation rates for the period set forth below, subject to the conditions set forth in this order.

29. The Commission's policy regarding rates is that rate filings generally should be suspended for the maximum period permitted by statute where preliminary study leads the Commission to believe that the filing may be unjust, unreasonable, or inconsistent with other statutory standards.[24] It is recognized, however, that shorter suspensions may be warranted in circumstances where suspension for the maximum period may lead to harsh and inequitable results.[25] Such circumstances do not exist here. Therefore, the Commission shall exercise its discretion to suspend the proposed tariff sheets listed in

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[23] *Portland Natural Gas Transmission System*, 102 FERC ¶ 61,026, at P 6 (2003).

[24] *See Great Lakes Gas Transmission Co.*, 12 FERC ¶ 61,293 (1980) (five-month suspension).

[25] *See Valley Gas Transmission, Inc.*, 12 FERC ¶ 61,197 (1980) (one-day suspension).

footnote no. 1, to be effective September 1, 2008, subject to refund and the outcome of the hearing established herein.

The Commission orders:

(A) The tariff sheets listed in the Appendix are accepted and suspended, to be effective September 1, 2008, upon motion by Portland, subject to refund and the outcome of the hearing established herein.

(B) Pursuant to the Commission's authority under the Natural Gas Act, particularly sections 4, 5, 8, and 15, and the Commission's rules and regulations, a public hearing is to be held in Docket No. RP08-306-000 concerning Portland's filing.

(C) A Presiding Administrative Law Judge, to be designated by the Chief Administrative Law Judge for that purpose pursuant to 18 C.F.R. § 375.304 (2007), must convene a prehearing conference in this proceeding to be held within twenty (20) days after issuance of this order, in a hearing or conference room of the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426. The prehearing conference shall be held for the purpose of clarifying the positions of the participants and establishing any procedural dates necessary for the hearing. The Presiding Administrative Law Judge is authorized to conduct further proceedings in accordance with this order and the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Appendix

Portland Natural Gas Transmission System
Tariff Sheets Accepted and Suspended, effective September 1, 2008

FERC Gas Tariff
Second Revised Volume No. 1

Third Revised Sheet No. 100
Third Revised Sheet No. 101
Third Revised Sheet No. 102
First Revised Sheet No. 201
First Revised Sheet No. 204
First Revised Sheet No. 205
First Revised Sheet No. 306
First Revised Sheet No. 307