

129 FERC ¶ 61,066
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Northern Natural Gas Company

Docket Nos. RP09-233-001
RP09-233-002

ORDER ON REHEARING AND COMPLIANCE FILING

(Issued October 26, 2009)

1. On March 23, 2009, SEMCO Energy Gas Company (SEMCO) filed a request for rehearing and clarification of the Commission's February 20, 2009 order in Docket No. RP09-233-000,¹ which accepted subject to conditions tariff sheets filed by Northern Natural Gas Company (Northern) to change the creditworthiness provisions in its tariff. On March 20, 2009, Northern filed tariff sheets in compliance with the February 20 Order.² For the reasons discussed below, the Commission denies rehearing and accepts Northern's proposed tariff sheets.

I. Background

2. On January 21, 2009, Northern filed revised tariff sheets to make several modifications to the creditworthiness provisions in its tariff. Several parties protested and commented regarding various aspects of Northern's proposed creditworthiness changes. Northern filed an answer and a revised answer in response to the protests and comments.

3. In the February 20 Order, the Commission accepted Northern's proposal subject to conditions. The Commission directed Northern to file revised tariff sheets and explanations consistent with the order within 30 days.

4. On March 20, 2009, Northern submitted its compliance filing to the February 20 Order. Notice of Northern's filing issued on March 23, 2009. Protests were due on

¹ *Northern Natural Gas Company*, 126 FERC ¶ 61,155 (2009) (February 20 Order).

² *See* Appendix.

April 1, 2009, as provided by section 154.210 of the Commission's regulations, 18 C.F.R. 154.210 (2009). No party filed a protest or adverse comments.

5. On March 23, 2009, SEMCO filed a request for rehearing of the Commission's February 20 Order.

II. Rehearing

6. SEMCO requests rehearing and clarification regarding several issues related to the escrow provisions in Northern's tariff.

7. In the February 20 Order, the Commission accepted Northern's proposal to provide that Northern will establish and own the interest bearing escrow accounts used for the deposit of security funds. Prior to the modifications accepted in the February 20 Order, Northern's tariff provided that the shipper, not the pipeline, would establish the escrow account. The February 20 Order held that consistent with Commission policy, Northern's proposed modification did not impair the shipper's right to designate the account or limit the shipper's right to receive interest on the cash held in the account.³ The Commission emphasized that the shipper may retrieve any interest that accrues on the principal amount whenever it chooses. Although Northern claimed that it may utilize the accrued interest in the account as collateral when it requires increased security, the Commission determined the tariff provision as proposed by Northern did not provide Northern with this right.

8. In its request for rehearing and clarification, SEMCO asserts the February 20 Order fails (a) to affirmatively grant shippers the right to withdraw interest accrued on shipper's funds deposited in the escrow accounts and requires clarification that a statement in the Commission's Order in *Mississippi Hub*⁴ that a pipeline may retrieve shipper's accrued interest is erroneous, (b) to permit shippers to jointly own such accounts, and (c) to specify Northern as responsible for all expenses associated with such accounts.

A. Shippers' Right to Withdraw Accrued Interest

9. SEMCO asserts the Commission erred by failing to direct Northern to revise its tariff sheets to grant shippers an affirmative right to withdraw at any time accrued interest

³ February 20 Order, 126 FERC ¶ 61,155 at P 30 (citing *Policy Statement on Creditworthiness for Interstate Natural Gas Pipelines*, FERC Stats. & Regs. ¶ 31,191, at P 22 (2005) (*Policy Statement*)).

⁴ *Mississippi Hub, LLC*, 118 FERC ¶ 61,099, at P 53 (2007) (*Mississippi Hub*).

from the escrow account. SEMCO maintains that although Northern's tariff provides that shippers are "entitled" to accrued interest, the tariff does not specify when, how or how often the shipper can receive the accrued interest. SEMCO contends the February 20 Order erroneously assumed that Northern's tariff provisions permit shippers to withdraw accrued interest at any time. Moreover, SEMCO asserts Northern's revised answer filed February 17, 2009, withdrew any assurances that the shipper had the right to withdraw all accrued interest.

10. The Commission denies rehearing on this issue. As the February 20 Order stated, Commission policy guarantees the shipper may remove the interest whenever it chooses.⁵ Section 46 of Northern's tariff so provides:

Shipper may designate an interest-bearing escrow account to be established and owned by Northern. Shipper shall be entitled to receive the interest on the cash Security held in the account.

11. As determined in the February 20 Order, Northern's tariff provision, as written, does not provide Northern with the right to prevent a shipper from withdrawing interest when it chooses.⁶ It is not necessary for Northern's tariff to specify the precise mechanism used by shippers to withdraw accrued interest from the escrow accounts, as alleged by SEMCO. Thus, we find no reason to grant rehearing and require further changes to the provision.

12. SEMCO requests clarification that shippers, not the pipeline, are entitled to any accrued interest in the escrow accounts. SEMCO further seeks clarification that a statement in the Commission's order in *Mississippi Hub* that the pipeline is entitled to the accrued interest in the escrow accounts is erroneous. SEMCO quotes the *Policy Statement*, which provides that "the shipper could retrieve any interest that accrued on the principle amount."⁷ SEMCO explains that *Mississippi Hub* repeats verbatim the *Policy Statement* provision except that *Mississippi Hub* substituted the name of the pipeline for

⁵ February 20 Order, 126 FERC ¶ 61,155 at P 30; *Northern Natural Gas Co.*, 103 FERC ¶ 61,276, at P 47 (2003) (*Northern*).

⁶ February 20 Order, 126 FERC ¶ 61,155 at P 30.

⁷ SEMCO March 23, 2009 Request for Rehearing and Clarification at 10 (quoting *Policy Statement*, FERC Stats. & Regs. ¶ 31,191 at P 22).

the word “shipper.”⁸ SEMCO avers that in *Mississippi Hub* the Commission inadvertently misstated Commission policy when it referred to the pipeline, instead of the shipper, and requests clarification.

13. SEMCO’s request for clarification is unrelated to Northern’s tariff proposal, because, as discussed above, Northern’s tariff does not provide Northern with the right to prevent a shipper from withdrawing interest when it chooses nor does it authorize Northern to use the interest for collateral.⁹ We do agree, however, that *Mississippi Hub* inadvertently substituted the name of the pipeline for the word shipper. *Mississippi Hub* does not stand for the proposition that pipelines have a right to access interest in shipper designated escrow accounts.

B. Whether Escrow Account Must Be Owned Jointly by Northern and Shipper

14. SEMCO contends that the Commission erred by failing to require Northern to permit shippers to jointly own prepayment escrow accounts. SEMCO states the *Policy Statement* envisions that the shipper will establish and own the escrow account rather than the pipeline. To support this proposition, SEMCO asserts the *Policy Statement* provides that the pipeline “may gain access” to the account to collect payments for services provided,¹⁰ which SEMCO asserts should be unnecessary if the pipeline owns the escrow account. Moreover, SEMCO contends the February 20 Order failed to address the advantages of joint ownership identified in SEMCO’s comments filed February 2, 2009, that joint ownership provided the most effective and simplest means to ensure that shippers have the right to accrued interest and that joint ownership recognized the status quo, which permitted sole shipper ownership of the escrow accounts.

15. SEMCO further contends that the February 20 Order did not explain how Northern’s exclusive rights to establish and own the escrow account are consistent with a shipper’s right to designate the escrow account as provided in the *Policy Statement*.¹¹ SEMCO believes the shipper’s right to designate the account means the shipper has the right to specify the escrow account and the financial institution that will hold those funds. SEMCO states that under the tariff provisions accepted by the February 20 Order, shippers would no longer have the right to designate the escrow account. SEMCO also

⁸ Citing *Mississippi Hub*, 118 FERC ¶ 61,099 at P 53.

⁹ February 20 Order, 126 FERC ¶ 61,155 at P 30.

¹⁰ *Policy Statement*, FERC Stats. & Regs. ¶ 31,191 at P 22.

¹¹ Citing *Policy Statement*, FERC Stats. & Regs. ¶ 31,191 at P 22.

states that Northern failed to provide evidence that it will establish separate accounts for each shipper, that it will not commingle various shippers' funds or explain how it will comply with the duties of an administrator of an escrow account.

16. We deny SEMCO's request for rehearing. Under Commission policy the pipeline must either pay interest itself on the escrow account or provide shippers the option to designate an escrow account.¹² If the shipper selects the latter option, Commission Policy does not require that the shipper own or establish the account. SEMCO provides no basis to presume that if Northern "establishes" and "owns" the escrow account, that Northern will choose the financial institution holding the funds and select the escrow account. Rather, Northern's proposal provides that it will permit the shipper to "designate the account,"¹³ which means that Northern will allow the shipper to select the financial institution and the escrow account it desires. Moreover, there is no evidence to support SEMCO's contention that Northern will fail in its responsibilities to avoid commingling of funds and to administer the account properly.

C. Cost Responsibility for the Maintenance Expenses Associated with the Escrow Accounts

17. SEMCO asserts the Commission erred by failing to require Northern to specify that Northern is responsible for all expenses related to the maintenance of the escrow accounts and by neglecting to direct Northern to file conforming tariff revisions reflecting this obligation. SEMCO adds that the Commission failed to address its arguments on this issue.

18. The Commission denies SEMCO's request for rehearing. Commission policy designates the pipeline as responsible for any expenses related to the maintenance of the escrow account it establishes and owns.¹⁴ The tariff provisions accepted by the Commission state that Northern will "establish" and "own" the escrow account. Thus, under the terms of the tariff, Northern is responsible for the expenses related to the maintenance of the escrow account.

III. Compliance Filing

19. The February 20 Order required Northern to revise its January 21, 2009 tariff filing and provide further explanation regarding the setoff provisions proposed in the

¹² *Policy Statement*, FERC Stats. & Regs. ¶ 31,191 at P 22.

¹³ Proposed Substitute 3 Revised Sheet No. 285A.

¹⁴ *See Policy Statement*, FERC Stats. & Regs. ¶ 31,191 at P 22.

January 21, 2009 filing. Northern modified its proposed tariff provisions to (a) provide that its creditworthiness provisions shall not supersede applicable bankruptcy laws, (b) add language clarifying that storage loan balances and imbalance gas values will not be revised more than weekly, (c) specify that references to loaned gas on Sheet No. 285A refer to storage gas, (d) make certain modifications to its creditworthiness provisions relating to capacity release, and (e) remove the provision providing that non-creditworthy shippers must grant Northern a security interest for payment obligations in the shipper's storage accounts and credits, imbalance accounts, and other rights to receive payment or delivery of gas by Northern.

20. In the January 23 filing, Northern proposed to apply a setoff to a non-creditworthy shipper following default and five days notice as opposed to the time of termination. As part of this proposal, Northern inserted a provision stating that, for purposes of setoff, gas volumes loaned to a shipper and gas volumes held by it on behalf of the shipper are considered mutual debts owed, valued at the posted Midpoint Price for "Northern demarc" as published in Gas Daily. The February 20 Order required Northern to clarify the scope of the term setoff in its proposal and explain whether the proposed tariff provision applies to a failure to post increased collateral, and if it does, why allowing a setoff relating to collateral is just and reasonable.

21. In its compliance filing, Northern clarifies that setoffs, to the extent allowed by applicable law, include gas owned by the shipper. Northern states that in the event of shipper default, it plans to monetize the value of gas loaned to the shipper and the defaulting shipper's balances it holds. Northern states that under its proposal these monetized obligations are then setoff against each other to determine a final net amount owed by one party or the other. Northern states its setoff language mirrors similar setoff provisions in standard industry contracts, such as North American Energy Standards Board and International Swaps Dealers Association master agreements. Northern does not believe this provision entitles it to a superior position vis-à-vis other creditors, stating that applicable law determines priority and whether other creditors have perfected a lien or security interest in the shipper's gas. Northern emphasizes that both the gas "parked" and gas "loaned" to the shipper are considered an asset of the shipper and the shipper may encumber these assets without regard to Northern's post-default settlement rights.

22. Northern also clarifies that under its proposal, a shipper's failure to post increased collateral within the time limits specified in section 46 of Northern's tariff constitutes default and thus is subject to the setoff. Northern states that the setoff proposal is just and reasonable because a non-creditworthy shipper's failure to provide additional security indicates financial instability.

23. Northern's proposed tariff revisions in the March 20, 2009 filing comply with the requirements of the February 20 Order, and we will accept them. We will also accept Northern's tariff provisions relating to the setoff provision. Northern's tariff will not

provide Northern with the ability to confiscate a shipper's gas or provide Northern with a superior security interest and therefore is consistent with our prior order rejecting Northern's proposal to confiscate gas owned by a shipper.¹⁵

24. Accordingly, the Commission accepts the tariff sheets in the Appendix to become effective February 21, 2009, as proposed.

The Commission orders:

(A) The request for rehearing is denied, as discussed in the body of the order.

(B) The tariff sheets listed in the Appendix are accepted to be effective February 21, 2009.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹⁵ See, e.g., *Northern Natural Gas Co.*, 102 FERC ¶ 61,076, at P 60 (2003).

Appendix

Northern Natural Gas Company
FERC Gas Tariff, Fifth Revised Volume No. 1

Tariff Sheets Accepted
Effective February 21, 2009:

Substitute 6 Revised Sheet No. 285
Substitute 3 Revised Sheet No. 285A
Substitute First Revised Sheet No. 285B
Ninth Revised Sheet No. 288
Substitute 11 Revised Sheet No. 289