

131 FERC ¶ 61,178  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Marc Spitzer and John R. Norris.

Northern Natural Gas Company

Docket No. RP10-148-000

ORDER ON MOTION TO TERMINATE

(Issued May 27, 2010)

1. On May 5, 2010, the Northern Customer Group (Customer Group)<sup>1</sup> submitted a Motion to Terminate the Section 5 Proceeding (Motion) in this docket. The basis of the Motion was that Northern Natural Gas Company (Northern) has indicated that it intends to file a substantial increase in rates on May 28, 2010, under section 4 of the Natural Gas Act (NGA) unless this section 5 proceeding is terminated by that date. However, if the section 5 proceeding is terminated, Northern has agreed not to file for any increase in rates for another year. The Customer Group asserted that the benefits to customers from Northern's agreement not to file for any increase outweigh the benefits from continuing the section 5 proceeding. For the reasons set forth below, the Commission exercises its discretion and grants the Motion.

2. On November 19, 2009, the Commission established a hearing, under section 5 of the Natural Gas Act (NGA), to determine whether the rates currently charged by Northern Natural Gas Company (Northern) are just and reasonable.<sup>2</sup> The Commission found that an analysis of the cost and revenue data in Northern's Form 2 for 2008 indicated that Northern may be substantially over-recovering its cost of service.

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<sup>1</sup> The members of the Customer Group are Black Hills Energy, CenterPoint Energy Minnesota Gas, Metropolitan Utilities District, MidAmerican Energy Company, and the Xcel Energy Companies (Northern States Power Company-Minnesota, Northern States Power Company-Wisconsin, and Southwestern Public Service Company). The Customer Group asserts that its members hold a majority of the firm transportation and storage capacity on Northern.

<sup>2</sup> *Northern Natural Gas Co.*, 129 FERC ¶ 61,159 (2009), *reh'g denied*, 130 FERC ¶ 61,134 (2010) (November 19 Order).

Specifically, that analysis indicated that Northern's 2008 return on equity (ROE), net of income taxes, appeared to be about 24.36 percent. The order directed Northern to file a cost and revenue study for the latest 12-month period available as of the date of the order. On February 4, 2010, Northern filed that study, using the period November 2008 through October 2009.

3. On April 1, 2010, the Chief Judge granted a motion to extend the procedural schedule in the hearing by one month in order to allow the participants to complete their analysis of materials obtained through discovery and discuss settlement of this proceeding. Under the revised schedule, the participants will file written testimony and exhibits during the period May 20 through August 16, 2010, the hearing will commence on September 1, 2010, and the Presiding Judge will issue an Initial Decision by December 15, 2010.

4. On May 5, 2010, the Customer Group submitted the Motion to Terminate. It states that the settlement discussions reached an impasse on May 3, 2010, and Northern has stated that it will file a general NGA section 4 rate case on May 28, 2010, proposing a substantial rate increase if this NGA section 5 proceeding is not terminated prior to that time. Customer Group asserted that the information provided by Northern through discovery shows that its Field Area revenues have dropped very substantially since the 2008 period relied on by the Commission in establishing the section 5 hearing. It included with its Motion an Appendix showing Northern's monthly revenues for the period November 2008 through March 2010 and Northern's estimates of its revenues during the period April 2010 through July 2010. That Appendix shows that Northern's monthly Field Area revenues dropped from about \$14 million in November 2008 to about \$4 million in March 2010. Accordingly, the Customer Group stated that, "while some cost of service items are ripe for challenge, the Customer Group believes the cost of service Northern will *claim* in a section 4 proceeding, when coupled with the decline in Field Area firm and interruptible billing determinants, will generate rates substantially above the current rates even under Northern's current Market Area/Field Area cost allocation method."<sup>3</sup> The Customer Group further asserted that it believes that the increased rates in the section 4 filing will be driven to a significant degree by proposed changes in cost allocation that will seek to shift to Northern's customers the risk that Northern currently bears for recovering costs of its underutilized Field Area facilities.

5. The Customer Group contended that assuming a May 28, 2010 filing date, and a maximum suspension period, Northern's new section 4 rates would go into effect, subject to refund, on December 1, 2010, before the date when the Initial Decision in this proceeding is due to be issued. Therefore, the Customer Group argued "even assuming the section 5 proceeding was to continue notwithstanding a section 4 filing by Northern,

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<sup>3</sup> Motion at 12 (emphasis in original).

there is no period of time when any rate reduction deemed appropriate by the Commission in the section 5 proceeding actually would be in effect. As a result, the Commission may find that the refund floor in the section 4 filing would be the existing rates, irrespective of the findings made by the Commission in the section 5 proceeding.”<sup>4</sup>

6. The Customer Group stated that Northern has agreed that if the Commission terminates this proceeding before May 28, 2010, Northern will not file a section 4 rate increase before May 1, 2011, and will not move higher rates into effect prior to November 1, 2011. The Customer Group asserts that Northern’s agreement to postpone a section 4 filing for at least eleven months is a valuable consideration for the termination of the section 5 proceeding, and the Commission should grant the Motion.

7. Northern filed in support of the Motion. A number of parties filed either in support of the motion, or not opposing the Motion,<sup>5</sup> echoing the reason stated by the Customer Group that continuing with the section 5 proceeding may actually lead to an increase in the rates that customers will be paying, at least for a limited period of time, if Northern filed a section 4 rate increase. Among those supporting the motion were four state commissions.<sup>6</sup>

8. In support of the Motion, Northern stated since the second half of 2009 Northern’s operations have changed in a negative way, and the 2008 analysis does not reflect Northern’s current position. Thus, Northern states, the forthcoming section 4 filing it is prepared to make on May 28, 2010 “will contain a request for a rate increase of more than 30 percent, as well as various proposed changes to Northern’s service structure to reflect current operational realities,” possibly including an “alternative cost allocation methodology.”<sup>7</sup>

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<sup>4</sup> *Id.* at 3.

<sup>5</sup> The Northern Municipal Distributors Group and the Midwest Regional Gas Task Force Association, consisting of 46 small local distribution customers (LDC) of Northern filed in support of the relief requested in the Motion but did not agree with the legal and factual assertions therein. It also filed a Motion for Temporary Suspension of the Procedural Schedule. On May 17, 2010, the Chief Judge denied that motion.

<sup>6</sup> The four are the Kansas Corporation Commission, the Minnesota Office of Energy Security and the Minnesota Public Utilities Commission, the Iowa Utilities Board, and the Michigan Public Service Commission.

<sup>7</sup> Northern’s May 12, 2010 Answer at 3.

9. Indicated Shippers,<sup>8</sup> Industrials,<sup>9</sup> and Trial Staff filed answers opposing the Motion. Trial Staff points out that the Motion does not address the issue of whether Northern's current rates subject to the section 5 investigation are just and reasonable. Rather, the Motion relies on the consequences of Northern making a section 4 filing, and Trial Staff argues the Commission should not yield to such "threat," because otherwise "no section 5 investigation would survive."<sup>10</sup> Staff asserts that its analysis of Northern's Form 2 for 2009 shows that Northern had an ROE in excess of 19 percent.<sup>11</sup> Trial Staff also states that its testimony and evidence to be filed on May 20 will show that Northern will continue to over-recover its cost of service by well over \$100 million under its current rates.

10. Moreover, Trial Staff argues there are procedural options to avoid the dire consequences the Motion forecasts if the section 5 proceeding were to continue and Northern files its threatened section 4 rate case. Among the options would be "to modify the current procedural schedule to allow for [the Commission's] decision in the instant case to issue before the Section 4 rate becomes effective."<sup>12</sup> For example, it suggests that the Commission could limit the hearing scheduled to begin on September 1 to two weeks, waive the initial decision, and give the participants four weeks for initial and reply briefs directly to the Commission. Trial Staff states that this would give the Commission almost six weeks to issue a decision in the section 5 proceeding before the December 1, 2010 effective date of Northern's section 4 proposal.

11. Indicated Shippers similarly argue that Northern's return on equity for 2009 is about 20 percent. Moreover, as for Customer Group's concern about Northern's proposal to change its cost allocation in the section 4 filing taking effect on December 1, 2010, Indicated Shippers states that Northern's 2005 Settlement provides that any change in

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<sup>8</sup> Indicated Shippers consists of Anglo Suisse Texas Offshore Partners, Apache Corporation, BP Canada Energy Marketing Company, Chevron Natural Gas, a division of Chevron U.S.A., Inc., ConocoPhillips Company, Marathon Oil Company, Medco Energi US LLC, Occidental Energy Marketing, Inc. and Shell Energy North America (US) L.P.

<sup>9</sup> Industrials filed in support of Indicated Shippers' opposition. Industrials consist of Ag Processing Inc. a cooperative, American Forest & Paper Association, Process Gas Consumers Group, United States Gypsum Company, United States Steel Corporation, and Weyerhaeuser Company.

<sup>10</sup> Trial Staff's Answer at 2.

<sup>11</sup> *Id.* at 4.

<sup>12</sup> *See* Exhibit 1 to Trial Staff's Answer.

rate design in Northern's next section 4 filing, as this one would be, will be prospective and effective only after a Commission decision on the merits.<sup>13</sup> Thus, any increase in rates based on such a change could not be placed into effect at the end of the suspension period. Indicated Shippers conclude that the Commission should not "be persuaded to back off on the basis of Northern's strong-arm litigation and retaliation tactics."<sup>14</sup> Industrials support Indicated Shippers' answer.

12. On May 14, 2010, the Customer Group and Northern filed answers in response to the answers opposing the Motion. Customer Group asserts that Trial Staff basically concedes that absent unusual action by the Commission, if Northern makes a section 4 filing with a substantial increase in rates, that filing will lead to higher rates for customers for a period of time. The Customer Group states it is significant that every LDC that filed either supports or does not oppose the Motion and, equally important, that every state commission that filed supports the Motion.

13. Northern's response refers to the broad support for the Motion, and that "only three answers in opposition (Objections) were filed: Commission Trial Staff and two groups that represent less than four percent of the entitlement on Northern's system." Northern further states that unless the Motion is granted it will file a rate case that "reflects an increase in rates of over 30 percent in the Market Area and over 40 percent in the Field Area plus numerous service and rate design changes."<sup>15</sup> Northern asserts that the Objections failed to respond to the test period data that the Motion referred to that showed a dramatic negative change in Northern's operations. This change indicates that Northern's "alleged overrecovery" is no longer true, and any new section 4 filing would undoubtedly result in a rate increase for the overwhelming number of Northern's customers. Further, Northern contends that Trial Staff's suggestion that the Commission could modify the procedural schedule to permit a Commission decision in this section 5 proceeding before Northern's new section 4 rate filing becomes effective is unrealistic. Northern concludes "no participant has submitted any data to refute the showing made in the Motion that termination of this proceeding is in the public interest."<sup>16</sup>

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<sup>13</sup> Indicated Shippers' Answer at 2.

<sup>14</sup> *Id.* at 4.

<sup>15</sup> Northern's Answer at 2.

<sup>16</sup> *Id.* at 8.

## Discussion

14. The Commission grants the Customer Group's Motion to Terminate this section 5 proceeding. The Commission has broad discretion, at this early stage of a section 5 proceeding before a hearing has been conducted, in determining whether to terminate such a proceeding based upon developments since the order initiating the proceeding was issued.<sup>17</sup>

15. The Commission instituted this section 5 proceeding based on the data in Northern's Form 2 report of its costs and revenues for 2008, which indicated that Northern's current rates may not be just and reasonable and that those rates could permit Northern to substantially overrecover its cost of service. Our order instituting this proceeding recognized, however, that the analysis of Northern's rates should be based on the most recent data available.<sup>18</sup> The more recent cost and revenue data, included in the Appendix to the Customer Group's motion, shows that there has been a significant decrease in Northern's Field Area revenues since 2008, with no offsetting increase in Northern's Market Area revenues. In particular, while Northern's monthly Field Area revenues averaged about \$13.4 million during the period November 2008 through March 2009, they averaged only about \$5.3 million during the same period one year later. The Customer Group states that this drop in demand for transportation in Northern's Field Area can be reasonably linked to events such as the extension of Rockies Express Pipeline to markets east of Northern's system and that they do not anticipate any significant increase in demand for Field Area transportation through the test period Northern is likely to use in a section 4 rate filing. Neither Trial Staff nor Indicated Shippers contest the Customer Group's assertions concerning the decrease in demand for transportation in Northern's Field Area and its likely continuation.

16. Based on this change in circumstances and the evidence presented in the Customer Group's motion, we believe it is appropriate to terminate the section 5 proceeding at this time. This change in circumstances and more recent evidence led the Customer Group to conclude that the potential benefits of continuing this section 5 investigation do not outweigh the risk of an increase in rates resulting from the immediate filing of a section 4 rate case by Northern. Customers representing 96 percent of entitlements on Northern's system, as well as four state commission intervenors and a consumer advocate, all either support, or do not oppose, the Customer Group's motion. Balancing the equities and based on the evidence before us, we agree with these parties that the immediate benefit of the rate certainty provided by Northern's commitment not to file a section 4 rate increase

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<sup>17</sup> *Wisconsin v. Federal Power Commission*, 373 U.S. 294, 308-314 (1963).

<sup>18</sup> November 19 Order at P 7.

until at least May 1, 2011, and not to move those rates into effect until November 1, 2011, outweighs the potential benefits of proceeding with the section 5 investigation.

17. The Commission will remain vigilant in reviewing the data submitted by interstate natural gas pipelines in FERC Form No. 2 to carry out its responsibilities under the NGA to ensure just and reasonable rates. However, given that the ultimate outcome of a continuation of this section 5 proceeding is uncertain and we lack authority under NGA section 5 to order refunds for the period before a merits decision in the section 5 proceeding, we hereby terminate this section 5 proceeding.<sup>19</sup>

The Commission orders:

Customer Group's May 5, 2010 Motion to Terminate is granted, and the section 5 investigation in this docket is terminated.

By the Commission. Chairman Wellinghoff is dissenting with a separate statement to be issued at a later date. Commissioner Spitzer is concurring with a separate statement to be issued at a later date. Commissioner Norris is concurring with a separate statement to be issued at a later date. Commissioner Moeller is not participating.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>19</sup> In discovery in the section 5 proceeding, Trial Staff's claim of the Commission's deliberative process privilege in response to a Northern data request led to Trial Staff filing an interlocutory appeal that the Chairman referred to the Commission. Termination of this proceeding moots Trial Staff's pending interlocutory appeal in this proceeding.