

133 FERC ¶ 61,111  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Northern Natural Gas Company

Docket No. RP10-148-003

ORDER DENYING REHEARING

(Issued October 29, 2010)

1. On May 27, 2010, the Commission issued an order<sup>1</sup> granting the May 5, 2010 motion of Northern Customer Group (Customer Group) to terminate the Natural Gas Act (NGA) section 5 investigation initiated by the Commission's November 19, 2009 order to determine whether the rates charged by Northern Natural Gas Company (Northern) are just and reasonable.<sup>2</sup> On June 28, 2010 the Process Gas Consumers Group, the American Forest & Paper Association, and the United States Gypsum Company (Industrials) requested rehearing of the May 27 Order.<sup>3</sup> For the reasons set forth the Commission denies rehearing.

**Background**

2. On November 19, 2009, the Commission established a hearing under section 5 of the NGA to determine whether the rates currently charged by Northern are just and reasonable. The Commission found that an analysis of the cost and revenue data in Northern's Form No. 2 for 2008 indicated that Northern may be substantially over-

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<sup>1</sup> *Northern Natural Gas Co., order on motion to terminate*, 131 FERC ¶ 61,178 (2010) (May 27 Order).

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

<sup>3</sup> On July 7, 2010, Northern filed an answer, and on July 13, 2010, Customer Group filed an answer. On July 22, 2010, Industrials filed a motion to reject the answers. The Commission rejects the answers pursuant to Rule 713(d)(1) of the Commission's regulations, 18 C.F.R. § 713(d)(1) (2010) which does not permit answers to requests for rehearing.

recovering its cost of service. Specifically, that analysis indicated that Northern's 2008 return on equity (ROE), net of income taxes, appeared to be approximately 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 to allow the participants to complete their analysis of materials obtained through discovery and discuss settlement of this proceeding. Under the revised schedule hearings would commence September 1, 2010, and the Initial Decision would issue by December 15, 2010. On May 5, 2010, the Customer Group submitted the Motion to Terminate. The Customer Group stated that settlement discussions had reached an impasse and that Northern had indicated that it intended to file a substantial increase in rates on May 28, 2010, under NGA section 4, unless the Commission terminated this NGA section 5 proceeding by that date. However, Northern had agreed that if this proceeding was terminated it would not file for any increase in rates before May 1, 2011, and would not move such rates into effect prior to November 1, 2011.

4. The Customer Group asserted that the information provided by Northern in this proceeding through discovery showed that its Field Area revenues had dropped substantially since the 2008 period relied on by the Commission in the November 19 Order initiating the section 5 hearing. 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>4</sup> The Customer Group pointed out that assuming Northern filed its rate case on May 28, 2010, and the Commission suspended the filing for the 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 was due to be issued. The Customer Group asserted that, in these circumstances, the certain benefits to customers from Northern's agreement to postpone any rate increase filing outweighed the possible benefits from continuing the section 5 proceeding.

5. Northern filed an answer in support of the Motion stating that its operations have changed in a negative way since the second half of 2009, referring to the precipitous decline in its Field Area revenues. Accordingly, Northern asserted, the forthcoming section 4 filing it was prepared to make on May 28, 2010, would "contain a request for a rate increase of more than 30 percent, as well as various proposed changes to Northern's

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<sup>4</sup> Motion at 12 (emphasis in original).

service structure to reflect current operational realities,” possibly including an “alternative cost allocation methodology.”<sup>5</sup>

6. Indicated Shippers,<sup>6</sup> Industrials,<sup>7</sup> and Trial Staff filed answers opposing the Motion. Trial Staff argued, among other things, that there were procedural options to avoid the consequences the Motion forecast if the section 5 proceeding were to continue and Northern filed 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 Northern’s new section 4 rates became effective. Northern filed a response to the answers.

7. In granting the motion the Commission stated that it 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>8</sup> The May 27 Order referred to the more recent revenue data included in the Appendix to the Customer Group’s motion, showing that there had been a significant decrease in Northern’s Field Area revenues since 2008, with no offsetting increase in Northern’s Market Area revenues. Significantly neither Trial Staff nor Indicated Shippers contested the Customer Group’s assertions concerning the decrease in demand for transportation in Northern’s Field Area and the likely continuation of that decrease.

8. The Commission agreed with the Customer Group that based on this change in circumstances and the more recent evidence presented in the Customer Group’s motion, it was appropriate to terminate the section 5 proceeding at this time. The May 27 Order found the immediate benefit of the rate certainty provided to customers by Northern’s

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<sup>5</sup> Northern’s May 12, 2010 Answer at 3.

<sup>6</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>7</sup> The Industrials who filed in support of Indicated Shippers’ opposition included not only American Forest & Paper Association, Process Gas Consumers Group, and United States Gypsum Company, but also Ag Processing Inc. a cooperative, United States Steel Corporation, and Weyerhaeuser Company. The latter three entities did not join in the Industrials’ current request for rehearing.

<sup>8</sup> May 27 Order at P 14, *citing Wisconsin v. FPC*, 373 U.S. 294, 308-314 (1963) (*Wisconsin*).

commitment not to file a section 4 rate increase until at least May 1, 2011, and not to move those rates into effect until November 1, 2011, outweighed the potential benefit from continuation of the section 5 investigation. The Commission also pointed out that customers representing 96 percent of entitlement on Northern's system, as well as four state commission intervenors and a consumer advocate, all either supported, or did not oppose the Customer Group's motion. Accordingly, balancing the equities, the May 27 Order concluded that it was appropriate to terminate the section 5 proceeding at this time. The Commission also stated that it would 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 continuing this section 5 proceeding was uncertain and given the Commission lacks authority under NGA section 5 to order refunds for the period before a merits decision in the section 5 proceeding, the Commission terminated this section 5 proceeding.

### **The Request for Rehearing**

9. Industrials assert that the May 27 Order relied primarily on the fact that most of the customers "support, or do not oppose" the Motion, and also referred to the recent data concerning Northern's Field Area revenues. Industrials argue that the Commission erred in relying on the support by Northern's customers and by the state commissions, rather than the Commission making an independent judgment that considered the evidence submitted to date in the section 5 proceeding. Industrials cite to *Tejas* where the court remanded a contested settlement that the Commission had approved.<sup>9</sup> Industrials assert that the reason the court did so was because "at bottom" the approval was based on the fact that "all of the pipeline's resale customers, which are LDCs, agreed to it and no state public service commission opposed it."<sup>10</sup> The court remanded because "the Commission failed to justify the extent to which it relied upon the LDC's agreement in determining where the public interest lies."<sup>11</sup>

10. Moreover, Industrials assert, that neither the Motion nor the May 27 Order addressed the sole issue the November 19 Order set for investigation, namely whether Northern's current rates are just and reasonable.

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<sup>9</sup> Industrials Request for Rehearing at 8-10, *citing Tejas Power Co. v. FERC*, 908 F.2d 998 (D. C. Cir. 1990) (*Tejas*).

<sup>10</sup> *Tejas*, 908 F.2d at 1002.

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

11. Industrials argue that *Tejas* provides compelling support for granting rehearing for a number of reasons. First, *Tejas* involved a settlement, while here there is a section 5 proceeding where Trial Staff is responsible for conducting the relevant investigation. Thus, while there may have been some basis in *Tejas* for the Commission's reliance on the support of customers to justify approval of the settlement, there is no such justification in this case since Trial Staff, the leading proponent of moving the litigation forward, opposed the Motion. Further, the Industrials assert that in *Tejas*, all the customers supported the settlement, while here there was no such unanimity since some customers opposed the Motion.

12. Finally, they argue, in *Tejas* the court stated that "the approval of the settlement in this case is particularly troublesome because the Commission made no prior finding that Texas Eastern lacks significant market power vis-à-vis the LDCs."<sup>12</sup> Therefore, under *Tejas*, the Commission must make a finding that Northern does not have any unfair advantage that would allow it to manipulate the process in its favor, when in fact the opposite is true here.

13. Industrials argue it is clear in this case that Northern does have an unfair advantage vis-à-vis the Customer Group due to the statutory scheme. They point out that the Commission lacks authority under section 5 to require refunds except on a prospective basis after the Commission makes its merits finding, but the pipeline can initiate a section 4 proceeding at any time, and any increase therein will become effective six months after the filing.

14. Industrials assert that to counter this unfair advantage, and address the Customer Group's concern about the timing problem where there is a section 5 investigation, Trial Staff proposed that the Commission modify the procedural schedule to permit the Commission's merits finding in the section 5 proceeding to issue before the section 4 rates could become effective. This would address the underlying reason in Customer Group's motion that customers would not benefit from continuation of the section 5 proceeding. Industrials state that while the May 27 Order described Trial Staff's proposal in P 10, in its determination in the order the Commission ignored the proposal, and did not consider the feasibility of the proposal, nor whether the proposal would alleviate the concerns expressed in the Motion and thus avoid the need for the termination of this proceeding. Industrials argue that termination is a drastic measure that should be reserved for cases where it is absolutely inevitable, and in this case, Trial Staff's proposal refuted the basis for the termination.

15. Industrials argue that in evaluating Northern's current operating conditions, the Commission erred in relying upon the change in Northern's Field Area revenue as

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<sup>12</sup> *Id.* at 1004.

reported by Northern, rather than relying upon the most recent Form No. 2 data. Industrials assert that as set forth in the Indicated Shippers' Answer, "Northern's most recent Form No. 2 data for year-end 2009, indicates an actual return of 20 percent, which is still significantly higher than current [returns on equity]." <sup>13</sup>

16. Industrials argue that the Commission chose to consider the partial, incomplete, and unofficial revenue information reported by Northern for the Field Area without examining or testing the data, and without subjecting it to any rigorous analysis. Industrials assert that the Field Area revenue data was designed by Northern to take advantage of the flawed section 5 structure. At the same time the Commission ignored the most recent Form No. 2 data analyzed by Trial Staff and the Indicated Shippers. Thus, Industrials contend, the overwhelming weight of the evidence in this case using Form No. 2 data is that Northern will continue to over-recover in spite of any alleged or actual decrease in demand for transportation in Northern's Field Area.

17. Accordingly, Industrials ask the Commission to grant rehearing, re-institute the investigation into Northern's rates, and direct the Presiding Judge to order an expedited procedural schedule consistent with Trial Staff's proposal that would permit a merits decision in this section 5 proceeding prior to the date that a new section 4 rate filing could be made effective, subject to refund.

### **Discussion**

18. The Commission denies rehearing. Given the early stage of the instant section 5 investigation, the uncertainty of the ultimate outcome of that proceeding, and the support of most interested parties for termination, the Commission reaffirms its decision to terminate the instant section 5 investigation.

19. As the May 27 Order stated, <sup>14</sup> in *Wisconsin*, the United States Supreme Court held that the Commission generally has broad discretion to terminate an investigation it has initiated pursuant to NGA section 5, particularly in the early stages of the investigation before a full record has been developed. In *Wisconsin*, the Commission determined that because of the staleness of the existing record, a continuation of the section 5 investigation there at issue would require a remand to an Administrative Law Judge for the receipt of additional evidence. In light of this fact, the Court held, "[t]his is not a case in which the Commission has walked right up to the line and then refused to cross it—a case, in other words, in which all the evidence necessary to a determination had been

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<sup>13</sup> Rehearing Request at 14.

<sup>14</sup> May 27 Order, 131 FERC ¶ 61,178 P 14.

received but the determination was not made.”<sup>15</sup> Rather, the Court pointed out, the alternative to termination, remanding for additional evidence, “undoubtedly would have consumed considerable time and energy, including that of the Commission and its staff, and would almost certainly have involved another decision by a hearing examiner, another appeal to the Commission, another petition for rehearing, and further judicial review of complex and difficult issues.”<sup>16</sup> The Court concluded it was uncertain whether a continuation of the section 5 investigation would provide greater protection to consumers than termination, and therefore the court affirmed the Commission’s exercise of its discretion to terminate the section 5 investigation there at issue.

20. The instant case involves a similar situation, in which a continuation of the section 5 investigation would have required a considerable expenditure of resources by all concerned, with some uncertainty as to whether the ultimate outcome would benefit consumers due to the changed circumstances. Here, when the Customer Group filed its Motion to Terminate on May 5, 2010, the section 5 investigation was in its earliest stages, and no hearing had yet been held. In addition, Northern had indicated its intent to submit a section 4 rate increase filing by May 28, 2010, with the rate increase to take effect, subject to refund, on December 1, 2010, after a five-month suspension. Therefore, a continuation of the section 5 investigation would have required further proceedings, including hearings in both the section 5 and section 4 proceedings. Those additional proceedings “undoubtedly would have consumed considerable time and energy, including that of the Commission and its staff.”

21. Moreover, it is uncertain whether at the end of the section 5 and section 4 proceedings, Northern’s customers would have received a significant rate decrease for any period. As Industrials point out, Trial Staff suggested that the Commission modify the procedural schedule of the section 5 investigation to permit a Commission decision in that investigation before the section 4 rate increase could become effective on December 1, 2010. Trial Staff proposed that the Commission limit the hearing scheduled to begin on September 1, 2010, to two weeks, waive the initial decision, and give the participants four weeks for initial and reply briefs directly to the Commission. Trial Staff stated that this would give the Commission almost six weeks to issue a decision in the section 5 proceeding before Northern could move its proposed section 4 rate increase into effect on December 1, 2010. While the Commission has authority to order that an initial decision be waived, even over the objections of parties,<sup>17</sup> such a waiver would have put before the Commission an unanalyzed record with no winnowing or clarification of

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<sup>15</sup> *Wisconsin*, 373 U.S. at 311.

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

<sup>17</sup> 18 C.F.R. § 385.710(a) (2010).

issues through an initial decision and briefs on exceptions. As is evident from the direct testimony filed by Trial Staff and others, the issues to be decided by the Commission would have been numerous and complex. It is unrealistic to believe that the Commission could issue an order addressing these issues in the six week period Trial Staff proposed before the December 1, 2010 end of the suspension period of Northern's new section 4 filing.

22. But, more importantly, even if the Commission had been able to issue an order deciding all the issues in the section 5 proceeding by December 1, 2010, all that such an order could have accomplished is to establish a refund floor for Northern's new section 4 rate case. NGA section 4 gives the pipeline the right, at any time, to file a proposed rate increase. While the Commission can suspend such a filing for five months, the pipeline has the right to move its proposed rate increase into effect subject to refund at the end of the five-month suspension, unless the Commission has acted on the merits of at least some of the issues presented by the section 4 filing. Thus, a continuation of the section 5 investigation could only lead to an actual rate reduction for Northern's shippers if, based on the record developed in the section 4 proceeding, the Commission determined that Northern's rates should be lowered below their existing level. Only then could the Commission order refunds subject to whatever refund floor was established in the section 5 proceeding, as well as ordering a prospective rate reduction.

23. While it appears probable that a refund floor established based on the record in the section 5 investigation would have been lower than Northern's existing rates, it is less certain that the record developed in the section 4 proceeding would have supported a sufficiently large rate decrease to justify the costs of continuing the section 5 proceeding over the objections of almost all interested parties. Industrials emphasize that Northern's Form No. 2 for calendar year 2009 indicates that its return on equity in that year was 19 percent, significantly above the returns the Commission has approved in other recent section 4 rate cases. However, the 2009 return on equity represented a decline from the 24.34 percent return on equity indicated by its 2008 Form No. 2, and the Customer Group provided monthly revenue data suggesting that Northern's return on equity would continue to decline in 2010. That data showed that Northern's Field Area revenues began to decline in mid-2009, and that revenue decline accelerated during the first three months of 2010, with no offsetting increase in Market Area revenues. Moreover, the Customer Group stated that there was no reason to expect that the factors that led to the drop Northern's Field Area revenues, including the extension of Rockies Express Pipeline to markets east of Northern's system, would not continue into the future. No party contested that expectation, including the Industrials.

24. Thus, Northern's Form No. 2 data for calendar year 2009 did not reflect a full year's experience with the drop in Field Area revenues since the decline in that revenue commenced in mid-2009. However, Northern could seek to fully reflect that drop in revenue in its proposed new section 4 rate filing. The base period for Northern's new

section 4 rate case would likely have been the one-year period from March 2009 through February 2010, with a nine-month adjustment period from March 2010 through November 2010.<sup>18</sup> Northern could have included in that section 4 rate filing a proposal to adjust its rate design volumes to account for the continuing drop in Field Area revenues, since that drop would be fully reflected in the last twelve months of the section 4 rate case test period (December 2009 through November 2010).

25. Based on these facts, the Customer Group concluded that the potential benefits of continuing this section 5 investigation did not outweigh the risk of an increase in rates resulting from the immediate filing of a section 4 rate case by Northern. In addition, the Customer Group expressed concern that “[e]ven if Northern is unable in the section 4 rate proceeding to meet its burden of proving that any rate increase is justified, the Commission and parties will have devoted substantial time and resources to achieve nothing more than a stalemate.”<sup>19</sup> As an alternative to “a costly stalemate,” the Customer Group preferred the 18 months of rate certainty provided by Northern’s agreement not to file a new section 4 rate case before May 1, 2011, so any rate increase could not become effective prior to November 1, 2011. Customers representing 96 percent of entitlements on Northern’s system, as well as four state commission intervenors and a consumer advocate, all either supported, or did not oppose, the Customer Group’s position.

26. In deciding whether to grant the Customer Group’s Motion to Terminate, the Commission had to weigh the possibility that continuation of the section 5 investigation could result in a significant rate decrease against: (1) the desire of almost all parties to terminate the investigation; and (2) the substantial costs that continuation of the section 5 proceeding would impose on all concerned. We do not discount the possibility that a continuation of the section 5 investigation, along with the processing of Northern’s section 4 rate increase filing, could ultimately have brought about at least some reduction in Northern’s rates.<sup>20</sup> However, accomplishing such a rate reduction within a reasonable amount of time would have required an extraordinary commitment of the Commission’s

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<sup>18</sup> See section 154.303(a) of the Commission’s regulations, 18 C.F.R. § 154.303(a) (2010).

<sup>19</sup> May 5, 2010 Motion to Terminate at 13.

<sup>20</sup> Industrials point out, Rehearing request at 13-14, that Trial Staff submitted evidence in the section 5 proceeding asserting that, during the November 2008 through October 2009 period used in Northern’s cost and revenue study in the section 5 proceeding, Northern’s cost-of-service was almost \$100 million less than its estimated revenues for the period August 2009 through July 2010, which covers the period after Northern’s Field Area revenues started declining. However, such evidence, like any evidence submitted by any party, would have to be tested at hearing.

and the parties' resources. That is illustrated by the Industrials' own assertion that the Commission should have waived the initial decision in the section 5 hearing and attempted to decide all issues in the section 5 proceeding by December 1, 2010, to establish a lower refund floor for use in the section 4 proceeding. While the Commission has already found that proposal to be unrealistic, a more realistic approach of establishing expedited procedures with a goal of deciding all issues in the section 5 proceeding within several months after December 1, 2010, would have required the commitment of a large portion of the Commission's staff devoted to natural gas pipeline proceedings for a substantial period of time. And that would still have left the section 4 rate case to be decided. Absent extraordinary procedures (or settlement), major section 4 rate cases ordinarily require longer than a year to decide.<sup>21</sup>

27. Given the burdens that continuing the section 5 investigation would have imposed on all parties, including the Commission and its staff, and the preference of the vast majority of Northern's customers for the immediate benefit of the rate certainty provided by Northern's commitment not to increase its rates until at least November 1, 2011, it was an appropriate exercise of the Commission's discretion to grant the Customer Group's Motion to Terminate the section 5 investigation. While Industrials assert that pipelines have an advantage in a situation like this because of the Commission's lack of refund authority in a section 5 proceeding, and the pipeline's right to submit a section 4 rate increase filing at any time during the pendency of a section 5 proceeding, the Commission can only act under the existing statutory scheme. The lack of refund authority under the existing statutory scheme, and the fact that it would have prevented the Commission from ordering refunds for the period before a merits decision in the section 5 proceeding, necessarily factored into the decision to terminate the section 5 investigation in this case.<sup>22</sup>

28. Nor does *Tejas* support Industrials' position. In that case, a pipeline proposed to modify its sales rates to include a new gas inventory charge. The Commission determined that this proposal constituted "a significant change in the service relationship" between the pipeline and its sales customers "requiring an amendment to" the pipeline's "sales certificates,"<sup>23</sup> and the Commission set the proposal for hearing. Before the hearing, the pipeline filed a contested settlement, which the Commission approved over

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<sup>21</sup> See *Kern River Gas Transmission Co.*, in which the Commission issued its order on initial decision on October 19, 2006, about two years after Kern River had moved its proposed rates into effect on November 1, 2004. Opinion No. 486, 117 FERC ¶ 61,077 (2006), *reh'g*, Opinion No. 486-A, 123 FERC ¶ 61,056 (2008).

<sup>22</sup> May 27 Order at P 17.

<sup>23</sup> *Texas Eastern Transmission Corp.*, 41 FERC ¶ 61,373, at 62,018 (1987).

the objections of various end-users of natural gas. The United States Court of Appeals for the District of Columbia Circuit remanded the Commission's approval of the settlement. The court found fault with the Commission's orders, because approval was based primarily, if not solely, on the grounds that "all of the pipeline's resale customers, which are LDCs, agreed to it and no state public service commission opposed it,"<sup>24</sup> and the Commission failed to make an independent finding that the settlement was just and reasonable.

29. *Tejas* thus did not involve the Commission's exercise of its discretion to terminate a section 5 investigation at an early stage and to allow the pipeline's existing rates to remain in effect. Rather, *Tejas* involved the Commission's approval at the end of an NGA section 7 certificate proceeding of a pipeline's proposal to make such a significant change in its rates for its bundled sales service as to require an amendment to its sales certificates. In the latter situation, the Commission must, of course, make a fully supported finding that the modified rates proposed by the pipeline are just and reasonable. No such finding is required when the Commission exercises its discretion to grant a motion, supported or not opposed by most customers, to terminate a section 5 proceeding.

The Commission orders:

The request for rehearing is denied, as discussed in the body of this order.

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

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>24</sup> *Tejas*, 908 F.2d at 1007.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Northern Natural Gas Company

Docket No. RP10-148-003

(Issued October 29, 2010)

LaFLEUR, Commissioner, *concurring*:

On November 19, 2009, the Commission instituted an investigation of Northern Natural Gas Company (Northern) under section 5 of the Natural Gas Act (NGA), along with two other pipelines.<sup>1</sup> Following Northern's filing of its cost and revenue study and discovery by the parties, on May 5, 2010, the Northern Customer Group filed a motion to terminate the section 5 investigation, indicating that settlement talks had reached an impasse and Northern threatened to file a general section 4 rate case to raise its rates. The motion was supported, or not opposed, by four state public service commissions, one consumer advocate and the majority of customers served by Northern. On May 27, 2010, the Commission granted the motion to terminate.<sup>2</sup> Three parties, the Process Gas Consumers Group, the American Forest & Paper Association and the United States Gypsum Company (collectively, Industrials), sought rehearing of that order.

I was not on the Commission at the time the prior orders in this docket were issued. Today, however, I concur in the Commission's decision on rehearing to uphold the termination of the section 5 investigation of Northern. I find compelling the fact that the motion to terminate is supported, or not opposed, by customers representing 96% of the entitlements on the Northern system as well as four state public service commissions and one consumer advocate. I also find compelling the concern that, as in the *Wisconsin* proceeding, the record is now stale and would require the receipt of new evidence.<sup>3</sup> Further, the results to which this new evidence may point are not certain. The cost and revenue study filed by Northern in response to the November 19 Order showed a significant decline in field area revenues and an apparent decline in demand for transportation on parts of Northern's system, which may be linked to the completion of the Rockies Express pipeline.<sup>4</sup> As the instant order states, it is not "certain that the

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<sup>1</sup> *Northern Natural Gas Co.*, 129 FERC ¶ 61,159 (2009), *reh'g denied*, 130 FERC ¶ 61,134 (2010) (November 19 Order).

<sup>2</sup> *Northern Natural Gas Co.*, 131 FERC ¶ 61,178 (2010) (May 27 Order).

<sup>3</sup> *Wisconsin v. Federal Power Commission*, 373 U.S. 294, 311 (1963).

<sup>4</sup> May 27 Order, 131 FERC ¶ 61,178 at P 4, 15-16.

record developed in the section 4 proceeding would have supported a sufficiently large rate decrease to justify the costs of continuing the section 5 proceeding over the objections of almost all interested parties.”<sup>5</sup>

Given these changed circumstances, the parties’ preference for rate certainty is also compelling. The Northern Customer Group and others indicated their preference for the rate certainty provided by Northern’s promise not to file a new general section 4 rate case prior to May 1, 2011 over continuation of the section 5 investigation. I do not want to force these parties to litigate a proceeding they do not wish to continue. I also respect their decision that the immediate benefit of rate certainty outweighs the potential benefit of continuing the section 5 investigation.

This decision to uphold the termination of one section 5 investigation should not be read as a lack of resolve by the Commission to pursue further section 5 cases as appropriate to ensure just and reasonable, and not unduly discriminatory rates, terms and conditions of natural gas transportation. The ability to institute an investigation or file a complaint under section 5 is an important tool both for the Commission and for parties affected by the rates, terms and conditions of interstate natural gas transportation. I believe that this tool should be wielded when the facts and circumstances so require.

I recognize the concerns raised by the Industrials on rehearing regarding the unfair advantage pipelines may have in a section 5 proceeding vis-à-vis their customers. The Commission can only act, however, within the existing statutory scheme. I believe that this proceeding clearly demonstrates the need for reform of section 5 of the NGA to prevent the asymmetry of leverage between applicants under section 4 and complainants or the Commission under section 5. As happened here, without Commission authority to set a refund effective date upon institution of a complaint or investigation under section 5, a pipeline can threaten to file a general section 4 rate case and move those rates into effect prior to the date by which a Commission order in the section 5 proceeding could lower those rates. This situation places the parties supporting the section 5 proceeding in a difficult situation in that they may be forced to pay even higher rates without refund relief for some period of time. It also hampers the Commission’s efforts to ensure just and reasonable rates. I therefore support legislative action to amend the NGA to provide the Commission with refund authority in section 5, similar to that provided under section 206 of the Federal Power Act.

For these reasons, I concur.

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Cheryl A. LaFleur  
Commissioner

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<sup>5</sup> *Northern Natural Gas Co.*, 133 FERC ¶ 61,111 at P 23 (2010).