

120 FERC ¶ 61,233  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Northern Natural Gas Company

Docket No. RP07-576-000

ORDER ACCEPTING TARIFF SHEETS

(Issued September 13, 2007)

1. On August 14, 2007, Northern Natural Gas Company (Northern) filed tariff sheets<sup>1</sup> to add a new *pro forma* Firm Deferred Delivery (FDD) service agreement specifically for customers who will be charged market-based rates for firm storage service resulting from Northern's planned expansion of its Redfield storage field. Northern requests an effective date of September 14, 2007. As discussed below, the Commission accepts the proposed tariff sheets to become effective September 14, 2007, as requested.

**I. Background**

2. On December 19, 2005, Northern held an open season to determine interest in an expansion of its aquifer storage field in Redfield, Iowa. The open season notice stated that Northern intended to seek market-based rates and indicated a maximum and minimum price, both of which were in excess of the existing maximum FDD rate. Customer response to the open season was positive and several parties submitted binding precedent agreements.

3. In a declaratory order dated November 16, 2006, the Commission authorized Northern to charge market-based rates to the shippers that signed the precedent agreements for FDD service resulting from the expansion of the Redfield storage field.<sup>2</sup> The Commission determined that Northern's proposal met the requirements set forth in

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<sup>1</sup> Fourth Revised Sheet No. 447, First Revised Sheet No. 448, and First Revised Tariff Sheet No. 449 to Northern's FERC Gas Tariff, Fifth Revised Volume No. 1.

<sup>2</sup> *Northern Natural Gas Co.*, 117 FERC ¶ 61,191 (2006) *reh'g denied*, 119 FERC ¶ 61,072 (2007).

section 4(f) of the Natural Gas Act (NGA)<sup>3</sup> and the implementing regulations<sup>4</sup> for underground natural gas storage providers to charge market-based rates. However, the Commission clarified that the order did not allow Northern to charge market-based rates for any subsequent sales of the expansion storage capacity, whether that be upon contract expiration, bankruptcy, or any other event leading to turned back capacity.<sup>5</sup>

## II. Description of Filing

4. In the subject filing, Northern proposes to add a new *pro forma* service agreement specifically for the market-based rate FDD customers. Northern explains that the capacity covered by the signed precedent agreements is anticipated to be available on June 1, 2008. Northern states that upon Commission approval of the proposed *pro forma* service agreement, it will tender market-based rate service agreements to each party that was awarded capacity in the open season. Northern states that the tendered agreements will set forth the individual rates that were accepted by Northern in the open season.

5. In addition, Northern states that the proposed *pro forma* FDD market-based rates service agreement provides that any shipper's respective rights contained in a precedent agreement will remain in effect until the earlier of the date set forth in the precedent agreement or the in-service date of the necessary facilities. Northern explains that this provision allows Northern and each of the market-based rate FDD shippers to execute the agreement in advance of Commission authorization, such that Northern may proceed with construction immediately after the Commission's approval of the certificate.

6. Finally, Northern's new *pro forma* service agreement provides that:

Shipper has a right of first refusal as described in section 52 of the General Terms and Conditions of Northern's FERC Gas Tariff for the capacity herein, *subject to any rate authority applicable at that time* (emphasis added).

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<sup>3</sup> The Energy Policy Act of 2005 added a new section 4(f) to the NGA, stating that the Commission may authorize natural gas companies to provide storage and storage-related services at market-based rates for new storage capacity (placed into service after August 8, 2005, the date of enactment of the Act), even though the company cannot demonstrate that it lacks market power. *See* Energy Policy Act of 2005, Pub. L. No. 109-58, section 312, 199 Stat. 594, 688 (2005) (to be codified at 15 U.S.C. § 717 c(f)(1)(A)).

<sup>4</sup> 18 C.F.R §§ 284.501, 284.502, and 284.505 (2007). *See Rate Regulation of Certain Natural Gas Storage Facilities*, Order No. 678, 71 FR 36612 (June 27, 2006), FERC Stats. & Regs. ¶ 31,220 (June 19, 2006).

<sup>5</sup> 117 FERC ¶ 61,191 at P 22.

### **III. Notices, Interventions and Protests**

7. Notice of Northern's filing issued on August 15, 2007. Interventions and protests were due as provided in section 154.210 of the Commission's regulations, 18 C.F.R. § 385.210. Pursuant to Rule 214, 18 C.F.R. § 385.214 (2007), all timely filed motions to intervene and any motions to intervene out-of-time filed before the issuance date of this order are granted. As discussed in detail below, Xcel Energy Services Inc. (Xcel) filed a protest and request for clarification, and Minnesota Energy Resources Corporation (MERC) filed comments in support of Xcel's protest. On September 6, 2007, Northern filed an answer. Generally, the Commission does not permit answers to protests (18 C.F.R. § 385.213(a)(2)(2007)). However, the Commission will accept Northern's answer as it aids in the Commission's review of the proposal.

8. Xcel states that, as a member of the group of customers targeted by Northern's filing, it does not oppose the adoption of a *pro forma* service agreement tailored for the market-based rate FDD customers. However, Xcel is concerned that Northern's proposed *pro forma* service agreement may restrict customers' rights of first refusal (ROFR) contrary to the NGA and Commission policy. Xcel requests clarification that the ROFR provision included in Northern's proposed *pro forma* service agreement is a regulatory ROFR, as established in Order Nos. 636 and 637 and mandated by Commission policy, and not a contractual ROFR.

9. In support of its position, Xcel argues that section 4(f) of the NGA does not exempt services for which the Commission has authorized market-based rates from the abandonment protection afforded by NGA section 7(b).<sup>6</sup> Xcel also argues that nothing in Order No. 678 indicates that the Commission intended the regulations implementing section 4(f) to strip market-based rate customers of their statutory abandonment protection under section 7(b).

10. Xcel acknowledges that pursuant to Order No. 637, the regulatory ROFR only applies to maximum rate contracts, and therefore, does not apply to discounted rate or negotiated rate contracts. However, Xcel states that in every case where the Commission found a regulatory ROFR was not required, service was either provided at a rate below the maximum recourse rate or the shipper had the option of taking service at the maximum recourse rate. Xcel argues that this is not the case for the FDD market-based rate customers in this matter. According to Xcel, when the customers bid on the Redfield

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<sup>6</sup> Section 7(b) of the NGA provides in relevant part:

No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained. . . .

expansion capacity during the open season, they could not require Northern to provide the expansion service at maximum recourse rate. Xcel states that Northern notified bidders of its intent to seek market-based rate authority and declined to inform them of what the maximum recourse rate would be based on the costs of the expansion project.

11. In addition to the request for clarification, Xcel protests Northern's use of a rate other than the maximum recourse rate as the ceiling rate in the ROFR process. Xcel argues that the ROFR language in the *pro forma* service agreement should ensure that upon the expiration of their contracts, customers will be able to retain their capacity if they are willing to pay the maximum recourse rate then in effect for FDD service. Xcel contends that, as written, the provision leaves the door open for Northern to request an extension of market-based rates twenty years after Northern made the decision to expand the Redfield storage field. Xcel argues that permitting Northern to charge market-based rates in perpetuity is contrary to the Commission's November 16, 2006 declaratory order. Xcel explains that the declaratory order limited Northern's market-based rate authority to the initial terms of the service agreements entered into by Northern and the shippers during the open season. Xcel asserts that the highest rate Northern may charge any of the market-based rate FDD customers following the primary term of their service agreements is the maximum recourse rate in effect at the end of the primary term, unless the parties agree to a higher negotiated rate.

12. Further, Xcel argues that the purpose of section 4(f) is to encourage the construction of new storage facilities, not to guarantee that a monopoly service provider can forever charge rates above the maximum cost-based rates. Xcel contends that the limited market-based rate authority granted in the declaratory order was sufficient to encourage Northern to expand its storage facility and the Commission should not grant additional market-based rate authority to Northern without a showing that Northern lacks market power.

13. Xcel requests the Commission to direct Northern to modify the *pro forma* service agreement so that it is consistent with all other Northern service agreements to which the regulatory ROFR applies. Specifically, Xcel would like the ROFR provision to state, "Shipper has a right of first refusal as described in section 52 of the General Terms and Conditions of Northern's FERC Gas Tariff for the capacity herein," without the contingency "subject to any rate authority applicable at the time."

14. MERC states that it supports the relief requested by Xcel in its protest. MERC supports the grant of ROFR rights for Northern's market-based rate FDD service, but feels that the "subject to" language in the *pro forma* service agreement is not clear and could be interpreted to deny a customer the ability to exercise its ROFR at the then-effective maximum recourse rate.

15. In its answer, Northern states that by adding the ROFR provision to its *pro forma* service agreement, it was providing the expansion shippers the right to retain their firm

storage capacity at the end of their agreements, at whatever rate is applicable at that time. Northern contends that Xcel wrongly requests that the Commission decide in advance an issue that the Commission by policy leaves for a later determination – the rate treatment of the expansion facilities.

#### **IV. Discussion**

16. We find Northern's proposed tariff sheets to be just and reasonable and accept them to become effective September 14, 2007. Northern's proposed *pro forma* service agreement for the shippers who will be charged market-based rates for the firm storage service resulting from the expansion of the Redfield storage field is consistent with the Commission's November 16, 2006, declaratory order. In that order, we found that Northern met the criteria necessary to charge market-based rates under section 4(f) of the NGA and the implementing regulations. The Commission also limited Northern's market-based rate authority in the declaratory order, stating that Northern is not permitted to charge market-based rates beyond the primary terms of the relevant service agreements. The Commission established this limitation because Northern did not provide adequate shipper protection against the possible use of market power beyond the terms of these agreements.

17. Xcel is concerned that Northern's filing violates the limitations set forth by the Commission in the declaratory order. Xcel finds acceptable the standard phrase for ROFR rights contained in all of Northern's *pro forma* service agreements: "Shipper has a right of first refusal as described in section 52 of the General Terms and Conditions of Northern's FERC Gas Tariff for the capacity herein." However, Xcel is concerned that Northern's addition of the phrase "subject to any rate authority applicable at the time" will enable Northern to continue market-based rates in perpetuity even though cost-based rates will apply at the end of the contract. Xcel maintains that under the provisions of the Commission's November 16, 2006 declaratory order, cost-based rates will apply at the end of the contract, and it argues shippers, therefore, should have the benefit of the regulatory ROFR. As noted above, MERC supports Xcel's pleading. Specifically, MERC objects to Northern's proposal to condition the shipper's ROFR "to any rate authority applicable at the time." The Commission does not agree with Xcel's and MERC's interpretation of the ROFR provision in Northern's proposed *pro forma* service agreement.

18. By making its ROFR provision subject to the rate authority applicable at the end of the contract, the Commission understands that Northern is recognizing that the type of rate authority in effect at the expiration of the contract will determine the type of ROFR the customers will receive. If at the end of the contract term, Xcel would be paying the maximum rate, under the tariff provision, it will be entitled to a regulatory ROFR. However, if sometime before the expiration of the contract, Northern proposes additional protections against the exercise of market power relating to the sale of capacity after the expiration of the primary term of the service agreements, the Commission will determine

at that time whether the protections are adequate and the extent to which market-based rates should apply beyond the primary term of the service agreement. If Northern should satisfy the requirements for extending market-based rates, Xcel would not be entitled to a regulatory ROFR. The declaratory order left this possibility open, which Northern recognizes in the final phrase of its ROFR provision.

19. Northern's filing is consistent with the limitations established in the declaratory order.<sup>7</sup> The Commission finds the tariff sheets to be just and reasonable and accepts them to become effective September 14, 2007.

The Commission orders:

The proposed tariff sheets listed in footnote 1 are accepted to become effective September 14, 2007, consistent with the discussion in this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>7</sup> *Northern Natural Gas Co.*, 117 FERC ¶ 61,191 (2006) *reh'g denied*, 119 FERC ¶ 61,072 at P 22 (2007) (stating that the Commission's actions in the declaratory order do not extend to permitting Northern Natural to charge market-based rates for any subsequent sales of the expansion storage capacity).