

141 FERC ¶ 61,190
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

December 5, 2012

In Reply Refer To:
Northern Border Pipeline Company
Docket No. RP12-1093-000

Andrews Kurth LLP
Attention: Mark F. Sundback
1350 I Street, NW
Suite 1100
Washington, DC 20005

Dear Mr. Sundback:

1. On September 27, 2012, Northern Border Pipeline Company (Northern Border) filed a petition for approval of a stipulation and agreement (Settlement) that provides for a reduction in rates proposed to become effective January 1, 2013, and eliminates the need for Northern Border to file a general rate case pursuant to section 4 of the Natural Gas Act (NGA).

2. As discussed below, the Commission approves the Settlement, as modified, because it appears to be fair and reasonable and in the public interest. This approval is subject to Northern Border modifying the Settlement to remove the provision that, with respect to future changes to the Settlement sought after its approval, purports to bind the Commission to the more rigorous application of the statutory “just and reasonable” standard of review that is often characterized as the *Mobile-Sierra* “public interest” standard. The Commission’s approval of the Settlement is also subject to Northern Border filing tariff records to implement the Settlement, as discussed below.¹

¹ *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) (*Mobile*); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956) (*Sierra*). As the Supreme Court has found, the NGA’s “just and reasonable” standard is the only statutory standard of review. *Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1 of Snohomish County, Washington*, 554 U.S. 527, 545 (2008) (*Morgan Stanley*).

3. Northern Border maintains that the Settlement will conserve the resources of the Commission and shippers and will achieve a resolution of certain matters with greater commercial certainty than would be the case if the parties litigated an NGA general section 4 rate proceeding. Northern Border asserts that the Settlement is broadly supported or not opposed by any customers that participated in the negotiation and drafting of the Settlement. Northern Border estimates that such customers (Supporting/Non-Contesting Participants that are listed in Appendix E to the Settlement) represent in excess of 95 percent of the contracted responsibility for the costs of firm capacity on the Northern Border system.

4. Northern Border states that a previous settlement in Docket No. RP06-72 resolved all issues raised in Northern Border's then-pending NGA general section 4 rate proceeding (2006 Settlement). According to Northern Border, Article II.B of the 2006 Settlement required it to file a new NGA section 4 general rate case no later than the sixth annual anniversary of the last day of the month in which the Commission issues an order approving the instant Settlement.

5. Northern Border explains that on August 13, 2012, following extensive settlement negotiations, and in anticipation of filing the Settlement, it asked the Commission to modify the 2006 Settlement language. Further, states Northern Border, the Commission amended the original language in the 2006 Settlement to extend Northern Border's obligation to file its next NGA section 4 general rate case until four months after the Commission issues an order that does not approve the Settlement.² However, Northern Border adds that, if the Settlement is approved, Northern Border's obligation to file a new NGA section 4 general rate case pursuant to the 2006 Settlement will be deemed satisfied.

6. Northern Border states that it and the Supporting/Non-Contesting Participants believe that the Settlement is fair and reasonable and in the public interest. Northern Border contends that the Settlement provides for a significant rate decrease, as well as rate certainty. Additionally, Northern Border submits that the Settlement does not implicate any new policy considerations, does not impact any pending cases, and does not address any issues of first impression. Northern Border explains that the Settlement is a black box settlement specifying rates of depreciation for various classes of property and reduced rates that it proposes to become effective as of January 1, 2013, and that these actions would not have occurred absent the Settlement.

² *Northern Border Pipeline Co.*, 140 FERC ¶ 61,145 (2012).

7. Public notice of the Settlement was issued on October 10, 2012. Interventions and protests were due on or before October 15, 2012. Pursuant to Rule 214 (18 C.F.R. § 385.214 (2012)), all timely-filed motions to intervene and any unopposed 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. The Settlement is unopposed.³

8. Northern Border maintains that expeditious approval of the Settlement by the Commission will reduce any period of uncertainty in the marketplace regarding the rate and service-related issues that are the subject of the Settlement. Northern Border asks the Commission to approve the Settlement in its entirety without modification or condition.

9. The major features of the Settlement are as follows: Article I sets out the background of the Settlement and states that it is an indivisible package that is intended to resolve all matters that could be raised in a Northern Border NGA section 4 general rate case that otherwise would be required by the 2006 Settlement.

10. Article II contains various provisions relating to a filing moratorium established by the Settlement and conditions under which Northern Border can adjust rates in the future. This article also provides in part that Northern Border and all other parties will be free to advance legislative and regulatory changes of general industry-wide applicability, unless they advocate positions that would undermine the effectiveness of the Settlement. Northern Border is precluded from making an NGA section 4 general rate filing to change Settlement base rates before January 1, 2016. Article II.A.2 also prohibits exercise by the settling parties of their rights under NGA section 5 to file a complaint seeking modification of the terms of the Settlement.

11. Article II further states that nothing in the Settlement prohibits Northern Border during the term of the Settlement from making any filing, including an NGA section 4 limited rate case filing, to adjust rates prospectively to reflect the cost-of-service impact of “Eligible Costs,” which are defined as costs resulting from compliance with any new regulations or legislation that becomes effective after September 27, 2012. These “Eligible Costs” are expenses related to: (a) environmental compliance obligations (such as climate change and greenhouse gas emissions); (b) compliance with requirements to use control technology for emissions as mandated by the Environmental Protection Agency; (c) Commission-mandated initiatives implemented on an industry-wide basis; and (d) additional pipeline safety requirements issued by the U.S. Department of Transportation. Article II.A.5.c. permits such a limited rate case filing only with regard to cost-of-service impacts that exceed \$15 million annually. Further, Article II.B requires

³ Sequent Energy Management, L.P. filed comments in support of the Settlement. No other intervenors filed comments.

Northern Border to file a new NGA section 4 general rate case no later than January 1, 2018.

12. Article III provides that, within 15 business days of the date of Commission approval of the Settlement, Northern Border will file tariff records consistent with the *pro forma* tariff records contained in Appendix A to the Settlement that will reflect the modified tariff provisions to become effective as of January 1, 2013. As provided in the *pro forma* revised tariff records and changes in the forms of service agreements reflected in Appendix A, Northern Border will use only Dekatherms as the standard contracting unit. This Article further provides that conversion of existing agreements from volumetric units will be accomplished by multiplying a shipper's Maximum Receipt Quantity by the currently-effective Posted Btu Factor at the point of primary receipt. Additionally, Northern Border will submit revised tariff records implementing reservation charge credits for unplanned and planned system outages that impact firm capacity. The Settlement states that the reservation charge credit language is intended to conform with Commission policy in existence at the time the Settlement was filed.⁴ Finally, Northern Border will submit revised tariff records implementing system modifications to automate segmentation for capacity release transactions. The Settlement states that certain provisions in the Northern Border tariff that were established in the 2006 Settlement will remain in effect. These tariff provisions concern posting of available firm capacity and the Right of First Refusal for short-haul contracts.

13. Article IV establishes Settlement rates for all existing and new maximum recourse rate service agreements. Rates for Rate Schedule T-1 services will be stated and charged based on mileage. The mileage-based reservation rate for the long-term (at least 12 consecutive months) Rate Schedule T-1 service within the path from Port of Morgan, Montana, to Ventura, Iowa, will be \$0.0286 per Dth per 100 miles. Within the path from Ventura, Iowa, to North Hayden, Indiana, the base rate will be \$0.0307 per Dth per 100 miles. The Settlement provides for a composite depreciation rate (including negative salvage) of 2.19 percent. Article IV also provides that the maximum base rate for Rate Schedule PAL will be \$0.3713 per Dth, that the monthly multipliers for seasonal short term service in effect at the time the Settlement is filed will continue, and that Northern Border will continue to apply commodity rates on a uniform system-wide basis stated as a rate per 100/Dth miles.

14. Article V generally describes the process by which the Settlement rates will be implemented and provides for non-Settlement rates for parties that contest the Settlement. As stated above, the Settlement provides that, within 15 business days from the date of the Commission's approval of the Settlement, Northern Border will file revised tariff records to become effective as of January 1, 2013. If the Commission accepts that

⁴ Northern Border cites *Kern River Gas Transmission Co.*, 139 FERC ¶ 61,044, at PP 11-16 (2012).

compliance filing after January 1, 2013, Northern Border will implement billing adjustments to collect or credit to each customer the difference between the rates in effect at the time the Settlement is filed and the Settlement Rates.

15. Article VI generally describes how the Supporting/Non-Contesting participants are bound by the Settlement. Article VI states that neither Northern Border, nor any person or party, will be bound or prejudiced by any part of this Settlement unless it becomes effective in accordance with its provisions. Article VI also acknowledges that the Commission's approval of this Settlement will not constitute approval of, or precedent regarding, any principle or issue.

16. Article VII governs the effectiveness of the Settlement and establishes that the date on which the Settlement will be deemed approved will be the first day of the month after issuance of a final and non-appealable Commission order without any modification to the Settlement. Separately, Article VII includes provisions in the event the Settlement is approved with modifications. Article VII of the Settlement also provides that the standard of review for any proposed future change to the Settlement shall be the "public interest" standard set forth in *Mobile-Sierra*.

17. As discussed below, the Commission finds that the Settlement appears to be fair and reasonable and in the public interest, and, therefore, the Commission approves the Settlement pursuant to Rule 602(g),⁵ subject to modification, as described below.

18. As stated above, Article VII of the Settlement contains a provision that would impose the *Mobile-Sierra* "public interest" standard of review on any future changes to the Settlement following its approval. Because the terms of the Settlement, if approved, will be incorporated into the service agreements of all present and future shippers,⁶ the Commission finds that the *Mobile-Sierra* presumption, as defined by the U.S. Supreme Court,⁷ does not apply to the Settlement. As the Commission has stated in several recent orders, in the context of reviewing settlements that do not involve "contract rates," the Commission has discretion as to whether to approve a request to impose the more rigorous application of the statutory "just and reasonable" standard of review that is often

⁵ 18 C.F.R. § 385.602(g) (2012).

⁶ See, e.g., Northern Border Pipeline Company, U.S. Shippers Service Agreement, Rate Schedule T-1, Article 12.

⁷ *Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1 of Snohomish County, Washington*, 554 U.S. 527, 546 (2008); *NRG Power Mktg. v. Me. Pub. Utils. Comm'n*, 130 S.Ct. 693, 700 (2010).

characterized as the *Mobile-Sierra* “public interest” standard of review.⁸ The Commission also has stated in those orders that it will not approve imposition of that more rigorous application of the “just and reasonable” standard of review to future changes to settlements sought by the Commission or non-settling third parties, absent compelling circumstances such as those that the Commission found to exist in *Devon Power*.⁹ In the instant case, the Commission finds that the circumstances surrounding Northern Border’s Settlement do not satisfy that test, and thus, the Commission finds it unjust and unreasonable to impose the more rigorous application of the “just and reasonable” standard of review with respect to future changes to the Settlement sought by the Commission or non-settling third parties.

19. While the Commission is requiring the Settlement’s standard of review provision to be modified, the Commission continues to recognize the role of settlements in providing rate certainty. The Commission has discretion whether to initiate NGA section 5 proceedings on its own motion or at the request of others.¹⁰ In deciding whether to exercise that discretion with respect to the instant Settlement or any other settlement, the Commission will take into account the parties’ interest in maintaining the Settlement.

20. The Commission finds that the proposed Settlement appears to be fair and reasonable and in the public interest, and it is hereby approved, subject to modification to remove the provision imposing the *Mobile-Sierra* “public interest” standard on future modifications of the Settlement. The Settlement, which was filed in lieu of a rate case, resolves system-wide rate issues without a hearing and lengthy litigation, consistent with the Commission’s guidance for settlements outside the context of an existing

⁸ See, e.g., *Devon Power LLC*, 134 FERC ¶ 61,208 (2011) (*Devon Power*). See also *High Island Offshore System, LLC*, 135 FERC ¶ 61,105, at P 24 (2011) (*HIOS*); *Petal Gas Storage LLC*, 135 FERC ¶ 61,152, at P 17 (2011) (*Petal*); *Southern LNG LLC*, 135 FERC ¶ 61,153, at P 24 (2011) (*Southern LNG*).

⁹ See *High Island Offshore System, LLC*, 135 FERC ¶ 61,105, at P 25 (2011); *Petal Gas Storage LLC*, 135 FERC ¶ 61,152, at P 18 (2011); *Southern LNG LLC*, 135 FERC ¶ 61,153, at P 25 (2011).

¹⁰ *General Motors Corp. v. FERC*, 613 F.2d 939, 944 (D.C. Cir. 1979); *Southern Union Gas Co.*, 840 F.2d 964, 968 (D.C. Cir. 1988); see also *Iroquois Gas Transmission System*, 69 FERC ¶ 61,165, at 61,131 (1994); *JMC Power Projects v. Tennessee Gas Pipeline*, 69 FERC ¶ 61,162 (1994), *reh’g denied*, 70 FERC ¶ 61,168, at 61,528 (1995), *affirmed*, *Ocean States Power v. FERC*, 1996 U.S. App. LEXIS 11096 at *18.

proceeding.¹¹ The Commission's approval of this Settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.

21. Finally, the Commission directs Northern Border to file, in eTariff format, actual tariff records identical to the Settlement's *pro forma* tariff records.

By direction of the Commission. Commissioner Norris is concurring with a separate statement attached.

Kimberly D. Bose,
Secretary.

¹¹ See, e.g., *Dominion Transmission, Inc.*, 111 FERC ¶ 61,285 (2005).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Northern Border Pipeline Company

Docket No. RP12-1093-000

(December 5, 2012)

NORRIS, Commissioner, *concurring*:

I concur in the outcome of this order, which conditionally approves an uncontested settlement (Settlement) that provides for a reduction in Northern Border's rates and eliminates the need for Northern Border to file a general rate case, subject to the Settlement being revised to remove a provision that would bind the Commission and non-settling third parties to the "public interest" standard of review on future changes to the Settlement that they seek. I agree that the Settlement does not establish "contract rates", and that as a result, the public interest presumption does not apply.¹ For the reasons I expressed in my partial dissent in *Devon Power LLC*, however, I disagree that the Commission can or should exercise its discretion to extend the public interest standard of review to non-contract rates, terms, and conditions.² Therefore, I disagree with the analysis in this order of whether the Commission should permit the application of the public interest standard to future changes to the Settlement sought by the Commission or non-settling third parties.³

For these reasons, I respectfully concur.

John R. Norris, Commissioner

¹*Northern Border Pipeline Company*, 141 FERC ¶ 61,190, at P 18 (2012).

²*Devon Power LLC*, 134 FERC ¶ 61,208 (2011), *Norris, dissenting in part*.

³*Northern Border Pipeline Company*, 141 FERC ¶ 61,190 at P 18. I note that I agree with the statement in this order that the Commission "continues to recognize the role of settlements in providing rate certainty," and that when deciding whether to exercise its discretion to initiate Natural Gas Act section 5 proceedings, the Commission "will take into account the parties' interest in maintaining the Settlement." *Id.* P 19; *see also Devon Power LLC, Norris, dissenting in part* at 5-6 (noting the Commission's responsibility to take into account the need for certainty and stability and to respect settlements under the usual "just and reasonable" standard).