

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Northern Natural Gas Company

Docket No. RP03-197-001

ORDER ON REHEARING AND REQUEST FOR STAY

(Issued June 5, 2003)

1. The Northern Municipal Distributors Group (NMDG), and the Midwest Region Gas Task Force Association (MRGTF), filed a request for rehearing of the Commission's "Order Accepting Tariff Filing" issued on January 10, 2003.¹ In that order, the Commission accepted a proposed tariff modification of Northern Natural Gas Company (Northern) in which it sought to remove the five-year term matching cap from its right of first refusal (ROFR) tariff provision, to be effective January 11, 2003. This filing was made consistent with the Commission's Order on Remand in the Order No. 637 proceeding,² in which the Commission removed the five-year cap on the term that an existing shipper must match in order to retain its capacity under the ROFR. As more fully discussed below, the Commission denies rehearing. This decision is in the public interest

¹Northern Natural Gas Co., 102 FERC ¶ 61,020 (2003).

²Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services, 101 FERC ¶ 61,127 (2002) (Order on Remand), reh'g pending. The Order on Remand responded to the order of the United States Court of Appeals for the District of Columbia (Court of Appeals) in *Interstate Natural Gas Association v. FERC*, 285 F.3d 18 (D.C. Cir. 2002) which remanded to the Commission certain issues regarding Order No. 637, FERC Stats. & Regs. Regulations Preambles (July 1996-December 2000) ¶ 31,091 at 31,335-42 (February 9, 2000); order on reh'g, Order No. 637-A, FERC Stats. & Regs. Regulations Preambles (July 1996-December 2000) ¶ 31,099 at 31,629-47 (May 19, 2000); order denying reh'g, Order No. 637-B, 92 FERC ¶ 61,062 (2000).

because it permits the implementation of tariff provisions consistent with the Commission's policies.

Background

2. On December 11, 2002, Northern filed to revise the General Terms and Conditions (GT&C) of its tariff by eliminating from its ROFR tariff provision concerning the five-year term matching cap as permitted by the Commission's "Order on Remand" in the Order No. 637 proceeding issued October 31, 2002. Parties protested the filing, pointing out that several pending requests for rehearing of the Order on Remand were pending. They therefore requested the Commission reject the filing without prejudice, suspend it for the full five-month period or maintain the status quo by granting a request for stay so that the Commission may issue a final, non-appealable order in Docket No. RM98-10-011 which will address, *inter alia*, arguments against the removal of the term matching cap raised on rehearing of the Order on Remand. The protestors argued this approach would prevent Northern from reinstating its ROFR provisions and exposing shippers to the ROFR process without a viable term matching cap, should the Commission reverse itself on rehearing.

3. The Commission accepted Northern's proposal to remove the five-year term matching cap from its tariff because the proposal was consistent with the Order on Remand. Therefore, we denied the parties' request to delay Northern's removal of the five-year cap by imposing a five-month suspension or some other action. The Commission stated that, in INGAA, the Court of Appeals vacated the five-year cap and remanded the issue to the Commission.³ We explained that, on May 16, 2002, we issued an Interim Policy allowing the five-year cap to govern the ROFR until the issuance of an order on remand.⁴ The Commission stated it had now issued that Order on Remand, permitting pipelines to remove the five-year term matching cap. We stated that Section 19(c) of the NGA provides that "[t]he filing of an application for rehearing under Subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order."⁵ Therefore, consistent with the Court of Appeal's holding

³INGAA at 53.

⁴Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services, 99 FERC ¶ 61,185 (2002).

⁵15 U.S.C. § 717r(c) (2000).

vacating the five-year cap and the Commission's decision in the Order on Remand,⁶ we allowed Northern to remove the cap from its tariff, effective January 11, 2003.

Request for Rehearing

4. On rehearing, NMDG/MRGTF argue that the Commission failed to properly exercise its authority under the NGA to protect shippers from Northern abusing its market power. They state that the five-year cap helps to ensure that Northern and others cannot exercise their considerable market power over its members and that it is a necessity for its members who are small, mostly low load factor customers of Northern.⁷ NMDG/MRGTF argue that the Commission's January 10 order is inconsistent with the goal of alleviating the cost burden on a pipeline's captive customers and protecting those customers from the abuse of monopoly power. NMDG/MRGTF argue that the Commission should not permit interstate pipelines to use their market power to the detriment of their customers.⁸ NMDG/MRGTF contend all they want is for the Commission to reject Northern's filing at this time, or take other actions to protect captive consumers pending the issuance of a final-non-appealable decision in Docket No. RM98-10-011.

⁶On November 27, 2002, the American Gas Association (AGA), the American Public Gas Association (APGA), and other parties filed requests for rehearing of the Order on Remand. In their requests, these parties argued that the Commission's decision to remove the term matching cap is contrary to the consumer protection mandate of the Natural Gas Act (NGA), arbitrary and capricious, not supported by substantial evidence, and not based on reasoned decision-making.

⁷They explain that most members are wholly dependent on Northern for firm interstate pipeline transportation capacity because the members serve predominantly residential and commercial heating markets. Because the members must serve the needs of their customers throughout the winter, they state they must maintain supply and capacity resources to meet peak demands under design day conditions. They explain that, given their small size, low load factors, and limited financial resources and staff, most members have not established (and cannot establish) interconnections with other interstate or intrastate pipelines. Request for Rehearing at 3.

⁸Request for Rehearing at 4 (citing *United Distribution Companies v. FERC*, 88 F.3d 1105, 1127 (D.C. Cir 1996)).

5. The parties assert that the Commission's only response (that the action it took in the instant proceeding is consistent with INGAA)⁹ is inadequate. They contend that the Court's decision on remand did not require elimination of the matching cap; it only required the Commission to revisit the issue and to provide reasons in support of the period selected for the cap.¹⁰ They argue that the NGA, which is specifically designed to protect consumers from the pipelines' market power, requires the Commission to prevent the removal of the five-year cap prior to a final determination on the merits in Docket No. RM 98-10-011.

Discussion

6. While it is true that the Court did not tell the Commission to direct pipelines to file tariff provisions removing the five-year cap, the Court did vacate the cap thereby indicating its intent that the cap should not be in effect unless the Commission could justify it. The Commission found in the Order on Remand that it could not justify the five-year cap. Therefore, the Commission permitted pipelines to revise their tariffs to remove the five-year matching cap. And, the Commission has accepted numerous filings allowing pipelines to do so, while rehearing of the Order on Remand is pending. Since Northern's filing is consistent with current Commission policy and the Court's intent that the five-year cap not be in effect absent Commission justification, there is no basis for granting rehearing.

7. NMDG/MRGTF contend that the standards set forth in the APA (*i.e.*, whether justice so requires) and used for determining whether to grant a stay (*i.e.*, weighing the overall public interest and determining whether a party will sustain irreparable harm in the absence of a stay) are easily met in this instance. They argue that, given the gravity of the issues and their importance to consumers, the public interest requires the Commission to fully address their request prior to permitting pipelines to remove the cap because consumers require protection from being irreparably harmed in their negotiations if the cap is removed and then later reapplied. They submit that there is no substantial harm to other parties from continuing the five-year cap at this time because that is the *status quo* under which pipelines and shippers have been operating.

8. The Commission eliminated the five-year matching cap on the term of ROFR bids, in part, on the basis that sufficient regulatory protections were in place to constrain a pipeline's ability to exercise market power. These include the requirement that pipelines

⁹See note 2, *supra*.

¹⁰See Request for Rehearing at 5 (quoting language from the Court's decision vacating the 5-year cap and remanding the issue back to the Commission because the record lacks indicators of the Commission "seriously" tackling the choice of the five-year cap).

sell all available capacity to shippers willing to pay the maximum rate so that a pipeline cannot withhold existing capacity in order to force shippers to bid for a longer term. NMDG/MRGTF's substantive arguments against the removal of the five-year cap are directed to the general requirements of the Order on Remand. Those arguments are more appropriately addressed in that proceeding where rehearing remains pending. Moreover, if the Commission were to reimpose the five-year cap as a result of rehearing or judicial review, the Commission could grant relief to any existing shipper who could show that the absence of the five-year cap had caused it to enter into a longer term contract in the ROFR process than it otherwise would have.¹¹

The Commission orders:

Rehearing is denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

¹¹See *Horsehead Resource Development Co., Inc. v. Transcontinental Gas Pipeline Co.*, 81 FERC ¶ 61,293 (1997) (finding the shipper had agreed to a longer term than it otherwise would have because of the twenty year cap requirement, therefore, entitling the shipper to a reduction in the term of the contract). See also *Williams Natural Gas Co.*, 81 FERC ¶61,350 (1997). But see *UtiliCorp United Inc.*, 84 FERC ¶61,059 (1998) (finding the shipper was not entitled to relief since the case involved a settlement specifically barring the shipper from seeking contract term relief on a retroactive basis). Id. at 61,265.