104 FERC ¶ 61,264
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Northern Border Pipeline Company Docket No. RP03-563-000

ORDER REJECTING TARIFF SHEET

(Issued September 10, 2003)

1. On August 11, 2003, Northern Border Pipeline Company (Northern Border) filed a revised tariff sheet[1] to govern the criteria for an acceptable bid when capacity becomes available. The provision allows firm shippers an opportunity to bid on posted available capacity on a first-come first-served basis, but the award of that capacity to a winning bid at the maximum rate for a shorter path than the posted path shall not be for a term to exceed 31 days. Northern Border proposes that the tariff sheet become effective September 11, 2003. The Commission rejects the tariff sheet, for the reasons given below. We shall require Northern Border to clarify its tariff with respect to bids for capacity. We direct it to respond to comments alleging instances of unreasonable withholding of capacity. This decision benefits the public because consistent with Commission policy it prevents the unreasonable withholding of capacity from customers willing to pay the maximum rate.

Background

2. Northern Border's pipeline system was built in the early 1980's as the Prebuild of the Eastern Leg of the Alaskan Natural Gas Transportation System and was constructed to accommodate long-term contracts for mainline capacity between specific receipt and delivery points. Northern Border spans 1,249 miles, with a design capacity of 2.4 Bcf/day. Several of Northern Border's long-term contracts will be transitioning to shorter term contracts and the capacity may no longer be subject to a right of first refusal.

3. Section 26.2 of Northern Border's General Terms and Conditions (GT&C) addresses the posting of available firm capacity. Currently effective Section 26.2(a) provides that Northern Border will post available capacity, the criteria for an acceptable

[1] Fifth Revised Sheet No. 270, to FERC Gas Tariff, First Revised Volume No. 1.

bid, the method for determining the best bid as referenced in Section 26.4(a), and the bid closing date on its web site. The bid period varies based on the length of the term of the bid. Section 26.2(b) provides that if no acceptable bids are received during a bid period pursuant to Section 26.2(a), Northern Border will post the capacity on its web site and award the capacity on a first-come, first-served basis at a mutually agreed upon rate under Rate Schedule T-1. Northern Border reserves the right not to award capacity at less than the maximum rate. Northern Border states it includes a specific path in the posted criteria for an acceptable bid. Northern Border states further that the available mainline capacity associated with the initial posting under Section 26.2(a), and the criteria for an acceptable bid is posted under Section 26.2(b)'s first-come, first-served provision. Northern Border denied requests for mainline capacity for a shorter path than the posted path.

Subject Filing

4. Northern Border proposes to revise Section 26.2(b) to clarify that posted available capacity is subject to and remains posted pursuant to the criteria under Section 26.2(a). Northern Border stipulates that if a first-come, first-served bid at the maximum rate is received for a path within, but shorter than the posted path, Northern Border will accept an operationally feasible maximum-rate bid received within 31 days prior to the effective date of a service agreement for a term not to exceed 31 days.

Notice, Interventions, Comments and Protests

5. Notice of the filing was issued on August 14, 2003, providing for the filing of interventions and protests in accordance with Section 154.210 of the Commission's regulations. 18 C.F.R. § 154.210 (2003). Pursuant to Rule 214, 18 C.F.R. § 385.214 (2003), all timely filed motions to intervene are granted and any motions to intervene out-of-time filed before the issuance of this order are granted. Granting late intervention at this stage of the proceedings will not disrupt the proceedings or place undue additional burdens on existing parties.

6. Foothills Pipe Lines Ltd. (Foothills) filed comments in support of Northern Border's filing. Western Gas Resources, Inc. (Western) and the Process Gas Consumers Group (PGC) filed protests to the filing.

Discussion

I. Restrictions on Short-Haul Bids

Parties' Positions

7. Northern Border argues that a pipeline whose rates are mileage-sensitive like Northern Border's, should not be forced to sell its mainline capacity designed and built for a specific path on a short-haul basis, except on a short-term basis. Northern Border claims that selling capacity on a short-haul, long-term basis, strands upstream or downstream capacity, potentially causes bottlenecks in the pipeline's system and may result in costs being shifted to existing long-haul, long-term shippers in the next rate case. Northern Border states that limiting the term of short-hauls will allow opportunities for those shippers who place a higher value on the full path capacity to bid on capacity without being blocked for extended terms by short-haul shippers. Northern Border does not believe a shipper should use segmentation by nomination or capacity release to use portions of long-haul capacity on a short-haul, long-term basis. Northern Border claims its proposal provides a balance between the pipeline's interest, existing long-term, long-haul shippers' interests, and the needs of potential short-haul shippers on the mainline. Northern Border also claims that its proposal will not affect the manner in which a shipper uses its contractual capacity, receipt or delivery point flexibility rights, nominating and scheduling, curtailment, or capacity release under Northern Border's existing tariff.

8. On August 25, 2003, Foothills filed comments supporting Northern Border's proposal. Foothills believes that Northern Border's proposal will allow Northern Border to effectively manage its system capacity to prevent its inefficient use and will minimize the possibility of impeding the transportation of Canadian or Alaskan gas to U.S. markets. Foothills states that Northern Border is an essential link in transporting gas supplies from the U.S./Canadian border to the Midwest U.S. and, if the Commission refuses to permit Northern Border to limit short-haul service contracts on its system, bottlenecks could prevent Foothills' and additional new natural gas volumes from reaching U.S. markets. Foothills asserts that the Commission should carefully consider Northern Border's relationship to the significant efforts underway to develop the gas reserves from Alaska.

9. On August 20, 2003, Western protested Northern Border's proposal stating that Northern Border rejected a maximum rate bid for capacity on its system that Western made on May 22, 2003, because it was for a shorter path than the posted path. Western claims that Northern Border said that the authority to impose "criteria" on bids under Section 26.2(a) extends to bids on capacity posted under Section 26.2(b). Furthermore, continues Western, Northern Border contends it is implicit that when it posted available capacity that Northern Border would reject bids for less than the posted transportation

path. Western also claims that Northern Border asserted it had the right to reject Western's bid because it stranded capacity on the system.

10. Western argues that the Commission should reject Northern Border's full-path condition before awarding available capacity for a term that exceeds 31 days. Western asserts that to impose a geographic "criteria" is contrary to Commission policy. Western states that in Natural Gas Pipeline Company of America (Natural), the Commission explained that its policy under Order No. 636 is that shippers can bid on a geographic portion of the capacity offered for sale, if operationally feasible.[2] Western further states that in Order No. 637, the Commission granted shippers sweeping segmentation rights and those policies support the conclusion that a bidder for available capacity, posted on a first-come, first-served basis, must be awarded the segmented path for which it bids the maximum rate.[3] Western views Northern Border's contention that accepting bids for less than the full transportation path posted would strand upstream capacity as an impermissible argument, since it is based on economic, and not operational, feasibility. Western asserts Northern Border's willingness to accept short-haul bids for 31 days or less does not cure this infirmity. Western claims that in Order Nos. 636, et seq., and 637, et seq., the Commission recognized that competition may adversely affect a pipeline's ability to recover its cost, yet the Commission chose not to insulate the pipelines from the forces of competition. In Order No. 637, the Commission stated, "If pipelines are given the upside potential inherent in lifting regulatory controls over prices and services, it is questionable whether they should have their revenues supported by a ratemaking regime that also guarantees the recovery of all 'prudently incurred' costs."[4] Western objects that Northern Border wishes to insulate itself from the competitive forces that have resulted in a decline of throughput of natural gas from Canada and desires to force shippers to take unneeded and undesired excess upstream capacity. Western states that the Commission

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[2] Natural, 93 FERC ¶ 61,075 at 61,206 (2000).

[3] See Natural at 61,204 and Tennessee Gas Pipeline Company, 91 FERC ¶ 61,053 at 61,190 (2000).

[4] Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services, FERC Stats. & Regs. Regulations Preambles (July 1996-December 2000) ¶ 31,091 at 31,266 (2000) (Order No. 637); order on rehearing, Order No. 637-A, FERC Stats. & Regs, Regulations Preambles (July 1996-December 2000) ¶ 31,099 (2000) (Order No. 637-A); and Order No. 637-B, 92 FERC ¶ 61,062 (2000) (Order No. 637-B), aff'd in part and remanded in part, Interstate Natural Gas Association of America v. FERC, 285 F.3d 18 (D.C. Cir. Apr. 5, 2002), Order on Remand, 101 FERC ¶ 61,127 (2002).

previously rejected the stranded capacity argument[5] proffered by Northern Border here.

11. Western maintains that an exception to the policies underlying Order Nos. 636 and 637 is not warranted by Northern Border's mileage-based rate structure. Western insists that approval of the requested exception would establish a dangerous precedent applicable to pipelines with zone-based rates that would erode the pro-competitive policies of Order Nos. 636 and 637. Western submits the Commission should reject the proposal because Northern Border's requiring shippers to pay increased charges to obtain the desired segment of capacity is unjust and unreasonable. Western asserts the proposal represents an impermissible attempt to change its mileage-based rate structure to a postage stamp rate structure outside of a full NGA Section 4 rate filing, since shippers may be forced to pay the mileage-based rate for a longer transportation path than desired. Western objects that Northern Border's proposal conflicts with the terms of the settlement in Northern Border's prior rate case in Docket No. RP99-322-000, et al.[6] Article III of the aforementioned settlement specifies that, during the settlement period, settlement rates will be based upon a uniform, system-wide, mileage-based rate design without distinction as to the portion of the facilities used. The settlement imposes a moratorium on changes in the settlement rates until November 1, 2005.

12. Finally, Western contends that Northern Border failed to carry its burden of demonstrating the reasonableness of its proposed tariff changes, since Northern Border has not shown that whatever justification may exist for imposing criteria on bids which remain open during a stated bid period under Section 26.2(a), this is insufficient to justify imposing criteria on first-come, first-served bids under Section 26.2(b). Western argues that under Section 26.2(b) there is no need to evaluate competing bids and the currently effective tariff is silent on the issue. Western also contends that it is unjust and unreasonable for Northern Border to withhold capacity until 31 days or less prior to the effective date of short-haul service. Western states this is inconsistent with the concept that the pipeline must award capacity to the first-in-time shipper who offers the maximum rate. Western asserts that Northern Border's proposal does not state when it will award less than full transportation path capacity, even for only 31 days or less and permits Northern Border to disregard a prior bid for less than the full transportation path if that bid was received more than 31 days before the effective date of the new service.

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[5] In Kinder Morgan Interstate Gas Transmission LLC's (KMI) Order No. 637 proceeding, the Commission rejected the pipeline's proposed tariff condition prohibiting new primary points for segmented capacity, if the new points resulted in stranded capacity, unless the pipeline could justify the restriction. KMI, 97 FERC 61,062 at 61,337 (2001), reh'g, 103 FERC ¶ 61,216 (2003).

[6] Northern Border, 93 FERC ¶ 61,261 (2000).

13. Western also requests**,** with respect to Section 26.2(a), that the Commission clarify that Northern Border is only authorized to impose criteria on bids that are necessary to enable the pipeline to evaluate competitive bids, consistent with Commission policy. Western also requests that the Commission prohibit implicit criteria and clarify that Northern Border must explicitly state any criteria it wishes to impose when it posts the capacity on its website.

14. The PGC argues that Northern Border failed to provide sufficient evidence to justify its proposal. The PGC states that Northern Border has not provided any examples of bids for short-hauls unduly interfering with requests for capacity along the entire posted path and that Northern Border's speculation of this occurring does not justify such a dramatic change in the first-come, first-served bid process.

15. The proposal to withhold capacity from the market is without Commission precedent, according to PGC. PGC states it knows of no Commission-approved pipeline tariff that permits such withholding other than for a reservation of capacity for an expansion project. According to PGC, the Commission previously rejected similar restrictive pipeline proposals because they would effectively withhold capacity from the market. For example, in Columbia Gas Transmission Corporation (Columbia), the pipeline proposed to restrict shippers wanting short-term capacity to either biding for a full year's worth of capacity or waiting until the day before the capacity was available for service to acquire short-term capacity. The Commission found the proposal would allow Columbia to withhold capacity and force a party to buy a longer term than it otherwise would.[7] Similarly, because Northern Border's proposal would essentially allow Northern Border to withhold capacity (forcing a shipper to buy more capacity, here a longer path, than it otherwise would), PGC asks the Commission to reject Northern Border's proposal.

16. PGC also states that Northern Border's proposal is contrary to "Commission policy under Order No. 636 [by which] shippers can bid on a geographic portion of the capacity offered for sale, if operationally feasible."[8] PGC states that the Commission's open-access program requires a pipeline to offer all its existing capacity for sale if parties are willing to pay the maximum just and reasonable rate.[9] After Northern Border has posted capacity and no shipper has bid on it, PGC says, that capacity should be available to any shipper seeking a shorter path for any term at maximum rates. To do so would be economically efficient and ensure that the capacity is used and paid for.

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[7] Columbia Gas Transmission Corporation, 94 FERC ¶ 61,301 at 62,107-08 (2001).

[8] Natural Gas Pipeline Co. of America, 93 FERC ¶ 61,075 at 61,206 (2000).

[9] <u>See, e.g.</u>, Tennessee Gas Pipeline Co., 91 FERC ¶ 61,053 at 61,091, <u>reh'g denied</u>, 94 FERC ¶ 61,097 (2001); Columbia Gas Transmission Corp., 99 FERC ¶ 61,136 at 61,565, <u>reh'g denied</u>, 100 F.E.R.C. P61,169 (2002).

17. PGC argues that Northern Border's proposal is also economically inefficient as it attempts to contradict clear market signals. PGC states that Northern Border's proposal would take effect after no shipper has bid on the capacity under Section 26.2(a). PGC attacks Northern Border's proposal as trying to ensure itself the perfect bidder, even though at this point, the market already shows that the perfect bidder is not there.

18. PGC also criticizes Northern Border's proposal to restrict bids for a path less than the posted path to a 31-day term, as it believes this would unduly restrict shipper flexibility. PGC says that shippers who need long-term capacity on a path shorter than the posted path could obtain their desired path only by continually submitting bids every 31 days and facing the continual uncertainty that they would lose their capacity. PGC argues that a shipper under Northern Border's proposal could not tailor its first-come, first-served bid to its own capacity needs. Further, even accepting other restrictions on the first-come, first-served bids, PGC claims the 31-day term limit is far too short to allow a shipper to adequately plan. If the Commission allows such restrictions on first-come, first-served bids, PGC asks that the Commission direct Northern Border to lengthen any term limit under Section 26.2(b) to at least one-year. PGC believes that this would give shippers some planning certainty, while satisfying Northern Border's desire to avoid the possibility of locking-out future long-haul shippers.

19. PGC criticizes Northern Border's suggestion that a shipper seeking a shorter path may bid on the longer, posted path and then release the unwanted segment through a capacity release or nominate only the desired path, while apparently leaving the unwanted capacity unused. PGC says this would shift the risk of unwanted capacity to shippers seeking shorter paths, after it has already been demonstrated that there is no market for a longer path. PGC argues the Commission should not allow Northern Border to insulate itself from the risk that capacity may go unwanted.

20. PGC asks that if the Commission accepts Northern Border's proposal to restrict first-come, first-served bids for less than the posted path, it not require Northern Border to accept only maximum rate bids. PGC acknowledges that a pipeline is not required to accept less than its maximum rate for posted capacity. However, PGC says, pipelines should not be precluded from the opportunity to award discounted rates where appropriate. PGC is concerned that the tariff language proposed by Northern Border would prevent the pipeline from accepting a bid less than the maximum rate for the posted capacity. As such, PGC requests that the Commission direct Northern Border to clarify that its proposal does not prevent the pipeline from awarding capacity at a discounted rate.

Commission Ruling

21. The Commission's policy under Order No. 636 requires a pipeline to offer all its existing capacity for sale to parties willing to pay the maximum rate.[10] Northern Border asserts the Commission should protect it from the economic cost of stranded capacity that would result if it were required to accept short-haul bids for terms greater than 31 days. The Commission's policy involves balancing the right of a pipeline to have the flexibility to manage its capacity to obtain the highest net present value for its capacity with a shipper's right to acquire capacity if it is willing to pay the maximum rate. Here the Commission must balance the right of a short-haul shipper, willing to pay the maximum rates, with the pipeline's right to obtain the highest net present value for its capacity . We shall not permit Northern Border to force shippers that are willing to pay the maximum rate to pay the additional cost of taking a longer transportation path than desired.[11] This would shift the risk of unwanted capacity to shippers seeking shorter paths.[12] In addition, Commission policy allows customers willing to pay the maximum rate for available capacity to dictate the term of the contract under which the rate is offered. However, under Commission policy a pipeline is not required to award capacity in the instance of a short-haul bid or a short-term bid until 90 days before the capacity is available.[13]

22. It is in the public interest for the Commission to allow Northern Border's shippers to submit bids without geographic restrictions. In Natural, the Commission found that under the policy established in Order No. 636 shippers can bid on a geographic portion of the capacity offered for sale, if operationally feasible. Northern Border does not argue that it is operationally infeasible to allow shippers to bid on a geographic portion of its system, and the Commission finds it has not been shown that it is operationally infeasible to do so. Nor has it shown that allowing bids for less than the full posted path for longer

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[10] See, e.g., Tennessee Gas Pipeline Co., 91 FERC ¶ 61,053 at 61,091, reh'g denied, 94 FERC ¶ 61,097 (2001); Columbia Gas Transmission Corp., 99 FERC ¶ 61,136 at 61,565, reh'g denied, 100 F.E.R.C. P61,169 (2002). See also Trailblazer Pipeline Company, 103 FERC ¶ 61,225 at P 81 (2003).

[11] See Columbia Gas Transmission Corporation, 94 FERC ¶ 61,301 at 62,107-08 (2001).

[12] As PGC noted, the Commission previously permitted pipelines to reserve capacity on a limited basis for future expansion (see Northwest Pipeline Corporation, 85 FERC ¶ 61,335 at 62,311-13 (1998)). However, Northern Border fails to explain how the circumstances here are analogous to the situation where a pipeline wished to reserve capacity for future expansions.

[13] Trailblazer Pipeline Company, 103 FERC 61,225 at P 78 (2003).

than 31 days would hamper the development and transportation of natural gas from Canada and Alaska, as Foothills suggests.

23. Furthermore, Northern Border has not met its burden of proof under Section 4 of the NGA that its proposed changes are just and reasonable. The proposal favors long-haul capacity. However, Northern Border has not provided any examples where first-come, first-served short-haul bids have unduly interfered with requests for capacity along the full posted transportation path. The proposal applies only to available capacity, posted under Section 26.2(a) on which no long-haul shipper has bid at the maximum rate. Therefore, Northern Border has not justified its proposal to prevent short-haul shippers from ever acquiring capacity for terms longer than one month. In addition, in accordance with Section 5 of the NGA, we find that Northern Border's procedures for awarding capacity are unreasonably vague, and therefore, unjust and unreasonable. For example, Section 26.2(a) reads: "Company will post available capacity, the criteria for an acceptable bid, the method for determining the Best Bid as referenced in Subsection 26.4(a), and the Bid Closing Date on the Company's web site." It is not clear from the tariff language that Northern Border must accept and allocate capacity to short-term or short-haul bids at the maximum rate, if the bid is the highest value bid, as required by Commission policy. Therefore we direct Northern Border to file to revise Sections 26.2(a) and 26.2(b) of its tariff to clarify that it must accept short-term or short-haul bids for posted capacity at the maximum rate, if that bid is the highest value bid. We also clarify that any criteria imposed by Northern Border must be explicit either in its tariff or in the posting of the available capacity. They may not be implied.

24. Northern Border proposes to reject bids for service with an effective date more than 31 days from the date the bid is received. This is inconsistent with Commission precedent. Commission policy provides that a limit of 90 days from the date transportation service is requested is an appropriate time limit for commencement of service, which allows shippers time to coordinate various transactions. Northern Border has not justified a deviation from this standard.[14]

II. Show Cause Order

25. Western requests that the Commission establish a show cause proceeding to address Northern Border's alleged past tariff violations, craft a remedy for shippers whose rights have been violated, and examine measures to assure that Northern Border does not repeat is tariff violations.

26. The Commission is concerned about the circumstances described by Western regarding Northern Border's awarding of posted capacity earlier this year. We therefore direct Northern Border to respond to Western's comments and provide a factual

[14] Trailblazer Pipeline Company, 103 FERC 61,225 at P 78 (2003).

framework describing the process it went through in posting capacity and awarding contracts. Northern Border is directed to file that information within ten days and Western and other intervenors will be provided up to ten days to respond to Northern Border's response.[15] The Commission will then decide whether further action is required.

The Commission orders:

(A) The tariff sheet listed in footnote No. 1 of this order is rejected, as discussed in the body of this order**.**

(B) Northern Border is directed to clarify Section 26.2(a) and Section 26.2(b), as discussed above.

(C) Northern Border is directed to file, within ten days from the date of this order, to respond to the circumstances relating to its posting of certain capacity, as discussed above and parties will have ten days to file comments on its response.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.

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[15] Although our procedural rules do not permit answers to protests, we acknowledge that Northern Border, on September 2, 2003, filed a response to the protests, which appears to include some information responsive to Western's comments in its protest. 18 C.F.R. § 385.213 (2003). Northern Border may incorporate by reference the relevant information from its answer in its filing in compliance with this order.