

105 FERC ¶ 61,326
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

LSP-Cottage Grove, L.P. and
LSP-Whitewater Limited Partnership

Docket No. RP03-604-000

v.

Northern Natural Gas Company

ORDER ON COMPLAINT AND TO SHOW CAUSE

(Issued December 22, 2003)

1. On September 12, 2003, LSP-Cottage Grove, L.P. and LSP-Whitewater Limited Partnership (Cottage Grove and Whitewater) filed a complaint against Northern Natural Gas Company (Northern Natural) claiming that Northern Natural is improperly billing them for transportation under certain Letter Agreements. Northern Natural claims that it is collecting amounts that are due to it under the Letter Agreements. The Commission finds the Letter Agreements appear to contain provisions that deviate materially from Northern Natural's pro forma service agreements. Such provisions would require Northern Natural to file the Letter Agreements with the Commission and make them available to the public.¹ In addition, some of the provisions containing material deviations appear to be contrary to Section 4 of the Natural Gas Act, the Commission's policies and regulations, or the pipeline's tariff.

2. Accordingly, the Commission is issuing an order to show cause to Northern Natural and requiring it to provide information. It is also providing the parties with the opportunity to comment on making the Letter Agreements available to the public.

¹ Section 4(c) of the Natural Gas Act and Sections 154.1 (b) and (d) of 18 C.F.R. (2003).

3. This order benefits the public because it monitors and enforces contracting practices in accordance with the Natural Gas Act and because it addresses a dispute between a natural gas company and its customers.

Background

4. In 1994 Northern Natural applied for certificate authority to construct facilities to serve cogeneration plants to be built by Cottage Grove and Whitewater in Minnesota and Wisconsin respectively. The cogeneration facilities are each 262 MW combined-cycle facilities.² The pipeline received certificate authority in 1995.³

5. Cottage Grove and Whitewater executed two Letter Agreements dated April 10, 1995 with Northern Natural which governed their contracts for firm and interruptible transportation service. Cottage Grove and Whitewater have requested privileged treatment of these Letter Agreements pursuant to § 388.112 of the Commission's regulations.⁴ Each of the complainants executed a contract for firm transportation, Cottage Grove for TF12 service and Whitewater for TFX service. Each of them also executed two TI or interruptible transportation contracts and a Firm Delayed Delivery (FDD) contract for storage.

6. Cottage Grove became commercially operational on October 1, 1997, and Whitewater, on September 17, 1997.

7. Cottage Grove and Whitewater allege that on June 2, 2003, Northern Natural sent them invoices for surcharges which were allegedly attributable to the Letter Agreements and applied to their TF and TFX agreements for the period January 2003 through March 2003. Cottage Grove and Whitewater allege that on June 16, 2003, Northern Natural again invoiced them for the same type of surcharges, this time, for the period 1997 through 2002. Cottage Grove and Whitewater state they disputed the invoices and posted a surety bond with Northern Natural to cover the disputed amounts.

² The Commission granted Cottage Grove and Whitewater qualifying facility status (Cottage Grove: 69 FERC ¶ 62,130 (1994), 75 FERC ¶ 62,093 (1996) Whitewater: 69 FERC ¶ 62,129 (1994)) and also found they were exempt wholesale generators. (LSP-Cottage Grove, L.P., 77 FERC ¶ 62,035 (1996); LSP-Whitewater, L.P., 77 FERC ¶ 62,034 (1996))

³ Order Granting Certificate and Denying Protest, 73 FERC ¶ 61,260 (1995) (Cottage Grove, Docket No. CP94-763-000); Order Issuing Certificate, 71 FERC ¶ 61,418 (1995) (includes Whitewater, Docket No. CP95-130-000).

⁴ 18 C.F.R. §388.112 (2003).

8. On September 12, 2003, Cottage Grove and Whitewater filed a complaint with the Commission alleging that Northern Natural was improperly billing them for surcharges under their Letter Agreements. They claimed the amount in controversy was \$1.7 million.⁵ Cottage Grove and Whitewater request privileged treatment for most of their Complaint under 18 C.F.R. § 388.112 (2003), FERC Order No. 630-A, and the Secretary's Filing Instructions (Revised August 8, 2003), including the Letter Agreements which they attached to the Complaint.

9. Cottage Grove and Whitewater allege Northern Natural is violating the Letter Agreements entered into between the parties; attempting to collect rates that are greater than the maximum rates in its tariff; violating Section 8 of its tariff by surcharging complainants retroactively;⁶ and departing from its course of performance prior to June 2003. They ask the Commission to find that (1) they are not obligated to pay any of the surcharges under the Letter Agreements; (2) Northern Natural is precluded from collecting the surcharges since they are above the maximum rates in its tariff; and (3) Northern Natural is precluded from collecting the surcharges by the parties' course of performance over the past five years. If the Commission should determine that the Letter Agreements authorize collection of the surcharges, then the complainants ask the Commission to find that most of the surcharges cannot be collected because Northern Natural has made a billing error and, under Section 8 of its tariff, the pipeline may correct billing errors for only six months after the initial invoice.

10. On October 15, 2003, Northern Natural filed an Answer, for much of which it also requested privileged treatment under 18 C.F.R. §§ 385.213(b)(5) and 388.112 (2003), FERC Order No. 630-A, and the Secretary's Filing Instructions (Revised August 8, 2003). Northern Natural characterizes the amounts it is billing as adjustments to the Market Area reservation rate paid by the two customers under their firm contracts. Northern Natural asserts that it is not charging rates in excess of its maximum rates because the reservation rate is discounted and the adjustment to the discounted reservation rate is capped at its maximum rate. Northern Natural also asserts that it comes within an exception in Section 8 of its tariff that permits it to collect amounts due for a period longer than six months after the initial invoice when there has been a mutual mistake of fact.

⁵ They noted that the amount is increasing over time as Northern Natural continues to make these surcharges for current service.

⁶ Fifth Revised Vol. No. 1, Second Revised Sheet No. 216.

11. The complainants met with Northern Natural in September 2003, to discuss the dispute and in October and November 2003, used the Commissions' Alternate Dispute Resolution procedures.⁷ To date, there has been no resolution.

Discussion

12. Contracts for the transportation of natural gas in interstate commerce must be filed with the Commission and made available to the public under Section 4(c) of the Natural Gas Act. The Commission has determined that a contract that conforms to a pipeline's pro forma service agreement need not be filed with the Commission because the Commission has already reviewed the pro forma service agreement pursuant to Section 4 and determined that it is just and reasonable. However, a contract that deviates from the pro forma service agreement has not previously been reviewed pursuant to NGA Section 4 and therefore must be filed so that it can be evaluated to determine that it is not unjust, unreasonable, preferential, or otherwise unacceptable.⁸

13. Thus, contracts that deviate materially from the pro forma service agreement must be filed with the Commission. 18 C.F.R. 154.1(b) and (d) (2003). The Commission has held that a material deviation includes any provision in a service agreement that is not in the approved language of the Form of Service Agreement and (1) goes beyond filling in the blank spaces with the appropriate information allowed by the tariff and (2) affects the substantive rights of the parties.⁹ The Commission has required disclosure of contracts with material deviations because the public disclosure of these agreements prevents undue discrimination through secret rates or terms.¹⁰

14. In examining the Letter Agreements, the Commission has found a number of provisions that appear to deviate in material respects from Northern Natural's pro forma service agreements.¹¹ Consistent with the discussion above, such material deviations

⁷ 18 C.F.R. § 385.604 (2003).

⁸ Williston Basin, 76 FERC at 61,177; Filing and Reporting Requirements for Interstate Natural Gas Company Rate Schedules and Tariffs, Order No. 582, FERC Stats. & Regs. ¶ 31,025 at 31,385 (1995).

⁹ ANR Pipeline Co., 101 FERC ¶ 61,096 P 7 (2002) (ANR).

¹⁰ ANR., 101 FERC ¶ 61,096 P 7 (2002); Williston Basin 76 FERC at 61,177.

¹¹ Northern Natural's pro forma service agreements for TF and TFX service on the date of the Letter Agreements, April 10, 1995, consisted, in relevant part, of Original Sheet Nos. 400-402 (Rate Schedule TF) and Original Sheet Nos. 412-414. Northern

would require that the pipeline file the Letter Agreements with the Commission and make them available to the public.

15. Because the letter agreements appear to contain material deviations, the Commission is considering denying the request that they be treated as privileged and making the Letter Agreements available to the public to satisfy the requirements of Section 4 and its regulations. Therefore, in accordance with § 388.112(d) of the Commission's regulations, the parties are given 15 days in which to comment in writing on the Commission's intent to release these documents. The parties must support any claim for confidentiality with specific detail regarding the basis for the request for privilege and the harm that will result from public disclosure, as well as the legal basis for nondisclosure.¹²

16. The Commission also finds that some of the material deviations in the Letter Agreements may be contrary to the Commission's policies and regulations, or the pipeline's tariff. Since the Complainants' request for privileged treatment of the Letter Agreements is still pending, the Commission will not describe the provisions that may be material deviations or unlawful in this order, but will only identify those provisions generally. Accordingly, the Commission requires Northern Natural to show cause why the following provisions in the Letter Agreements are not unlawful.

17. With respect to Cottage Grove, Northern Natural is required to show cause concerning the lawfulness of the following provisions in the Cottage Grove Letter Agreement. Northern Natural is required to show cause why Paragraph A (page 3 concerning fuel) does not unlawfully collect fuel charges in excess of Northern Natural's maximum fuel charges. Northern Natural is also required to show cause why Paragraph E and Paragraphs E(1) through E(6), both singly and in combination, do not unlawfully collect rates in excess of the maximum TF12 Base Market-to-Market reservation rate. Northern Natural is further required to show cause why Paragraph E and Paragraphs E(1) through E(6) do not unlawfully subject service under one rate schedule to the rates under

(...continued)

Natural's current pro forma service agreement for TF and TFX service is contained in Substitute Third Revised Sheet No. 400, Third Revised Sheet No. 401, Substitute Second Revised Sheet No. 401, and Substitute First Revised Sheet No. 403. Material deviations in the Cottage Grove Letter Agreement appear to include the following: Paragraph A (page 3 concerning fuel); Paragraph E; Paragraphs E(1) through E(7); and Paragraph K. Material deviations in the Whitewater Letter Agreement appear to include the following: Paragraph A (page 2 concerning fuel); Paragraphs E(1) through E(6); and Paragraph K.

¹² Tennessee Gas Pipeline Co., 89 FERC ¶ 61,033 at 61,100 (1999); Williston Basin Interstate Pipeline Co., 76 FERC ¶ 61,030 at 61,177 (1996) (Williston Basin).

another rate schedule and why Paragraphs E(2) through E(4) do not unlawfully constitute minimum bill or minimum take provisions. In addition, if Northern Natural contends that Paragraphs E(1) through E(4) are discounts, then it must show cause why these discounts are authorized. Northern Natural is further required to show cause why Paragraph E(4) does not unlawfully restrict competition from, for example, capacity releases.¹³

18. With respect to Whitewater, Northern Natural is required to show cause concerning the lawfulness of the following provisions in the Whitewater Letter Agreement. Northern Natural is required to show cause why Paragraph A (page 2 concerning fuel) does not unlawfully collect rates in excess of the pipeline's maximum fuel rates and why Paragraphs E(1) through E(6), both singly and in combination, do not unlawfully collect rates in excess of the pipeline's maximum TFX summer and maximum TFX winter rates. Northern Natural is also required to show cause why Paragraphs E(2) through E(4) do not unlawfully constitute minimum bill or minimum take provisions. In addition, if Northern Natural contends that Paragraph A (page 2 concerning fuel) and Paragraphs E(2) through E(4) are discounts, then it must show cause why these discounts are not unauthorized. Northern Natural is further required to show cause why Paragraph E(4) does not unlawfully restrict competition, similar to Paragraph E(4) of the Cottage Grove agreement.

19. The Commission finds these matters must be settled prior to any determination by the Commission concerning the billing dispute. If the parties do not resolve their dispute, then the Commission's determinations may affect the resolution of that dispute and rates charged under the Letter Agreements in the future. If the parties do resolve their dispute, the Commission's determinations may still affect the application of the Letter Agreements in the future. The Commission has an interest in ensuring that the contracting practices required by the Natural Gas Act are observed.

20. The Commission also orders Northern Natural to provide the information specified in the Appendix to this order.

The Commission Orders:

(A) The Commission directs Northern Natural to submit a show cause response, including the information required in the Appendix of this order, within 30 days of the date of this order, as discussed in the body of this order.

¹³ See Natural Gas Pipeline Co., 77 FERC ¶ 61,028 at 61,116-17 (1996); 82 FERC ¶ 61,298 at 62,173-78 (1998).

(B) The parties may submit comments concerning the public disclosure of the Letter Agreements within 15 days from the date of the issuance of this order.

By The Commission.

(S E A L)

Magalie R. Salas,
Secretary.

APPENDIX

Information to be Provided by Northern Natural

As part of its response to this Show Cause Order, Northern Natural is directed to provide the following information:

For LSP-Cottage Grove, L.P.:

1. Copies of all reports Northern Natural has made to the Commission concerning discounts it has given to Cottage Grove under the Cottage Grove Letter Agreement.

2. Copies of all postings on its Electronic Bulletin Board or website concerning discounts Northern Natural has made to Cottage Grove under the Cottage Grove Letter Agreement.

3. A statement as to whether Northern Natural has changed its TF rate design since 1997 and, if so, the resulting rates for Cottage Grove and an explanation of the way in which those rates were derived including numerical calculations.

4. Copies of any filings Northern Natural has made to obtain approval of the Cottage Grove Letter Agreement as a negotiated rate contract and any FERC orders granting such approval.

5. A listing by calendar year of transactions for which the reservation rate was increased under Paragraph E(4) and the amount of such increases.

6. A table showing for each calendar year or portion(s) of a calendar year from October 1, 1997 through December 31, 2003:

(a) the maximum TF12 Market Area base rate in effect;

(b) the maximum amount of each type of adjustment in the TF12 Market Area base reservation rate as a result of each of the following paragraphs--Paragraph E(1), Paragraph E(2), Paragraph E(3), Paragraph E(4), Paragraph E(5), and Paragraph E(6);

(c) the total TF12 Market Area base rate, including all adjustments under the Cottage Grove Letter Agreement, that Northern Natural is now seeking to charge Cottage Grove;

(d) the type and dollar amount of each adjustment to the TF12 Market Area base rate that Northern Natural has already charged Cottage Grove ; and

(e) the dollar amount of the adjustment to the TF12 Market Area base rate that Northern Natural is now seeking to charge Cottage Grove under Paragraph E(3) of the Cottage Grove Letter Agreement.

For LSP-Whitewater Limited Partnership:

1. Copies of all reports Northern Natural has made to the Commission concerning discounts it has given to Whitewater under the Whitewater Letter Agreement.

2. Copies of all postings on its Electronic Bulletin Board or website concerning discounts Northern Natural has made to Whitewater under the Whitewater Letter Agreement.

3. Copies of any filings Northern Natural has made to obtain approval of the Letter Agreement as a negotiated rate contract and any FERC orders granting such approval.

4. A statement as to whether Northern Natural has changed its TFX rate design since 1997 and, if so, the resulting rates for Whitewater and an explanation of the way in which those rates were derived including numerical calculations.

5. A listing by calendar year of transactions for which reservation rates were increased under Paragraph E(4) and the amount of such increases.

6. A table showing for each year or portion(s) of a year from September 17, 1997 through December 31, 2003:

(a) the maximum summer TFX rate in effect;

(b) the maximum winter TFX rate in effect;

(c) the maximum amount of each type of adjustment in the Whitewater Letter Agreement in Paragraphs E(3) through E(6). (Provide this information for the summer months of April through October and the winter months of January through March and November through December if the adjustment differed from the summer months to the winter months);

(d) the total summer TFX reservation rate and the total winter TFX reservation rate, including all adjustments under the Whitewater Letter Agreement, that Northern Natural is now seeking to charge Whitewater;

(e) the type and dollar amount of each adjustment to the TFX summer reservation rate and each adjustment to the TFX winter reservation rate that Northern Natural has already charged Whitewater; and

(f) the dollar amount of the adjustments to the TFX summer reservation rate and the TFX winter reservation rate that Northern Natural is now seeking to charge Whitewater under Paragraph E(3) of the Whitewater Letter Agreement.