

111 FERC ¶ 61,287
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Northern Natural Gas Company

Docket No. RP05-297-000

ORDER ACCEPTING TARIFF SHEET AND SERVICE AGREEMENTS SUBJECT
TO CONDITIONS

(Issued May 27, 2005)

1. On April 29, 2005, Northern Natural Gas Company (Northern) filed two non-conforming contract amendments to its existing service agreements with Metropolitan Utilities District (MUD). Those amendments extend MUD's existing service agreements for firm transportation service under Rate Schedule TF and firm storage service under Rate Schedule FDD to MUD.¹ Northern states that the amendments contain non-conforming provisions necessary to retain MUD, a major customer on its system. The filing includes a related meter agreement for informational purposes, and Tenth Revised Sheet No. 66C to Northern's FERC Gas Tariff, Fifth Revised Volume No. 1 to add the amendments to its list of non-conforming service agreements. Northern requests the revised tariff sheet become effective May 30, 2005.

2. The Commission accepts for filing the non-conforming amendments, subject to the conditions discussed below, and accepts the revised tariff sheet to become effective May 30, 2005, as proposed. This acceptance benefits the public by permitting Northern to retain its current system load and assuring shipper parity on its system.

¹ Northern offers two firm transportation services. Throughput Firm (TF) Service has uniform year-round rates. TFX Service has a higher rate in the winter (November-March) than the summer (April-October). Firm Deferred Delivery (FDD) service is a firm storage service.

Background

3. Northern states that MUD issued a Request for Proposal (RFP) requesting service for its “existing load and growth options” to commence upon termination of its firm deferred delivery and throughput contracts with Northern on May 31 and October 31, 2006, respectively. Northern claims that MUD’s RFP also contemplated a new expansion by a nearby interstate pipeline that would bypass and compete with Northern in the Omaha metropolitan area.

4. Following three months of negotiations, Northern indicates that MUD agreed to extend their existing service agreements for firm transportation under Rate Schedule TF and firm storage under Rate Schedule FDD, which account for 70 percent of MUD’s firm load on Northern’s system [119,500 Dth per day (year around) out of the current volume of 189,500 per day (winter) and 153,650 Dth per day (summer)].

Details of Filing

5. Northern’s filing consists of TF Amendment No. 35, FDD Amendment No. 10, an Administrative Agreement, and a tariff sheet adding the amendments to its list of non-conforming agreements in its tariff. Amendment No. 35 to existing TF Agreement extends Northern’s firm throughput service to MUD at discounted rates through October 31, 2016, and includes a provision that provides the parties may agree to an additional five year extension of service to 2021. Amendment No. 10 to the FDD Agreement extends Northern’s firm storage service to MUD through May 31, 2011. The FDD Amendment provides for service within contract demand at the maximum tariff rate and with certain discounts for overrun service.

6. Northern states that the amendments contain non-conforming provisions necessary to retain MUD on its system. Such provisions under the TF Amendment include: (1) a growth option allowing MUD to increase its maximum daily quantity at certain intervals over the contract term; (2) a commitment by MUD to take its full service requirements from Northern; (3) a commitment by MUD not to bypass Northern in its existing service area; (4) a commitment by Northern to meet MUD’s and its customers’ gas quality requirements; and (5) a “renegotiation” provision should the Commission not approve the subject provisions. Non-conforming provisions under the FDD Amendment include: (1) an option allowing MUD to obtain additional storage service under Rate Schedule PDD (Preferred Deferred Delivery), an interruptible storage service; and (2) the same “renegotiation” provision included in the TF Amendment should the Commission not approve the non-conforming provisions.

Public Notice

7. Public notice of Northern's filing was issued on May 4, 2005 with interventions, comments, and protests due as provided in section 154.210 of the Commission's regulations (18 C.F.R. § 154.210 (2004)). Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.214 (2004)), all timely filed motions to intervene and any 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. MUD filed in support of the instant filing. Aquila, Inc., (Aquila), Cornerstone Energy, Inc. (Cornerstone), Northern Municipal Distributors Group and the Midwest Region Gas Task Force Association (NMDG/MRGTF), and Northern States Power Company and Northern States Power Company-Wisconsin (NSP) filed the protests addressed below. On May 23, 2005, Northern filed an answer. The Commission, therefore, waives its regulations (18 C.F.R. §385.213(b) (2004)) to accept Northern's answer offering assistance to the interested parties to develop a full understanding of its proposal.

Discussion

8. The Commission generally denies the protests and accepts Northern's filing subject to the conditions discussed below. Among other things, the protesters contend that Northern improperly failed to post the capacity for competitive bidding to give other shippers an opportunity to bid a higher rate than that agreed to by MUD. Further, the protesters raise concerns that shippers who do not receive the proposed discounts will ultimately subsidize MUD through a future discount adjustment. In general, the protests raise issues previously addressed by the Commission in a similar proposal in Docket No. RP05-181-000. In that proceeding, Northern filed new non-conforming contracts to retain CenterPoint Energy Minnesota Gas on its system (CenterPoint). On March 23, 2005, the Commission issued an order addressing these arguments and accepting Northern's proposal in Docket No. RP05-181-000 subject to conditions. *Northern Natural Gas Company*, 110 FERC ¶ 61,321 (2005). Except as discussed below, for the reasons given in the March 23, 2005 order, the Commission rejects the instant protests and accepts Northern's proposal.

Firm Throughput Service Amendment No. 35

9. TF Amendment No. 35 paragraphs 4, 7, and 8 provide MUD with the option to obtain full service requirements if it agrees not to bypass Northern's system, and permits MUD to increase its contract demand for firm transportation service at stated intervals to accommodate load growth. Northern's proposed non-conforming contracts with CenterPoint contained similar provisions. The Commission found that such non-conforming contract provisions presented a substantial risk of undue discrimination,

unless offered to all customers on a not unduly discriminatory basis. The Commission accordingly made its acceptance of the CenterPoint contracts subject to the condition that Northern revise its tariff to offer a similar full requirements service and load growth option to all its customers.² On May 4, 2005, after Northern's instant filing, the Commission accepted a filing by Northern in Docket No. RP05-266-000, amending its tariff to offer a full requirements and load growth option as generally available provisions of Rate Schedules TF and TFX. However, the Commission required Northern to eliminate its proposal that this option be limited to shippers with a bona fide ability to bypass Northern, and on May 9, 2005, Northern filed to comply with that requirement.³ In light of Northern's amendment of its tariff to offer the full requirements and load growth provisions to all its customers under Rate Schedules TF and TFX, we accept paragraphs 4, 7, and 8 as consistent with parallel generic provisions under Northern's Rate Schedule TF, subject to the outcome of the revised tariff sheets pending in Docket No. RP05-266-001.

10. Cornerstone objects to Northern's claim that the subject discounts were posted in compliance with the Commission's Order No. 2004 discount posting requirements. Cornerstone states that Northern is obligated to post a discount it awards contemporaneously with the time that the offer is contractually binding. Cornerstone asserts that Northern executed the TF Amendment as of January 25, 2005; thus, it argues that Northern's posting obligation could not have been satisfied prior to January 25, 2005. However, Cornerstone argues that the Amendment permits certain of the discounts to become effective retroactively on January 1, 2005. Therefore, Cornerstone objects in that MUD will enjoy discounted service for a period during which no party received notice of such discount.

11. Cornerstone does not state the date of the posting nor whether that date was significantly after the contract became effective, or whether the discount was posted before gas flowing under the discount was nominated. The Commission designed its posting requirements to require pipelines to post their discounts when such discounts become effective so that other shippers have sufficient notice to determine whether they are similarly situated so they might also request a discount. Generally pipelines may implement discount agreements without making any filing with the Commission, since their tariffs authorize them to discount their rates. Here, however, Northern had to file the discount agreements for approval by the Commission, since the agreements include non-conforming provisions, and the contracts include provision for their renegotiation if

² 110 FERC at P 21-22.

³ *Northern Natural Gas Company*, 111 FERC ¶ 61,141 (2005).

the Commission imposes conditions on its acceptance of them. Thus, while the agreements provide for certain of the discounts to take effect retroactive to January 1, 2005, the contracts do not become fully binding on the parties until approved by the Commission. The Commission finds that the filing of these contracts with the Commission for approval provided all parties sufficient notice of the discount to determine whether they are similarly situated and to seek similar discounts.

12. TF Amendment No. 35 paragraph 2.g provides that MUD's discounted rates will apply to all market area receipt points, contract-specific delivery points and "alternate delivery points in the state of Nebraska." The protestors argue that because the discounted rates granted to MUD are not limited to primary points but rather include secondary delivery points in Nebraska, Northern improperly granted MUD the ability to gain a competitive advantage over non-discounted shippers in terms of developing new markets. Therefore, NSP, in particular, requests the Commission find that, should MUD take advantage of the discount at one or more secondary points, all other shippers will, for the period MUD uses such points, consider themselves similarly situated to MUD and therefore entitled to the same discount at those points. Aquila submits that the Commission should require Northern to amend paragraph 2.g. to reflect discounts "only at points where MUD has competitive pipeline alternatives."

13. Northern's proposed discount to MUD is consistent with the Commission's discounting policies.⁴ The Commission will not pre-determine here that any shipper is similarly situated to a shipper obtaining a discount from Northern merely because the discount covers both primary and secondary points. If Northern denies a shipper a discount at a secondary point, the shipper may file a complaint and the Commission will then entertain arguments regarding whether the shipper is "similarly situated" to the shipper obtaining the discount and whether Northern should grant the discount.

14. In a similar vein, Cornerstone argues that in January 2005, it approached Northern and requested Market Area discounts from receipt points included in the MUD Amendments to delivery points included in the MUD Amendments and that Northern refused to grant the discount even though Northern was negotiating with MUD during this period for the instant agreement. Cornerstone argues the Commission must examine this apparent undue discrimination and, if Cornerstone's concerns are valid, must remedy them. Cornerstone argues that it is similarly situated to MUD and that the Commission

⁴ See *El Paso Natural Gas Co.*, 61 FERC ¶ 61,311 at 62,990 (1993), holding that pipelines may either negotiate discount agreements in which the discount is limited to particular points or agreements under which the discount would apply throughout the contract path or zone for which the customer is paying.

should, therefore, reject the instant undue preferential arrangement or direct that Northern offer the same discounts to all similarly situated Northern shippers. Aquila makes a similar argument.

15. Northern asserted that its proposed discount to MUD is necessary to retain load and meet competitive forces. The Commission's selective discounting policies permit Northern to offer a discount to a shipper to meet competition.⁵ The Commission will not reject Northern's proposal as undue discriminatory, as requested, based upon an argument that Cornerstone did not receive a similar discount. However, if Cornerstone and/or Aquila believes that it is similarly situated to MUD, and that Northern improperly denied it a discount, Cornerstone and/or Aquila should file a complaint with the Commission pursuant to 18 CFR §385. 213 (2004). Based upon the information contained in that filing, the Commission can fully consider the allegations and determine the appropriate action.

16. TF Amendment No. 35 paragraph 9 states that Northern currently uses commercially reasonable efforts to manage the quality of the gas delivered to MUD's distribution facility to meet MUD's and its customers' gas quality requirements. Paragraph 9 provides that Northern will continue to use "commercially reasonable efforts" to manage the nitrogen and carbon dioxide levels in the gas delivered to MUD. In its transmittal letter, Northern states that this provision is appropriate in light of the unique aspects of MUD's gas quality requirements. MUD has a large LNG facility on its system that is sensitive to carbon dioxide during times LNG is being produced and a consumer attached to MUD's system has fuel cells that are sensitive to nitrogen levels. Northern also states that MUD told it that gas quality from the competing pipeline could be better at times because of the competing pipeline's mix of supply sources. Northern further states that it manages its gas quality pursuant to General Terms and Conditions

⁵ Order No. 637-A, *Regulation of Short Term Natural Gas Transportation Services, and Regulation of Interstate Natural Gas Services*, FERC Stats.& Regs.[Regulations Preambles] ¶31,099 at 31,551(2000), *citing, Associated Gas Distributors, et al., v. FERC*, 824 F.2d 981, 1010-1012 (D.C. Cir. 1987) (selective discounting permitted to benefit captive customers by contributing to payment of fixed costs), *cert. denied*, 485 U.S. 1006 (1988); *United Distribution Companies v. FERC*, 88 F.3d 1105, 1141-42 (D.C. Cir. 1996) (affirming the Commission's determination to permit selective discounting and not requiring pipelines to discount); 1A. Kahn, *The Economics of Regulation* 131-33 (1970) (price discrimination one solution to problems of natural monopoly and declining costs).

(GT&C) section 44, and that Paragraph 9 only reaffirms tariff requirements and does not make any other commitments.

17. Section 44 of Northern's GT&C contains provisions concerning the quality of the gas Northern will accept at its receipt points. Section 44(a)(e) requires that carbon dioxide be less than or equal to 2.0 percent by volume. Section 44 contains no provision concerning acceptable nitrogen content. Section 44 also contains no provision concerning efforts Northern might make to manage the quality of gas delivered to customers at particular delivery points to meet the specific needs of the customer at that point. Thus, TF Amendment No. 35 paragraph 9 appears to grant MUD a different quality of service that could result in MUD receiving a better quality of service than Northern's other customers. Accordingly, the Commission directs Northern to either remove this provision from the amendment as unduly discriminatory, or file revised tariff language offering to negotiate with all its other customers similar commitments concerning the quality of gas delivered to that customer.

18. TF Amendment No. 35 paragraph 2.e. provides that the total annual amount paid by MUD for (1) the reservation charges under the instant TF agreement excluding the growth volumes, (2) certain charges for FDD service, and (3) the reservation charges for no-notice system management service (SMS) shall not exceed a total of \$15.1 million through October 31, 2016. This rate cap includes all current and future reservation surcharges. NMDG/MRGTF expresses general concern about the proposal's lack of support for this provision. Aquila argues that Northern did not indicate how much SMS service MUD currently has under contract, nor whether more SMS service could be taken within the cap level. Without this information, Aquila comments that it is not possible to determine whether or not MUD might exceed this cap amount even under the rates already agreed to in the recent rate case settlement, or in future years.

19. Northern's tariff provides for the use of rate formulas in context of proposed discounts. *Northern Natural Gas Company*, 111 FERC ¶ 61, 223 (2005) (finding that the Commission does not limit the types of formulas that may be included in discount agreements as long as they use the same rate design as the pipeline's tariff and the discounted rate remains within the minimum and maximum tariff rate). Here, Northern provided the rate cap amount and set forth the rate components affected by the rate cap. Therefore, the Commission finds the subject provision to constitute a rate cap a permissible discount arrangement under GT&C section 54 of Northern's tariff and will accept the provision without condition.

20. TF Amendment No. 35 paragraph 10 provides a "renegotiation" provision providing that if the Commission finds that the agreement contains impermissible terms, the parties agree to renegotiate the agreements to retain the same economic value to both parties. The Commission recently approved a similar provision stating that such a

provision does not present a “substantial risk of undue discrimination or a substantial negative impact upon other shippers and do[es] not affect the quality of service provided.” *Northern Natural Gas Company*, 110 FERC ¶ 61,321 at P 12 (2005). Accordingly, the Commission accepts the provision, as proposed.

Firm Deferred Delivery Service Amendment No. 10

21. FDD Amendment No. 10 paragraph 3 states that Northern expects additional FDD service to become available in the near future either through the ROFR process or via expansion of Northern’s storage services. Paragraph 3 further provides that MUD may participate in such ROFR bidding process or expansion open season in order to obtain additional FDD capacity. However, if MUD is unable to obtain all of its requested additional firm FDD storage capacity in that manner, Northern commits to provide the balance of the storage service under Rate Schedule PDD, a “preferred” interruptible deferred delivery service. If PDD service is necessary to meet MUD’s storage service requirements, Northern states that it will render and schedule the service as PDD service according to its tariff.

22. NSP argues that this provision may result in MUD gaining early, or otherwise preferential, access to information concerning the timing of the availability of Rate Schedule FDD service or that Northern determined that Rate Schedule FDD capacity sufficient to satisfy MUD will not become available. NSP requests the Commission require Northern to disclose simultaneously to all shippers any information that Northern provides MUD with respect to the future availability of FDD service. Further, NSP requests the Commission direct Northern to inform all shippers when Northern notifies MUD that MUD will not receive the additional FDD capacity, thereby placing all shippers on an equal footing as to the need to consider alternatives to additional FDD service. Aquila and NMDG/MRGTF express similar concerns with respect to the impact of this provision and the future availability of FDD capacity.

23. First, the Commission does not interpret Northern’s proposal as giving MUD a priority over other shippers for the acquisition of available capacity. MUD must obtain its capacity pursuant to the capacity allocation procedure outlined in Northern’s tariff. Second, section 284.13(d) of the Commission’s regulations requires an interstate pipeline to provide all shippers with “equal and timely access” to information relevant to the availability of capacity. 18 CFR § 284.13(d) (2004). The requirement to provide timely access to such information encompasses the obligation to post the future availability of capacity once it becomes known that capacity will become available. The Commission sees nothing in Paragraph 3 that is inconsistent with the requirements of section 284.13(d), which in any event are binding on Northern. Paragraph 3 expressly contemplates that MUD would only obtain any additional FDD service pursuant to the ROFR provisions in Northern’s tariff or any open season for an expansion, and both

procedures would require Northern to give the same information at the same times to all potential participants. Also, MUD could only obtain PDD service pursuant to the generally applicable provisions of Northern's tariff. Accordingly, the Commission denies the protests on this issue.

24. FDD Amendment No. 10 paragraph 6 provides the same "renegotiation" provision in the TF Amendment No. 35 paragraph 10. For the same reason discussed above in P 18, the Commission accepts the provision, as proposed.

Administrative Agreement

25. Northern's filing also includes a March 3, 2003, Administrative Agreement which it filed for informational purposes. Northern claims that the Administrative Agreement it entered into with MUD is a part of an effort to manage the integrity of its system and comply with certain U.S. Department of Transportation Office of Pipeline Safety regulations. Paragraph 9 of the agreement states that in the event another LDC or end user obtains transportation service on Northern for deliveries downstream of the master meter, this new customer will have its volumes measured by a "deduct" meter from the master meter. Such volumes will be included in the master meter volume less the sum of all third parties downstream of the master meter and provided to MUD.

26. NMDG/MRGTF argues that the agreement may impact the rights of shippers that obtain a transportation service agreement for deliveries downstream of the master meter, as such, future shippers should not be bound by an agreement between Northern and MUD.

27. The Administrative Agreement appears to bind MUD and Northern and obligates Northern to certain actions it must take concerning MUD if it garners new customers taking delivery downstream of the master meter. Although NMDG/MRGTF argues that the agreement may have some unspecified effect on future shippers, the Commission notes that Paragraph 9 of the agreement states that Northern's tariff will govern as to scheduling, curtailment, penalties and all other matters dealing with the transportation of gas to the new customer. Accordingly, the Commission does not find any reason to require any modification of the subject agreement, except to note that all shippers on a pipeline's system are subject to the pipeline's generally applicable tariff and that agreements between the pipeline and a third party, not reflected in the tariff, do not govern a shipper's rights on a pipeline's system.

Request for Technical Conference

28. Protestors claim that Northern did not include sufficient information to support its filing, and request summary rejection of Northern's proposal, or in the alternative, a

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suspension of the filing for the maximum term and the establishment of a technical conference or evidentiary hearing.

29. The Commission finds that further discovery, a technical conference, or evidentiary hearing is not necessary in this proceeding. Northern filed the total text of its amendments for review and delineated its non-conforming provisions and explained its reasons for the implementation of these agreements in its transmittal letter. This is sufficient information for the Commission and other parties to this proceeding to determine whether Northern's agreements comply with the Commission's policies.

Tariff Sheet

30. Given the discussion above, the Commission accepts the proposed tariff sheet, subject to the conditions above, to be effective May 30, 2005 as proposed.

The Commission orders:

(A) Tenth Revised Sheet No. 66C is accepted to be effective May 30, 2005, as proposed.

(B) Northern's TF and FDD Amendment Nos. 35 and 10, respectively, are accepted subject to the conditions discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry
Deputy Secretary