

174 FERC ¶ 61,038  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James P. Danly, Chairman;  
Neil Chatterjee, Richard Glick,  
Allison Clements, and Mark C. Christie.

Northern Border Pipeline Company

Docket No. RP21-38-000

ORDER GRANTING PETITION FOR WAIVER

(Issued January 19, 2021)

1. On October 6, 2020, Northern Border Pipeline Company (Northern Border) submitted a request for a temporary, retroactive waiver of section 6.27 of the General Terms and Conditions (GT&C) of its tariff, which details the capacity release provisions for firm shippers to release firm capacity, and related Commission capacity release regulations and policies,<sup>1</sup> to permit Northern Border to correct an error made in a pre-arranged capacity release transaction between Oasis Petroleum Marketing, LLC (Oasis) and Twin Eagle Resource Management, LLC (Twin Eagle). Northern Border requests the temporary, retroactive waiver in order to ensure that Northern Border may bill the intended rate, as requested by both Oasis and Twin Eagle. As discussed below, we grant Northern Border's request for a temporary, retroactive waiver, to implement the mutually agreed-upon rate effective November 1, 2019, the effective date of the capacity release.

**I. Background**

2. Northern Border states that Oasis holds firm capacity under Contract No. FB0720 on Northern Border's pipeline system. Northern Border explains that during October 2019, Oasis temporarily released 50,000 dekatherms per day held under Contract No. FB0720 to Twin Eagle effective November 1, 2019 through March 31, 2020, on a pre-arranged basis pursuant to the competitive bidding requirements set forth in section 284.8 of the Commission's regulations and section 6.27 of the GT&C of its tariff.

3. Northern Border states that when Oasis and Twin Eagle posted the notice for the pre-arranged capacity release on Northern Border's Electronic Bulletin Board, the rate was listed in the posting as a volumetric rate, to be calculated by multiplying the volume of gas transported under the contract by the awarded rate. However, Oasis and Twin Eagle had

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<sup>1</sup> See 18 C.F.R. § 284.8 (2020).

intended for the rate to be determined by multiplying the awarded rate by the total Maximum Receipt Quantity for the contract, not the volumes actually transported. Twin Eagle was awarded the capacity at a volumetric rate, “contrary to Oasis and Twin Eagle’s intent,” which resulted in Northern Border invoicing Twin Eagle at the volumetric rate, which Twin Eagle subsequently paid.<sup>2</sup>

## II. Request for Waiver

4. Northern Border requests a temporary, retroactive waiver of section 6.27 of the GT&C of its tariff, as well as section 284.8 of the Commission’s regulations, and any other Commission regulations necessary, effective November 1, 2019. Northern Border maintains that its retroactive waiver request in the instant filing is being submitted out of an abundance of caution so that Northern Border may correct this oversight by Oasis and Twin Eagle in the capacity release transaction and implement the mutually agreed-upon rates as requested by Oasis and Twin Eagle.<sup>3</sup>

5. Northern Border states that it is unlikely that the mutual oversight by Oasis and Twin Eagle in posting the rate as a volumetric rate discouraged other shippers from bidding on the capacity. Northern Border reports that BP Canada Energy Marketing Corporation did, in fact, submit a bid for the released capacity which Twin Eagle matched. Accordingly, Northern Border argues that correcting the rate to fix the mutual oversight by Oasis and Twin Eagle affects only Oasis and Twin Eagle. Northern Border states that the Commission has consistently approved similar waivers in similar circumstances involving a mutual mistake.<sup>4</sup> Therefore, Northern Border asserts that good cause exists to grant the requested retroactive waiver.

## III. Public Notice and Interventions

6. Public notice of the filing was issued on October 7, 2020. Interventions and protests were due as provided in section 154.210 of the Commission’s regulations.<sup>5</sup> Pursuant to Rule 214,<sup>6</sup> all timely filed motions to intervene and any unopposed motion to

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<sup>2</sup> Waiver Request at 3.

<sup>3</sup> Northern Border reports that both Oasis and Twin Eagle have reviewed the filing and support the request for retroactive waiver.

<sup>4</sup> Waiver Request at 3 (citing *S. Star Cent. Gas Pipeline, Inc.*, 167 FERC ¶ 61,085 (2019); *Iroquois Gas Transmission Sys., L.P.*, 161 FERC ¶ 61,146 (2017)).

<sup>5</sup> 18 C.F.R. § 154.210 (2020).

<sup>6</sup> *Id.* § 385.214.

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. No protests or adverse comments were filed.

#### **IV. Data Request and Response**

7. On December 29, 2020, Commission staff issued a data request, asking Northern Border to: (1) clarify whether it intends to modify the capacity release transaction to reflect the rate originally posted on Northern Border's Electronic Bulletin Board or to reflect the revised rate that BP Canada Energy Marketing Corporation submitted and Twin Eagle agreed to match, and provide a rationale for the proposed rate; and (2) if possible, to provide a copy of Oasis' Offer for the pre-arranged capacity release detailing the release rate.

8. On January 6, 2021, Northern Border filed a response to the staff issued data request. Northern Border states that it does not intend to modify the pre-arranged capacity release transaction to revise the rate, but rather to correct the quantities of gas upon which the rate is applied.<sup>7</sup> Northern Border further explains that it requested this temporary retroactive waiver of its capacity release tariff provisions to correct a mutual oversight by Oasis and Twin Eagle in the pre-arranged capacity release offer and bid posted on Northern Border's Electronic Bulletin Board. Northern Border states that Oasis submitted the pre-arranged capacity release offer identifying a "Volumetric charge only" as the Rate Form/Type Code in the Rate Information section of the offer, with Twin Eagle as its designated replacement shipper. Northern Border notes, in a "Volumetric charge only" form, the reservation component of the capacity release rate is applied only to the actual volume of gas transported on any given day whereas in a "Blended" form, the reservation component of the capacity release rate is applied to all of the released capacity regardless of the actual amount transported on any given day. In response to the staff's second question, Northern Border provided the details of the pre-arranged capacity release offer which provides for the capacity to be released at a rate of \$0.0013 per 100 dekatherm-miles.<sup>8</sup>

#### **V. Discussion**

9. As discussed below, we grant Northern Border's request for waiver of section 6.27 of the GT&C of its tariff and Commission regulations to implement the mutually agreed-upon rates effective November 1, 2019. As an initial matter, we view this as a retroactive tariff waiver request. Below we evaluate Northern Border's request for waiver using a "four-factor test" and the "good cause shown" standard. As noted in *Fayetteville Express*

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<sup>7</sup> Northern Border Response to Data Request 1.

<sup>8</sup> Northern Border Response to Data Request 2, Attachment at 2.

*Pipeline LLC*<sup>9</sup> and *Ruby Pipeline, L.L.C.*,<sup>10</sup> in pending and future tariff waiver requests, the Commission will evaluate tariff waiver requests using its four-factor test. For requests to waive the Commission's regulations, policies, and order conditions, the Commission will continue to use the good cause shown standard.

10. In evaluating requests for waiver of tariff provisions, the Commission considers whether: (1) the underlying error was made in good faith; (2) the waiver is of limited scope; (3) the waiver addresses a concrete problem; and (4) the waiver does not have undesirable consequences, such as harming third parties.<sup>11</sup> We find that the circumstances of the instant case satisfy the foregoing criteria. First, we find that the error was made in good faith because the posting error was inadvertent. We also note that Northern Border submitted this filing to implement the mutually agreed-upon rates effective November 1, 2019 as intended. Second, we find that the waiver requested is limited in scope because Northern Border seeks a one-time, temporary waiver of section 6.27 of GT&C of its tariff for one transaction. Third, we find that the requested waiver addresses a concrete problem because, absent the waiver, Northern Border could not bill the mutually agreed-upon rate as intended. Finally, we find that the requested waiver does not result in undesirable consequences, such as harm to third parties, because Northern Border contends that it is unlikely that the mutual oversight by Oasis and Twin Eagle in posting the rate as a volumetric rate discouraged other shippers from bidding on the capacity. Here, there is no evidence in the record of negative consequences such as harm to third parties due to the requested waiver of Northern Border's tariff provision.

11. For good cause shown, we also grant Northern Border's request for a temporary, retroactive waiver of the Commission's regulations and policies discussed above. Specifically, granting this unopposed waiver will allow the parties to correct the rate in a pre-arranged capacity release transaction to the correct mutually agreed upon rate, and no other shipper on Northern Border's system will be adversely affected. We further note that Northern Border provided information: (1) identifying the regulations for which waiver is sought; (2) identifying the pipeline service agreement and capacity that is the subject of the release; and (3) describing the overall transaction and error, with sufficient detail to permit the Commission and other interested parties to determine whether granting the requested waiver is in the public interest. Accordingly, we find that

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<sup>9</sup> 173 FERC ¶ 61,187, at P 5 & n.6 (2020).

<sup>10</sup> 173 FERC ¶ 61,190, at P 5 & n.8 (2020).

<sup>11</sup> See, e.g., *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,059, at P 13 (2016); see also *Fayetteville Express Pipeline LLC*, 173 FERC ¶ 61,187 at P 5; *Ruby Pipeline, L.L.C.*, 173 FERC ¶ 61,190 at P 5.

Northern Border has provided good cause for waiving these Commission capacity release regulations and policies.

The Commission orders:

Northern Border's request for waiver is hereby granted, effective November 1, 2019, as discussed in the body of this order.

By the Commission. Chairman Danly is dissenting with a separate statement attached.

( S E A L )

Kimberly D. Bose,  
Secretary.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Northern Border Pipeline Company

Docket No. RP21-38-000

(Issued January 19, 2021)

DANLY, Chairman, *dissenting*:

The Commission’s order issued in this docket today grants Northern Border Pipeline Company’s (Northern Border) request for a retroactive waiver of its tariff to permit Northern Border to correct an error made in a pre-arranged capacity release transaction. I recognize that Northern Border has presented sympathetic facts in support of its request. Nevertheless, as I explained in detail in my dissent in *Sunflower*, the approval of such a retroactive waiver exceeds our legal authority under the Natural Gas Act (NGA), as constrained by two legal doctrines: the filed rate doctrine and the rule against retroactive ratemaking.<sup>1</sup>

For these reasons, I respectfully dissent.

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James P. Danly  
Chairman

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<sup>1</sup> *Sunflower Elec. Power Corp.*, 173 FERC ¶ 61,054 (2020) (Danly, Comm’r, dissenting at P 5) (*Sunflower*). Although *Sunflower* is a Federal Power Act (FPA) case, the courts have treated the NGA and FPA as analogous in substance. See *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981) (following its “established practice of citing interchangeably decisions interpreting the pertinent sections of the [FPA and NGA]” due to the relevant provisions being “substantially identical”) (citations omitted).