

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DG 15-090

NORTHERN UTILITIES, INC.

2015 Summer Period Cost of Gas Adjustment

Order Approving Settlement Agreement Regarding PNGTS Refund

ORDER NO. 25,816

September 22, 2015

In this order, we approve the Settlement Agreement that describes how Northern Utilities will distribute the Portland Natural Gas Transmission System refund to its sales and delivery service customers over the next three years.

I. PROCEDURAL HISTORY

On March 17, 2015, Northern Utilities, Inc. (Northern), filed its proposed cost of gas (COG) rate adjustments for the summer period May 1 through October 31, 2015. Northern's filing included an initial proposal to distribute a \$10.5 million refund paid to Northern by Portland Natural Gas Transmission System (PNGTS) pursuant to a Federal Energy Regulatory Commission order. Exhibit 2, Kahl testimony, at 31-32; Transcript of June 2, 2015, hearing (Tr.) at 21. Northern's initial proposal was to distribute the refund to its New Hampshire customers in equal amounts over three years. Exhibit 2 at 37. Shortly before the April 22, 2015, hearing on the petition, Northern revised its proposal to distribute 50% of the refund over the year May 1, 2015, through April 30, 2016; 30% over the 2016-17 year; and 20% over the 2017-18 year (the 50-30-20 proposal). Tr. at 7-8.

Two retail gas suppliers intervened in this docket, Global Montello Group Corp. and Sprague Operating Resources LLC (the Marketers). Their sole interest in this docket was how

the PNGTS refund was to be distributed. The Marketers requested a one-time payment of that portion of the PNGTS refund due to delivery service customers or their marketers, Exhibit 5, Roberts testimony, at 2, which is approximately 20% of the \$10.5 million refund, Tr. at 10.

The Commission approved Northern's 2015 summer period COG rates, but continued this docket to determine the appropriate method for distributing the PNGTS refund. *Northern Utilities, Inc.*, Order No. 25,783 at 9 (Apr. 30, 2015). The Commission scheduled a second hearing for June 2, 2015. *Id.* Immediately prior to the June 2 hearing, the parties engaged in settlement discussions that resulted in an agreement that Northern would distribute the PNGTS refund to both sales and to delivery service customers using the 50-30-20 proposal. Tr. at 13. Northern's witness described the terms of the agreement.

Q. And, is it your understanding that the settlement involves implementing the same allocation that was recently ordered by the Maine Public Utilities Commission in Docket Number 2015-00041?¹

A. (Kahl) Yes. That's correct.

Q. Okay. And, that order was issued on May 12th, 2015. And, is it your understanding that what that order stated was that Northern Utilities shall return to sales service customers the applicable Portland Natural Gas Transmission System refund amount by reducing the demand costs over a three-year period, in the proportion of 50 percent in the first year, 30 percent in the second year, and 20 percent in the third year?

A. (Kahl) Yes. That's correct.

Q. And, is it your understanding that the settlement agreement that's been reached among the Parties in this docket is that those proportions would apply not just to sales service customers, but also to the refund for delivery service customers?

A. (Kahl) That is my understanding.

Q. And, in terms of the interest rate that would be applicable, it would be the -- on the balances, it would be the interest calculated at Northern's short-term borrowing rate, is that correct?

A. (Kahl) That is correct.

¹ The Maine order referenced in this exchange "approve[d] the return of the refund from Portland Natural Gas Transmission System (PNGTS) over a three-year period flowed back through the calculation of the demand rate for Sales Service customers ... in ... decreasing increments of 50%, 30% and 20% over the 3-year period," and "defer[red] a decision on how, and the period over which, the PNGTS refund should be returned to transport customers and the marketers who supply them" May 12, 2015, Order at 1 (emphasis added). The Maine commission issued an order on September 21, 2015, directing Northern to return the PNGTS refund to marketers in a one-time payment rather than the three year method applicable to sales customers.

Tr. at 22-23. At the close of testimony, the Commission polled each party:

Thank you. I heard Mr. Frink [from Commission Staff] say it, but I just want to confirm that everybody else agrees, that the settlement is fair to all the parties, although not what they necessarily wanted, fair, and produces just and reasonable rates. Mr. Brennan [from OCA], you're satisfied on that?

A. (Brennan) Yes. We agree that it is a fair and reasonable settlement.

Q. Mr. Roberts [from the Marketers]?

A. (Roberts) We agree.

Q. And, do the Company's witnesses agree?

A. (Kahl) Yes.

A. (Wells) Yes.

Tr. at 38-39. The Commission directed the parties to file a written agreement memorializing the oral agreement quoted above. Tr. at 17.

Staff filed a Settlement Agreement on June 26, 2015. Exhibit 8. The Settlement Agreement contains the following terms.² Northern shall distribute the refund to its sales service customers and to its capacity-assigned delivery service customers over a 3-year period, so that 50 percent of the total refund is returned in the first year, 30 percent in the second year, and 20 percent in the third year. *Id.* at 1. The refund will be paid through a credit to the PNGTS demand rate. *Id.* Northern will pay interest on the amount not yet refunded at Northern's short-term borrowing rate and will provide a reconciliation of the balance in future COG filings. *Id.* at 2. The parties agreed to enter the pre-filed direct testimonies of the Marketers and the OCA, and the public version of certain data responses by the Marketers. *Id.* Finally, "[t]o the extent that the Commission determines that a waiver is required from Northern's Tariff regarding the method to be employed for distribution of a refund from an upstream capacity supplier, Northern requests such a waiver, and the Parties do not object to the request." *Id.*

² The language of the Settlement Agreement controls to the extent there is a conflict with this summary.

Staff, Northern, and the OCA signed the Settlement Agreement. Exhibit 8 at 3-4. The Marketers did not sign because, they alleged, “there arose a *bona fide* question of whether Northern actually does not have the ability to protect sales customers.” Letter filed June 29, 2015. The Marketers alleged that Northern’s inability to track migration was, in large part, the reason that the Marketers agreed to the settlement. Subsequently, the Marketers questioned whether Northern was in fact unable to track and prevent “transportation customers [from] migrating to sales service in order to take advantage of the price disparity and to obtain the PNGTS refund if the marketers’ proposal for a one-time refund payment was adopted.” *Id.* The Commission granted leave for the Marketers to file an opposition to the settlement, limited to “evidence on the factual question of ‘whether Northern actually does not have the ability to protect sales customers.’” July 30, 2015, Secretarial Letter. The Marketers filed their opposition on August 13, 2015 (Opposition). Staff and Northern responded on August 24 (Staff Response) and August 26 (Northern Response), respectively. The Marketers’ filed a sur-reply on August 27 (Sur-Reply).

II. POSITIONS OF PARTIES AND STAFF

A. The Marketers

The Marketers’ initial proposal was for Northern to distribute the delivery service customers’ share of the PNGTS refund in a single payment to the appropriate marketer. Exhibit 5 at 3. The Marketers participated in the settlement discussion that preceded the June 2 hearing and, at that hearing, accepted Northern’s revised 50-30-20 proposal. Tr. at 13, 24, and 38. The Marketers claim, however, that they acceded to the settlement only because “Commission Staff was acutely concerned with transportation customers migrating to sales service in order to take advantage of the price disparity and to obtain the PNGTS refund if the

marketers' proposal for a one-time refund payment was adopted." Further, according to the Marketers, Northern represented that it could not track the delivery service customers who migrated to sales service so that Northern could prevent them from receiving the refund. Marketers' June 29, 2015 letter; Tr. at 42. The Marketers claim that they thought Northern could not track migrating customers and thus could not "protect" sales customers, so the Marketers accepted the oral settlement during the June 2 hearing. *Id.*

After the June 2 hearing, the Marketers alleged that Northern had misrepresented its inability to track migrating customers, and that they reasonably relied on Northern's supposed misrepresentation when they agreed to the settlement at the hearing. The Marketers now seek to withdraw from the oral settlement, and they object to the other parties' request that the Commission approve the Settlement Agreement. "Northern procure[d] the agreement by means of its negligently offered misrepresentation." Sur-Reply at 2.

B. Northern

Northern disputes that it misrepresented its ability to track migrating customers. Northern attached to its response a transcript from a technical conference in the Maine proceeding referenced above, in which Northern described its relevant capabilities:

[W]here we become not neutral is if we are asked to undertake some kind of administrative tracking to try to figure out who's going to migrate back or forth, why, and whether or not they should get a portion of the refund or not or what portion of the refund. And the -- the more complex that gets, the greater the administrative burden is on us. We don't have a system in place that can do that automatically, and it's -- it's very much a manual process. And the -- the more complex that is, the greater burden, the greater cost to us, and we're -- as we said, we recognize this money is not our money. We also don't want to incur additional cost to have to administrate a complex program.

July 16, 2015, transcript from Maine technical conference at 70 (emphasis added). The Marketers were present at this conference. *Id.* at 2-3. Counsel for the Marketers acknowledged

in the Maine proceeding that Northern *could* track migrating customers and suggested that the issue was not that important to the Marketers:

With regard to the concern about migration, I don't think that it's been shown that there is an inability on the part of Northern to protect sales customers from a migration from transportation customers. And frankly, we'd be perfectly happy to have there be a moratorium on migration for the period of the refund or -- or any other kind of, you know, protection for sales customers to make sure that they're insulated by presumably a transportation customer who might try to get the benefit of the refund. At -- so -- and there's probably a lot of noise around Northern's ability to -- to actually protect sales customers or its inability to protect sales customers from that kind of dilution of the refund. So in sum, marketers' position is, as it's been from the beginning, that there's a calculable amount that was paid in and they should be able to have that back.

Id. at 72-73 (emphasis added).

Northern also agrees with Staff's arguments that the Marketers failed to prove that their characterization of Northern's capabilities was correct, that the information the Marketers did provide violates the confidentiality of settlement discussions provided in Puc 203.20(a), and that the Marketers failed to demonstrate that Northern's inability to stop migrating customers from receiving a refund was a material condition of their participation in the settlement. Northern Response at 1, 3. Northern concluded that "all parties have been afforded sufficient due process and an opportunity to be heard on this matter" and that the Commission should approve the Settlement Agreement. Northern Response at 3.

C. Staff

Staff argues the Commission should approve the Settlement Agreement as filed because the Marketers accepted the settlement at the June 2 hearing without condition and because the Settlement Agreement is consistent with what all parties stated at the hearing. Staff Response at 3-5, 7. Staff argues that whether Northern has the ability to track migration is not a term or condition of the settlement and that, during the June 2 hearing, the Marketers did not insist on

any such condition despite several opportunities to do so. *Id.* at 5-6. Finally, to the extent the Marketers' argument rests on Northern's alleged misrepresentation that it could not track migrating customers, Staff argues that the Marketers did not prove Northern made such a statement. The Marketers' Opposition, according to Staff, does not contain "evidence" on the question the Commission posed but consists of their inadmissible interpretation of confidential settlement discussions that the Commission should disregard. Puc 203.20(a); Staff Response at 2-3.

D. The OCA

The OCA supported the oral settlement at the June 2 hearing, Tr. at 42-43, and signed the written Settlement Agreement, Exhibit 8. The OCA did not file further pleadings regarding the post-hearing dispute described above.

III. COMMISSION ANALYSIS

We encourage parties to settle issues through negotiation and compromise. *Liberty Utilities (EnergyNorth Natural Gas) Corp.*, Order No. 25,797 at 11 (June 26, 2015); *see* RSA 541-A:31, V(a) ("informal disposition may be made of any contested case ... by stipulation [or] agreed settlement"). Even when the parties join a settlement, however, we must independently determine that the result comports with "applicable standards." *EnergyNorth Natural Gas, Inc. d/b/a National Grid NH*, Order No. 24,972 at 48 (May 29, 2009) ("we must scrutinize settlement agreements thoroughly regardless of whether a party appears at hearing to raise objections"). We conduct this analysis to ensure through a transparent process that a just and reasonable result has been reached. *Id.*; *see* N.H. Code Admin. Rules Puc 203.20(b) ("The commission shall approve a disposition of any contested case by stipulation [or] settlement ... if it determines that the result is just and reasonable and serves the public interest"). The

“applicable standard” governing the proposed settlement in this COG case is whether the resulting rates are “just and reasonable.” RSA 378:7; *Liberty Utilities (Granite State Electric) Corp.*, Order No. 25,638 at 15 (Mar. 17, 2014). Therefore, we must review the Agreement according to the just-and-reasonable-rates standard to “provide the public with the assurance that a just and reasonable result has been reached.” *EnergyNorth Natural Gas*, Order No. 24,972 at 48.

The only issue left in this docket is to determine whether the Settlement Agreement’s method for distributing the PNGTS refund to Northern’s New Hampshire customers results in just and reasonable rates. There is no dispute among the parties that the 50-30-20 proposal results in just and reasonable rates as to sales service customers. Exhibit 8; Tr. at 38-39.³ We agree. The PNGTS refund is substantial and would cause a dramatic reduction in rates if it were returned to customers over one year. Northern estimated the 2015 Summer COG rate would be 11 cents if Northern returned the refund in a single year. Staff testified that, “looking back over the last ten years, the lowest rate we’ve ever seen is 40 cents. This year’s rate is around 30 cents. So, [11 cents] seems artificially low.” Tr. at 29. Such a drop in rates would send improper price signals, would cause customer confusion when the rates rise next year, and could provide an incentive for delivery customers to return to sales service to take advantage of the low rates and receive some of the refund intended for sales service customers. Tr. at 28-30. The 50-30-20 proposal contained in the Settlement Agreement represents a fair resolution of these complex issues as to sales service customers and we thus approve it.

Addressing the refund due to transportation customers, Northern and Staff agree that the above rationale behind the 50-30-20 proposal applies equally. At the June 2 hearing, the Marketers also accepted the 50-30-20 proposal, Tr. at 12-13, admitting that it results in just and

³ The Marketers took no position as to sales service customers.

reasonable rates for them as well, Tr. at 38. Following the June 2 hearing, however, the Marketers have attempted to withdraw from the agreement and now oppose its approval.

The Marketers' opposition is not based on an argument that the resulting rates are unjust or unreasonable. Rather, their argument rests entirely on Northern's alleged misrepresentation of an inability to track migrating customers which, the Marketers allege after-the-fact, violates a condition of the settlement. We find that the Marketers' argument is without factual support and is unpersuasive.

First, we find no evidence supporting the Marketers' claim that Northern misrepresented its capability to track migrating customers. Northern said nothing on this issue in its prefiled testimony or at the June 2 hearing. Northern subsequently filed a transcript from a similar Maine proceeding, quoted above, in which Northern plainly said it *could* track migrating customers, but that it would have to do so manually and that it objected to the imposition of such an administrative burden. The transcript is dated July 16, 2015, before the Marketers' August 27 Sur-Reply which the Marketers alleged that "Northern 'made a representation with knowledge of its falsity or with conscious indifference to its truth'" (citation omitted). The Marketers were present at the July 16 session in Maine and did not dispute or otherwise comment on Northern's statement. We find no evidence of any misrepresentation by Northern.⁴ Rather, we find the Marketers' allegations of misconduct to be unfounded.

Second, we find that the Marketers did not condition their acceptance of the agreement on Northern's inability to track customers. Early in the June 2 hearing, counsel for the Marketers

⁴ We refuse to consider what may have transpired during the settlement discussions on June 2. Our rules render such conversations confidential and inadmissible. "All participants in settlement conferences shall treat discussions at settlement conferences as confidential and shall not disclose the contents of such discussions to third parties or seek to introduce them into evidence." Puc 203.20(a). Counsel's inclusion of such material in the Marketers' Opposition was improper.

announced their agreement with the 50-30-20 proposal without raising Northern's inability to track migrating customers as an issue or condition:

MS. FRENCH: Well, actually, we're willing to move toward the position that Northern and the OCA and the Staff have come to, on the condition that we can get all of our -- all of the work that we've created here, because this may be an issue that can repeat itself in the future, that we could put our testimony and our data responses into the record. [⁵]

But both Global and Sprague have indicated a willingness just to go forward on the 50-30-20 proposal ... we just did not have the opportunity to tell the other Parties that, because we were gaining those assents.

Tr. at 13. After Northern's witness described the terms of the settlement, Tr. at 22-23, the Marketers' representative accepted them without condition:

BY MS. FRENCH: Q. Mr. Roberts, isn't it true that Sprague and Global, or Sprague anyway, and I can represent that Global agrees with this, would support the settlement as described by the Company?

A. (Roberts) That is correct.

Q. [E]xplain why now this proposal is at least reasonably acceptable for the purposes of settlement.

. (Roberts) We're certainly disappointed in that we were not refunded directly, the funds that we paid for these rate increase. However, the settlement, in terms of the distribution changes, is a better scenario than a ratable 33 percent across three years.

Tr. at 24. Commissioner Honigberg asked all the parties if they agreed with the settlement and Mr. Roberts confirmed that the Marketers agreed. Tr. at 38. Again, the Marketers failed to express that Northern's inability to track migrating customers was necessary for their participation. Counsel's closing statement was the first on-the-record mention of migration, but counsel acknowledged that Northern's ability to track migrating customers was not part of the settlement:

⁵ The Marketers' testimony is Exhibit 5 and does not discuss Northern's ability to track customer migration. The Marketers never filed their data responses as contemplated by the Settlement Agreement.

And, part of the concerns with the original proposal was that Unitil doesn't have the ability currently to stop migrating customers from taking advantage of a price decrease and moving over to sales service. So, part of what we're hoping is that we would be looking to Northern to implement the functionality that would allow it to control this type of behavior in the future, so that gaming can't occur.

But we understand that's not necessarily part of this settlement, and we understand and do agree that this is a reasonable outcome, given the differing positions of all the parties. Thank you.

Tr. at 42 (emphasis added). The Marketers had several opportunities to put on the record their belief that Northern's alleged inability to track migrating customers was necessary for their participation in the settlement, but failed to do so. We find that the settlement did not contain such a condition and we find that the Marketers did not rely on the representation of such a term in accepting the settlement at the June 2 hearing.

Even if we accepted the Marketers' argument that their misunderstanding of Northern's ability to track migrating customers is sufficient to withdraw from the settlement, we would nonetheless approve the Settlement Agreement over the Marketers' objection for the reasons discussed above. The 50-30-20 proposal embodied in the Settlement Agreement reflects a reasonable balance of competing interests and results in just and reasonable rates as to both sales and delivery service customers.

Finally, the parties discussed whether a waiver is necessary for Northern to implement the Settlement Agreement. Tr. at 8-10. The Settlement Agreement calls for a refund over three years but Northern's tariff provides that "[r]efund programs shall be initiated with each semiannual COG filing and shall remain in effect for a period of one year." Northern's Original Tariff No. 11, at 33 (available at www.puc.nh.gov/Regulatory/companies-regulated-tariffs.htm). Commission rules require tariffs to provide "a full description of the rates and terms under which service shall be provided." Puc 1603.02(m). To the extent the Settlement Agreement contains

“terms and conditions” that conflict with Northern’s tariff, Northern could either amend its tariff through the process required by Puc 202.01(b) (“A person seeking to implement or amend a tariff ... shall make the appropriate filing required by Puc 1600”), or seek a waiver of Puc 1603.02(m) pursuant to Puc 201.05. The Settlement Agreement embodies Northern’s request for a waiver. *See* Exhibit 8 at 2 (“To the extent that the Commission determines that a waiver is required from Northern’s Tariff regarding the method to be employed for distribution of a refund from an upstream capacity supplier, Northern requests such a waiver, and the Parties do not object to the request”).

A waiver requires a showing that it “serves the public interest” and “will not disrupt the orderly and efficient resolution of matters before the commission.” Puc 201.05(a)(1) and (2). The public interest standard is met when “[c]ompliance with the rule would be onerous or inapplicable given the circumstances” or the “purpose of the rule would be satisfied by an alternative method proposed.” Puc 201.05(b)(1) and (2). We find that a waiver of Puc 1603.02(m) will not disrupt this case and that the public interest requirement is met. It would be onerous for Northern to change its tariff for the sole purpose of accommodating this atypical refund. The purpose of the rule that tariffs must “provide a full description of the ... terms and conditions” of service is a requirement that utilities make publicly available those terms and conditions. That purpose is met as to the PNGTS refund through the Settlement Agreement and this order. No party objected to a waiver. Tr. at 10. We thus find the conditions for a waiver exist in this case and will serve the public interest. Northern need not amend its tariff to include the procedure for distributing the PNGTS refund.

Based upon the foregoing, it is hereby


ORDERED, that the Settlement Agreement, Exhibit 8, is approved; and it is

FURTHER ORDERED, that Northern's request for a waiver of Puc 1603.02 is granted.

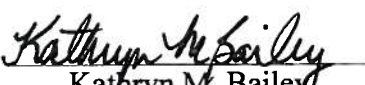
By order of the Public Utilities Commission of New Hampshire this twenty-second day
of September, 2015.



Martin P. Honigberg
Chairman



Robert R. Scott
Commissioner



Kathryn M. Bailey
Commissioner

Attested by:



Debra A. Howland
Executive Director