UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Portland Natural Gas Transmission System — Docket Nos. RP03-620-000
RP03-620-001

ORDER ON SUPPLEMENTAL COMMENTS AND ON REHEARING

(Issued November 26, 2004)

1. On September 26, 2003, Portland Natural Gas Transmission System (Portland) filed primary and alternative tariff sheets[1] to decrease the maximum recourse reservation rate for its firm seasonal (Winter-only) transportation service from 2.4 times the firm non-seasonal transportation maximum recourse reservation rate to 1.9 times the non-seasonal rate so that the maximum rate equals the rate under its two contracts for such services. The reduction, it asserted, would preclude the contracts from triggering discounts in other non-seasonal contracts pursuant to a Most-Favored-Nations (MFN) clause of those contracts. Portland also requested that the Commission vacate a June 9, 2003 Letter Order which had accepted the existing 2.4 times rate in a compliance filing in Portland's earlier general rate proceeding in Docket No. RP02-13. The instant filing was protested. On October 31, 2003, the Commission accepted the proposed primary sheet, permitting the rate reduction to take effect November 1, 2003, subject to refund and further review.[2] In light of late-filed answers and comments in response to Portland's September 26, 2003 filing, the Commission provided parties an additional opportunity to submit responsive pleadings. As discussed in more detail below, the Commission finds Portland's proposed rate reduction to be just and reasonable in light of protection accorded shippers by an at-risk condition of its certificate, denies the request to vacate the June 9, 2003 Letter Order, and grants a motion to strike a settlement document Portland filed in support of its filing.

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[1] Seventh Revised Sheet No. 100 (primary), Alternate Fifth Revised Sheet No. 100, and Alternate Sixth Revised Sheet No. 100 to FERC Gas Tariff, First Revised Volume No. 1.

[2] *Portland Natural Gas Transmission System*, 105 FERC ¶ 61,169 (2003) (October 31, 2003 Order).

2. On November 3, 2003, Portland filed a request for rehearing of the Commission's October 31, 2003 Order, alleging as error the Commission-imposed refund condition. For the reasons discussed below, we deny Portland's request for rehearing as moot. This order is in the public interest by permitting a rate reduction to take effect while ensuring that the pipeline remains at risk for under-collections, as required by its certificate.

Background

3. In the instant filing, Portland states that, since its inception of service in 1999, Portland has provided service under two long-term contracts for winter-only firm seasonal service at a contract rate equal to 1.9 times the maximum recourse rate under its Rate Schedule FT. Portland states that in its original certificate application in Docket No. CP96-248-000, *et al*., Portland had proposed a winter-only, *i.e*., November 1 through March 31 of each year, seasonal service (Rate Schedule WFT) and a seasonal rate of 1.9 times its proposed initial FT maximum recourse rate. In granting Portland a certificate, in its July 31, 1996 Order, the Commission found that Portland's proposed initial seasonal rate was too low insofar as it did not reflect the total capacity, *i.e.*, 12 months of billing determinants, and therefore placed Portland at risk for recovery of the off-peak (summer) capacity costs.[3] To reflect these annualized billing determinants in the rate for a five-month service in order to comply with this at-risk condition, Portland would have had to modify its proposed rate to be 2.4 times the FT maximum recourse rate (12 months' costs divided by five months equals a multiplier factor of 2.4). Portland later withdrew its proposed Rate Schedule WFT, but the at-risk condition remained in effect.

4. On October 1, 2001, Portland filed a general rate increase in Docket No. RP02-13-000. In addition to rate increases for its other rates, Portland proposed a firm, winter-only seasonal maximum recourse rate of $89.1936 per Dth and proposed to credit the seasonal revenues against its cost of service. In an order issued on October 31, 2001, the Commission accepted and suspended the rates, permitting them to become effective April 1, 2002, subject to refund and the outcome of a hearing.[4] However, the Commission found that Portland had failed to show how it derived its proposed seasonal maximum reservation rate of $89.1936 per Dth. The Commission stated that, because Portland did not have a firm seasonal rate schedule on file with the Commission, if Portland intended on charging its customers a winter-only seasonal rate, it would have to file under section 4 of the NGA to propose a firm seasonal rate schedule and maximum rate, with support for the derivation of the rate.

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[3] *Portland Natural Gas Transmission System*, 76 FERC ¶ 61,123 at 61,660-661 (1996).

[4] *Portland Natural Gas Transmission System*, 97 FERC ¶ 61,131 (2001) (October 31, 2001 Order).

5. On November 19, 2001, Portland submitted a filing in Docket No. RP02-13-001 in compliance with the October 31, 2001 Order. In its compliance filing, among other things, Portland explained that its proposed seasonal maximum recourse rate was derived by multiplying its proposed FT maximum recourse rate by a factor of 1.9. Portland also included copies of its two winter-only, firm seasonal service contracts which provided for the rate to be equal to 1.9 times the FT maximum recourse rate.[5] However, Portland did not propose to establish a seasonal service in its tariff. In an order issued on March 1, 2002, the Commission clarified that the March 1, 2002 Order did not constitute a ruling on the merits of the seasonal rate issues, and, among other things, directed Portland to file to revise its tariff to establish seasonal firm recourse transportation rates and services and *pro forma* contract provisions.[6] The Commission held that, although the contracts constituted negotiated terms and conditions of service since Portland had no seasonal firm service in its tariff, it was aware of the contracts in the certificate case and, therefore, permitted the contracts to remain in effect in light of the requirement to file tariff provisions authorizing such services.

6. On April 1, 2002, Portland submitted a filing in Docket No. RP02-13-003 in compliance with the March 1, 2002 Order. In its filing, Portland proposed to modify its FT Rate Schedule to authorize the winter-only seasonal service and proposed a maximum recourse once again equal to 1.9 times the FT maximum recourse rate. In an order issued on October 10, 2002, the Commission found that Portland had not fully complied with the directives of the March 1, 2002 Order.[7] Although the Commission accepted Portland's proposal to provide seasonal firm transportation service as part of its Firm Transportation (FT) Rate Schedule, the Commission directed Portland to revise the maximum recourse seasonal rate to state it as the maximum recourse rate in effect for its non-seasonal FT service.

7. On October 25, 2002, during the same period in which the above referenced filings were made and orders were issued, Portland filed a Stipulation and Agreement (Settlement) in Docket No. RP02-13-004.[8] Among other things, the Settlement included a modified discount "Most Favored Nation" (MFN) clause of the tariff's Form of Service Agreement for FT service, which was incorporated into amendments to Portland's FT service agreements, which provided for an equivalent unit rate discount to shippers with

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[5] The two winter-only firm shippers are Bay State Gas Company (Bay State) and Northern Utilities, Inc. (Northern Utilities).

[6] *Portland Natural Gas Transmission System*, 98 FERC ¶ 61,237 (2002) (March 1, 2002 Order)

[7] *Portland Natural Gas Transmission System*, 101 FERC ¶ 61,022 (2002) (October 10, 2002 Order).

[8] *Portland Natural Gas Transmission System*, 102 FERC ¶ 61,026 (2003).

FT service if a discount is provided any other FT shipper for the months of November through March. The Settlement also contained a condition that the design of Portland's base tariff rates satisfies the at-risk condition of its initial certificate, but was a black-box settlement that did not specify how the rates were designed. Further, the Settlement did not contain settled maximum recourse rates for the firm winter-only seasonal services. In an order issued on January 14, 2003, the Commission approved the Settlement.[9]

8. On November 12, 2002, Portland submitted a filing in Docket No. RP02-13-005 in compliance with the October 10, 2002 Order. In its filing, Portland proposed a maximum FT Seasonal Recourse Reservation Rate of "12 times the Recourse Reservation Rate." In an order issued on April 14, 2003, the Commission found that this proposed maximum rate contravened the Commission's directive in the October 10, 2002 Order. The Commission once again directed Portland to file a revised tariff sheet to reflect a maximum FT seasonal recourse reservation rate equal to the maximum FT non-seasonal rate.

9. On April 24, 2003, following a pre-filing telephone conference with the Commission Staff regarding its compliance obligations, Portland submitted a filing in Docket No. RP02-13-010 in compliance with the April 14, 2003 Order. Portland proposed an FT seasonal maximum recourse reservation rate equal to 2.4 times the non-seasonal FT maximum recourse rate (*i.e.*, 12 months divided by 5 months equals 2.4), to be effective November 12, 2002, and stated that this complied with the Commission's directive in the April 14, 2003 Order that Portland state its seasonal recourse rate on an equivalent basis to the non-seasonal FT rate. Portland's filing was not protested, and in a letter order dated June 9, 2003, Portland's proposed seasonal rate was accepted as in compliance with the April 14, 2003 Order.[10]

10. Finally, in the subject September 26, 2003 filing in the instant docket, Portland proposed to reduce the FT seasonal recourse reservation rate to 1.9 times the FT non-seasonal maximum recourse reservation rate. Portland proffered several reasons for the proposed reduction. Portland asserted that the winter-only seasonal contracts, with a "premium" 1.9 times rate, were part of the basis for the original certification of Portland's system and provided benefits to Portland's long-term annual shippers. It asserted that stating the maximum recourse rate for seasonal service at 2.4 times the FT maximum recourse rate has no precedent on its system and could cause potential issues regarding its MFN clause. It asserted that its historic, Commission-approved winter-only contracts were never intended to produce future or retroactive MFN discount triggers. It asserted

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[9] *Portland Natural Gas Transmission System*, 102 FERC ¶ 61,026 (2003) (January 14, 2003 Order).

[10] *Portland Natural Gas Transmission System*, Docket No. RP02-13-010 (June 9, 2003) (unpublished letter order issued by delegated authority) (June 9, 2003 Order).

that triggering a discount under its seasonal contracts might result in substantial revenue loss to Portland which could result in problems such as loan defaults and revenue uncertainty.

11. Portland requested an effective date of November 1, 2003, for the primary tariff sheet, or, alternatively, the earlier effective dates of November 12, 2002, and April 1, 2003, for the two alternate tariff sheets. In its September 26, 2003 filing, Portland also requested that the Commission vacate its June 9, 2003 Letter Order in Docket No. RP02-13-010, which had accepted the existing FT seasonal recourse rate of 2.4 times the non-seasonal rate, effective November 12, 2002.[11] The filing was protested. In the October 31, 2003 Order, the Commission accepted Portland's proposed primary tariff sheet, effective November 1, 2003, subject to refund and further review after an additional comment period.

Portland's Supplemental Answer

12. On November 20, 2003, Portland filed a supplemental answer to its answer filed on October 15, 2003, in which Portland opposed motions for summary rejection filed on October 8, 2003, by the Rumsford Power Associates, L.P. and Androscoggin Energy, L.L.C. (collectively, Generators) and by H.Q. Energy Services (U.S.) Inc. and Wausau Papers of New Hampshire (collectively, H.Q./Wausau). In its Supplemental Answer, Portland provided, as Attachment A, a workpaper containing the cost allocation and design determinants it claims were used to derive the Settlement rates approved in the January 14, 2003 Order in Docket No. RP02-13. Portland asserts that the Settlement workpaper confirms the facts and arguments presented in Portland's September 26, 2003 filing and its October 15, 2003 answer by showing that the 1.9 times seasonal recourse rate is consistent with the Settlement and the derivation of the Settlement rates, while the higher 2.4 times rate is inconsistent with the Settlement and the derivation of the Settlement rates. Portland states that those submissions show that the 2.4 times seasonal recourse rate was never just and reasonable, and therefore the 2.4 times rate was proposed by Portland, and accepted by the Commission in its June 9, 2003 Order, only through error.

H.Q./Wausau's Supplemental Comments

13. On November 20, 2003, H.Q./Wausau filed supplemental comments. H.Q./Wausau contend that approval of Portland's proposed reduction of its seasonal FT recourse reservation rate would grant Portland relief from the at-risk condition far beyond

[11] *Portland Natural Gas Transmission System*, 103 FERC ¶ 61,055 (2003) (April 14, 2003 Order).

that contemplated by the Settlement by shifting costs under-recovered by Portland to its other customers, notwithstanding the Commission's apparent intention to preserve the at-risk condition.

14. H.Q./Wausau assert that, although Portland argues that there is no link between its seasonal recourse rate and the bargain struck in the Settlement with regard to its at-risk condition, the two are inextricably intertwined. H.Q./Wausau maintain that the Settlement was negotiated with the implicit understanding that Portland's seasonal recourse rate would be established at the 2.4 times level necessary for the pipeline to continue to be held at risk for the costs of unsubscribed off-peak capacity, but that for the stipulated term of the Settlement, Portland would, in accordance with the Settlement provisions, be deemed to have satisfied that condition. H.Q./Wausau argue that reduction of the seasonal recourse rate to the 1.9 times level as proposed by Portland would build into the design of Portland's rates a maximum seasonal rate level that would place Portland "at risk" for nothing, despite the Commission's stated intent to the contrary. Such approval would place upon Portland's customers the burden of proving that Portland should continue to be held at risk following the expiration of the Settlement.

15. H.Q./Wausau also assert that approval of Portland's proposed 1.9 times seasonal recourse rate proposal would allow Portland potentially to circumvent the MFN provisions that were integral parts of the negotiated Settlement. H.Q./Wausau state that they explained in their initial protest in this proceeding that the MFN clauses contained in Portland's firm service agreements originally were offered to potential shippers in order to provide an economic inducement for them to contract for long-term firm service, thereby providing Portland with the evidence of market demand necessary to justify a grant of certificate authority to permit the construction of its system. H.Q./Wausau maintain that the clauses have retained enormous significance for customers, particularly in view of the widely-held belief that customers now committed to Portland under twenty-year service agreements are paying rates which generally exceed competitive levels. H.Q./Wausau contend that the clauses serve to provide some protection against the competitive disadvantages that can result in existing customers' use or release of firm capacity when new shippers are granted steep discounts by the pipeline that might not otherwise also be afforded shippers of longstanding. However, H.Q./Wausau argue that, now that Portland's system has been certificated and constructed, Portland has found the clauses to be an economic nuisance.

16. H.Q./Wausau state that the Settlement had appended to it revised MFN clauses that had been executed by each of Portland's long-term FT shippers. H.Q./Wausau state that the language of the revised MFN clauses was a principal part of the Settlement, and that it greatly reduced the scope of the original MFN clauses, to the obvious benefit of Portland. H.Q./Wausau note that while the original clauses stated that customers would be provided equivalent discounts if Portland "discounts any mainline transportation services," the revised clauses apply only if Portland "discounts the applicable Recourse

Rate under Rate Schedule FT . . . pursuant to an FT Service Contract with a primary term greater than 24 consecutive months . . .." H.Q./Wausau contend that this revision which greatly reduced the scope of Portland's FT customers' contract rights was obviously a significant element of the Settlement that affected the negotiation of many other aspects of the agreement ultimately reached between the pipeline and its core customer group.

17. H.Q./Wausau state that, although Portland candidly states that a purpose of its September 26, 2003 seasonal recourse rate proposal is to prevent parties from contending that the revised Settlement MFN clauses may have been – or will be – triggered by "existing or future seasonal contracts," H.Q./Wausau assert this is not the issue before the Commission at this time, nor is it an issue for the Commission to resolve at any time.

18. H.Q./Wausau also assert that approval of Portland's 1.9 times seasonal recourse rate will not produce a rate reduction for any customer, nor will maintenance of the currently effective seasonal recourse rate result in a rate increase or permit over-collection of Portland's cost-of-service. H.Q./Wausau aver that the discounted rate is already firmly embedded in the long-term contracts of its two existing seasonal firm customers, and its establishment as the maximum FT seasonal recourse reservation rate would have no effect on those existing contracts whatsoever. Moreover, H.Q./Wausau maintain that there is virtually no likelihood that any future customer would be affected by a lowering of that recourse rate. H.Q./Wausau argue that Portland's ability to attempt to charge a higher rate to new seasonal customers is already significantly capped by the long-term seasonal rate it negotiated with Bay State and Northern Utilities and, as a practical matter, by the general noncompetitive level of the existing rates on its system. Additionally, H.Q./Wausau state that Portland itself repeatedly contended in its rate case that it has practically no firm peak period capacity available, rendering it questionable whether a near-term possibility of new firm seasonal customers exists.

19. On the other hand, H.Q./Wausau also state that Portland's currently effective 2.4 times firm seasonal recourse rate will not result in a rate increase to any customer. H.Q./Wausau note the October 21, 2003 comments of the NiSource Distribution Companies, which stated that the seasonal service agreements of Bay State and Northern Utilities reflect a negotiated seasonal rate fixed at 1.9 times the annual non-seasonal FT Recourse Rate for the entire twenty-year term of such agreements. H.Q./Wausau acknowledge that Portland has no contractual ability to change that negotiated 1.9 times rate level, regardless of whether it establishes a higher recourse rate. Perhaps this is best evidenced, H.Q./Wausau note, by the fact that Portland has had a 2.4 times seasonal recourse rate in effect since November 12, 2002, yet Bay State and Northern Utilities apparently have continued to pay only the 1.9 times rate reflected in their contracts. H.Q./Wausau assert that the existing negotiated seasonal rate will also likely serve as a cap on Portland's ability to charge future seasonal customers a rate higher than "1.9 times," given Portland's obligation to offer firm seasonal service on a nondiscriminatory basis.

20. H.Q./Wausau assert that as a result of Portland's rate proceeding in Docket No. RP02-13, Portland's existing firm shippers have been able to retain very few of the economic benefits they were promised by the pipeline when they first contracted for service and thereby enabled expansion of the Portland system. H.Q./Wausau further assert that, having been enticed by the prospect of a unit rate no higher than sixty-five cents for the twenty-year term of their service agreements, after only three years of service they are paying rates thirty-five percent above the pipeline's initial rate level. H.Q./Wausau additionally assert that, having been offered broad MFN protection, that protection has been significantly curtailed by revisions to the clauses they were originally provided. Finally, H.Q./Wausau assert that, having been assured that the pipeline itself would shoulder responsibility for its decision to build its system with much of its off-peak capacity left unutilized due to seasonal firm service commitments, Portland has now been relieved of that responsibility for the term of the Settlement.

Generators' Supplemental Comments

21. On November 20, 2003, the Generators filed further comments on Portland's September 26, 2003 seasonal rate filing. The Generators contend that the 1.9 times ratio would result in an under-allocation of costs for the five-month seasonal service. The Generators contend that such a ratio represents a permanent discount from the cost of providing the associated service, which would create "competitive concerns and potential cost-subsidization."

22. The Generators argue that Portland's proposed recourse rate for seasonal service should recover a fully allocated share of the pipeline's annual revenue requirement. Instead, what Portland proposes effectively guarantees a discount adjustment in its next rate proceeding because it cannot collect revenue up to the fully allocated cost of the seasonal recourse rate if the "maximum" recourse rate is set at this discounted level, according to the Generators.

23. The Generators contend that Portland's recourse rate proposal, at base, is little more than an attempt to preempt its customers' potential contract rights, raises potentially harmful cost-shifting and competitive issues, and is discriminatory. Contrariwise, a seasonal recourse rate set at 2.4 times the maximum FT recourse rate is not discriminatory and is not contrary to the Settlement but rather is required by it.

Wausau and the Generators' Motion to Strike and Further Supplemental Comments

24. On November 26, 2003, Wausau Papers of New Hampshire, Inc. (Wausau) and the Generators filed a motion to strike, or in the alternative, request for leave to file further supplemental comments. Wausau and the Generators contend that Portland's supplemental answer and the attachment included with it constitute an improper

disclosure of privileged and confidential settlement material that violates both rule 602(e) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.602(e) (2004), and the Commission's longstanding policy prohibiting release or consideration of such privileged settlement materials. Wausau and the Generators assert that Portland's supplemental comments should be stricken and accorded no consideration in this proceeding. Wausau and the Generators further assert that this action would be the only effective remedy for Portland's reckless disregard of the Commission's rules, policies, and precedent, as well as the rights of the other parties, principally Portland's customers, under the Settlement.

25. Nevertheless, should the Commission determine to consider Portland's supplemental comments, Wausau and the Generators request leave to submit supplemental comments and an affidavit. To the extent necessary, they request waiver of any Commission rules, policies, or procedures required to permit the acceptance and consideration of such comments, in order to provide the Commission with an accurate and balanced view of the Settlement and its relevance to Portland's proposal in this proceeding.

26. Wausau and the Generators state that — contrary to Portland's contention that the parties agreed to a settlement rate design that is supportive of a 1.9 times seasonal recourse rate — the parties were unable to reach any agreement on billing determinant levels, seasonal rate design, or at-risk revenues. Instead, Wausau and the Generators maintain that the reason the Settlement does not include any detail on rate derivation is that the parties were wholly unable to agree on any compromise of rate or rate design specifics. Wausau and the Generators assert that the settlement negotiations got nowhere until principals of the parties involved committed to a "black box" agreement under which the parties expressly agreed that the Settlement would not in any way discuss the specific derivation of the settlement rates, seasonal rate differentials, or seasonal at-risk revenues. Rather than some specific derivation, Wausau and the Generators assert that the parties simply agreed to an overall rate level and to temporarily relieve Portland of at-risk challenges during the stipulated term of the Settlement. Wausau and the Generators contend that because the Settlement was not to include any stipulated compromise on cost allocation or rate design issues, the parties agreed to permit Portland to "derive" the black box rate level for purposes of rationalizing it to the Commission Staff in whatever manner it chose, so long as the Settlement itself would not include or discuss such derivation in any respect.

27. Wausau and the Generators maintain that the parties did not agree to include the derivation of settlement rates as part of the Settlement itself; they did not agree to any specific seasonal volume levels or cost allocations with respect to the at-risk condition; and they did not agree to a seasonal recourse rate level.

28. Wausau and the Generators also maintain that Portland's proposal to establish a lower seasonal recourse rate to ensure that its long-term firm customers are unable to contend that their revised MFN clauses are triggered under certain circumstances is nothing more than an effort by the pipeline to gain something it was offered in settlement negotiations but was unwilling to pay the price demanded by the other parties to obtain.

Portland's Answer to Comments

29. On December 5, 2003, Portland filed an answer to the parties' comments regarding the instant rate filing. Portland asserts that H.Q./Wausau, as well as the Generators, have failed to support the higher 2.4 times seasonal recourse rate.

30. Portland recounts that, in the Generators' October 8, 2003 motion and protest, their central argument was that the higher 2.4 times seasonal recourse rate was required by the Commission's rate-making policy set forth in Order No. 637.[12] Portland further recounts that, in its October 15, 2003 answer, Portland explained in detail why the Generators were wrong, *i.e.*, that the higher 2.4 times rate in fact violates the Commission's Order No. 637 principles for designing peak and off-peak rates, and that the 2.4 times rate was just the type of "extraordinarily high" peak rate Order No. 637 sought to prevent.

31. Portland asserts that while the Generators cite the Commission's July 31, 1996 preliminary determination in Portland's initial certificate proceeding, the Generators fail to reference any specific language from that order. Portland further asserts that nothing in that order requires or sanctions use of the 2.4 times seasonal recourse rate, but rather the Commission's July 31, 1996 Certificate Order[13] supports Portland's proposal to use the 1.9 times seasonal recourse rate, as well as Portland's position that such 1.9 times rate is consistent with the Commission-imposed certificate at-risk condition.

32. Portland states that as a purported directive requiring use of the 2.4 times seasonal recourse rate, the Generators also cite the Commission's April 14, 2003 Order, but with no specific reference to any language in that order. Portland further states that nothing in that order requires use of the 2.4 times rate. Rather, Portland asserts that that order directed Portland "to reflect a maximum FT Seasonal Recourse Reservation Rate equal to the maximum non-seasonal FT rate." Portland characterizes this directive as ambiguous at best because there is no purpose served by setting the seasonal FT recourse rate "equal

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[12] *Regulation of Short-Term Natural Gas Transportation Services, and Regulations of Interstate Natural Gas Transportation Services*, Order No. 637, 65 Fed. Reg. 10,156 (Feb. 25, 2000), FERC Stats. & Regs. ¶ 31,091 (2000).

[13] *Portland Natural Gas Transmission System*, 76 FERC ¶ 61,123 (1996) (July 31, 1996 Order).

to" the annual FT recourse rate. Portland contends that this ambiguous directive led to the erroneous filing and acceptance for filing of the current 2.4 times seasonal recourse rate. Portland maintains that nothing in any Commission order has ever directed Portland to use the 2.4 times seasonal recourse rate or found such rate to be just and reasonable.

33. Portland states that H.Q./Wausau's contentions are incorrect and easily refuted. Specifically, Portland argues that, if use of the 2.4 times seasonal recourse rate was truly "recognized by all parties" and was as critical to the settlement bargain as H.Q/Wausau contend, that alleged understanding would have been included in the Settlement, but it was not. Portland contends that the Settlement reflects no requirement or understanding that the seasonal recourse rate would be set at the 2.4 times level, and H.Q./Wausau cite no provision of the Settlement requiring use of the 2.4 times rate. To the contrary, Portland asserts that the 2.4 times seasonal recourse rate is inconsistent with the Settlement, while the 1.9 times seasonal rate is consistent with the Settlement, as well as with Portland's initial certificate orders.

34. Portland also contends that H.Q./Wausau are incorrect in asserting that Portland's use of the 1.9 times seasonal recourse rate "will permanently build into Portland's rates and rate structure the effective elimination of the 'at-risk' condition imposed on Portland in its initial certificate authorization." Portland again refers to the Commission's July 31, 1996 Order in Portland's certificate proceeding, which recognized the "1.9 times" relationship of Portland's annual firm and winter firm recourse rates and established the certificate at-risk condition, showing that those two provisions are fully compatible. Portland maintains that, consistent with that certificate order, the Settlement demonstrates that the firm annual rate and firm winter-only rate can (and do) reflect the "1.9 times" relationship while at the same time placing Portland at risk for an appropriate level of off-peak volumes and associated costs. Portland notes that in this regard, while section 3.5(a) of the Settlement stipulates that the settlement rate design "satisfies, for the term of this Settlement, the at-risk throughput condition directed by the Commission in granting Portland's initial certificate," section 3.5(b) provides that "[t]his Settlement shall not prejudice any party from taking any position regarding the at-risk condition after the term of this Settlement."

35. Finally, Portland asserts that H.Q./Wausau are incorrect in arguing that Portland's use of the 1.9 times seasonal recourse rate "will allow Portland to circumvent the literal language and narrow scope of the revised MFN clauses that are integral parts of the RP02-13 settlement." Portland states that H.Q./Wausau cite no provision of the Settlement that confirms their allegations that not only did all parties to Docket No. RP02-13 understand that Portland would establish the seasonal recourse rate at the higher 2.4 times level, but also that the Settlement contemplated that, after establishment of that higher 2.4 times seasonal recourse rate, Portland's firm annual shippers would be entitled to millions of dollars of further rate reductions from Portland through operation of the revised MFN clauses.

Portland's Answer to Motion to Strike

36. On December 12, 2003, Portland filed an answer to Wausau's and the Generators' motion to strike. Portland asserts that Wausau's and the Generators' contention, that Portland's supplemental answer should be stricken because it violates the Commission's settlement privilege and constitutes a misrepresentation of the Settlement itself, is incorrect.

37. Portland states that the Commission's settlement privilege, codified in rule 602(e),[14] prohibits the submission of "non-approved offers of settlement" and any "discussion of the parties" with respect to non-approved settlement offers. Portland contends that it did not violate rule 602(e) because the workpaper is neither a "non-approved offer of settlement" nor discussions related to a non-approved offer. Portland asserts that the workpaper relates to an approved offer of settlement and is relevant to the Commission's resolution of conflicting claims regarding the proper interpretation of that Settlement.

38. Portland also argues that Wausau's and the Generators' position is unsupported by applicable case law. Citing *Calpine Energy Services, L.P. v. Southern Natural Gas Company*, Portland states that it is well established that "the Commission [may] properly look to evidence of the circumstances surrounding the making of the contract as well as extrinsic evidence, including the conduct of the parties, in order to determine the intent of the parties."[15] Portland concludes that the admission of the workpaper is consistent with that principle.

39. Portland further argues that a central precedent relied on by Wausau and the Generators is not good law, having been significantly modified by a subsequent order in that same proceeding which both reversed the Commission's decision regarding the applicability of settlement privilege, as well as distinguished the applicability of the other central precedent relied on by Wausau and the Generators.[16]

40. Portland states that it made no such contention that its supplemental answer reflects the parties' agreement to a specific allocation of costs to seasonal services. Portland asserts it did not claim that the parties have "agreed to" the rate design reflected in the workpaper, nor did Portland offer the workpaper in any way to impeach the

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[14] 18 C.F.R. § 385.602(e) (2004).

[15] *Calpine Energy Services, L.P. v. Southern Natural Gas Co.*, 105 FERC ¶ 61,033, at P 19 (2003).

[16] *See Independent Oil & Gas Assoc. of W.Va.*, 18 FERC ¶ 61,289, at 61,603 (1982) (correcting error made in instructing judge with regard to privilege and distinguishing *Texas Eastern Transmission Corp.*, 48 FPC 1170 (1972), as inapposite).

Settlement or alter its express terms. Nevertheless, Portland contends that the Settlement workpaper is relevant and probative evidence of the circumstances surrounding the negotiation and execution of the Settlement, which may assist the Commission in resolving what it recognized as the various "conflicting claims regarding the nature of Portland's . . . settlement in Docket No. RP02-13."[17]

Discussion

A. Proposed Rate Reduction

41. The issue in the instant proceeding is whether Portland's proposal to reduce its maximum FT seasonal recourse reservation rate from 2.4 times the non-seasonal maximum recourse rate to 1.9 times that rate is just and reasonable. Portland seeks to reduce the maximum recourse rate for these services to avoid the possibility of the MFN clause being triggered in its non-seasonal contracts. In brief, it asserts it was error to have filed the 2.4 times rate to begin with, and that the 1.9 times rate was factored into the Settlement's cost allocation, citing the workpaper appended to its Supplemental Answer. Further, it states that its proposed reduction of the seasonal recourse reservation rate from 2.4 times the non-seasonal rate to 1.9 times that rate is necessary to provide its seasonal service on a non-discriminatory basis and to ensure that no existing or future seasonal contracts trigger the discount or MFN clauses in Portland's FT contracts. Consistent with its claim that it was error to file the 2.4 times rate, Portland asks the Commission to vacate the April 9, 2003 Order that accepted that rate. In contrast, H.Q./Wausau asserts that the 2.4 times rate was consistent with the implicit understanding of the Settlement and the 1.9 times rate would circumvent the MFN clause of the Settlement by precluding discounted seasonal contracts from lower rates of other services. H.Q./Wausau and the Generators are concerned that the reduced recourse rate for seasonal service will not fully recover the allocated share of the pipeline's annual revenue requirement and thereby contravene the at-risk condition of its certificate and the subsequent Settlement.

42. At the outset, we wish to clarify that H.Q./Wausau and the Generators' concerns regarding the continued viability of the certificate at-risk condition are unfounded. Portland remains subject to the at-risk condition of its certificate and, therefore, cannot increase its maximum recourse rates for non-seasonal services to recover any under-collection attributable to the seasonal service caused by the proposed seasonal rate reduction. Moreover, any such attempt would require a new general rate filing, which it is barred from filing to be effective prior to April 1, 2008, pursuant to section 5.1(a) of the Settlement. Any such filing would be subject to review for compliance with the certificate at-risk condition and, if found to reflect a recovery of such costs from its non-

[17] October 31, 2003 Order, 105 FERC ¶ 61,169, at P 47.

seasonal shippers, would be subject to rejection. In any event, Portland has indicated that it will respect the at-risk condition imposed by the Commission in Portland's initial certification authorization if the Commission accepts Portland's proposed reduction of its maximum FT seasonal recourse reservation rate from 2.4 times the non-seasonal rate to 1.9 times the non-seasonal rate.

43. Further, we reject the claim that the 1.9 times rate should be rejected on the asserted basis that the 2.4 times maximum recourse rate for winter-only seasonal service was an assumption underlying the Settlement and that the 1.9 times rate would, therefore, conflict with the Settlement. The 2.4 times maximum rate was not part of the Settlement, but imposed independently by the Commission acting under section 5 of the NGA to implement the at-risk condition of the certificate proceeding. In the certificate order, the Commission directed that Portland's seasonal winter-only rate was to be designed based on 12 months of costs at the FT maximum recourse rate. Consequently, the 2.4 times maximum recourse rate for winter-only seasonal service is the result of a simple mathematical calculation; namely, 12 months of costs at the FT maximum recourse rate divided by 5 months of service equals a seasonal rate that is 2.4 times the non-seasonal rate. The Settlement failed to include any settled winter-only seasonal maximum recourse rates.

44. However, we find it is not necessary to maintain the winter-only seasonal maximum rate at the 2.4 level in order to implement the at-risk condition. As discussed above, the at-risk condition relates to the allocation of costs to other, non-seasonal shippers, and is met if their rates are not increased in order to recover costs not recovered due to the reduction in the winter-only seasonal maximum rates. Portland has not proposed an increase in its non-seasonal maximum rates. Nor can we reject the proposed rate reduction on the basis that a higher rate was needed to permit the settled MFN clause to operate to provide non-seasonal shippers with discounts. There is nothing in the Settlement that conditions acceptance of the MFN clause in the Form of Service Agreement on any particular rate for non-seasonal service. Once again, the Settlement did not settle non-seasonal service maximum rates. In any event, the reduced seasonal maximum rate is still subject to discounting in new contracts if any are entered into in the future. Accordingly, the Commission finds that customers who receive service under Portland's non-seasonal FT service will not be harmed by Portland's proposed reduction in its maximum FT seasonal recourse reservation rate because Portland remains at risk for any under-recovery resulting from this reduction.

45. In the October 31, 2003 Order, the Commission conditionally accepted Portland's proposal to reduce its seasonal recourse rate, subject to review of the parties' pleadings. The Commission has reviewed those pleadings, and finds that such rate reduction may benefit Portland's customers and may result in more efficient utilization of its pipeline capacity. In addition, the Commission finds that no customers are harmed by the rate

deduction because Portland's at-risk condition prevents the shifting of costs due to under-collection. Therefore, the Commission finds that the proposal is just and reasonable and will be accepted with the foregoing conditions.

B. Request to Vacate

46. Although we are accepting the rate reduction, we will deny Portland's request to vacate the June 9, 2003 Order that accepted the 2.4 times maximum recourse rate for winter-only seasonal service. The Commission finds that there is no basis to vacate the June 9, 2003 Order, which accepted Portland's originally proposed maximum FT seasonal recourse rate of 2.4 times the non-seasonal rate. Portland contends that the Commission should reconsider and vacate its June 9, 2003 Order because the 1.9 times rate is consistent with the historic, Commission-approved relationship of seasonal to annual rates on Portland's system and that it submitted the 2.4 times rate in error. As discussed above, the 2.4 times rate was not in error. In accepting that rate, the Commission acted unilaterally under section 5 of the NGA, independent of the Settlement, and established a rate consistent with the ruling of the Commission in the original certificate proceeding regarding the design of a seasonal rate to comport with the at-risk condition of its certificate.

C. Motion to Strike

47. We will grant Wausau's and the Generators' motion to strike Portland's workpaper submitted in its Supplemental Answer filed on November 20, 2003. Portland claims that the workpaper contains the cost allocation and rate design determinants used to derive the Settlement rates. However, Article VIII of the Settlement provides in pertinent part:

> The Commission's approval of this Settlement shall constitute a finding that the Settlement is fair and reasonable and in the public interest, but shall not constitute a determination on the merits of the specific provisions of the Settlement. Except as specifically provided in this Settlement, no participant shall be deemed to have accepted or consented to any policy or principle purported to underlie the provisions of this Settlement.

48. The Commission finds that the workpaper cannot be used on evidence pursuant to the parties' agreement that no participant shall be deemed to have consented to any policy or principle purported to underlie the provisions of the Settlement, in particular the cost allocations and rate design. Therefore, the motion to strike is granted.

D. Portland's Request for Rehearing

49. In its October 31, 2003 Order, the Commission accepted Portland's "1.9 times" rate proposal "subject to refund." Inasmuch as Portland's proposal constituted a reduction of the seasonal recourse rate, Portland filed a request for rehearing arguing that, even if the Commission upheld the "2.4 times" rate, a refund would not be possible.

50. In view of the Commission's acceptance of the proposed rate, as discussed above, Portland's request for rehearing is rejected as moot.

The Commission orders:

(A) The September 26, 2003 filing in this proceeding is accepted effective November 1, 2003, subject to the at-risk condition, as discussed in the body of this order.

(B) Wausau's and the Generators' motion to strike the workpaper appended to its Supplemental Answer is granted.

(C) Portland's motion to vacate the June 9, 2003 Order is denied, as discussed in the body of this order.

(D) Portland's request for rehearing is denied as moot, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.