

140 FERC ¶ 61,148
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinohoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

El Paso Natural Gas Company

Docket Nos. RP08-426-018
RP12-788-000

ORDER ON CLARIFICATION AND COMPLIANCE

(Issued August 27, 2012)

1. On May 4, 2012, the Commission issued an order (Rehearing Order)¹ addressing multiple requests for rehearing of an earlier order on technical conference² that dealt with services, terms and conditions of service proposed by El Paso Natural Gas Company (El Paso) in this proceeding. Requests for clarification, or in the alternative rehearing, of the Rehearing Order were filed in Docket No. RP08-426-018 on June 4, 2012. Also on that day, El Paso made a compliance filing required by the Rehearing Order in Docket No. RP12-788-000. For the reasons discussed below, the Commission grants, in part, and denies, in part, requests for clarification/rehearing of the Rehearing Order. The Commission also accepts certain tariff records contained in El Paso's compliance filing, to be effective January 1, 2009,³ and rejects others.⁴

I. Background

2. This proceeding began on June 30, 2008, when El Paso filed revised tariff sheets that proposed a number of changes to its tariff, including new services, a rate increase for existing services, and changes in certain terms and conditions of service. El Paso's Filing

¹ *El Paso Natural Gas Co.*, 139 FERC ¶ 61,096 (2012) (Rehearing Order).

² *El Paso Natural Gas Co.*, 125 FERC ¶ 61,309 (2008) (December 18 Order).

³ See Appendix A.

⁴ See Appendix B.

included two sets of revised tariff sheets—primary and alternate tariff sheets.⁵ On August 5, 2008, the Commission accepted and suspended El Paso’s primary tariff sheets, subject to refund, conditions, and the outcome of a hearing and technical conference.⁶ The Commission rejected El Paso’s alternate tariff sheets.⁷ The Commission set for hearing the issues relating to El Paso’s proposed cost-of-service, cost allocation, and rate design for existing and new services.⁸ The Commission set all other issues related to proposed services, terms, and conditions for technical conference.⁹ Several parties sought rehearing of the August 5 Order. On November 10, 2010, the Commission denied those requests for rehearing.¹⁰

3. On September 11, 2008, the Commission held a technical conference to address the services, terms, and conditions of service proposed by El Paso. A number of parties filed both initial and reply comments on the matters discussed at the technical conference. In the December 18 Order, the Commission addressed the issues discussed at the technical conference and accepted many of El Paso’s proposed tariff revisions, including, but not limited to, revised definitions of hourly scheduling penalties and the elimination of sculpted maximum daily quantities (MDQ).¹¹

4. On May 4, 2012, the Commission largely affirmed and clarified the December 18 Order.¹² Among other things, the Rehearing Order affirmed the December 18 Order’s determination to allow El Paso to keep the unauthorized overrun rate at two times the 100 percent load factor interruptible (IT) rate, while at the same time requiring El Paso to

⁵ The two sets of tariff sheets differed by the manner in which they treated a specific article (Article 11.2) of a 1996 rate settlement.

⁶ *El Paso Natural Gas Co.*, 124 FERC ¶ 61,124, at P 28 (2008).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* P 29.

¹⁰ *El Paso Natural Gas Co.*, 133 FERC ¶ 61,129 (2010).

¹¹ December 18 Order, 125 FERC ¶ 61,309 at P 6.

¹² Rehearing Order, 139 FERC ¶ 61,096. On the same day, the Commission issued Opinion No. 517, which addressed the issues that the Commission set for hearing in this proceeding. *El Paso Natural Gas Co.*, Opinion No. 517, 139 FERC ¶ 61,095 (2012). Requests for rehearing of that order will be dealt with in a separate order.

change its hourly scheduling penalty to the 100 percent load factor IT rate, i.e., not two times the IT rate.¹³ The Rehearing Order also affirmed the December 18 Order's acceptance of El Paso's proposal to remove a provision allowing shippers to convert a sculpted FT-I contract to the new firm service options while retaining sculpted monthly delivery point rights.¹⁴ The Rehearing Order also granted El Paso's request for clarification that shipper requests to amend, reform, and convert contracts (i.e., terminate existing contracts and enter into new ones) after January 1, 2009, require the mutual agreement of El Paso and the shipper.¹⁵

II. Discussion

5. Two issues are raised in the requests for clarification/rehearing of the Rehearing Order and El Paso's compliance filing: (1) the appropriate rate for the scheduling and overrun component of El Paso's Hourly Scheduling Penalty Quantity; and (2) the effect of statements made in the Rehearing Order that could be read as affecting existing sculpted contractual rights. For the reasons discussed below, we deny El Paso's request for clarification/rehearing with respect to the first issue and grant Petitioners' request for clarification with respect to the second. Additionally, we accept certain tariff records in El Paso's compliance filing and reject others, as discussed below.

A. Hourly Scheduling Penalty Quantity

1. Request for Clarification/Rehearing

6. In its request for clarification, El Paso argues that the Commission should clarify that quantities related to the unauthorized hourly overrun component of El Paso's Hourly Scheduling Penalty Quantity should be assessed a rate of two times the 100 percent load factor equivalent of the IT rate during non-critical periods. El Paso explains that its tariff defines its non-critical Hourly Scheduling Penalty Quantity as containing two components—a scheduling quantity and an overrun quantity.¹⁶ El Paso states that the hourly scheduling quantity consists of quantities taken at the delivery point that exceed

¹³ Rehearing Order, 139 FERC ¶ 61,096 at PP 83-84 (citing December 18 Order, 125 FERC ¶ 61,309 at P 65).

¹⁴ *Id.* PP 103-08.

¹⁵ *Id.* P 101.

¹⁶ El Paso Request for Clarification at 2 (citing El Paso, FERC Gas Tariff, General Terms and Conditions, Third Revised Vol. 1A, section 1.33).

the scheduled hourly entitlement but that are less than the contractual hourly entitlement; the unauthorized hourly overrun quantity is the amount taken at the delivery point that exceeds the contractual hourly entitlement.

7. El Paso describes the Rehearing Order as permitting El Paso to have a penalty rate of one times the 100 percent load factor equivalent IT rate for hourly scheduling quantities and two times the 100 percent load factor equivalent IT rate for unauthorized overrun quantities.¹⁷ El Paso urges the Commission to clarify that it intended to apply the 100 percent load factor equivalent IT rate to the *hourly* scheduling quantity and apply two times the 100 percent load factor equivalent IT rate to the non-critical unauthorized *hourly* overrun quantity. El Paso argues that this clarification would be consistent with the Rehearing Order's finding that the appropriate non-critical unauthorized overrun rate is two times the 100 percent load factor equivalent IT rate to deter any inappropriate shipper reliance on overrun service.

8. To the extent that the Commission denies this clarification, El Paso requests rehearing. El Paso states that because unauthorized hourly overruns represent amounts taken by the shipper that exceed its hourly contract entitlement, it would be inappropriate to charge the same rate for unauthorized hourly overrun quantities as for hourly scheduling quantities. El Paso contends that not only has the shipper not paid for service attributable to hourly overrun quantities, the 100 percent load factor equivalent IT rate is also lower than the applicable maximum rate for hourly firm service. El Paso therefore believes that shippers would have an incentive to rely on cheaper unauthorized overrun amounts instead of contracting for the hourly firm service levels they need.

9. Joint Parties¹⁸ filed an answer on June 18, 2012. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2012), prohibits an answer to a request for rehearing unless otherwise ordered by the decisional authority. We are not persuaded to accept Joint Parties' answer and will, therefore, reject it.

¹⁷ *Id.* at 3 (citing Rehearing Order, 139 FERC ¶ 61,096 at P 84).

¹⁸ Joint Parties include the following entities: Arizona Electric Power Cooperative, Inc.; Arizona Public Service Company; Gila River Power LLC; Golden Spread Electric Cooperative, Inc.; Salt River Project Agricultural Improvement and Power District; Sempra Generation; and Texas Gas Service Company, a division of ONEOK, Inc.

2. Compliance Filing

a. El Paso's Filing

10. On June 4, 2012, El Paso filed revised tariff records, listed in the Appendix, in compliance with the Rehearing Order, requesting a May 1, 2010 effective date.¹⁹ In its compliance filing, El Paso states that it is updating its tariff to identify the penalty rates applicable to the scheduling and overrun components noted in the definition of the Hourly Scheduling Penalty Quantity. El Paso bases this update on what it describes as the Commission's recognition that keeping the unauthorized overrun rate at two times the IT rate was sufficient to deter shippers from any inappropriate reliance on overrun service, as well as other statements in the Rehearing Order.²⁰

11. El Paso also made additional tariff revisions in compliance with different sections of the Rehearing Order, which are not contested by any parties to this proceeding.

b. Public Notice, Intervention and Comments

12. Public notice of El Paso's Filing was issued on June 5, 2012. Interventions and protests were due as provided in section 154.210 of the Commission's regulations, 18 C.F.R. § 154.210 (2012). Pursuant to Rule 214, (18 C.F.R. § 385.214 (2012)), all timely filed motions to intervene and any unopposed 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

¹⁹ El Paso states that while these tariff revisions should be in effect retroactive to January 1, 2009 (the implementation date of the relevant tariff revisions in Docket No. RP08-426-000, *et al.*), it is submitting these tariff records with an effective date of May 1, 2010 (El Paso's baseline eTariff effective date) consistent with the Commission's eTariff procedures that do not allow requests for effective dates prior to the implementation of the baseline tariff. El Paso states that it is setting the priority of these records at a higher level than those submitted in El Paso's baseline tariff.

²⁰ El Paso Compliance Filing at 5 (citing Rehearing Order 139 FERC ¶ 61,096, at P 125 (declining to clarify the definition of hourly scheduling penalty related to the recovery of hourly scheduling penalty quantity because such an interpretation would change the nature of El Paso's penalty structure beyond the scope of the proposed change and in a way not intended by the Commission; *id.* P 84 ("While our decision requires El Paso to revise its hourly scheduling penalty to reflect the 100 percent load factor IT rate, it also allows El Paso to keep the unauthorized overrun rate at two times the 100 percent load factor IT rate."))).

existing parties. UNS Gas, Inc. and Tucson Electric Power Company (collectively, UNS) filed comments.²¹ Joint Parties filed a protest.²²

13. In its comments, UNS states that it had concerns when it reviewed El Paso's compliance filing as to how El Paso would apply the unauthorized overrun component of the Hourly Scheduling Penalty. After discussions with El Paso and others, the parties drafted a clarification. It was agreed among the parties to these discussions that if the Commission accepts that portion of El Paso's compliance filing, the Commission should require El Paso to clarify its proposal as follows:

Specifically, El Paso's proposed rate for the unauthorized overrun component of the Hourly Scheduling Penalty would (1) be applied to firm transportation service, such that the overrun quantity would only reflect quantities *above* applicable hourly contract entitlement for service taken under firm transportation Rate Schedules, that is, 1/24 times the shipper's MDQ times the percentage hourly allowance purchased by the shipper under various firm Rate Schedules; (2) not be applied to any interruptible transportation quantities; and (3) not result in the surcharging or additional refund of any penalties from January 1, 2009 to July 1, 2012. The hourly scheduling quantity component shall include quantities in excess of the applicable hourly scheduled entitlement, but less than the applicable hourly contract entitlement.²³

14. UNS states that El Paso has reviewed this paragraph and authorized the parties to state that El Paso agrees with the clarification. UNS further states that with this clarification, it does not oppose El Paso's compliance filing.

²¹ On June 19, 2012, UNS filed an errata, in which UNS filled in a placeholder for a citation that was not completed in its initial filing.

²² Joint Parties include the following entities: Arizona Electric Power Cooperative, Inc.; Arizona Public Service Company; Gila River Power LLC; Golden Spread Electric Cooperative, Inc.; Salt River Project Agricultural Improvement and Power District; Sempra Generation; and Texas Gas Service Company, a division of ONEOK, Inc. On June 20, 2012, Joint Parties filed an errata, in which it corrected typographical errors related to the effective date of El Paso's proposed tariff revisions.

²³ UNS Comments at 3 (internal footnote omitted) (emphasis in original).

15. In its protest Joint Parties argue that the Rehearing Order does not require, nor can it justify, El Paso's proposal to charge two times the 100 percent load factor equivalent IT rate for unauthorized hourly overrun quantities, much less authorize such a change to become effective May 1, 2010. Joint Parties note that El Paso's proposal in its compliance filing is the subject of El Paso's currently pending clarification request. As such, Joint Parties argue that it is inappropriate to accept the proposed change under the guise of a compliance filing. Joint Parties state that it was not until El Paso's June 4 compliance filing in this proceeding that El Paso proposed an hourly overrun rate and that prior to this filing, El Paso's tariff did not have such a rate. Accordingly, Joint Parties contend that the Rehearing Order could not authorize such a rate, which they note is consistent with the Commission's decision that it was not changing the penalty itself.²⁴

16. Joint Parties also contend that the details of El Paso's proposed new charge are unclear and have not been shown to be just and reasonable. For example, Joint Parties ask how the hourly overrun component would be calculated: (a) if a shipper has more than one firm service agreement or subscribes to more than one type of firm service; or (b) if at all for deliveries at an alternate receipt point. Joint Parties also argue that under El Paso's proposal, a shipper could experience an hourly overrun and still remain within its contract maximum daily quantity.

17. Finally, Joint Parties argue that to the extent the Commission does not reject El Paso's proposal, it should condition its acceptance of the proposal in the way described by UNS above.

18. El Paso filed an answer on June 28, 2012. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2012), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept El Paso's answer because it has provided information that assisted us in our decision-making process.²⁵

19. In its answer, El Paso frames the issue as whether the Commission intended to exercise its authority under section 5 of the Natural Gas Act (NGA) to change the rate that applies to the non-critical unauthorized *hourly* overrun quantities from two times the 100 percent load factor equivalent IT rate to one times that rate and whether El Paso's compliance filing implemented that intent. El Paso claims that contrary to the protest, a rate for non-critical unauthorized hourly overrun quantities did exist prior to El Paso's

²⁴ Joint Parties Protest at 8 (citing Rehearing Order, 139 FERC ¶ 61,096 at P 123).

²⁵ On July 9, 2012, Joint Parties filed an answer to El Paso's answer. We are not persuaded to accept Joint Parties' answer and will, therefore, reject it.

compliance filing. El Paso states that the rate that applied to both the scheduling and overrun components of El Paso's Hourly Scheduling Penalty Quantity was two times the 100 percent load factor equivalent rate.

20. El Paso states that in light of conflicting statements in the Rehearing Order, the question legitimately arises as to whether the Commission intended to exercise its section 5 authority to reduce the rate for the non-critical unauthorized hourly overrun component quantities. If not, El Paso claims that the existing rate (two times the 100 percent load factor IT rate) remains in effect for that portion of the Hourly Scheduling Penalty and is consistent with El Paso's compliance filing. El Paso further asserts that its proposed rate for its non-critical unauthorized hourly quantities is properly structured vis-à-vis the daily unauthorized overrun rate. El Paso states that shippers would only pay the higher of the two overrun penalties and that hourly overrun quantities are not converted into a daily equivalent. El Paso contends that the Commission has stated that the proper rate for amounts above contract entitlements is the "two times" rate, and El Paso argues that this should apply regardless of whether the entitlement exceeded was the daily or hourly entitlement.

3. Commission Determination

21. El Paso seeks clarification, or in the alternative rehearing, that the Commission intended to exercise its authority under section 5 of the NGA to change the rate that applies only to the hourly scheduling component of the Hourly Scheduling Penalty Quantity—and not to the non-critical unauthorized *hourly* overrun quantities component—from two times the 100 percent load factor equivalent IT rate to one times that rate.

22. El Paso did not raise this issue in its request for rehearing of the December 18 Order, which found that "El Paso's hourly scheduling penalty should be the 100 percent load factor IT rate, and not two times the IT rate, as was previously accepted in the 2006 Rate Case."²⁶ In its request for rehearing of the December 18 Order, El Paso summarized the Commission's decision as follows: "The result of the Commission's holdings is that El Paso is required to: (1) set its unauthorized *daily* overrun charge at twice the 100 percent load factor IT rate regardless of the rates that are approved in this proceeding for El Paso's short-term services and premium hourly services; and (2) further reduce its *hourly* scheduling penalty to one times the 100 percent load factor IT rate."²⁷ As this statement illustrates, El Paso appears to have understood the December 18 Order as

²⁶ December 18 Order, 125 FERC ¶ 61,309 at P 65.

²⁷ El Paso, January 21, 2009 Request for Rehearing at 15 (emphasis added).

requiring it to reduce its *hourly* scheduling penalty, but not its unauthorized *daily* overrun charge. El Paso did not raise the issue it now presents—how the December 18 Order applies to the overrun quantity component of its hourly scheduling penalty—in its rehearing request of the December 18 Order. As we have previously stated, “[a party] is entitled to one opportunity to ask the Commission to reconsider a decision. Arguments that are not made then cannot be made later. . . .”²⁸ We therefore look with disfavor on El Paso’s introduction of this issue at this late stage of the proceeding, and we deny its request for rehearing on this issue.

23. Nonetheless, to remove any uncertainty, we clarify that the Rehearing Order required El Paso to revise the rate for its hourly scheduling penalty, comprised of both the hourly scheduling quantities and unauthorized hourly overrun quantities, to 100 percent load factor IT rate.²⁹ El Paso is permitted, however, to maintain an unauthorized *daily* overrun rate at two times the 100 percent load factor IT rate.³⁰ Consistent with this clarification, we find that El Paso’s proposal to charge two times the 100 percent load factor IT rate for the unauthorized *hourly* overrun quantity component of El Paso’s hourly scheduling penalty does not comply with the Rehearing Order. We therefore reject that portion of El Paso’s compliance filing.

24. The remaining uncontested tariff records contained in El Paso’s compliance filing are accepted as consistent with the Rehearing Order. While we accept these tariff records effective January 1, 2009, we note that they will show an effective date of May 1, 2010, in eTariff.³¹

²⁸ See *Southwestern Public Service Co.*, 65 FERC ¶ 61,088, at 61,533 & n.14 (1993) (explaining that a party is entitled to one opportunity to ask the Commission to reconsider a decision and that arguments not made then cannot be made later).

²⁹ Rehearing Order, 139 FERC ¶ 61,096 at P 83.

³⁰ *Id.* P 84.

³¹ Consistent with the Commission’s eTariff procedures, an applicant may not request an effective date for tariff records prior to the implementation date of the baseline tariff. El Paso’s baseline tariff became effective May 1, 2010. Therefore, while the Commission accepts the proposed tariff revisions effective January 1, 2009, the tariff records will show an effective date of May 1, 2010 in eTariff.

B. Existing Contractual Rights to Sculpted Capacity**1. Request for Clarification**

25. In their joint request for clarification, Texas Gas Service Company, a division of ONEOK, Inc.; UNS Gas, Inc.; and Arizona Public Service Company (collectively, Petitioners) state that they do not take issue with the Commission's acceptance of the elimination of the sculpted monthly contract quantity and conversion rights in El Paso's tariff. Petitioners express concern, however, with statements in the Rehearing Order on this issue, arguing that such statements should not prejudge any future matters related to sculpting without consideration of specific contractual rights or operational considerations. Petitioners are concerned that statements that "sculpting is no longer needed because El Paso's system is no longer constrained and instead has unsubscribed capacity" and that certain actions "would do little to phase out these sculpted agreements" could be read to prejudge or prejudice issues that may arise regarding the continuation of shippers' existing sculpted contractual rights.³²

26. Petitioners argue that the Commission should remove any uncertainty on this point and clarify that it did not intend to prejudge future matters or impact existing contractual rights. Petitioners argue that such a clarification would confirm all parties' existing contractual rights and would be consistent with other sections of the December 18 Order as well as Opinion No. 517.³³ To the extent the Commission does not grant this clarification, Petitioners seek rehearing on this point.

2. Commission Determination

27. We grant Petitioners' request for clarification. The statements Petitioners are concerned about—"sculpting is no longer needed because El Paso's system is no longer constrained and instead has unsubscribed capacity" and that certain actions "would do little to phase out these sculpted agreements"—were general observations made in responding to arguments raised on rehearing in *this* proceeding. These statements, however, should not be taken as findings of fact applicable to the circumstances that may

³² Petitioners Request for Clarification at 2 (quoting Rehearing Order, 139 FERC ¶ 61,096 at PP 104, 106).

³³ *Id.* P 3 (citing December 18 Order, 125 FERC ¶ 61,309 at P 88 (clarifying that the Commission did not intend to prejudge any case-specific issue that may arise with respect to rights of first refusal in existing contracts in the context of seasonal shoulder month flexibility); Opinion No. 517, 139 FERC ¶ 61,095 at P 332 (declining to address issues related to the expiration of Article 11.2 protections as not yet ripe)).

arise in future proceedings. Accordingly, we grant Petitioners' request for clarification that the above-quoted statements do not prejudge or prejudice issues that may arise regarding the continuation of shippers' existing sculpted contractual rights.

The Commission orders:

(A) Petitioners' request for clarification of the Rehearing Order is granted, as discussed above.

(B) El Paso's request for clarification, or in the alternative rehearing, of the Rehearing Order is denied, as discussed above.

(C) The tariff records listed in Appendix A are accepted effective January 1, 2009.

(D) The tariff record listed in Appendix B is rejected.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Appendix A – Accepted Tariff Records

El Paso Natural Gas Company
FERC NGA Gas Tariff
EPNG Tariffs

[Part II: Stmt. of Rates, Section 4 - Footnotes, 5.0.0](#)

[Part III: Rate Schedules, Section 1 - Rate Schedule FT-1, 6.0.0](#)

[Part III: Rate Schedules, Section 3 - Rate Schedule FT-H, 7.0.0](#)

[Part III: Rate Schedules, Section 6 - Rate Schedule NNTD, 6.0.0](#)

[Part III: Rate Schedules, Section 7 - Rate Schedule NNTH, 7.0.0](#)

Appendix B – Rejected Tariff Record

El Paso Natural Gas Company
FERC NGA Gas Tariff
EPNG Tariffs

[Part IV: GT&C, Section 1 - Definitions, 6.0.0](#)