

107 FERC ¶ 61,245  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Southern Natural Gas Company

Docket Nos. RP02-86-002  
RP03-123-002  
RP04-79-001

ORDER ON REHEARING

(Issued June 2, 2004)

1. On March 18, 2004, Alabama Gas Corporation (Alabama Gas) filed a request for rehearing of the Commission's February 17, 2004 Order in the captioned dockets.<sup>1</sup> The February 17, 2004 Order denied requests for rehearing of two annual filings made under Southern Natural Gas Company's (Southern) cash-out mechanism. The order also declined to modify Southern's cash-out mechanism pursuant to section 5 of the Natural Gas Act (NGA) as requested by certain parties. For the reasons discussed below, the Commission denies Alabama Gas's request for rehearing.

**Background**

2. Section 14.2(c) of Southern's GT&C provides for an annual reconciliation of Southern's storage costs to reflect differences between the cost to Southern of its storage gas inventory and the amount Southern receives for such gas arising out of: (1) the purchase and sale of such gas in order to resolve shipper imbalances pursuant to the cash-out mechanism in section 14.1 of the GT&C; and (2) the purchase and sale of gas as necessary to maintain an appropriate level of storage gas inventory for system management purposes. In each of Southern's annual reconciliation filings since November 2000, Alabama Gas has protested that section 14.2 of the GT&C fosters "gaming" on Southern's system. Alabama Gas argued that Southern's cash-out pricing mechanism and Storage Cost Reconciliation Mechanism (SCRM) (collectively, cash-out

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<sup>1</sup> Southern Natural Gas Co., 106 FERC ¶ 61,149 (2004).

provisions) in sections 14.1 and 14.2 of its GT&C, respectively, unjustly and unreasonably permit the balancing parties to game the system and engage in cash-out arbitrage resulting in increased costs to Southern's customers. Alabama Gas pointed out that the index price used in Southern's cash-out mechanism is the average gas price for the month, which, at least toward the end of the month, can be predicted accurately. Alabama Gas noted that in times of price volatility, when the average gas price for the month is lower or higher than the actual price at the end of the month a shipper can game the system by purchasing more gas before the end of the month if the average price is lower, or less when higher.

3. In Southern's Order No. 637 compliance proceeding in Docket No. RP00-476-002,<sup>2</sup> Southern proposed a settlement that included a change to its cash-out index price to make it less predictable during the month and thus discourage arbitrage. The Commission found that the settlement's proposed changes to Southern's cash-out mechanism were beyond the scope of Order No. 637. Therefore, the Commission required Southern to eliminate the proposed change to its cash-out mechanism. The Commission stated that Southern could propose changes to its cash-out mechanism in a separate section 4 proceeding.

4. On November 27, 2002, Southern filed tariff sheets to place into effect its annual reconciliation of its storage costs for 2003. Protestors again contended that Southern's cash-out mechanism and its SCRM in section 14 of its GT&C contain flaws which result in gaming of the system, imposing unnecessary costs on shippers. On December 30, 2002, the Commission accepted and suspended the filing subject to refund and conditions.<sup>3</sup> The Commission found that this proceeding was the appropriate forum to address the issues raised by the protestors. Accordingly, the Commission ordered that a technical conference be held to address such issues.

5. A technical conference was held on April 3, 2003. On April 11, 2003, Southern filed a proposal to modify its cash-out mechanism and SCRM similar to the high-low weekly pricing mechanism that was previously proposed in its Order No. 637 proceeding. However, Southern contended that the settlement of its last general section 4 rate case, executed on March 10, 2000 (March 10, 2000 Settlement),<sup>4</sup> prohibited it from proposing

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<sup>2</sup> Southern Natural Gas Co., 99 FERC ¶ 61,042 at 61,162-63 (2002).

<sup>3</sup> Southern Natural Gas Co., 101 FERC ¶ 61,397 (2002).

<sup>4</sup> See Southern Natural Gas Co., 91 FERC ¶ 61,206 (2000) (approving uncontested settlement).

a change to its cash-out mechanism pursuant to section 4 of the NGA because the March 10, 2000 Settlement included a moratorium on proceedings initiated by Southern under section 4 of the NGA with an effective date prior to March 1, 2004.<sup>5</sup> Therefore, Southern requested that the Commission act under NGA section 5 to implement Southern's proposal to modify its cash-out mechanism. The Municipals, which includes Alabama Gas,<sup>6</sup> also filed a proposal to modify Southern's cash-out mechanism.<sup>7</sup>

6. On February 17, 2004, the Commission issued an order that terminated the technical conference proceeding. The Commission stated that a major threshold issue is whether the March 10, 2000 Settlement permitted Southern to propose a change in its cash-out mechanism pursuant to NGA section 4. The Commission found that it was ambiguous whether any modification of Southern's cash-out provisions would amount to an increase in "Settlement Rates" as prohibited by the rate moratorium. Likewise, the Commission found that it was ambiguous whether such cash-out provisions clearly fall within the prohibited modification of "the cost allocation, rate design, services, or billing determinants which underlie the rates established" in the March 10, 2000 Settlement. The Commission found that the better argument on balance was that the rate moratorium in the March 10, 2000 Settlement prohibits Southern from proposing to modify its cash-out mechanism under section 4 of the NGA. The March 10, 2000 Settlement includes an express listing of what rate changes are exempted from the rate moratorium. That listing does not include changes in the rate that must be paid to cash-out imbalances. Moreover, the Commission gave weight to the fact that most of the parties to the March 10, 2000 Settlement interpret the rate moratorium as applying to the cash-out mechanism. In any event, Southern had not made a section 4 filing to modify its cash-out provisions at that point. Therefore, the Commission concluded that change to Southern's cash-out provisions could only be effected through action under section 5 of the NGA.

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<sup>5</sup> See March 10, 2000 Settlement, Article IV.

<sup>6</sup> The Municipals are comprised of Alabama Municipal Distributors Group, the Austell Gas System, the Southeast Alabama Gas District, the Municipal Gas Authority, and Alabama Gas Corporation.

<sup>7</sup> Subsequent to this action, on November 26, 2003, Southern filed tariff sheets to place into effect its annual reconciliation of its storage costs for 2004. On December 31, 2003, the Commission accepted and suspended the revised tariff sheets to become effective January 1, 2004, subject to refund and conditions and the outcome of the proceedings in Docket No. RP03-123-000. Southern Natural Gas Co., 105 FERC ¶ 61,401 (2003).

7. The Commission determined that it would not exercise its discretion to take action pursuant to section 5 of the NGA, based upon the facts in evidence in that proceeding.<sup>8</sup> The Commission reasoned that a major purpose of a rate case moratorium in a settlement is to provide rate certainty to the parties.<sup>9</sup> Accordingly, the Commission determined that it would only take section 5 action to modify the rates subject to the rate moratorium in extraordinary circumstances. The Commission determined that in this instance it would exercise its discretion not to institute an NGA section 5 proceeding because there was insufficient evidence to support a finding that arbitrage is so detrimental to Southern's system that it creates such significant operating difficulties that the Commission needs to intervene in order to ensure adequate service to all of Southern's customers.

8. The Commission noted that Southern is not bound by the terms of its rate moratorium as of March 1, 2004. The Commission stated that, since Southern supported changing its cash-out mechanism in its comments following the technical conference, the Commission assumes that once the moratorium ends Southern will propose such changes under section 4 of the NGA. The Commission also stated that it expects that any filing proffered by Southern to modify its cash-out provisions at the end of its rate moratorium, in addition to reducing gaming opportunities on its system, would clearly explain the relationship between its cash-out mechanism and its SCRM. Moreover, the Commission stated that it expects that any such filing would address comments in the instant proceeding regarding the exclusion of poolers from the cash-out mechanism.

### **Discussion**

9. On rehearing, Alabama Gas contends that the Commission used the wrong legal standard in determining not to exercise its authority under section 5 of the NGA to modify sections 14.1 and 14.2 of the GT&C of Southern's tariff to eliminate cash-out arbitrage. Alabama argues that the Commission ignored Article XVI, section 6 of the March 10, 2000 Settlement and erroneously required proponents of changing the cash-out mechanism to meet the Mobile-Sierra "public interest" standard, when the "just and reasonable" standard applied under governing precedent. By requiring the proponents of changing Southern's tariff to prove operating difficulties of the magnitude necessary to require Commission intervention to protect the adequacy of service to all of Southern's

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<sup>8</sup> 106 FERC ¶ 61,149 at P 18 (2004).

<sup>9</sup> See 106 FERC at P 18 (citing *Panhandle Eastern Pipe Line Co. v. FERC*, 95 F.3d 62, 74 (D.C. Cir. 1996)).

customers, the Commission was applying in everything but name the Mobile-Sierra “public interest” standard.<sup>10</sup>

10. Alabama Gas incorrectly characterizes the Commission’s action as requiring a Mobile-Sierra finding in order to modify the March 10, 2000 Settlement under section 5 of the NGA. In fact, the Commission applied the “just and reasonable” standard that Alabama Gas asserts is the correct standard. As stated in its February 17 Order, however, it is well settled that the Commission has discretion whether to proceed on a section 5 complaint.<sup>11</sup> The Commission determined that it would not exercise that discretion in this case due to the March 10, 2000 Settlement moratorium. The purpose of a rate case moratorium in a settlement is to provide significant rate certainty to the parties. Therefore, in deciding whether to take section 5 action under the NGA “just and reasonable” standard, it is appropriate for the Commission to take into account the existence of a rate moratorium. In Texas Eastern,<sup>12</sup> the Commission found that if a settlement rate moratorium is in effect that includes a moratorium on changes in the pipeline’s cash-out mechanism, the Commission would not take action under section 5 of the NGA to modify the cash-out mechanism unless there is sufficient evidence to support a finding that arbitrage is so detrimental to the system that it creates such significant operating difficulties that the Commission needs to intervene in order to ensure adequate service to all of its customers. The Commission did not find such evidence. Nor does Alabama Gas allege any such evidence in its rehearing request. Accordingly, as discussed above, Alabama Gas’s request for rehearing is denied.

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<sup>10</sup> See United Gas Pipeline Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956); FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956).

<sup>11</sup> In General Motors Corp. v. FERC, 613 F.2d 939, 944-45 (D.C. Cir. 1979), the D.C. Circuit Court held that the Commission did not abuse its discretion in dismissing the complaint, stating, “[i]n general, an administrative agency’s decision to conduct or not to conduct an investigation is committed to the agency’s discretion. If an agency considers all the relevant factors so that a court can satisfy itself that the agency has actually exercised its discretion, an agency’s decision to refrain from investigation is unreviewable.” Id. at 944 (citations omitted).

<sup>12</sup> Texas Eastern Transmission, L.P., 102 FERC ¶ 61,198 at P 104-05 (2003).

The Commission orders:

Alabama Gas's request for rehearing of the February 17, 2004 Order in this docket is denied.

By the Commission.

( S E A L )

Linda Mitry,  
Acting Secretary.