

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

El Paso Natural Gas Company

Docket Nos. RP04-251-000
RP04-248-000

ORDER ON SETTLEMENT

(Issued December 20, 2004)

1. On September 13, 2004, El Paso Natural Gas Company (El Paso) and the Settling Parties filed a settlement to resolve the issues in El Paso's Order No. 637 proceeding in Docket No. RP04-251-000 and El Paso's Imbalance Management filing in Docket No. RP04-248-000. This order accepts the settlement as fair and reasonable and in the public interest because it will allow El Paso and its shippers to benefit from the requirements of Order No. 637, including, but not limited to, segmentation, and various enhancements to imbalance management on El Paso's system.

Background

2. On June 15, 2000, El Paso filed tariff sheets in Docket No. RP00-336-000 to comply with Order No. 637, *et al.*¹ On August 15, 2000, El Paso submitted a plan to allow limited segmentation on its system in light of El Paso's existing full requirements contracts, which did not have specific capacity rights and had system-wide receipt points. In response, the Commission ordered El Paso to file a system-wide capacity allocation

¹ Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services, FERC Stats. & Regs., Regulations Preambles (July 1996 – December 2000) ¶ 31,091 (Feb. 9, 2000); *order on rehearing*, Order No. 637-A, FERC Stats. & Regs., Regulations Preambles (July 1996 – December 2000) ¶ 31,099 (May 19, 2000); *order on rehearing*, Order No. 637-B, 92 FERC ¶ 61,062 (July 26, 2000); *aff'd in part and remanded in part*, *Interstate Natural Gas Association of America v. FERC*, 285 F.3d 18 (D.C. Cir. 2002).

proposal, and among other things, directed the conversion of full requirements contracts to contract demand contracts and the assignment of specific receipt point rights to all contracts except FT-2 small customers.²

3. Those changes took effect September 1, 2003, and in light of these significant changes, the Commission ordered El Paso to refile to comply with Order No. 637.³ On April 1, 2004, El Paso filed *pro forma* tariff sheets in Docket Nos. RP04-248-000 and RP04-251-000. In Docket No. RP04-248-000, El Paso addressed imbalance management services. El Paso proposed changes to its tariff regarding shippers' ability to manage their imbalances, including the introduction of two new services, Park and Loan and Swing Service. In addition, El Paso sought to institute an Imbalance Adjustment Nomination Cycle to replace Flow Day Diversion to allow shippers the opportunity to resolve over and under delivery issues and reduce or eliminate imbalances. El Paso also proposed revisions and additions to daily and monthly balancing requirements. Finally, El Paso requested the establishment of a Cash Value Account to address the costs and revenues of managing gas supply issues caused by shipper behavior.

4. In Docket No. RP04-251-000, El Paso filed its proposal to establish primary firm path rights and procedures for segmenting its system. El Paso also proposed to change its Operational Flow Order (OFO) procedures. El Paso proposed a new alert, Strained Operating Conditions (SOC), to warn that system resources are being stressed. El Paso also proposed to convert its existing Overpull Alert to a Critical Operating Condition alert (COC). Under El Paso's filing, the SOC and COC each had daily balancing requirements with the COC having lower tolerances.

5. Technical conferences were held on May 24-25, 2004, and July 27-28, 2004, to discuss the issues raised in Docket Nos. RP04-248-000 and RP04-251-000. El Paso and the parties to the proceedings also met separately in an effort to discuss the issues and resolve them by settlement. As a result of the various discussions, El Paso and the Settling Parties filed a settlement on September 13, 2004.

² *El Paso Natural Gas Company*, 99 FERC ¶ 61,244 (2002); *El Paso Natural Gas Company*, 100 FERC ¶ 61,285 (2002), *reh'g denied*, 104 FERC ¶ 61,045 (2003); *appeal pending, Arizona Corp. Comm. v. FERC*, No. 03-1206 (D.C. Cir.) (Capacity Allocation Proceeding).

³ *El Paso Natural Gas Company*, 106 FERC ¶ 61,050 (2004).

Details of the Settlement

6. Article I of the settlement sets forth the background of the proceedings. Article II of the settlement addresses implementation. Article II states that to resolve all the issues in Docket Nos. RP04-248-000 and RP04-251-000, El Paso shall file to make effective the tariff sheets in Appendix A to the settlement. To the extent there are any conflicts between the settlement and the *pro forma* tariff sheets, the tariff sheets shall govern. El Paso estimates that it will require approximately one year after a Commission order accepting the settlement to complete the extensive business system changes that are required to implement the *pro forma* tariff sheets. El Paso is required to post a notice on its electronic bulletin board indicating when it expects the tariff provisions to become effective. Within 35 days of the date it anticipates the required business changes will be completed, El Paso is required to file a motion to place the *pro forma* tariff sheets into effect. El Paso is not required to implement all changes at one time, and El Paso may file to implement tariff sheets as their related business system changes are completed. Upon the effectiveness of the settlement as provided in Article VII, the tariff sheets filed on April 1, 2004 in Docket Nos. RP04-248-000 and RP04-251-000 shall be deemed withdrawn.⁴ As a result of this settlement, the new Swing Service, the Imbalance Adjustment Nomination Cycle, and the daily balancing requirement not associated with an SOC or COC, as proposed by El Paso in the April 1, 2004 filing, will not be implemented. In addition, El Paso's proposal in the April 1, 2004 filing to eliminate Flow Day Diversion will be withdrawn. The settlement is without prejudice to El Paso's filing to propose to institute new services in El Paso's next rate case to become effective no earlier than January 1, 2006, and to any party's right to advocate any position on such proposed new services.

7. Article III of the settlement addresses the procedures to be employed during strained operating conditions and critical operating conditions. El Paso may issue an SOC or COC under certain conditions described in the tariff. The SOC or COC will be called for specific shippers or a specific location if doing so will remedy the cause(s) for the SOC or COC. An SOC will remain in effect until canceled or elevated to a COC. In the event of an emergency situation where safety and/or system integrity is at immediate risk, El Paso may declare a COC without first declaring an SOC. El Paso will establish a tolerance level in the SOC notice and shippers failing to comply may be subject to imbalance charges. El Paso will permit shippers under the SOC to nominate gas to resolve an imbalance created in a previous gas day (catch-up). To the extent such nominations are scheduled and received by El Paso, a shipper would have the ability to reduce or eliminate an imbalance charge incurred the previous day. There are various

⁴ The tariff sheets to be withdrawn are listed in the Appendix to this order.

situations in which El Paso will permit a shipper to catch-up. El Paso is required to issue a notice of a COC and shippers are subject to imbalance charges if they exceed certain tolerances stated in the tariff. The imbalance charges under a SOC or COC will be the higher of \$10 per Dekatherm or a formula based on certain spot index prices. An SOC or COC imbalance charge will not be assessed for a shipper whose imbalance is in the opposite direction of the situation identified in the SOC or COC area and whose imbalance helps relieve the strained or critical condition. Subject to certain conditions, El Paso is also restricted for one year from making changes concerning the SOC or COC or implementing certain non-critical penalties. The SOC or COC imbalance charges will be credited annually to all non-offending transportation shippers by invoice credit.

8. Article IV of the settlement addresses monthly imbalances. Imbalances created by shippers during a calendar month shall be cashed out in the two months following the month the imbalance was created. Prior to cash-out, shippers will have several mechanisms to reduce or eliminate the quantity of the imbalance. These mechanisms are netting, trading, and make-up or pay back. A shipper may also elect to cash out imbalances at any time. In order to mitigate arbitrage opportunities, if a shipper owes El Paso gas for a month, the imbalance will be cashed out based on a price which is the higher of the applicable cash-out price for the month the imbalance was incurred or the applicable cash-out price for the month the imbalance is cashed out. If a shipper is owed gas, the imbalance will be cashed out using a price based on the lower of the applicable cash-out price for the month the imbalance was incurred or the applicable cash-out price for the month the imbalance is cashed out. El Paso shall retain any and all revenues from monthly cash-outs to reimburse it for any and all costs of obtaining the gas supply and shall be at risk if the cost of obtaining the gas supply exceeds the revenues from cash-out. El Paso is required to file with the Commission a report detailing all imbalance activity for the first and then succeeding twelve months of operation, respectively, including the revenues and costs from the monthly cash-outs.

9. El Paso's agreement to certain monthly imbalance procedures is based on the parties' commitment to: (1) reasonably minimize the creation of monthly imbalances, and (2) make reasonable efforts to eliminate any monthly imbalances through the use of the imbalance procedures coupled with gas scheduling opportunities. Based on the parties' commitment, El Paso will not file to change its monthly imbalance tariff sheets prior to the development of a one-year history of operations under the monthly imbalance tariff sheets. However, if such shipper commitments are not kept or unforeseen situations of persistent abuse of the imbalance tariff provisions to take advantage of arbitrage situations cause harm to El Paso or its system, El Paso shall have the right to file to change its monthly imbalance tariff provisions and parties reserve their rights to advocate any position with respect to any such filing.

10. Article V addresses delivery point Operational Balancing Agreement (OBA) operators. Operators of delivery points at traditional city-gate or end-user delivery points (Delivery Point Operators) may retain existing or execute new delivery point operational balancing agreements (Delivery Point OBA) if the delivery points have remotely activated electronic flow control (Active Flow Control) and/or so long as the Delivery Point OBA is subject to the same requirements as Transportation Service Agreements (TSAs) for imbalances, including, without limit, monthly balancing and daily balancing under an SOC or COC.

11. Article VI addresses pathing and segmentation. The *pro forma* tariff sheets in Appendix A identify the physical and virtual paths that shippers will have under their contracts and the rights such paths provide. The identification of such paths will allow shippers to segment those paths either for their own use or for capacity release. The *pro forma* tariff sheets in Appendix A also set forth the rights and procedures for segmenting capacity. In assigning paths to the shippers for their contracts, El Paso will first assign a path using the San Juan-Permian Crossover to shippers with "North" receipt points and delivery points in the "East End" that are located east of Cornudas, Texas. To enable El Paso to assign path rights from receipt points to delivery points, shippers shall not be eligible to change their current receipt or delivery points for a period of up to 60 days ("Black-out Period"). After the initial assignment of paths to shippers and the Black-out period, El Paso will establish procedures for shippers to trade paths. El Paso will file a report with the Commission detailing the first twelve months of El Paso's implementation of pathing and segmentation activity on the system. El Paso shall eliminate its reliance upon 80 percent of the annual average North to South displacement capacity in providing firm transportation service, by February 28, 2007.

12. Article VII addresses the conditions under which the settlement becomes effective. Article VII also outlines the conditions under which El Paso may withdraw the settlement if the settlement is accepted subject to modifications or conditions. The article also provides the Settling Parties rights to withdraw their support of the settlement if modifications or conditions are attached to the settlement. If 40 percent of the Settling Parties file to withdraw their agreement with the settlement it will become null and void.

13. Article VIII addresses modifying the stipulation and agreement. After it becomes effective, the settlement may be amended in writing by the agreement of El Paso and the Settling Parties. It is agreed that the *Mobile-Sierra* standard of review to modify or amend the settlement applies. Nothing in the settlement shall be construed to change or alter El Paso's right from time to time, to propose and file with the Commission, in accordance with section 4 of the Natural Gas Act, changes, additions, amendments, revisions and modifications in rate(s) (including, without limit, the Statement of Rates), Rate Schedules, and General Terms and Conditions of El Paso's Tariff.

14. Article IX addresses the term of the settlement. The term of the settlement will extend from the date it becomes effective in accordance with Article VII through December 31, 2005, except for certain specified provisions.

15. Article X sets forth the reservations applicable to the settlement. The settlement shall not be subject to discovery or admissible in evidence. Nothing in the settlement is intended to affect or should be construed as affecting, in any way, any party's rights to argue or take any position on the proper application of Section 11.2 in the 1996 El Paso Settlement filed in Docket No. RP95-363-000, *et al.*, as accepted by the Commission. The outcome of any decision on the proper application of paragraph 11.2 shall not affect the resolution of the issues by this settlement. Nothing in the settlement is intended to affect, or should be construed as affecting, in any way, any party's rights in Docket No. RP00-336-000 or in any appeal of any order in that proceeding. In its next rate case filing to be effective no earlier than January 1, 2006, for the virtual portion of any path involving movement of gas received from the North System to deliveries on the South System which traverses the Plains to Cornudas virtual area, El Paso will propose no more than 257 miles as a mileage assignment associated with the Plains to Cornudas virtual area for ratemaking purposes. Nothing in the settlement is intended to waive or should be construed as waiving any party's right to advance any argument or position in Docket No. RP00-336-000 including, without limit, any proceedings as the result of any remand in that proceeding. Nothing in the settlement is intended to preclude or inhibit a party from arguing that a remand and/or reversal from a court of appeals in Docket No. RP00-336-000 requires the Commission to vacate its orders in Docket No. RP04-251-000, including the order accepting this settlement or from arguing in opposition to such an argument.

16. Article X states that if the Court of Appeals orders a remand of the Docket No. RP00-336-000, *et al.* orders to the FERC, no party shall contend before the FERC, or in any judicial forum, that the existence of this Stipulation and Agreement or participation of a party to this Stipulation and Agreement has precluded or made impossible either the restoration of Full Requirements service or any other remedy that the FERC may fashion in response to a remand; provided, however, that subject to the reserved issue provision described in paragraph 7.2, all parties can maintain any and all other arguments with respect to the appropriateness of the restoration of Full Requirements service.

17. Article XI addresses termination of the proceedings. It is stipulated and agreed that upon the effectiveness of the instant Stipulation and Agreement, as provided in Article VII, hereof, the proceedings in Docket Nos. RP04-248-000 and RP04-251-000 shall be deemed terminated. Additionally, all issues related to the tariff sheets listed in Appendix B shall be deemed resolved by this Stipulation and Agreement.

Public Notice and Interventions

18. On September 14, 2004, a notice was issued providing for initial comments on the settlement to be filed by September 24, 2004, and reply comments by October 6, 2004. Comments on the settlement were filed by: El Paso; Sid Richardson Energy Services Co., Sid Richardson Pipeline, Ltd, and Richardson Energy Marketing, Ltd. (Richardson);⁵ Southern California Gas Company (SoCal Gas) and San Diego Gas and Electric Company (SDG&E); the Public Utilities Commission of the State of California (CPUC); Arizona Public Service Company (APS) and Pinnacle West Energy Corporation (PWEC); Southwest Gas Corporation (Southwest); GS Electric Generating Cooperative, Inc. (GSE) and Golden Spread Electric Cooperative, Inc. (Golden Spread); El Paso Electric Company (El Paso Electric); the Indicated Shippers; Phelps Dodge Corporation (Phelps Dodge); MGI Supply Ltd. (MGI); Arizona Electric Power Cooperative, Inc. (AEPCO); and El Paso Municipal Customer Group (EPMCG).

19. Reply comments were filed by: SoCal and SDG&E; CPUC; El Paso; UNS Gas, Inc.; El Paso Electric; Duke Energy Trading and Marketing, L.L.C. and Duke Energy Marketing America, L.L.C. (Duke); and Phelps Dodge. Phelps Dodge also filed a motion for leave to file answer clarifying settlement provision and answer. Most of the parties filed comments or reply comments urging the Commission to accept the settlement without modification. Several parties requested clarifications or modifications to the settlement. Those comments will be discussed below.

Discussion

20. In their comments, El Paso Electric and Phelps Dodge request clarification or modification of Article X, section 10.2(f) of the settlement. Both parties are concerned that the implementation of pathing and segmentation might serve as a basis for arguing that the Commission should deny restoration of FR service regardless of the Court of Appeals' instructions. That section states:

If the Court of Appeals orders a remand of the Docket No. RP00-336-000, *et al.* orders to the FERC, no party shall contend before the FERC, or in any judicial forum, that the existence of this Stipulation and Agreement or participation of a party to this Stipulation and Agreement has precluded or

⁵ Richardson states that it is incorrectly listed as a Settling Party in Appendix C. Richardson states that it is not a sponsor of the settlement but takes no position regarding the terms of the settlement. In its comments El Paso states that it has no objection to the removal of Richardson as a settling party.

made impossible either the restoration of Full Requirements service or any other remedy that the FERC may fashion in response to a remand; provided, however, that subject to the reserved issue provision described in paragraph 7.2, all parties can maintain any and all other arguments with respect to the appropriateness of the restoration of Full Requirements service.

21. El Paso Electric states that its agreement to the settlement presumes that the Capacity Allocation Proceeding has been resolved lawfully. El Paso Electric asserts that if the D.C. Circuit remands the Capacity Allocation Proceeding, then the Commission should adopt a lawful remedy, including the possible restoration of FR service, to resolve the Capacity Allocation Proceeding. El Paso Electric asserts that the Commission should refrain from taking actions to “scramble the egg” so that it cannot be unscrambled. Consistent with this policy, El Paso Electric argues that the Commission should clarify that it will not tolerate arguments from any party that the implementation of the settlement precludes the adoption of any remedy in the Capacity Allocation Proceeding upon remand from the court, including the restoration of FR service.

22. Similarly, Phelps Dodge submits that it is in the public interest for the Commission to modify the settlement to include language barring all parties from contesting the possible future restoration of FR service on the basis that implementation of the settlement has “scrambled the egg.” Phelps Dodge requests that the Commission modify Section 10.2(f) of the settlement to add the phrase “the implementation of service rights in accordance with this Stipulation and Agreement” immediately after the phrase “the existence of this Stipulation and Agreement.”

23. A number of parties filed reply comments opposing the requests for clarification or modification of Phelps Dodge and El Paso Electric. They assert that El Paso Electric and Phelps Dodge are attempting to add terms to a settlement that was the result of lengthy and careful negotiations. They contend that it is impossible to craft in advance language addressing the various contingencies that may result if a remand of the Docket No. RP00-336 proceeding occurs.

24. The Commission will not grant the requests for clarification or modification. The Commission does not believe that it is appropriate to add terms to the settlement that were not negotiated or contemplated by the parties. If the court remands the Capacity Allocation Proceeding in Docket No. RP00-336-000, parties will have the opportunity to make their arguments at that time and the Commission will consider the arguments and take the appropriate action consistent with the court’s direction.

25. The Commission has reviewed the settlement and associated tariff sheets and finds that this uncontested settlement is fair and reasonable and in the public interest.⁶ The Commission also finds that the tariff sheets are consistent with the requirements of Order No. 637. Accordingly, the settlement filed by El Paso and the Settling Parties is accepted. Acceptance of this settlement does not constitute a precedent regarding any principle or issue in this proceeding.

The Commission orders:

(A) El Paso's September 13, 2004 settlement is accepted as fair and reasonable and in the public interest.

(B) The tariff sheets listed in the Appendix shall be deemed withdrawn, as discussed in the body of this order. El Paso is required to file actual tariff sheets 30 days from the date of this order, to be effective January 1, 2006. To the extent El Paso completes its business system changes prior to that date, El Paso may file a motion to seek earlier implementation.

By the Commission. Commissioner Kelly not participating.

(S E A L)

Magalie R. Salas,
Secretary.

⁶ The fact that parties commented on Section 10.2(f) of the settlement does not make this a contested settlement because Section 7.2 of the settlement permitted parties to submit comments on that section. It states "[a]ny party that comments on the appropriateness of expanding the scope of the waiver in subparagraph 10.2(f) of the Stipulation and Agreement may not withdraw its consent to the Stipulation and Agreement pursuant to this paragraph if the Commission issues a final order adverse to its position on that issue."

Appendix

Docket No. RP04-251-000
Tariff Sheets Proposed to be Withdrawn

Pro Forma Second Revised Volume No. 1A

Sixth Revised Sheet No. 102
Fourth Revised Sheet No. 113B
Fourth Revised Sheet No. 114
Twelfth Revised Sheet No. 202B
Original Sheet Nos. 202C and 202D
Sixth Revised Sheet No. 211
Ninth Revised Sheet No. 214
Second Revised Sheet No. 214A
Ninth Revised Sheet No. 215
Fifth Revised Sheet No. 217
First Revised Sheet Nos. 219G – 219I
Second Revised Sheet No. 259
First Revised Sheet No. 270A
Third Revised Sheet No. 271
Second Revised Sheet No. 274
First Revised Sheet Nos. 284A and 284B
Third Revised Sheet No. 285
Second Revised Sheet No. 286
Original Sheet Nos. 286A – 286C
Sixth Revised Sheet No. 287
First Revised Sheet Nos. 287A and 287B
Original Sheet No. 287C
Fifth Revised Sheet No. 288
Sixth Revised Sheet No. 289
Seventh Revised Sheet No. 290
Second Revised Sheet No. 301
Third Revised Sheet Nos. 303 and 304
Sixth Revised Sheet No. 336
Second Revised Sheet No. 348A
Eighth Revised Sheet No. 350
Third Revised Sheet No. 353 and 354
First Revised Sheet Nos. 363 – 366
Second Revised Sheet No. 415
Third Revised Sheet Nos. 417 and 423

Appendix (cont)

Docket No. RP04-248-000
Tariff Sheets Proposed to be Withdrawn

Second Revised Volume No. 1-A

Twenty-Second Revised Sheet No. 1
Sixth Revised Sheet No. 21
Thirty-Sixth Revised Sheet No. 24
Original Sheet No. 27A
Seventh Revised Sheet No. 102
Third Revised Sheet No. 103
Second Revised Sheet Nos. 104 and 105
Fifth Revised Sheet No. 114
Original Sheet Nos. 114A and 114B
Fourth Revised Sheet No. 119
Original Sheet Nos. 122 and 131 – 144
Fourth Revised Sheet Nos. 200 and 211A
Third Revised Sheet No. 212
Second Revised Sheet No. 213
Tenth Revised Sheet no. 214
Fourth Revised Sheet No. 215A
Third Revised Sheet No. 215B
Original Sheet No. 215C
First Revised Sheet Nos. 261 – 264
Third Revised Sheet No. 265
Second Revised Sheet No. 266
First Revised Sheet Nos. 267 and 268
Third Revised Sheet Nos. 269 and 270
First Revised Sheet Nos. 276 and 277
Second Revised Sheet Nos. 278 and 279
Third Revised Sheet No. 280
Second Revised Sheet Nos. 281 and 282
First Revised Sheet No. 283
Third Revised Sheet No. 284
Second Revised Sheet Nos. 297 – 298
Third Revised Sheet No. 362
Original Sheet Nos. 362A – 362M
Second Revised Sheet No. 445
First Revised Sheet Nos. 446 and 447 - 452