

111 FERC ¶ 61,511
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Southwest Gas Corporation

Docket No. RP05-354-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued June 30, 2005)

1. On May 24, 2005, Southwest Gas Corporation (Southwest) filed a petition for declaratory order to remove uncertainty concerning Section 20.8 of the General Terms and Conditions (GT&C) of El Paso Natural Gas Company's (El Paso) tariff. Southwest requests expedited treatment of this petition so that an order can be issued by the Commission by June 30, 2005, or as soon thereafter as possible. As discussed below, the Commission will clarify that while El Paso's tariff recognizes some flexibility with regard to uniform hourly flows, it does not give shippers a firm right to hourly variations in service.

The Petition for Declaratory Order

2. Southwest requests that the Commission remove uncertainty regarding section 20.8 of El Paso's GT&C, which states:

[Shipper shall] endeavor to deliver and receive natural gas in uniform hourly quantities during any gas day with operating variations kept to the minimum feasible.¹

¹ Second Revised Sheet No. 274.

Southwest requests that the Commission declare the following:

GT&C section 20.8 states that the shipper endeavor to take gas ratably through the gas day and to keep variations in hourly takes to the minimum feasible. This tariff provision does not constitute a fixed obligation of shipper to take 1/24 ratably throughout the gas day, nor does it limit daily firm service rights by imposing an inflexible uniform hourly service limitation.

3. Southwest states that El Paso does not offer firm no-notice service or firm contract storage services and historically has managed transient flows through line pack. Southwest asserts that El Paso has never applied nor enforced 1/24 ratable takes under this provision, but that El Paso has recently adopted a new interpretation of section 20.8 that is creating uncertainty regarding Southwest's service rights on the mainline, as well as on laterals. Southwest states that El Paso has expressed this new interpretation in a data response in another proceeding, where El Paso stated that "shippers only have tariff rights to 1/24 ratable hourly service."² Southwest avers that El Paso's tariff interpretation has made it difficult for Southwest to plan future service needs because Southwest cannot meet its firm service load profile under a 1/24 ratable take requirement.

4. Southwest asserts that under the North American Energy Standards Board (NAESB) standards and the Commission's regulations, the applicability of uniform hourly flow restrictions is controlled by the individual pipeline's tariff.³ Southwest states that Section 20.8 of El Paso's GT&C requires a shipper to "endeavor" to deliver and receive uniform hourly quantities "with operating variations kept to the minimum feasible." Southwest asserts that the language requiring a shipper to "endeavor" to take at uniform hourly rates requires only that a shipper try to do so and, therefore, section 20.8 of the GT&C is something less than a fixed, inflexible obligation to meet a 1/24 ratable requirement. Southwest further argues that the feasibility language adds another qualification that further weakens the obligation.

5. In addition, Southwest argues that if the Commission finds that section 20.8 of the GT&C is not clear based upon the plain language of the tariff, then the course of performance between El Paso and Southwest, as well as between El Paso and its other shippers, supports Southwest's tariff interpretation. Southwest states that El Paso has permitted Southwest and others for many years to take firm service within daily contract rights as necessary, regardless of hourly fluctuations. Southwest concludes that if

² See El Paso Natural Gas Company Data Response No. 1, Docket No. CP05-2-000, filed April 25, 2005.

³ Southwest cites Standards for Business Practices of Interstate Natural Gas Pipelines, 99 FERC ¶ 61,348 at P 22 (2002)(citing 18 C.F.R. § 284.12(a)(1)(i)).

El Paso wants to impose hourly take restrictions or new service differentiating between 1/24 ratable takes and accelerated flow service, it must do so through a section 4 rate filing. Southwest states that El Paso cannot illegally impose such limits where none otherwise exists in the tariff by reinventing its tariff interpretation.

6. Southwest further states that El Paso's new interpretation of section 20.8 is creating uncertainty regarding Southwest's rights on laterals and that this uncertainty is obstructing normal planning. Southwest states that its current contract commitment with El Paso provides an early termination option effective as of September 1, 2006, upon written notice to El Paso by no later than August 31, 2005. Southwest states that it is considering supporting a new, competitive pipeline delivery system into central Arizona but that the uncertainty created by El Paso's tariff interpretation is making evaluation of that option difficult. Southwest concludes that these factors are creating an unacceptable business risk.

Public Notice and Comments

7. Southwest's petition was noticed on May 27, 2005, with comments, protests or interventions due on or before June 3, 2005. All timely motions to intervene and all motions to intervene out of time filed before the issuance of this order are granted pursuant to Rule 214 of the Commission's Rules of Practice and Procedure.⁴ Granting late intervention at this early stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties.

8. Comments in support of the petition for declaratory order were filed by Salt River Project Agricultural Improvement and Power District (Salt River); Arizona Electric Power Cooperative, Inc.; New Harquahala Generating Company, LLC; Phelps Dodge Corporation; Public Service Company of New Mexico; El Paso Electric Company; Southwestern Public Service Company; and jointly by UNS Gas, Inc., El Paso Municipal Customer Group, Public Service Company of New Mexico, and Texas Gas Service Company, a Division of ONEOK, Inc. (Joint Commenters). Protests were filed by El Paso and jointly by Southern California Gas Company and San Diego Gas & Electric Company (SoCalGas/San Diego).

9. In support of Southwest's interpretation of Section 20.8, El Paso Electric, Phelps Dodge, Arizona Electric Power, Salt River, and the Joint Commenters state that El Paso has not enforced or claimed a right to enforce a 1/24 ratable take requirement. Joint Commenters state that the conversion of firm requirements to contract demand service on

⁴ 18 C.F.R. § 385.214 (2003).

El Paso⁵ did not contemplate or require a degradation in shippers' historic rights to take service in a variable hourly manner. The commenters in support generally assert that they would be unable to meet their own service obligations under a ratable take requirement. Salt River contends that a ratable take requirement would result in the need for shippers to nominate based on peak hour needs. Salt River asserts that El Paso has insufficient capacity to serve this level of nominations and that, even if it could support such a high load, this inefficient use of resources would financially harm shippers and their customers.

10. Harquahala argues that this shift in interpretation of section 20.8 would be unjust and unreasonable to existing shippers who relied on the prior interpretation. Salt River states that it made business decisions impacting electricity infrastructure based on the current interpretation. El Paso Electric contends that, if the Commission confirms El Paso's tariff interpretation, El Paso will be relieved of the burden of proving that it is necessary to change its tariff provision.

11. The protestors, on the other hand, argue that the petition for declaratory order should be dismissed. SoCalGas/San Diego assert that there is no controversy or uncertainty that requires clarification. SoCalGas/San Diego also argue that Southwest is incorrect in asserting that its historical ability to ignore the ratable obligation, because El Paso has no means to enforce it, has evolved into a firm service right.

12. El Paso contends that it has proposed no change to its existing tariff language, its application, or any associated charges for violating section 20.8. El Paso contends that the petition prematurely seeks to litigate issues that will be raised in or rendered moot by its upcoming rate case,⁶ in which, El Paso states, it will propose new hourly services that will allow shippers the firm right to flow on an uneven hourly basis and will propose mechanisms to enforce the ratable take requirement.

⁵ In El Paso's Capacity Allocation Proceeding, the Commission found that full requirements service on El Paso was no longer just and reasonable and ordered that full requirements shippers convert to contract demand service. *El Paso Natural Gas Co.*, 99 FERC ¶ 61,244 (2002), *reh'g*, 100 FERC ¶ 61,285 (2002), *reh'g*, 104 FERC ¶ 61,045 (2003), *aff'd*, *Arizona Corporation Commission v. FERC*, 397 F.3d 952 (D.C. Cir. 2005).

⁶ El Paso is required by the terms of a 1996 Settlement to file a new rate case effective January 1, 2006. El Paso has stated that it plans to file this rate case on June 30, 2005.

Discussion

13. As Southwest points out, the applicability of uniform hourly flow requirements is controlled by the individual pipeline's tariff. Here, the tariff language provides that the shipper will "endeavor" to take gas in uniform hourly quantities and will keep variations to the minimum "feasible." While this language suggests that there is some flexibility in hourly flow requirements, the Commission has made clear that this type of language does not give the shipper a firm right to hourly variations in service.⁷

14. The parties agree that in practice El Paso has allowed non-uniform hourly takes. In fact, El Paso has no current mechanism to enforce uniform hourly takes except when system integrity is threatened. El Paso's only mechanism to enforce uniform hourly takes on a daily basis is to use flow control under its Critical Operating Condition Procedures⁸ to enforce uniform hourly takes to ensure operational integrity.

15. Southwest argues that if El Paso wants to impose hourly take restrictions or new service differentiating between 1/24 ratable takes and accelerated flow service, it must do so through a section 4 rate filing and cannot currently impose such limits where none otherwise exists in the tariff. The Commission agrees that El Paso would have to amend its tariff to impose strict service limits,⁹ and likely amend its penalty provisions to enforce service limitations. However, the current tariff does not convey to shippers firm rights to hourly variations in service and requires shippers to make good faith efforts to keep takes at uniform hourly rates.

16. Further, there is no indication in this proceeding that El Paso has taken any action to change the way it implements Section 20.8 or that Southwest's current service has been degraded. The Commission finds that El Paso has not proposed a new interpretation of section 20.8 nor has it proposed to change its enforcement of section 20.8.

17. El Paso states that it will be proposing modifications to section 20.8 in its upcoming general rate filing, and that it will be proposing new hourly services and mechanisms to enforce the requirements to take gas on a ratable basis. Southwest and the commenters in support of its position state that they cannot serve their customers under a uniform hourly take requirement. El Paso may propose any changes to its tariff that it

⁷ See, e.g., Tennessee Gas Pipeline Co., 76 FERC ¶ 61,022 at 61,138 (1996).

⁸ See El Paso's GT&C Section 33.6

⁹ Service limits may also be governed or addressed in existing service agreements.

deems necessary in its rate proceeding, and will bear the burden of proof under section 4 of the NGA in that proceeding. Issues regarding the need for hourly services and any proposed modifications to section 20.8 will be addressed in the upcoming rate proceeding and are not appropriate for resolution here.

18. In conclusion, the Commission clarifies that while the current section 20.8 of El Paso's tariff does provide some flexibility to shippers, it requires shippers to make good faith efforts to take gas at uniform hourly rates of flow and does not give shippers firm rights to hourly variations. Southwest's request for a declaratory order is granted to the extent consistent with this clarification.

The Commission orders:

The request for a declaratory order is granted to the extent consistent with the above discussion.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.