

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

June 30, 2006

In Reply Refer To:
El Paso Natural Gas Company
Docket Nos. RP06-372-000 and
RP06-372-001

El Paso Natural Gas Company
Post Office Box 1087
Colorado Springs, CO 80944

Attention: Richard Derryberry, Director
Regulatory Affairs

Reference: Non-conforming Transportation Service Agreements

Dear Mr. Derryberry:

1. On May 31, 2006, as amended on June 12, 2006, El Paso Natural Gas Company (El Paso) filed revised tariff sheets¹ along with three firm transportation service agreements (TSAs) with Arizona Public Service Company and one TSA with UNS Gas, Inc. (UNS) as non-conforming agreements. El Paso requests that the Commission accept the agreements and the revised tariff sheets, effective July 1, 2006. The Commission finds that the TSAs do contain provisions that are material deviations from El Paso's form of service agreement but that these deviations are permissible. The Commission therefore accepts the non-conforming agreements and accepts El Paso's proposed tariff sheets effective July 1, 2006, as proposed.

Background

2. On June 30, 2005, in Docket No. RP05-422-000, El Paso filed tariff sheets to implement, among other things, a general system-wide rate change as well as various new service rate schedules (New Services). By order issued July 29, 2005, the Commission accepted and suspended the tariff sheets to become effective January 1,

¹ Twenty-Eighth Revised Sheet No. 1, Ninth Revised Sheet No. 2 and Fourth Revised Sheet No. 2A to FERC Gas Tariff, Second Revised Volume No. 1-A.

2006, subject to conditions and the outcome of a hearing and technical conference.² On March 20, 2006, the Commission issued an order on post-settlement issues³ that addressed the applicability of Article 11.2 from El Paso's 1996 Settlement.⁴ On March 29, 2006, El Paso submitted an Offer of Partial Settlement that proposed, among other things, to conditionally waive the implementation of new services until June 1, 2006.⁵ On April 4, 2006, El Paso filed tariff sheets in compliance with the March 20 Order that, among other things, added a new section 37, Article 11.2 Provisions, to its tariff.⁶

Instant Filing

3. El Paso states that, over the past several months, it has engaged in contract negotiations and an open season bidding process with its shippers to formalize contract portfolios that will best meet those shippers' future system requirements once the New Services are implemented. As a result of these negotiations, a number of shippers have entered into new contracts with El Paso to be effective June 1, 2006 concurrently with the implementation of new services for either traditional Rate Schedule FT-1 service or for one of El Paso's New Services.

4. El Paso indicates that each of the TSAs contains a provision in paragraph 9.4 that addresses whether Article 11.2 rights apply to the TSA.⁷ El Paso also indicates that the provision applies only to those shippers with Article 11.2 rights that are changing their contract portfolios. According to El Paso, for those TSAs in which Article 11.2 applies, it agreed to add a provision stating that Article 11.2 applies to the TSA, subject to Commission order, to provide shippers additional contractual assurance during the

² *El Paso Natural Gas Co.*, 112 FERC ¶ 61,150 (2005).

³ *El Paso Natural Gas Co.*, 114 FERC ¶ 61,290 (2006).

⁴ *Id.* at P 19. The Commission accepted El Paso's 1996 Settlement in April 1997. *See El Paso Natural Gas Co.*, 79 FERC ¶ 61,028, reh'g denied, 80 FERC ¶ 61,084 (1997).

⁵ The Commission accepted the Offer of Partial Settlement on May 30, 2006. *See El Paso Natural Gas Co.*, Docket No. RP06-422-008 and RP06-226-001 (May 30, 2006) (unpublished letter order).

⁶ The filing is pending Commission action.

⁷ Article 11.2 of the 1996 Settlement between El Paso and its customers places certain limitations on the rates that El Paso can charge to shippers that were parties to that Settlement. *See* 79 FERC ¶ 61,028, reh'g denied, 80 FERC ¶ 61,084 (1997).

pendency of El Paso's rate case proceeding. El Paso states that this contractual commitment allows the shippers to go forward with conversion of their contract portfolios to New Services knowing that their rights under Article 11.2 are preserved while various issues, including the applicability of Article 11.2, are being decided by the Commission and, potentially, the courts.⁸ In addition, for those TSAs in which Article 11.2 does not apply, El Paso has added a provision in paragraph 9.4 stating that Article 11.2 is not applicable.

5. El Paso states that it also revised the rate language in paragraph 3.1(a), which is fill-in-the-blank, to state that the shipper will pay the Article 11.2 rates set forth in the tariff.

6. On June 12, 2006, El Paso filed a revision to the TSA with UNS Gas, Inc. El Paso explains that after submitting the May 31, 2006, filing it discovered that it failed to discuss one additional change, requested by UNS, from the *pro forma* agreement. Specifically, the revision modifies paragraph 6.1 of the TSA which addresses the cancellation of prior contracts. The *pro forma* agreement states that certain "contracts" will be superseded and cancelled. El Paso is modifying paragraph 6.1 to state that certain "documents to the extent that they constitute a contract" will be superseded and cancelled. El Paso states that the nature and extent of the TSAs held by El Paso's former full requirements shippers are the subject of filings in Docket Nos. RP05-422-000 and RP06-226-000, among others, and El Paso asserts that the revision to paragraph 6.1 merely restates the procedural rights afforded to UNS and all other shippers to raise their arguments in proceedings before the Commission.

7. El Paso states that the Commission should accept its filing, as amended, as a permissible material deviation because the proposed provisions enable the shippers to transition to El Paso's New Services environment effective June 1, 2006, while preserving the parties' litigation positions. El Paso further states that this provision is unique to Article 11.2 shippers and does not adversely affect other shippers or convey a new term and condition of service.

Public Notice

8. Public notices of El Paso's May 30, 2006 and June 12, 2006 filing were issued on June 2, 2006, and June 20, 2006 respectively, with comments, protests or interventions to be filed in accordance with section 154.210 of the Commission's regulations. All timely motions to intervene and all motions to intervene out of time filed before the issuance of

⁸ El Paso submitted a concurrent filing in Docket No. RP06-374-000 for the Commission's review of additional TSAs with other shippers that contain this same Article 11.2 provision.

this order are granted pursuant to Rule 214 of the Commission's Rules of Practice and Procedure. Granting late intervention at this early stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties. No protests or adverse comments were filed.

Discussion

9. Under section 4(c) of the Natural Gas Act (NGA), pipelines must file "all contracts which in any manner affect or relate to" the pipeline's rates and services. Section 154.1(b) of the Commission's regulations implements this provision and provides that pipelines must file all contracts related to their services.⁹ Section 154.1(d) provides that any contract that conforms to the form of service agreement in the pipeline's tariff need not be filed, but that any contract that deviates in any material aspect from the form of service agreement in the pipeline's tariff must be filed.¹⁰

10. As the Commission explained in *Columbia Gas Transmission Corp.*¹¹, the exemption from the requirement that each customer service agreement must be filed with the Commission is based on a finding that the section 4 filing requirement has already been satisfied by the pipeline's previous filing of the *pro forma* service agreement.¹² Where a customer's service agreement conforms to the *pro forma* service agreement (and the other provisions of the pipeline's tariff), the Commission's prior review and approval of the *pro forma* service agreement and the tariff have accomplished the purpose of the NGA section 4 filing requirement. Since the Commission and other interested parties have had an opportunity to determine that the form of service agreement provided for in the tariff is just and reasonable and non-discriminatory, there is no need to review subsequent conforming contracts to determine if they comply with the requirements of the NGA.

11. However, for this procedure to satisfy the filing requirements of NGA section 4, the customer's service agreement must truly conform to the form of service agreement. There is such conformity where a service agreement contains only the approved language of the form of service agreement, with blank spaces for filling in such information as the name of customer, etc., completed in a manner consistent with the tariff. However, where the service agreement contains a provision not in the approved language of the form of service agreement and that provision (1) goes beyond filling in the blank spaces

⁹ 18 C.F.R. § 154.1(b) (2005).

¹⁰ 18 C.F.R. § 154.1(d) (2005).

¹¹ 97 FERC ¶ 61,221(2001).

¹² *Id.* at 62,001.

with the appropriate information allowed by the tariff and (2) affects the substantive rights of the parties, the Commission cannot be considered to have already reviewed the service agreement when it reviewed the *pro forma* service agreement. In such a case, the contract contains a provision affecting the substantive rights of the parties that the Commission has never seen before. Since NGA section 4 requires the filing of all contracts that affect the pipeline's service "in any manner," the statute requires the filing of such a service agreement.

12. The Commission has defined a material deviation as "any provision of a service agreement which goes beyond the filling in of the spaces in the form of service agreement with the appropriate information provided for in the tariff and that affects the substantive rights of the parties."¹³ Once a service agreement has been found to deviate materially from the form of service agreement in the tariff, the Commission must then determine whether to approve the non-conforming agreement. The Commission bases this determination upon whether the material deviation presents a significant potential for undue discrimination among customers. The Commission has also held that the pipeline must explain why the non-conforming provisions are specific to a particular shipper and why the provision should not be included in the tariff and made available to all shippers.

13. The Commission finds that the TSAs at issue here are permissible material deviations from El Paso's form of service agreement. The Commission accepts the Article 11.2 provisions as permissible material deviations from the *pro forma* agreement. As El Paso's filing indicates, these provisions are unique to these Article 11.2 shippers and do not adversely affect other shippers or convey a new transportation term or condition.

14. The Commission finds that these provisions do not affect the substantive rights of the parties and do not present the potential for a significant risk of undue discrimination among customers. The Commission therefore accepts the non-conforming agreements and El Paso's proposed tariff sheet effective July 1, 2006.

By direction of the Commission.

Magalie R. Salas,
Secretary.

¹³ Id.