

116 FERC ¶ 61,114
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeem G. Kelly and Philip D. Moeller.

El Paso Natural Gas Company

Docket No. RP05-422-000

ORDER DENYING MOTION FOR STAY

(Issued August 1, 2006)

1. On July 26, 2006, Southwest Gas Company (Southwest) filed a Motion for Limited Stay and Request for Shortened Response Time¹ and Expedited Action in this proceeding. Specifically, Southwest requests that the Commission stay its approval of the Maximum Delivery Obligation (MDO)² and Maximum Hourly Obligation (MHO)³ penalty set forth on Sheet No. 28G of El Paso's Natural Gas Company's (El Paso) Gas Tariff until the Commission reviews the allocated MDO/MHO quantities upon which each shipper's MDO/MHO penalty responsibility will be based. Southwest further asks the Commission to direct El Paso to cease and desist from implementing any MDO/MHO penalty or entering any binding Operator Point Aggregation Service Agreements until the Commission reviews and addresses the allocated MDO/MHO quantities to prevent institutionalizing any unduly discriminatory MDO/MHO allocations in those agreements. Texas Gas Service Company, a division of Oneok, Inc., filed an answer in support of Southwest's motion. El Paso filed an answer in opposition to Southwest's motion.

¹ The Commission shortened the time for responding to Southwest's motion to July 31, 2006.

² The MDO is the maximum daily amount of gas an operator is entitled to take at a specific meter.

³ The MHO is the maximum amount an operator is entitled to take in a single hour at a specific meter.

2. To assure definiteness and finality in Commission proceedings, the Commission typically does not stay its orders.⁴ However, the Commission may stay its action when "justice so requires."⁵ In addressing motions for stay, the Commission considers: (1) whether the moving party will suffer irreparable injury without the stay; (2) whether issuing the stay will substantially harm other parties; and (3) whether a stay is in the public interest.⁶ The key element in the inquiry is irreparable injury to the moving party.⁷ If a party is unable to demonstrate that it will suffer irreparable harm absent a stay, we need not examine the other factors.⁸ The standard for showing irreparable harm is strict, as the D.C. Circuit has explained:

the injury must be both certain and great; it must be actual and not theoretical. Injunctive relief 'will not be granted against something merely feared as liable to occur at some indefinite time.' It is well established that economic loss does not necessarily constitute irreparable harm . . . Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough.⁹

3. Southwest argues that El Paso's MDO/MHO allocation methodology was discriminatory and that a limited stay of the March 23 Order to halt the MDO/MHO penalty implementation is necessary to prevent the injustice that would result from the application of penalties that reflect unduly discriminatory MDO/MHO allocations. Southwest asserts that it will be injured by the application of the penalty provisions because these penalties may not be recoverable from El Paso through refunds.

4. Contrary to Southwest's assertion, the Commission finds that if the MDO/MHO allocation process was in fact discriminatory, as Southwest alleges, the Commission retains the authority under the original suspension order in this proceeding¹⁰ to refund

⁴ See, e.g., *CMS Midland, Inc.*, 56 FERC ¶ 61,630 (1991), *aff'd sub nom.*, *Michigan Municipal Cooperative Group v. FERC*, 990 F.2d 1377 (D.C. Cir. 1993); *Robin Pipeline Co.*, 92 FERC ¶ 61,217 (2000).

⁵ 5 U.S.C. § 705 (2000).

⁶ See, e.g., *CMS Midland, Inc.*, 56 FERC at 61,631.

⁷ *Id.*

⁸ *Id.*

⁹ *Wisconsin Gas Co. v. FERC*, 785 F.2d 699, 674 (D.C. Cir. 1985).

¹⁰ *El Paso Natural Gas Co.*, 112 FERC ¶ 61,150 (2005).

any penalty charges that were imposed pursuant to an allocation methodology that is determined to be unjust and unreasonable or unduly discriminatory.¹¹ Therefore, the Commission finds that Southwest has failed to establish that it will suffer any irreparable harm as a result of the implementation of the MDO/MHO penalties, and a stay is not warranted in these circumstances. However, by separate notice, the Commission is establishing a technical conference to address shippers' concerns regarding El Paso's new services and penalties, including the concerns raised by Southwest.

The Commission orders:

The motion for stay filed by Southwest Gas Company is denied.

By the Commission. Commissioners Spitzer and Wellinghoff not participating.

(S E A L)

Magalie R. Salas,
Secretary.

¹¹ In its answer, El Paso acknowledges that the penalties are subject to refund and states that it will refund any MDO/MHO penalties the Commission finds should not have been imposed during the MDO/MHO implementation period prior to the time the Commission has had an opportunity to review the merits of Southwest's arguments.