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

Before Commissioners: Jon Wellinghoff, Chairman;
Suedeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

El Paso Natural Gas Company Docket No. RP09-601-000

ORDER ACCEPTING TARIFF SHEETS SUBJECT TO CONDITIONS

(Issued June 16, 2009)

1. On May 18, 2009, El Paso Natural Gas Company (El Paso) filed revised tariff sheets[1] to clarify the procedure for an existing shipper to exercise its right-of-first-refusal (ROFR) following an open season in which no acceptable bids are received. As discussed below, the Commission accepts El Paso's revised tariff sheets effective June 16, 2009, subject to conditions.

I. Background

2. Section 20.16 of El Paso's General Terms and Conditions (GT&C) describes the process by which shippers may exercise their ROFRs to retain or relinquish transportation service on El Paso. Section 20.16 currently provides that an existing shipper must exercise its ROFR by notifying El Paso within a specified time period, and that once notified, El Paso will hold an open season bidding process for the capacity lasting twenty business days. If El Paso receives an acceptable bid, the tariff requires that El Paso notify the existing shipper and the shipper has five business days to either match the bid or let its transportation service agreement (TSA) expire.

3. If no acceptable bids are submitted, the tariff states that El Paso and the existing shipper may enter negotiations to discuss continued service. The tariff provides that the existing shipper may only continue to receive service if the shipper agrees to pay the maximum applicable tariff rate or negotiates a new TSA providing otherwise. El Paso's current tariff does not specify the length of the negotiation period nor any restriction on term length if the existing shipper agrees to pay the maximum tariff rate.

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[1] Eleventh Revised Sheet No. 290A, and Second Revised Sheet No. 290A.01 to El Paso's FERC Gas Tariff, Second Revised Volume No. 1A.

II. Filing

4. El Paso proposes to update the ROFR provisions in GT&C section 20.16 to clarify the procedures by which an existing shipper can use its ROFR when no bids are accepted during an open season. El Paso explains that it is making these modifications because several shippers hold TSAs that are due to expire within the next six months and the current tariff does not specify a timeline or conditions for negotiating continued service when an open season produces no acceptable bids.

5. The first modification El Paso proposes is to provide a negotiation period of ten business days following El Paso's notification to the existing shipper that no acceptable bids were submitted during the open season. El Paso states that this ten-day period gives existing shippers ample time to make a decision and provides other shippers with the opportunity to bid on the available capacity as soon as reasonably possible, consistent with Commission precedent.[2]

6. El Paso also proposes to institute a minimum contract term requirement of one year if the existing shipper chooses to continue service at the maximum rate. El Paso states that a one-year minimum service requirement will provide shippers with capacity assurance by means of a new TSA with ROFR rights, as well as ensure that El Paso can sustain financial and operational stability. El Paso states that the Commission has previously accepted one-year minimum service requirements similar to the one proposed here.[3]

III. Notices and Protests

7. Notice of El Paso's filing was issued on May 19, 2009. Interventions and protests were due as provided in section 154.210 of the Commission's regulations.[4] Pursuant to Rule 214,[5] all timely filed motions to intervene and any motions to intervene out-of-time

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[2] *Gas Transmission Northwest Corp.*, 107 FERC ¶ 61,253 (2004); *Northern Border Pipeline Co.*, 101 FERC ¶ 61,249, at P 16-17 (2002); *Columbia Gas Transmission Corp.*, 107 FERC ¶ 61,078 (2004); *Gulf South Pipeline Co., LP*, 125 FERC ¶ 61,010 (2008) (*Gulf South*).

[3] *See* Gulf South Pipeline Company (Gulf South), FERC Gas Tariff, GT&C, section 30.2(h); Gas Transmission Northwest Corporation (GTN), FERC Gas Tariff, GT&C, section 33.4; North Baja Pipeline, LLC (North Baja), FERC Gas Tariff, GT&C, section 10.4. *See also Gulf South*, 125 FERC ¶ 61,010 at P 14-15.

[4] 18 C.F.R. § 385.210 (2008).

[5] 18 C.F.R. § 385.214 (2008).

filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt this proceeding or place additional burdens on existing parties. Southern California Gas Company (SoCalGas) and San Diego Gas & Electric Company (SDG&E) filed comments, and MGI Supply Ltd. (MGI Supply) filed a protest.

8. On June 5, 2009, El Paso filed an answer. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure[6] prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept El Paso's answer because it has provided information that assisted us in our decision-making process.

9. SoCalGas and SDG&E support El Paso's proposed revisions to section 20.16. They assert that following a ROFR-related open season in which no acceptable bids are submitted, ten business days is a reasonable timeframe for the pipeline and the existing shipper to renegotiate continued transmission service. SoCalGas and SDG&E state that, in contrast to the five-day negotiation period following an open season in which acceptable bids are received, the additional time specified in El Paso's filing will allow the parties to reconsider the market value of existing capacity.

10. While MGI Supply generally supports El Paso's proposed revisions, it opposes the one-year minimum service requirement. MGI Supply argues that a mandatory service term is inconsistent with Commission policy.[7] MGI Supply explains that in Order No. 636-A, the Commission stated that existing shippers have the right to extend transmission service for a term of any length, so long as the shipper pays the maximum rate. MGI Supply asserts that El Paso's one-year minimum service requirement is inconsistent with this policy.

11. MGI Supply further argues that El Paso's reliance on the *Gulf South* case and the Gulf South, GTN, and North Baja tariffs is misplaced. MGI Supply argues that none of those tariffs require an existing shipper to enter into a new contract at the maximum tariff rate for a term of one year or greater in order to retain capacity upon the expiration of its

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[6] 18 C.F.R. § 385.213(a)(2) (2008).

[7] *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, FERC Stats. & Regs. ¶ 30,939, *order on reh'g*, Order No. 636-A, FERC Stats. & Regs. ¶ 30,950, at 30,633, *order on reh'g*, Order No. 636-B, 61 FERC ¶ 61,272 (1992), *order on reh'g*, 62 FERC ¶ 61,007 (1993), *aff'd in part and remanded in part sub nom. United Distribution Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996), *order on remand*, Order No. 636-C, 78 FERC ¶ 61,186 (1997). *See also Williston Basin Interstate Pipeline Co.*, 62 FERC ¶ 61,144, at 62,025 (1993).

TSA. MGI Supply explains that these tariff provisions are either designed to empower existing shippers to preserve their ROFRs by requiring the pipeline to enter into a TSA of a year or more, or provide an explanation that existing shippers must enter into contracts of a year or more to retain their ROFRs. MGI Supply argues that the Commission should require El Paso to revise the proposed tariff language in section 20.16(e)(i) accordingly.

12. El Paso responds that its proposal is consistent with Commission policy and precedent. El Paso explains that if it receives no acceptable bids during the open season and the existing shipper is unwilling to enter into a new contract at the maximum rate for a term of at least one year and the existing shipper and the pipeline cannot come to a mutual agreement otherwise, the existing shipper can still purchase the capacity for a term of under one year under the tariff provisions for the sale of unsubscribed capacity. El Paso points to section 20.16(e)(ii) of its proposal which provides that should El Paso and the existing shipper fail to agree, the existing shipper's ROFR will expire and El Paso will post the capacity as available on its electronic bulletin board (EBB). El Paso recognizes that once the capacity is posted as available, El Paso must sell the capacity if a shipper (including the existing shipper) offers to pay the maximum rate for any term.

IV. <u>Discussion</u>

13. The Commission accepts El Paso's proposed tariff revisions, to be effective June 16, 2009,[8] subject to further modifications. El Paso seeks to revise its ROFR provisions to specify how an existing shipper may continue to receive transportation service beyond the expiration date of its contract if no acceptable bids are received during an open season. Specifically, El Paso proposes to revise its tariff to provide that if there are no competing bidders during an open season, the existing shipper will have ten business days to negotiate a new contract with El Paso. The Commission finds that a ten-day negotiation period is reasonable because it gives the existing shipper and the pipeline sufficient time to consider and discuss the appropriate rate and term for the capacity at issue.

14. El Paso also proposes to revise the ROFR provisions at section 20.16(e)(i) of its GT&C to give existing shippers two options for maintaining service when an open season produces no acceptable bids. One option is for the shipper to agree to extend all or a portion of its contract at the maximum applicable tariff rate for a term of at least one year. In the alternative, the shipper may continue to receive service if El Paso and the shipper mutually agree within the ten-day negotiation period to a discounted rate and term.

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[8] The filing was formally made May 18, 2009, three days later than the May 15, 2009 date on El Paso's transmittal letter. The Commission grants waiver of the thirty-day notice requirement to permit the tariff filing to become effective, as proposed, on June 16, 2009, subject to conditions.

15. MGI Supply argues that the one-year minimum contract requirement El Paso proposes under the first option is contrary to Commission policy. El Paso responds that its filing is consistent with Commission policy because existing shippers are able to purchase the capacity at issue for a term of less than a year pursuant to section 20.16(e)(ii) of the proposal. El Paso explains that once an existing shipper's ROFR has terminated because it has not reached an agreement with El Paso or agreed to pay the maximum rate for a term of at least one year under section 20.16(e)(i), the existing shipper can still purchase the capacity under the procedures set forth in the tariff for the sale of unsubscribed capacity pursuant to section 20.16(e)(ii).

16. The Commission finds that El Paso's proposed tariff language does not clearly reflect the explanation El Paso provides in its answer, and so must be revised. In Order No. 636-A, the Commission explained the mechanics of its ROFR policy for gas pipelines, and in doing so, clarified that "when there are no competing bidders for capacity, and the existing shipper agrees to pay the maximum rate, the existing customer is entitled to continue the transportation service for whatever term it chooses."[9] El Paso's tariff language, as proposed, does not comply with this policy. Section 20.16(e)(i) states in relevant part:

> In order to retain service, Shipper must agree to extend all or a portion of the contract quantity for which no acceptable bid was received under a new TSA at the maximum applicable tariff rate for a term of at least one Year.

17. The plain meaning of this language states that an existing shipper cannot retain *service* if it does not extend its contract for at least one year. However, the Commission made clear in Order No. 636-A that pipelines may not withhold service at the maximum rate.[10] If there are no competing bids and the existing shipper is willing to pay the maximum rate, whatever term the existing shipper tenders is the "longest" term offered for that capacity, and the pipeline must accept it.

18. El Paso points out that under its proposal an existing shipper may purchase the capacity at issue for a term of less than one year pursuant to section 20.16(e)(ii), which states:

> Should existing Shipper and Transporter fail to agree within the ten Business Days, Shipper's right-of-first refusal shall

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[9] Order No. 636-A, FERC Stats. & Regs. ¶ 30,950 at 30,633.

[10] *Id.*

> terminate and Transporter will post the capacity as available on its EBB.

19. Section 20.16(e)(ii)'s requirement that an existing shipper whose ROFR has terminated must purchase its former capacity under the procedures for the sale of unsubscribed capacity is reasonable and was accepted by the Commission in *Gulf South*.[11] However, as currently written, El Paso's proposed sections 20.16(e)(i) and 20.16(e)(ii) contradict one another and do not provide clear guidance as to what an existing shipper must do to retain service, with or without a ROFR, when no acceptable bids are received. Accordingly, the Commission directs El Paso to revise section 20.16(e) to make clear that in order for an existing shipper to retain service *with a ROFR*, the shipper must agree to extend a contract for which no acceptable bid was received under a new TSA at the maximum applicable tariff rate for a term of at least one year. However, if the shipper no longer wishes to retain its ROFR, it may contract for capacity for less than one year.

<u>The Commission orders</u>:

The tariff sheets referenced in footnote one are accepted, to be effective June 16, 2009, as proposed, subject to El Paso's revising section 20.16(e) within 30 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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[11] *Gulf South*, 125 FERC ¶ 61,010 at 61,025.