129 FERC ¶ 61,006
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. RP09-117-000

ORDER FOLLOWING TECHNICAL CONFERENCE

(Issued October 1, 2009)

1. On November 26, 2008, El Paso Natural Gas Company (El Paso) filed a revised tariff sheet[1] to modify the Fuel and Lost and Unaccounted-For (L&U) retention percentages applicable to transportation service on El Paso's system. On December 30, 2008, the Commission issued an order accepting and suspending El Paso's tariff sheet, subject to the outcome of a technical conference.[2] In this order following the technical conference, the Commission accepts the revised tariff sheet containing the new retention percentages, to be effective January 1, 2009. However, in light of the Commission's recent decision in *Colorado Interstate Gas Co.*, 128 FERC ¶ 61,117 (2009) (July 31 CIG Order), the Commission finds El Paso's fuel tracker mechanism to be unjust and unreasonable. Pursuant to the Commission's authority under section 5 of the Natural Gas Act (NGA), the Commission directs El Paso to file revised tariff sheets within 15 days, to be effective the date this order issues, modifying El Paso's fuel tracker mechanism to be consistent with the directives herein. Moreover, the annual fuel tracker filing to be effective January 1, 2010, must include a true-up to reconcile the difference in costs recovered under the prior fuel tracker mechanism from the date of this order through December 31, 2009, and those that would have been recovered under the revised fuel tracker mechanism established in this order.

[1] Seventeenth Revised Sheet No. 29 to its FERC Gas Tariff, Second Revised Volume No. 1A.

[2] *El Paso Natural Gas Co*., 125 FERC ¶ 61,372 (2008) (December 30 Order).

I. **Background**

2. Article 26 of the General Terms and Conditions (GT&C) of El Paso's tariff provides that El Paso will annually restate its Fuel and L&U percentages using a 12-month data collection period ending September 30 and including true-up computations as specified in the tariff. In accordance with the fuel and L&U mechanism accepted by the Commission in Docket No. RP05-422-000,[3] and implemented in Docket No. RP07-88-000,[4] determination of the Fuel and L&U retention percentages involves two or three computations. First, the current period Fuel and L&U retention percentage is calculated using the most recent twelve months of available data. Second, a volumetric true-up is computed by comparing the most recent volumetric retention against actual volumetric fuel use and L&U experienced. Third, El Paso applies a cost and revenue true-up to the mainline fuel retention percentage that it does not apply to the other fuel retention percentages in its tariff. The cost and revenue true-up is computed to adjust for the cost of fuel and L&U and all related linepack and gas balance adjustments, including imbalances. This true-up includes and accounts for changes in value of gas over time, for example between the date a shipper incurs an overage imbalance and the date El Paso purchases gas to replace the gas from the system. The cost and revenue true-up incorporates costs unrelated to the actual purchase and sale of gas in two respects. The cost and revenue true-up assigns a value to the gas at the time an underage or overage occurs using El Paso's Monthly System Cash Out Index Price. Also, the cost and revenue true-up incorporates monthly "accrued costs" or "accrued revenues" into the fuel tracker. The accrued costs result not from any purchase or sale of gas, but from monthly revaluations of gas and fuel balances in accordance with the fixed asset methodology of accounting.

3. In El Paso's November 26, 2008 filing in this docket, El Paso proposed to revise its Fuel and L&U retention percentages to be effective January 1, 2009, using a 12-month data collection period ended September 30, 2008, and including the true-up computations specified by its tariff. Several protests were filed to El Paso's annual fuel filing.

4. On December 30, 2008, the Commission issued an order accepting and suspending the tariff sheet, to be effective January 1, 2009, and establishing a technical conference to address the issues raised by the filing. The technical conference was held on February 26, 2009. Subsequently, the parties to the proceeding filed initial and reply comments.

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[3] *El Paso Natural Gas Co*., 112 FERC ¶ 61,150 (2005); *El Paso Natural Gas Co*., 114 FERC ¶ 61,305, at P 207-208 (2006).

[4] *El Paso Natural Gas Co*., 117 FERC ¶ 61,361 (2006), *order on compliance,* 120 FERC ¶ 61,152 (2007).

5. After the parties submitted their post-technical conference comments, the Commission issued its July 31 CIG Order.[5] In the July 31 CIG Order, the Commission rejected a proposed fuel tracker filing by CIG, an El Paso affiliate, that used a methodology nearly identical to the one used by El Paso.

II. Discussion

6. The July 31 CIG Order and the post-technical conference comments raise the following issues: (1) whether El Paso may collect in its mainline fuel retention percentage only fuel costs related to actual purchases or sales made for fuel purposes or whether the cost and revenue true-up includes deemed costs prohibited by Commission policy; (2) whether El Paso appropriately incorporates shipper imbalances or other non-fuel costs in its cost and revenue true-up for calculating the mainline fuel retention percentage; (3) whether El Paso has complied with Commission policy regarding tariff listing of points and paths that are not assessed a fuel charge; and (4) to the extent the fuel tracker is modified, whether El Paso is entitled to recover any refunds as a result of the changes to its fuel tracker mechanism.

A. Incorporation of Costs Not Related to Actual Purchases and Sales of Fuel in El Paso's Fuel Tracker Mechanism

7. The mainline fuel retention percentage proposed by El Paso in the November 26, 2008 filing incorporates expenses that do not result from actual purchases and sales of fuel. First, the cost and revenue true-up assigns a value to the gas at the time an underage or overage occurs using El Paso's Monthly System Cash Out Index Price. Second, the cost and revenue true-up incorporates recovery of monthly accrued costs, i.e., changes in gas value resulting from monthly revaluations of gas and fuel balances in accordance with the fixed asset methodology of accounting, but not from actual purchases and sales of gas for fuel.

8. The Indicated Shippers contend that El Paso may only collect fuel costs resulting from actual transactions in its fuel tracker. The Indicated Shippers first assert that the inclusion of El Paso's monthly accrued costs is contrary to El Paso's tariff, and thus the Commission may act under section 4, as opposed to section 5 of the NGA, to order El Paso to remove the accrued costs from El Paso's filing. Second, notwithstanding the terms of El Paso's tariff, the Indicated Shippers assert that the incorporation of costs not related to actual purchases and sales of fuel is contrary to Commission policy.

[5] July 31 CIG Order, 128 FERC ¶ 61,117.

1. Accrued Costs Under El Paso's Current Tariff

9. The Indicated Shippers assert that El Paso's inclusion of accrued costs is properly addressed under section 4 of the NGA because while El Paso's tariff permits it to adjust the value of gas purchases and sales based on differences in the cash-out index price when the shortfall (or overage) occurred and when the actual cost of replacing the gas was incurred,[6] this language does not permit El Paso to include in its rates the monthly revaluations of its shortfalls/overages that El Paso makes to its books in accordance with accounting principles.

10. El Paso asserts that, if a change is made to the mechanism, it should be under section 5 of the NGA rather than section 4. El Paso asserts that the monthly accrued costs are "actual" costs permitted by its tariff. Moreover, El Paso asserts that its November 26, 2008 filing is its third true-up filing, and the Commission has twice previously accepted annual fuel tracker filings pursuant to El Paso's current fuel tracker mechanism.

Commission Determination

11. As Indicated Shippers acknowledge, El Paso's tariff explicitly permits it to incorporate into its cost/revenue true-up the "difference between the cost of such gas based on the Monthly System Cash Out Index Price for the Month when the shortfall or (overage) occurred and the actual cost of gas that Transporter bought or sold."[7] Thus, once a cost for an underage or overage has been realized by an actual purchase or sale, El Paso's tariff allows the pipeline to use its cash-out index to determine the value of the fuel at the time of the underage/overage to calculate the cost and revenue true-up. Objections to practices pursuant to this provision require the exercise of the Commission's section 5 authority.

12. El Paso's tariff language does not, however, explicitly provide for the incorporation of accrued costs, in the form of monthly revaluations, into the fuel tracker

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[6] Section 26.6(a)(ii) of the GT&C of El Paso's FERC Gas Tariff, which provides as follows:

> [W]hen Transporter purchases or sells gas to maintain system linepack due to Fuel recovery shortfalls or (overages), the adjustment will include the difference between the cost of such gas based on the Monthly System Cash Out Index Price for the Month when the shortfall or (overage) occurred and the actual cost of gas that Transporter bought or sold.

[7] Section 26.6(a)(ii) of the GT&C of El Paso's FERC Gas Tariff.

absent the realization of such costs through an actual purchase or sale of gas. Section 26 of El Paso's GT&C, which provides the terms of its fuel tracker, only references "actual costs" resulting from the purchase or sale of gas as opposed to accruals on El Paso's books due to the Commission's accounting rules.[8] Nonetheless, the Commission has twice accepted El Paso's fuel tracker filings.[9] In those proceedings, El Paso filed work papers explaining the operation of its tracker mechanism. In those annual filings, shippers and the Commission's staff had the opportunity to protest and correct El Paso's usage of accrual adjustments in the tracker mechanism. Thus, as discussed below, in rejecting El Paso's continued use of accrued costs in its fuel tracker, the Commission is acting under section 5, given the consistent past practice under the existing tariff, and not under section 4.

2. <u>El Paso's Collection Mechanism and Deemed Costs</u>

13. The Indicated Shippers aver that El Paso cannot recover accrued costs in its fuel tracker mechanism, that accounting practices are not controlling for ratemaking purposes, and that collection of monthly accrued costs is contrary to Commission policy.

14. The Indicated Shippers further contend that the Commission's order on El Paso's fuel savings sharing mechanism stated that El Paso has a tracker that tracks "actual use" of fuel and no more.[10] In addition, the Indicated Shippers state that, in the order approving El Paso's proposed expanded fuel tracker mechanism, the Commission noted that the mechanism would collect gas costs for purchases and sales for fuel purposes and never intimated that El Paso may include non-cash (accrued) costs.[11] Finally, the Indicated Shippers cite several other orders where the Commission rejected the use of estimated costs and approved the use of only actual gas costs.[12]

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[8] *Id*. The same is also true of the imbalance provisions in El Paso's tariff, which do not specify the inclusion of monthly accruals. Section 32.3(e) and section 36.7 of the GT&C of El Paso's FERC Gas Tariff.

[9] *El Paso Natural Gas Co.*, 120 FERC ¶ 61,152; *El Paso Natural Gas Co.*, Docket No. RP08-106-000 (December 19, 2007) (unpublished letter order).

[10] *Citing El Paso Natural Gas Co*., 126 FERC ¶ 61,247, at P 12 (2009).

[11] *Citing El Paso Natural Gas Co*., 114 FERC ¶ 61,305 at PP 207-208.

[12] *Citing Colorado Interstate Gas Co.*, 126 FERC ¶ 61,085 (2009); *Northern Border Pipeline Co.*, 103 FERC ¶ 61,134 (2003); *ANR Pipeline Co.*, 80 FERC ¶ 61,173 (1997).

15. Although comments filed by the Indicated Shippers primarily focus on monthly accruals, the Indicated Shippers also state that even if El Paso has made an actual purchase or sale of gas, the usage of estimated values of fuel based upon the cash-out index to determine the cost-revenue true-up violates Commission policy.

16. El Paso asserts that the true-up mechanism properly includes costs and revenues resulting from monthly price revaluations, consistent with Order No. 581 accounting requirements. El Paso asserts that while these accrued costs are not yet out-of-pocket "cash" costs, they are actual costs reflected on El Paso's books and financial statements.

17. El Paso argues that the cases cited by the Indicated Shippers are distinguishable. El Paso states that under its mechanism costs and revenues will ultimately be trued-up,[13] and that, unlike in *ANR*,[14] when El Paso makes a cash purchase or sale of gas, the cash cost and revenue associated with such transactions will offset the accrued amount, so that the end result of the accrued cost approach will be revenue neutrality.

Commission Determination

18. After the parties submitted their post-technical conference comments, the Commission issued its July 31 CIG Order.[15] The July 31 CIG Order rejected a proposed fuel tracker filing by El Paso's affiliate CIG that used a similar methodology for recovering the costs unrelated to actual purchases and sales of gas.

19. Upon consideration of the arguments and issues raised by the parties and consistent with the analysis in the July 31 CIG Order,[16] the Commission finds that El Paso's inclusion of values determined by the cash-out index at the time an overage or underage is recorded and the inclusion of monthly accrued costs in its fuel and L&U mechanism violates the Commission's prohibition against pipelines recovering "deemed costs." As the July 31 CIG Order explained, any tracking mechanism designed to recover fuel and L&U may not include costs or revenues that may only have been recorded on the company's books pursuant to its accounting methodologies, but which have not yet been expended or realized through an arms-length cash transaction with a third party.[17]

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[13] *Citing Colorado Interstate Gas Co.*, 126 FERC ¶ 61,085.

[14] *Citing ANR Pipeline Co.*, 80 FERC ¶ 61,173.

[15] July 31 CIG Order, 128 FERC ¶ 61,117.

[16] *Id*.

[17] *Id.* P 34.

20. Like CIG's proposal rejected by the Commission, El Paso's fuel mechanism monetizes various categories of gas quantities, such as changes in storage gas, linepack, and net shipper imbalances, by multiplying those quantities by its cash-out index price each month and adding those monthly figures together to determine an annual total value of system balance activity.[18] The resulting dollar figure (i.e., the value of activity in those different gas accounts) is then incorporated into the cost/revenue true-up,[19] and used to determine the net cost/revenue true-up value. Such an adjustment is problematic because the valuations are a form of "deemed" valuation of gas that is not linked to an actual purchase or sale of gas for fuel. As a result, El Paso's current fuel mechanism is contrary to Commission policy. The monthly cash-out to determine gas values and subsequent accrued costs, as opposed to actual fuel costs, in a fuel tracker violates the Commission's policy. Thus, El Paso's tariff must be revised to exclude such deemed costs from rates. This order does not determine whether El Paso's accounting methodologies conform with the Commission's accounting regulations; rather, the order's purpose is to conform El Paso's fuel and L&U methodology with the Commission's policy that pipelines may not pass on deemed costs to shippers through a fuel tracker.

21. Moreover, fuel and L&U tracking mechanisms must be designed to accurately track and recover the distinct set of fuel-related costs actually incurred.[20] As the July 31 CIG Order stated, the usage of multiple cost and revenue estimates results in "inaccuracies and uncertainties inimical to a just accounting of its fuel use and LUF volumes/costs."[21] In this proceeding, shippers have expressed concern regarding the lack of transparency of El Paso's fuel tracker filings and the difficulty in following El Paso's fuel calculations.[22] Although we approved the tariff language proposed by El Paso in Docket No. RP05-422-000, which inaugurated El Paso's tracker mechanism, our subsequent experience with El Paso's (and its affiliates') proposal(s) demonstrates that such an expansive tracker creates a fuel mechanism resulting in virtually unverifiable opacity. El Paso's current fuel mechanism violates both the Commission's policies

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[18] *Id.*

[19] This figure would be net of CIG's total revaluation activity for the year, i.e., the monthly change in the cumulative beginning balance multiplied by the difference between the current month's index price and the previous month's index price.

[20] *Id.* P 33 (citing *ANR Pipeline Co.*, 110 FERC ¶ 61,069 at P 28).

[21] *Id.* P 32.

[22] *See, e.g.,* Texas Gas Service March 26, 2009 Initial Comments, at 4-5; El Paso Electric Company March 26, 2009 Initial Comments at 2.

against the inclusion of deemed costs and results in a fuel mechanism that lacks transparency, and is therefore unjust and unreasonable.

B. Imbalance Costs and Other Non-Fuel Costs in Fuel Tracker

22. El Paso includes imbalance-related cash-out costs and other non-fuel and L&U costs in its mainline fuel retention percentage. Specifically, El Paso includes timing differences relating to the value of gas, i.e., the difference between the cost of gas based on its tariff's monthly cash-out index price when the imbalances occurred and subsequent periods, including monthly accruals, and when El Paso bought gas to maintain linepack.[23] El Paso also includes total imbalance cash-out revenues received from penalties that are in excess of El Paso's gas costs.[24] In addition to imbalance-related activity, El Paso's fuel mechanism monetizes various categories of gas quantities, such as changes in storage gas and linepack.

23. Customers object that El Paso's tariff does not permit the inclusion of imbalance-related costs in its fuel tracker, and that inclusion of any costs other than those related to fuel and L&U violates Commission policy.

1. Imbalance and Other Non-Fuel Costs in El Paso's Current Tariff

24. The Indicated Shippers and Southern California Gas Company/San Diego Gas & Electric Company (SoCal Gas/San Diego) contend that the provision in El Paso's tariff which establishes the fuel mechanism, section 26.6(a)(ii) of the GT&C, only permits inclusion of purchases or sales of gas due to fuel recovery shortfalls or overages. The Indicated Shippers and SoCal Gas/San Diego assert that purchases or sales of gas for any other reason, such as shipper imbalance behavior, are not permitted by El Paso's tariff. The Indicated Shippers contend that in approving El Paso's fuel tracker mechanism, the Commission specifically stated that the mechanism related solely to purchases or sales of gas for fuel purposes.[25] The Indicated Shippers further contend that, because the inclusion of imbalances is not authorized by El Paso's current tariff, the presence of imbalance costs in the fuel tracker is properly considered under section 4.

25. In contrast, El Paso avers that its tariff permits cost and revenues from purchases and sales related to shipper imbalances to be included in the fuel mechanism. El Paso asserts that sections 32.3(e) and 36.7 of its tariff's GT&C provide for the crediting of

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[23] *See* section 36.7 of the GT&C of El Paso's tariff.

[24] *See* section 32.3 of the GT&C of El Paso's tariff.

[25] *Citing El Paso Natural Gas Co*., 114 FERC ¶ 61,305 at PP 207-08.

imbalance-related costs and revenues, unless otherwise accounted for in the fuel mechanism in section 26. El Paso further alleges that the Commission, in its order accepting the first annual true-up filing, acknowledged that the mechanism tracked the value of gas purchased or sold for fuel and shipper imbalance requirements and that the Commission approved this practice due to the interrelated nature of the system gas balance impacts of fuel and imbalances. In response to the Indicated Shippers, El Paso asserts that, as a result of its tariff language and these prior orders, if a change is made to the mechanism, it should be under section 5 of the NGA and thus only prospective, effective with the fuel retention percentages starting January 1, 2010. El Paso states that its November 26, 2008 filing is its third true-up filing, and that the Commission has twice previously accepted annual fuel tracker filings pursuant to El Paso's current fuel tracker mechanism.[26]

<u>Commission Determination</u>

26. El Paso's tariff does not unambiguously authorize incorporation of imbalance costs or other non-fuel costs into the fuel tracker. Section 26 of El Paso's GT&C, which establishes El Paso's fuel tracker mechanism, does not refer to the incorporation of any non-fuel costs. It is incorrect for El Paso to assert that sections 32.3(e) and 36.7 explicitly justify the inclusion of imbalance-related costs in the fuel tracker. Rather, these sections provide a different mechanism for the recovery of such imbalance costs unless these costs are "otherwise accounted for in Transporter's Fuel mechanism pursuant to section 26."[27] The effect of this provision is negated, or at least unclear, because the language in section 26 mentions only fuel and does not account for purchases and sales related to imbalances.

27. However, the Commission has accepted two annual fuel tracker filings from El Paso under its existing mechanism.[28] In accepting those annual fuel tracker filings, the Commission permitted the inclusion of non-fuel costs, explicitly acknowledging and accepting El Paso's incorporation of imbalance-related costs into its fuel tracker mechanism.[29] Given the Commission's previous acceptance of El Paso's application of

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[26] *See El Paso Natural Gas Co.*, 117 FERC ¶ 61,361, *order on compliance*, 120 FERC ¶ 61,152 (2007), *order on compliance*, Docket No. RP07-88-002 (December 19, 2007) (unpublished letter order); *El Paso Natural Gas Co.*, Docket No. RP08-106-000 (December 19, 2007) (unpublished letter order).

[27] Section 32.3(e) and section 36.7 of the GT&C of El Paso's FERC Gas Tariff.

[28] *El Paso Natural Gas Co.*, 120 FERC ¶ 61,152; *El Paso Natural Gas Co.*, Docket No. RP08-106-000 (December 19, 2007) (unpublished letter order).

[29] *El Paso Natural Gas Co.*, 120 FERC ¶ 61,152.

its fuel tracker mechanism, we conclude that alterations to El Paso's ongoing fuel tracker practices most properly proceed under section 5 of the Natural Gas Act.[30]

2. Conforming El Paso's Fuel Tracker to Commission Policy

28. The Indicated Shippers and SoCal Gas/San Diego argue that Commission policy and precedent prohibit the inclusion in the fuel tracker of costs related to shipper imbalances. They both cite the Commission's footnote 23 in *Wyoming Interstate Co., Ltd*. wherein the Commission stated that "[p]urchases and sales for system balancing are to be kept separate and must be recovered through the cash-out provisions and not through the fuel mechanism."[31] Additionally, Texas Gas Service Company, a division of ONEOK, Inc. (Texas Gas Service) asserts that the inclusion of imbalance resolution-related costs makes the fuel tracker filing overly complex.

29. El Paso replies that its cost and revenue true-up properly accounts for purchases and sales relating to shipper imbalances. El Paso argues that the Commission should decline to apply its statement in *WIC* that purchases and sales for system balancing are to be kept separate and must be recovered through the pipeline's cash-out provisions. El Paso maintains that the Commission did not articulate a rationale in *WIC* for its statement regarding imbalance costs and that the order was issued more than two years after El Paso's tracker was accepted by the Commission. El Paso states that the Commission should instead endorse the findings made in the prior El Paso orders which allow El Paso to track and true-up the costs and revenues without attempting to separate or allocate costs and revenues attributable to shipper imbalances.

Commission Determination

30. Although the Commission initially accepted El Paso's proposed fuel tracker mechanism and the first two tracker filings that included imbalance and other costs as well as fuel costs in one mechanism, subsequent experience has demonstrated that El Paso's inclusion of these non-fuel costs is problematic. Much like our determination in the July 31 CIG Order involving a very similar fuel mechanism of an El Paso affiliate, El Paso's methodology for including imbalance and non-fuel costs in its mainline fuel retention percentage is not just and reasonable.[32]

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[30] 15 U.S.C. § 7171(d) (2006).

[31] *Citing Wyoming Interstate Co., Ltd*., 122 FERC ¶ 61,303, at n.23 (2008) (WIC).

[32] July 31 CIG Order, 128 FERC ¶ 61,117.

31. As discussed previously in this order, as applied in El Paso's fuel tracker mechanism, the non-fuel costs incorporated into El Paso's mainline fuel percentage are inextricably intertwined with El Paso's application of deemed costs. These non-fuel costs are incorporated into the fuel tracker via monetization of changing fuel quantities using the cash-out index price. Because El Paso cannot use deemed costs in its fuel tracker, El Paso's treatment of these non-fuel costs is similarly inappropriate.

32. Moreover, as applied in El Paso's fuel tracker mechanism, the lack of transparency and complexity that emerges when all of the different accounts are combined together creates a process that is effectively unverifiable and, thereby, unjust and unreasonable. As noted above, in this proceeding, shippers have expressed concern regarding their difficulty understanding El Paso's fuel calculations.[33] The Commission finds that El Paso's current fuel tracker calculation methodology (like those more recently filed by its affiliates) remains opaque after technical conferences and multiple adjustment filings. Accordingly, El Paso is directed to remove the non-fuel costs from its fuel tracker mechanism.

C. No-Fuel-Use Transactions

33. El Paso asserts that it appropriately excluded transactions that do not consume compression fuel from the billing determinants used to calculate fuel retention percentages. In the technical conference and subsequent March 12, 2009 post-conference filing, El Paso identified the points and paths related to such no-fuel transactions and provided additional supporting information. El Paso further states that it intends to make a tariff filing in the near future to address no-fuel transactions. As a result of a question at the technical conference, El Paso states that it assessed the Ehrenberg-to-Phoenix route and concluded that fuel has been and can be consumed during west-to-east flows on this route. El Paso concludes that, because it can no longer reliably assume "no fuel use," it will begin assessing a fuel charge. Thus, El Paso states that it will post a notice on its Electronic Bulletin Board (EBB) that it will begin assessing fuel on future transmissions on this route beginning May 1, 2009.

34. A number of commenters protested El Paso's proposal. Texas Gas Service and UNS Gas, Inc. and Tucson Electric Power Company (UNS/Tucson) argue that, going forward, El Paso must comply with Commission policy and precedent in *Ozark* that require a pipeline to (1) identify the specific transactions it intends to exempt from fuel

[33] *See, e.g.,* El Paso Electric Company, March 26, 2009 Initial Comments at 2; Texas Gas Service Company, March 26, 2009 Initial Comments at 4-5.

charges and demonstrate that those transactions do not require the use of fuel, and (2) list the exempted transactions in the pipeline's tariff.

35. Commenters also object to El Paso's proposal to post a notice on its EBB that it will begin assessing fuel on future transmissions on the Ehrenberg-to-Phoenix route beginning May 1, 2009. Salt River Project Agricultural Improvement and Power District (Salt River), Arizona Public Service Company (APS), and Texas Gas Service argue that El Paso provides no evidence that these transactions should be assessed fuel or demonstration of changed circumstances.

36. In its reply, El Paso states that it plans to submit a filing with the Commission within 60 days that will identify the transportation paths on its system that do not consume fuel and where it proposes to continue to exempt fuel charges. El Paso states that it will include operational data that demonstrates those specific transactions that do not use fuel. El Paso anticipates proposing to describe in its tariff transportation paths that qualify for a longer-term fuel exemption and to identify on its EBB short-term transportation routes that are based on seasonal or limited displacement activity (i.e., reliance on a short-term forward haul contract). El Paso explains that an EBB posting provides an expedient manner of communicating temporary no-fuel routes.

Commission Determination

37. Subsequent to the comments filed in this proceeding, El Paso submitted a filing in Docket No. RP09-762-000 to identify the pipeline segments where no fuel is used to provide transportation service and no fuel charge will be assessed. The Commission accepted and suspended the revised tariff sheets to be effective August 1, 2009, subject to conditions and further order by the Commission.[34] The Commission directed El Paso to provide additional supporting documentation for the identified no-fuel routes and to address comments regarding other routes and whether short-term exempt fuel paths should be posted on El Paso's EBB. Issues in the instant proceeding regarding no-fuel transactions are thus appropriately addressed in the Docket No. RP09-762-000 proceeding.

D. Summary of Section 5 Determination

38. As discussed above, because of the practices under the existing tariff, the Commission is acting pursuant to NGA section 5 to remove the aspects of the existing mechanism that it finds unjust and unreasonable. Accordingly, the Commission is here establishing the practices to govern El Paso's mechanism, which practices are to be

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[34] *El Paso Natural Gas Co*., 128 FERC ¶ 61,097 (2009).

hereafter observed and in force[35] coincident with the date of this order. Accordingly, El Paso is directed to make a compliance filing in which it should revise the fuel tracker mechanism in its tariff consistent with this order, i.e., removing non-fuel costs and deemed costs from the existing fuel tracker mechanism. The new mechanism shall be effective the date this order issues.

39. Further, El Paso's upcoming annual fuel tracker filing (due to be filed for an effective date of January 1, 2010) must reflect that all current period adjustments[36] containing these deemed and non-fuel costs are removed and credited (or charged, as appropriate), beginning the date this order issues. The filing should clearly identify the adjustments for the period beginning the date of this order and ending December 31, 2009, and provide sufficient work papers to substantiate the adjustments.

E. El Paso's Request for Refunds

40. El Paso asserts that, if the Commission acts under section 5 to modify El Paso's fuel tracker mechanism, as we have done here, El Paso must be "made whole" in recognition of revenue returned to shippers due to the non-cash monthly accrual costs incorporated into the fuel percentages effective January 1, 2007, filed in Docket No. RP07-88, the fuel percentages effective January 1, 2008, which were filed in Docket No. RP08-106, and the fuel percentages effective January 1, 2009 as filed in Docket No. RP09-117.[37]

Commission Determination

41. The prohibition against retroactive ratemaking bars the refunds sought by El Paso. The prior fuel retention percentages accepted in Docket Nos. RP07-88, and RP08-106 provided the effective rates on file in 2007 and 2008. Those filings were made pursuant to the fuel tracker mechanism as proposed by El Paso and accepted by the Commission. Neither the pipeline nor the Commission can now go back and retroactively change these filed rates as a result of those proceedings, even if the rates arose from a mechanism that

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[35] *See* 15 U.S.C. § 717d(a).

[36] *See* Tab 1, Page 3, Line 6 (current period) of November 26, 2008 filing in Docket No. RP09-117-000.

[37] *Citing 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., Regulations Preambles, January 1991-June 1996 ¶ 30,939, at 30,457-58 (1992), *aff'd in part and rev'd in part*, *United Distribution Companies v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996).

the Commission now concludes is no longer just and reasonable.[38] Furthermore, because our section 5 authority is prospective, refunds are not permitted for the fuel retention percentages in effect from January 1, 2009 until the date of this order because those percentages were calculated from the then-effective fuel tracker mechanism.

The Commission orders:

(A) The tariff sheet listed in footnote 1 is accepted to be effective January 1, 2009.

(B) El Paso is directed to file revised tariff sheets within fifteen (15) days of the date of this order to modify its fuel tracking mechanism to be consistent with the directives herein, to be effective the date this order issues.

(C) El Paso is also directed to include in its next annual fuel tracker filing, to be effective January 1, 2010, a true-up to reconcile the difference in costs recovered under the prior fuel tracker mechanism from the date of this order through December 31, 2009, and those that would have been recovered under the fuel tracker mechanism established in this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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[38] *Associated Gas Distributors v. FERC*, 898 F.2d 809, 810, 283 U.S. App. D.C. 212 (D.C. Cir. 1990) (J. Williams, *concurring*).