129 FERC ¶ 61,036
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. RP08-426-009

ORDER ACCEPTING TARIFF SHEETS SUBJECT TO CONDITIONS

(Issued October 14, 2009)

1. On September 14, 2009, El Paso Natural Gas Company (El Paso) filed tariff sheets[1] proposing a new General Terms and Conditions (GT&C) section 41 to govern the installation and use of flow control equipment on its system. As discussed below, the Commission accepts El Paso's tariff sheets to be effective October 15, 2009, subject to conditions.

I. <u>Background</u>

2. On June 30, 2008, El Paso submitted a general rate case filing (Rate Case Filing) proposing new services, a rate increase for existing services, and changes in certain terms and conditions of service. El Paso included in its Rate Case Filing a proposal to modify its existing flow control provisions. On August 5, 2008, the Commission accepted and suspended the Rate Case Filing, subject to conditions and the outcome of a hearing and technical conference.[2]

3. The Commission held a technical conference on September 11, 2008, to review certain aspects of the Rate Case Filing, including the proposed flow control provisions. As a result of discussions and pleadings on the technical conference, El Paso offered to withdraw its flow control proposal without prejudice to its ability to file a new flow control proposal in a separate filing after engaging in additional discussions with its shippers on the issue.

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[1] Fifth Revised Sheet No. 200A, Fourth Revised Sheet No. 366, Fourth Revised Sheet No. 387, Third Revised Sheet No. 388 to its FERC Gas Tariff, Second Revised Volume No. 1A.

[2] *El Paso Natural Gas Co.*, 124 FERC ¶ 61,124 (2008).

4. On December 18, 2008, the Commission issued an order on the issues addressed at the technical conference (Order on Technical Conference). The Order on Technical Conference, among other things, accepted El Paso's proposal to withdraw its flow control proposal and directed El Paso to submit a new proposal within 90 days.[3] The Commission encouraged El Paso and its shippers to work together to develop a new proposal that allows El Paso the discretion to install and use flow control equipment, but that also includes a reasonable prior notice requirement.[4]

II. <u>Filing</u>

5. El Paso proposes a new GT&C section 41 governing the use and installation of flow control equipment to restrict or temporarily suspend the flow of gas into or out of its system. Section 41 provides that El Paso has the right to install and/or use flow control to preserve the operational safety and reliability of its system and that El Paso must exercise flow control using reasonable judgment and in a not unduly discriminatory manner. In addition, El Paso must use flow control in a manner that is consistent with its service obligations under its rate schedules.

6. El Paso states that flow control will be used on a specific operator and/or location basis. While El Paso's proposal permits the use of flow control without mutual agreement, El Paso must provide the point operator with eight hours advance notice, by phone or email, prior to the use of flow control. However, pursuant to section 41.1(d), advance notice is not required in the following circumstances: (i) in a critical operating condition (COC) at a location in the declared COC area; (ii) when the immediate shut-in of non-conforming gas is necessary to preserve the safety and/or reliability of the affected location, segment, lateral, or overall system; (iii) in an emergency situation where safety or the integrity of the affected location, segment, lateral, or overall system is at immediate risk and necessitates the shut-in of facilities; and (iv) upon the mutual agreement of El Paso and an operator. In these situations, El Paso will provide as much advance notice as reasonably possible. In addition, El Paso will provide at least one hour notice prior to the use of flow control during a COC.

7. Section 41.1(c) of the proposal states that El Paso may not use flow control at the following locations: (i) those where an operator elects a pre-determined allocation methodology to allocate imbalances; or (ii) those being operated within the parameters of an executed operational balancing agreement. In addition, section 41.3 of the proposal

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[3] *El Paso Natural Gas Co.*, 125 FERC ¶ 61,309, at P 183 (2008). The Commission subsequently granted El Paso two extensions of time to submit its revised flow control provision.

[4] *Id.*

states that El Paso will not be held liable for any damages to an operator that may result from El Paso's use of flow control, except to the extent of El Paso's gross negligence or willful misconduct.

8. El Paso states that the installation of flow control facilities is subject to the same requirements as the construction of any other pipeline facility. El Paso explains that this means the costs must be prudently incurred by El Paso and they may be examined in a subsequent rate case. However, in the event that El Paso has repeatedly issued notice of intent to use flow control at a location or has repeatedly declared location-specific COCs, and the location does not have remote-controlled flow control equipment, El Paso may install such equipment at the operator's expense pursuant to section 41.2. El Paso states that the cost of installation would be rightly borne by the operator causing the operational problem and, in this way, would not cause non-offending parties to cover such an expense.

9. El Paso asserts that consistent with the Commission's directive in the Order on Technical Conference, its flow control proposal is the product of a collaborative process with its shippers. El Paso states that based on its past operational experience, it anticipates that the use of mandatory flow control measures will be very rare. However, El Paso states that describing the procedures for mandatory flow control in its tariff will help operators prepare for all types of operating conditions and improve their ability to plan during these challenging circumstances. El Paso asserts that its proposal provides a reasonable balance between the notification needs of location operators and the pipeline's need to ensure safe and reliable firm transportation service.

III. Notices and Protests

10. Notice of El Paso's filing was issued on September 17, 2009. Interventions and protests were due as provided in section 154.210 of the Commission's regulations.[5] Pursuant to Rule 214,[6] all timely filed motions to intervene and any motions to intervene out-of-time 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. Golden Spread Electric Cooperative, Inc. (Golden Spread) and GS Electric Generating Cooperative, Inc. (GSE) (jointly),

[5] 18 C.F.R. § 385.210 (2009).

[6] 18 C.F.R. § 385.214 (2009).

Southwest Gas Corporation (Southwest Gas), and El Paso Electric (EPE) filed protests. The Indicated Shippers[7] filed a request for clarification.

11. Southwest Gas objects to the first sentence of section 41, which states that El Paso has the right to install and/or use flow control equipment to preserve the operational safety and reliability of its system. Southwest Gas states that this sentence gives El Paso too broad a right to install flow control. Southwest Gas asserts that many other pipelines' flow control provisions are more restrictive and provide more defined criteria than El Paso's proposal.[8] Southwest Gas argues that El Paso has shown no need for greater tariff authority to install flow control than the authority in proposed section 41.2. Southwest Gas states that given the cost of installing flow control equipment,[9] granting El Paso such a broad right to install flow control could result in a substantial cost increase to shippers that would be difficult to challenge in a rate case proceeding. Southwest Gas explains that should El Paso determine it has a legitimate need for flow control at a particular site, it can still exercise its right to install flow control pursuant to the certificate procedures in section 7 of the Natural Gas Act (NGA). As such, Southwest Gas argues that the introduction to proposed section 41 should be modified to limit the installation of flow control to situations covered by proposed section 41.2, which specifies cost recovery. Southwest Gas suggests this can be done by inserting the phrase "subject to the following provisions" at the end of the first sentence of 41, and deleting the second sentence.

12. EPE argues the Commission should require El Paso to reconcile the flow control notice procedures with the timing for declaring strained operating conditions (SOCs) and COCs in sections 33.1(f) and 33.2(d) of El Paso's tariff.[10] EPE states that doing so

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[7] The Indicated Shippers include BP America Production Company; BP Energy Company; ConocoPhillips Company; Chevron Natural Gas, A Division of Chevron U.S.A. Inc.; and Occidental Energy Marketing, Inc.

[8] Attachment 1 to Southwest Gas' protest contains a table showing the flow control tariff provision for a number of major interstate natural gas pipelines.

[9] Southwest Gas states that El Paso estimated the cost of installing flow control equipment to be $1 million per meter.

[10] Sections 33.1(f) and 33.2(d) state that El Paso must declare an SOC/COC before 12:00 p.m. (Mountain Clock Time) for such SOC/COC to apply to the current Gas Day and that should El Paso declare an SOC/COC after that time, such SOC/COC will apply to the next Gas Day. Section 33.2(d) also provides that if a COC is declared, shippers in the COC area must be in balance on the first Gas Day for which at least a four hour scheduling opportunity is available.

would prevent El Paso from implementing flow control while the shipper is preparing to balance through other means. EPE also argues that the Commission should require El Paso to modify its eight-hour notice in section 41.1(b) to include an opportunity for shippers to schedule firm service. In addition, El Paso contends that instead of the one-hour notice proposed in section 41.1(d)(i), the Commission should require El Paso to provide at least two hours' notice before at least one firm service nominating cycle. EPE argues that without these modifications, El Paso's proposal gives little consideration to the firm service scheduling cycle and provides shippers with few opportunities to balance.

13. EPE also asserts that El Paso fails to define the word "repeatedly" in proposed section 41.2, which provides that El Paso may install flow control at the operator's expense if El Paso has repeatedly issued notice of intent to use flow control or repeatedly declared location-specific COCs at such point. EPE states that "repeatedly" should be defined to mean "at least three times within twelve calendar months." EPE also argues that El Paso and the shipper should share equally the costs of implementing flow control under section 41.2 if the shipper has not been able to access firm nomination cycles or market. EPE states that the shipper should only bear the entire cost of the flow control equipment if El Paso can demonstrate, in a Commission-filed application, that the flow control device does not benefit the system.

14. The Indicated Shippers state that they do not oppose the filing, subject to clarification regarding the circumstances under which El Paso may exercise flow control under proposed section 41.1(d)(ii) regarding non-conforming gas. The Indicated Shippers state that because "non-conforming gas" is not a defined term in El Paso's tariff, there is some ambiguity as to what constitutes non-conforming gas for the purposes of section 41.1(d)(ii). The Indicated Shippers are concerned that section 41.1(d)(ii) could be interpreted to allow El Paso to use flow control to refuse to accept gas that does not conform to the specifications in section 5.1 of its tariff, but is acceptable gas under either the grandfathered provisions of section 5.2 or the exemptions in section 5.3.[11] The Indicated Shippers suggest the following language be inserted in section 41.1(d)(ii): "Natural gas that is subject to, and meets the requirements of, Section 5.2 or Section 5.3 is not considered to be non-conforming gas for the purposes of this Section 41.1."

[11] Section 5.1 of El Paso's current tariff sets forth the quality standards for the gas transported on the El Paso system. Section 5.2 provides that certain grandfathered plant receipt points and interconnects may receive gas that is technically non-conforming under the gas quality standards in section 5.1. Section 5.3 specifies certain exceptions under which El Paso may accept gas that does not conform to the gas quality standards in section 5.1.

15. Golden Spread, GSE, and EPE object to El Paso's proposed section 41.3, which states that El Paso will not be liable for any damages resulting from flow control except to the extent of gross negligence or willful misconduct. Golden Spread, GSE, and EPE argue that this section violates Commission policy that "all parties, including the pipeline, should be liable for their negligent acts."[12] Golden Spread and GSE argue that by carving out an exception to this rule, section 41.3 improperly exempts El Paso from damages resulting from simple negligence. Golden Spread and GSE request that the Commission require El Paso to delete the word "gross" from section 41.3, thereby applying a simple negligence standard of liability to El Paso's flow control activities.

IV. Discussion

16. The Commission finds that El Paso's flow control proposal is generally just and reasonable. Pursuant to El Paso's new GT&C section 41, El Paso may exercise flow control, using reasonable judgment and in a not unduly discriminatory manner, to restrict or temporarily suspend the flow of gas into or out of its system. The Commission finds that, consistent with the Commission's directive in the Order on Technical Conference, El Paso's flow control proposal establishes a reasonable balance between the notification needs of location operators and the pipeline's need to ensure safe and reliable firm transportation service. Therefore, the Commission will accept the tariff sheets listed in footnote one, to be effective October 15, 2009, subject to the conditions discussed below.

A. Installation of Flow Control

17. The opening paragraph of proposed section 41 states that El Paso has the right to install and use flow control equipment to preserve the operational safety and reliability of its system. Southwest Gas argues that that this language gives El Paso too broad a right to install flow control equipment. Southwest Gas asserts that because a pipeline's authority to install flow control does not stem from its tariff, the broad tariff authorization in section 41 is unnecessary.

18. The Commission finds the introductory statement in proposed section 41 to be just and reasonable. As Southwest Gas acknowledges, and as the Commission has previously stated, El Paso has the authority to install flow control to preserve the operational safety and reliability of its system.[13] The first sentence of El Paso's proposal simply restates this policy, and the Commission construes it as neither expanding nor narrowing that

[12] *Gulf States Transmission Corp.*, 114 FERC ¶ 61,006, at P 5 (2006), *citing Gulf South Pipeline Co.*, 98 FERC ¶ 61,278, at 61,182 n.56 (2002). *See also Guardian Pipeline, L.L.C.*, 101 FERC ¶ 61,107, at P 18 (2002).

[13] Order on Technical Conference at P 183.

policy. Southwest Gas is concerned that such a delineation of El Paso's authority in its tariff may result in El Paso installing extensive flow control equipment, which would impose a substantial cost burden on shippers. The Commission disagrees. Regardless of the presence or absence of the first sentence in section 41, El Paso is obligated to abide by the procedures in NGA section 7 regarding the construction of new facilities,[14] which will reduce the likelihood of El Paso installing, and incurring the costs related to, any unnecessary flow control equipment.

19. Moreover, El Paso has the burden of justifying the costs it passes through to its shippers, including the costs associated with flow control, in its rate cases. Southwest Gas argues that it will be difficult to challenge the cost of installing flow control equipment after-the-fact in a rate case setting. We disagree. There shall be no different standard for challenging the cost of these facilities than for any other facilities built by El Paso as part of any maintenance or updating project. Moreover, if El Paso installs flow control equipment to address a repeat problem, it is likely that the costs of that installation will be allocated to the offending operator under section 41.2. Thus, not all of the costs of installing necessary flow control on the El Paso system will be borne by its shippers as a whole, and any installations shown to be unnecessary shall be borne by El Paso, not its shippers. For these reasons, the Commission finds Southwest Gas' contention that El Paso's flow control provisions will result in a significant cost burden for shippers to be unfounded.

B. Prior Notice

20. Section 4.1(b) of El Paso's proposal states that El Paso will provide at least eight hours advance notice to the affected operator before invoking flow control, and section 4.1(d)(ii) states that, during a COC, El Paso will provide at least one hour advance notice to the affected operator before using flow control. EPE argues that El Paso should reconcile the flow control notice procedures with the timing for declaring SOCs and COCs in order to prevent El Paso from implementing flow control while the shipper is preparing to balance through other means.

[14] Pursuant to NGA section 7, pipelines must apply for certificates of public convenience and necessity to construct certain facilities, as described in 18 C.F.R. § 157.6 (2009). However, if the cost of the project does not exceed specified dollar levels, or if the project is required to restore service in an emergency, pipelines may have blanket authorization to construct the projects, as described in 18 C.F.R. § 157.208 (2009). Certain types of construction, such as auxiliary installations and replacement facilities, are exempt from the NGA section 7 certificate requirement, as described in 18 C.F.R. § 2.55 (2009).

21. The Commission finds that the advance notice procedures El Paso proposed for the use of flow control are just and reasonable. The eight hours advance notice El Paso provides for in section 41.1(b) should, in many instances, enable shippers to modify their schedules accordingly in the next nomination cycle. In those circumstances where the timing precludes a shipper from resolving its imbalance through scheduling in a nomination cycle, the eight-hour notice provides sufficient time for the shipper to make any necessary system changes in preparation for mandatory flow control. The eight hour notice also provides time for a shipper, if it so desires, to communicate with El Paso and request additional time to make new nominations.

22. In COC or emergency situations, section 41.1(d) requires El Paso to provide "as much advance notice as reasonably possible" and at least one hour notice at locations in a declared COC order. In situations where system integrity is threatened, it is unreasonable to require a pipeline to provide notice more than one hour in advance of a firm nominating cycle, as requested by EPE. If system integrity is threatened, El Paso needs the ability to act quickly to resolve the threat. The Commission finds that one hour's notice gives the shipper sufficient notice that it must prepare for mandatory flow control use in critical or emergency operating conditions.

23. Moreover, EPE (the only party to challenge El Paso's prior notice requirements) is exempt from these provisions because it selected a predetermined allocation methodology. As explained above, El Paso proposes not to use flow control at locations where an operator has elected a predetermined allocation methodology or that are operated pursuant to an operational balancing agreement. El Paso included this exemption in order to make its imbalance penalty structure the first-line operational deterrent, rather than the use of flow control.[15] Thus, parties such as EPE have the option of not being subject to El Paso's prior notice procedures for the use of flow control if they elect a predetermined allocation methodology or to execute an operational balancing agreement.

24. Finally, El Paso has stated that it anticipates that the use of mandatory flow control measures will be very rare. It is reasonable for El Paso to have the ability to use mandatory flow control in a timely fashion in those rare instances where it is needed to maintain system integrity. For these reasons, we find that El Paso's proposed notice procedures for the use of flow control are just and reasonable.

C. Cost Responsibility

25. Section 41.2 of El Paso's proposal provides that El Paso may install flow control at the operator's expense if El Paso has repeatedly issued notice of intent to use flow

[15] El Paso's September 14, 2009 Filing at 4.

control or repeatedly declared location-specific COCs at such point. EPE argues that El Paso and the shipper should share equally the costs of implementing flow control under section 41.2 if the shipper has not been able to access firm nomination cycles or market. EPE also contends shippers should only bear the entire cost of the flow control equipment if El Paso can demonstrate that the flow control equipment does not benefit the system.

26. The Commission finds El Paso's proposal to allocate the costs of installing flow control to operators who are the cause of repeated problems to be just and reasonable. As El Paso explains in its transmittal letter, the cost of installing flow control equipment is rightly borne by the operator causing the operational problem. This approach prevents non-offending shippers from bearing these costs and is consistent with the principle of cost-causation.[16] For these reasons, the Commission rejects EPE's cost-sharing proposal.[17]

27. However, the Commission agrees with EPE that El Paso's use of the term "repeatedly" in section 41.2 is ambiguous and should be defined. The costs related to the installation of flow control equipment may be significant and operators should have a clear idea when such costs may be imposed. Stating that operators must bear these costs if El Paso has "repeatedly" issued notices of intent to use flow control or has "repeatedly" declared location-specific COCs, does not provide shippers with enough specificity as to when they may be responsible for these costs and leaves too much of the determination to El Paso's discretion. Accordingly, the Commission directs El Paso to revise section 41.2 of its tariff to define "repeatedly" within 15 days of the issuance of this order.

D. Non-Conforming Gas

28. Under proposed section 41.1(d), one of the circumstances where El Paso is not required to give eight hours' notice before using flow control is when the immediate shut-in of non-conforming gas is necessary to preserve system safety or reliability. The Indicated Shippers assert that gas that meets the requirements of El Paso's existing tariff sections 5.2 or 5.3 should not be considered non-conforming gas for the purposes of section 41.1. The Commission agrees that the gas quality exemptions and grandfathering in tariff sections 5.2 and 5.3 should apply to El Paso's flow control provisions, and orders El Paso to revise its proposal to clarify this within 15 days of the issuance of this order.

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[16] *See Pacific Gas & Elec. Co. v. FERC*, 373 F.3d 1315, 1320 (D.C. Cir. 2004).

[17] The Commission notes that the cost allocation language in proposed section 41.2 is virtually identical to El Paso's currently effective flow control provision in GT&C section 33.6(d), which was agreed to as part of El Paso's Order No. 637 Settlement and accepted by the Commission in *El Paso Natural Gas Co.*, 109 FERC ¶ 61,292 (2004).

E. Indemnification

29. Golden Spread, GSE, and EPE object to El Paso's proposed section 41.3, which states that El Paso will not be liable for any damages resulting from flow control except to the extent of gross negligence or willful misconduct. As the protestors point out, the Commission has consistently held that a simple negligence standard is appropriate for the liability and indemnification provisions in pipeline tariffs on the grounds that all parties, including the pipeline, should be liable for their negligent acts.[18] El Paso's proposal would improperly insulate it from all damages, direct and indirect, for its own simple negligence related to the use of flow control. Accordingly, El Paso must modify its proposed section 41.3 so as not to exclude it from liability for direct damages arising from its own simple negligence. The Commission directs El Paso to file revised tariff sheets consistent with this requirement within 15 days of the issuance of this order.

The Commission orders:

(A) The tariff sheets referenced in footnote one are accepted, to be effective October 15, 2009, subject to conditions, as discussed in the body of this order.

(B) El Paso is directed to file revised tariff sheets within 15 days of the date of this order, as discussed in the body of this order.

By the Commission.

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Kimberly D. Bose,
Secretary.

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[18] *Gulf States Transmission Corp.*, 114 FERC ¶ 61,006, at P 5 (2006), *citing Gulf South Pipeline Co.*, 98 FERC ¶ 61,278, at 61,182 n.56 (2002). *See also Guardian Pipeline, L.L.C.*, 101 FERC ¶ 61,107, at P 18 (2002).