

130 FERC ¶ 61,096
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

El Paso Natural Gas Company

Docket Nos. RP08-426-011
RP08-426-012

ORDER ON REHEARING AND COMPLIANCE FILING

(Issued February 11, 2010)

1. On October 29, 2009, El Paso Natural Gas Company (El Paso) filed Fourth Revised Sheet No. 388 to its FERC Gas Tariff, Second Revised Volume No. 1A to comply with the Commission's directive in its October 14, 2009 order in this proceeding¹ to clarify certain flow control provisions involving cost responsibility, indemnification, and a notification exemption for non-conforming gas. On November 13, 2009, El Paso filed a request for clarification or, in the alternative, rehearing of the October 14 Order. As discussed herein, the Commission grants clarification of the October 14 Order. In addition, the Commission accepts the revised tariff sheet filed by El Paso on October 29, 2009, to be effective October 15, 2009, as discussed below.

Background

2. As part of its June 30, 2008 general rate case filing in this proceeding, El Paso proposed to revise its flow control provisions. In an August 5, 2008 Order, the Commission accepted and suspended the proposed tariff provisions, among other things, subject to condition and the outcome of a technical conference.² As a result of discussions at the technical conference, El Paso offered to withdraw its flow control proposal and remove its previously effective flow control tariff provisions while El Paso and its shippers worked to develop new flow control tariff provisions. In its December 18, 2008 Order on technical conference, the Commission accepted El Paso's

¹ *El Paso Natural Gas Co.*, 129 FERC ¶ 61,036 (2009) (October 14 Order).

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

offer to withdraw its flow control proposal but rejected the request to eliminate the existing flow control provision, stating that the current flow control provision should remain during the interim period to ensure that there are tariff parameters to govern how and when El Paso may use flow control while the parties negotiate a new provision.³

3. On September 14, 2009, El Paso filed revised tariff provisions to govern the installation and use of flow control equipment. In the October 14 Order, the Commission accepted El Paso's filing to add a new section 41 to the General Terms and Conditions (GT&C) of its tariff to govern the installation and use of flow control equipment on its system, subject to conditions. Specifically, the October 14 Order required El Paso to make certain clarifications and modifications to its proposed section 41 to (1) define the term "repeatedly" in section 41.2; (2) modify the indemnification provision in section 41.3; and (3) clarify section 41.1 regarding non-conforming gas.

Request for Clarification or, in the Alternative, Rehearing

4. On November 13, 2009, El Paso filed a request for clarification or, in the alternative, rehearing of the October 14 Order. El Paso states that the October 14 Order required El Paso to modify the indemnification provision in section 41.3 of its GT&C "so as not to exclude it from liability for direct damages arising from its own simple negligence."⁴ El Paso states that in its October 29 compliance filing, it changed section 41.3 so that it no longer excludes El Paso from liability for direct damages arising from its simple negligence, but that section 41.3 continues to exclude El Paso from liability for any special, indirect, consequential, incidental or punitive damages from the use of flow control arising out of simple negligence. El Paso requests that the Commission clarify that El Paso is allowed to limit its liability for special, indirect, consequential, incidental or punitive damages unless the liability arises out of gross negligence or willful misconduct. In other words, El Paso requests clarification that the Commission found it was only improper to exclude El Paso from liability for direct damages arising out of simple negligence.

5. We will grant clarification. The Commission has consistently held that a simple negligence standard is appropriate for liability and indemnification provisions on the ground that all parties, including the pipeline, should be liable for their negligent acts.⁵

³ *El Paso Natural Gas Co.*, 125 FERC ¶ 61,309, at P 183-84 (2008).

⁴ *Citing* October 14 Order at P 29.

⁵ *Gulf States Transmission Corp.*, 114 FERC ¶ 61,006, at P 5 (2006) (*citing Gulf South Pipeline Co.*, 98 FERC ¶ 61,278, at 62,182, n.56 (2002)); *ANR Pipeline Co.*, 100 FERC ¶ 61,132, at 61,505 (2002).

However, the Commission has allowed pipelines to limit their liability for simple negligence to direct damages, so that they are only liable for indirect, consequential, incidental, or punitive damages where there is gross negligence, willful misconduct or bad faith.⁶

Compliance Filing

6. On October 29, 2009, El Paso submitted a filing to modify section 41 of its GT&C, as required by the Commission in the October 14 Order. El Paso states that section 41.2 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 has repeatedly declared location-specific critical operating conditions (COC) at the point. The October 14 Order found that the term "repeatedly" was ambiguous and should be defined.⁷ El Paso proposes to modify section 41.2 to include the following: "For purposes of this Section 41.2, 'repeatedly' shall be deemed to be three notifications of intent to use Flow Control within a twelve-month period or three location-specific COC declarations within a twelve-month period."

7. El Paso further proposes to revise the flow control indemnification language in section 41.3 to clarify that El Paso will not be excluded from liability for direct damages arising from its simple negligence, as directed by the October 14 Order.⁸ El Paso proposes to revise section 41.3 as follows (new language in italics): "Transporter will not be held liable for any *special, indirect, consequential, incidental or punitive* damages to Operator resulting from Transporter's use of Flow Control that meets the requirements of this Section 41 except to the extent of gross negligence or willful misconduct of Transporter."

8. In addition, El Paso proposes to modify the notification exemption for non-conforming gas in section 41.1(d)(ii) by adding the following sentence: "Natural gas that is subject to, and meets the requirements of, section 5.2 or 5.3 is not considered to be non-conforming gas for purposes of this section 41.1." El Paso states that this revision is in compliance with the Commission's directive in the October 14 Order to clarify section 41.1(d)(ii) to ensure that the gas quality exemptions and grandfathered gas quality requirements should apply to El Paso's flow control provisions.⁹

⁶ *Id.*

⁷ October 14 Order at P 27.

⁸ *Id.* P 29.

⁹ *Id.* P 28.

9. Public notice of El Paso's filing was issued on November 10, 2009, with protests due on or before November 16, 2009. Pursuant to Rule 214, 18 C.F.R. § 385.214 (2009), all timely filed motions to intervene and any motions to intervene out-of-time filed before the issuance date of this order are granted. No protests or adverse comments were filed.

10. The Commission finds that El Paso's proposed modifications to section 41 of its GT&C comply with the October 14 Order. El Paso's definition of the term "repeatedly" in section 41.2 provides shippers with a clear idea of when the costs related to the installation of flow control may be imposed, consistent with the Commission's directive in the October 14 Order. In addition, as explained above, El Paso's revised section 41.3 complies with the Commission's policy regarding liability and indemnification provisions for pipelines.¹⁰ Finally, El Paso's revisions to section 41.1(d)(ii) appropriately clarify that the gas quality exceptions and grandfathering in tariff sections 5.2 and 5.3 apply to El Paso's flow control provisions. Accordingly, the Commission accepts El Paso's revised tariff sheet effective October 15, 2009, as proposed.

The Commission orders:

(A) Clarification of the October 14 Order is granted, as discussed in the body of this order.

(B) Fourth Revised Sheet No. 388 to El Paso's FERC Gas Tariff, Second Revised Volume No. 1A is accepted, effective October 15, 2009, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹⁰ See *Gulf States Transmission Corp.*, 114 FERC ¶ 61,006, at P 5 (2006) (citing *Gulf South Pipeline Co.*, 98 FERC ¶ 61,278, at 62,182, n.56 (2002)); *ANR Pipeline Co.*, 100 FERC ¶ 61,132, at 61,505 (2002).