

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

Before Commissioners: Jon Wellinghoff, Chairman;
John R. Norris, and Cheryl A. LaFleur.

El Paso Natural Gas Company

Docket No. RP05-422-035

ORDER ON REHEARING

(Issued November 1, 2010)

1. On August 17, 2010, the Commission issued an order affirming its decision to approve a settlement filed by El Paso Natural Gas Company (El Paso) in the instant proceeding.¹ On September 16, 2010, El Paso filed a request for clarification, or in the alternative, rehearing of the August 17 Order. On rehearing, the Commission clarifies the August 17 Order, as discussed below.

I. Background

2. In the August 17 Order, the Commission denied Phelps Dodge Corporation's (Phelps Dodge) request for rehearing of the August 31, 2007 order approving a settlement submitted by El Paso on December 6, 2006 (2006 Settlement).² Phelps Dodge argued primarily that the Commission erred in approving the 2006 Settlement under the standards for approving contested settlements and without considering evidence regarding El Paso's alleged withholding of capacity during 2000-2001. The Commission denied Phelps Dodge's rehearing request, finding that its allegations of withholding were irrelevant and had been rejected on the merits by the Commission in prior orders, and that the 2006 Settlement was properly approved under the standards for contested settlements.

II. Request for Clarification, or in the Alternative, Rehearing

3. El Paso does not seek rehearing of the Commission's primary findings in the August 17 Order. However, El Paso objects to one statement in a footnote that it argues is inconsistent with the Commission's prior orders and should be clarified.

¹ *El Paso Natural Gas Co.*, 132 FERC ¶ 61,139 (2010) (August 17 Order).

² *El Paso Natural Gas Co.*, 120 FERC ¶ 61,208 (2007).

4. El Paso explains that in the August 17 Order, the Commission accurately cited the March 20, 2006 order³ in this proceeding for its holding that the rate cap in Article 11.2(a) of El Paso's 1996 Settlement⁴ does not apply to the Expansion Capacity⁵ and the cost of such capacity should be allocated to all of El Paso's shippers.⁶ However, El Paso objects to footnote 120, which is appended to language discussing allocation of Expansion Capacity costs, and which states that the cost of the Power-Up Project should be allocated to all of El Paso's customers "[w]ith the exception of Article 11.2(a) shippers, because their rates are capped."⁷

5. El Paso argues this quoted statement is inconsistent with the Commission's prior decisions in this proceeding, because in the March 20 Order, the Commission held that Article 11.2(a) does not apply to the Expansion Capacity and that El Paso is entitled to allocate the costs of the Expansion Capacity to all of its customers. El Paso states that the Commission subsequently affirmed this holding on rehearing in a September 5, 2008 order⁸ and reiterated it in a recent August 24, 2010 order.⁹

6. El Paso states that in response to the Commission's holding in the March 20 Order, El Paso and its shippers bifurcated the Article 11.2(a) shippers' capacity into

³ *El Paso Natural Gas Co.*, 114 FERC ¶ 61,290, at P 69 (2006) (March 20 Order).

⁴ In 1996, El Paso entered into a settlement with its shippers to resolve a Natural Gas Act (NGA) section 4 rate case it had filed in Docket No. RP95-363-000, *et al.* The 1996 Settlement established the rates and terms and conditions of service that would apply on the El Paso system for a ten-year period, i.e., until January 1, 2006 (1996 Settlement). Article 11.2 of the 1996 Settlement provided that rates for capacity then under contract by eligible shippers would be capped, subject to annual inflation adjustment, until the termination of the shippers' transportation service agreements (TSA). Eligible shippers are firm shippers with TSAs that were in effect on December 31, 1995, and that remained in effect on January 1, 2006.

⁵ In 2000-2001, El Paso undertook two expansion projects – the Line 2000 and Power Up Projects – which together are the Expansion Capacity.

⁶ August 17 Order, 132 FERC ¶ 61,139 at P 99.

⁷ *Id.* P 99 n.120.

⁸ *El Paso Natural Gas Co.*, 124 FERC ¶ 61,227, at P 63-79 (2008) (September 5 Order).

⁹ *El Paso Natural Gas Co.*, 132 FERC ¶ 61,155, at P 109 (2010) (August 24 Order).

capped Article 11.2(a) contracts and non-capped Expansion Capacity contracts (and non-capped contracts for new services). El Paso states that consistent with this bifurcation by contract, it is not entirely accurate to say, as footnote 120 of the August 17 Order did, that Article 11.2(a) protects a *shipper*. Rather, El Paso states, Article 11.2(a) protects at most the specific “capped” contracts of its shippers, and El Paso may seek to allocate the costs of the Expansion Capacity to an Article 11.2(a) shipper’s non-capped contracts, as well as to other (non-Article 11.2(a)) shippers’ contracts.

7. Accordingly, to the extent that it was not *dicta*, El Paso requests the Commission to clarify footnote 120, so that El Paso is not barred from allocating the cost of the Expansion Capacity to all its customers, including those with Article 11.2(a) capped contracts, so long as they also have uncapped contracts, and that the precise means of El Paso’s recovery of the cost of the Expansion Capacity in El Paso’s rates will be addressed in its pending and future rate cases. If footnote 120 is not considered *dicta* or so clarified, El Paso seeks rehearing, so that the language in footnote 120 does not prejudice issues being litigated in El Paso’s rate cases concerning the appropriate means of El Paso’s recovery of the costs of the Expansion Capacity.

III. Answer

8. On October 1, 2010, the East of California Shippers¹⁰ filed a motion for leave to answer and answer to El Paso’s request for clarification, or in the alternative, rehearing. The East of California Shippers essentially argue that no clarification should be given, because if the language is *dicta* El Paso has not been aggrieved, and if the language is not *dicta* and there is confusion as to the meaning of footnote 120 and the accompanying text, this language need not be clarified since all remaining issues related to El Paso’s ability to recover its cost of service through its rates should be addressed in the particular rate case proceeding, not in this underlying docket.¹¹

IV. Discussion

9. The Commission finds that the language in footnote 120 of the August 17 Order should have been more precisely phrased to reflect the contract-specific application of the Article 11.2(a) cap. Notwithstanding East of California Shippers’ answer urging no further clarification is required, the Commission finds that providing clarification of the

¹⁰ The East of California Shippers consist of El Paso Municipal Consumer Group, Freeport-McMoRan (formerly known as Phelps Dodge Corporation), Salt River Project Agricultural Improvement and Power District, and Southwest Gas Corporation.

¹¹ East of California Shippers’ October 1, 2010 Answer at 4 (citing August 24 Order at P 116; September 5 Order at P 66).

language at issue is necessary to avoid any continuing confusion in this or other related proceedings.

10. Article 11.2(a) of the 1996 Settlement does not apply to shippers, but to contracts that were in effect on December 31, 1995, that remained in effect on January 1, 2006 when the 1996 Settlement expired, and that continue to remain in effect, for capacity in existence at the time of the 1996 Settlement. Accordingly, the Commission clarifies on rehearing that footnote 120 should not be understood as to bar El Paso, in its pending and future rate cases, from seeking an allocation of costs of the Expansion Capacity to the service under uncapped contracts of shippers who may have other Article 11.2-capped contracts, as well as to other shippers whose service is pursuant to contracts to which the Article 11.2 cap does not apply.¹² The justness and reasonableness of any such allocation is to be determined in El Paso's future rate cases, and was not intended to be prejudged in the August 17 Order.

The Commission orders:

The August 17 Order is clarified, as discussed in the body of this order.

By the Commission. Commissioners Spitzer and Moeller not participating.

(S E A L)

Kimberly D. Bose,
Secretary.

¹² The language quoted earlier from footnote 120 -- “[w]ith the exception of Article 11.2(a) shippers, because their rates are capped.” – should be considered revised to read as follows: “[w]ith the exception of rates for service pursuant to Article 11.2(a) contracts, because the rates for service under such contracts are capped.”