

136 FERC ¶ 61,219
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

September 29, 2011

In Reply Refer To:
El Paso Natural Gas Company
Docket No. RP11-2288-000

El Paso Natural Gas Company
Post Office Box 1087
Colorado Springs, CO 80944

Attention: Catherine E. Palazzari, Vice President

Reference: Request for Waiver

Dear Ms. Palazzari:

1. On July 20, 2011, El Paso Natural Gas Company (El Paso) filed a request for waiver of certain critical condition penalties and charges incurred by El Paso customers February 2 through February 4, 2011, and February 6 through February 7, 2011. We will grant El Paso's request as discussed below.
2. El Paso states that its waiver request arises from unexpectedly extreme cold in the southwestern United States (primarily Texas, New Mexico, and Arizona) during the first week of February 2011 (February Weather Event). The resulting supply disruptions, extreme demand spikes, and widespread third-party operational failures during the February Weather Event greatly impacted El Paso and its shippers.
3. On February 2, 2011, severe temperatures caused dramatic demand spikes, well freeze-offs and equipment outages due to rolling electrical blackouts, which required El Paso to declare an emergency critical operating condition (COC) on its system. On February 3 and 4, 2011, El Paso's system continued to experience high overpulls of gas at delivery locations and low levels of gas receipts into the pipeline. On February 5, 2011, El Paso lifted the Emergency COC as the cold weather conditions moderated and shipper overpulls began to decrease. However, even as gas demand began to decrease, shipper nominations generally continued at previous high levels, resulting in a severe packing effect on El Paso's system, the opposite of the overpull it had just experienced. El Paso responded by declaring a strained operating condition (SOC) – Pack effective

February 6 and 7, 2011, encouraging shippers to monitor their transportation to ensure that scheduled receipts were in balance with actual delivery quantities. El Paso lifted its SOC – Pack on February 8, 2011 after linepack returned to a manageable level.

4. On March 11, 2011, El Paso issued invoices for certain critical condition penalties and/or charges that resulted from customer actions during the SOC/COC periods. Several customers submitted requests for penalty waivers and/or claims disputing the invoiced amounts. As a result, El Paso filed a request for limited waiver in Docket No. RP11-1879-000, so that it need not bill interest on late payments when those late payments resulted from a bona fide dispute over February billings.¹ In that filing, El Paso stated that it intended to review the facts surrounding the February Weather Event and assess its customers' requests for penalty waivers.

5. Having reviewed the facts surrounding the February Weather Event and evaluated the reasonableness of assessing certain critical condition penalties and charges to customers, El Paso states it has determined that its customers could not have reasonably anticipated, and were generally unable despite their best efforts to respond to, the confluence of events that occurred the first few days of February. In sum, El Paso concludes that the physical availability of gas supply was too severely restricted on February 2 and 3, 2011, to avoid a critical condition on its system.

6. El Paso therefore requests waiver of all critical condition penalties and charges incurred by El Paso's customers on February 2 and 3, 2011. While the majority of El Paso's customers submitted penalty waiver requests and billing dispute claims, a few customers have paid the penalties and did not request a waiver. Since all of El Paso's customers were affected by the extraordinary conditions of February 2 and 3, 2011, El Paso proposes that all shippers receive a waiver of applicable critical condition penalties and charges for those days. These penalties and charges include MDO/MHO violation penalties, hourly scheduling penalties, daily unauthorized overrun penalties, and COC daily imbalance charges.

7. El Paso states that on February 4, 2011, system linepack reached its lowest level, and then began to improve as certain shippers were able to offer assistance in the form of packing the pipeline which helped to mitigate the loss of linepack. El Paso thus proposes to waive penalties for hourly scheduling, MDO or MHO violations that day solely for those shippers who packed El Paso's system on February 4, 2011. In addition, because it was daily "overpulls" that were continuing to harm the system on February 4, 2011 (i.e., shippers taking gas supplies in excess of supplies delivered to the pipeline), El Paso proposes to bill and collect the COC daily imbalance charge rather than any higher penalty amount that was assessed for shippers who continued to take gas supplies in

¹ *El Paso Natural Gas Co.*, 135 FERC ¶ 61,070 (2011).

excess of supplies delivered to El Paso's system. El Paso thus requests waiver of GT&C Section 14.1(a) which provides that a shipper will only pay one penalty/charge, the highest of the penalties/charges that result from a shipper's actions on a given day.²

8. As described above, El Paso declared an SOC – Pack for February 6 and 7, 2011. El Paso proposes a limited waiver of the SOC daily imbalance penalties for these two days due to an error in its transportation computer system (Passport). El Paso explains that pursuant to GT&C Section 11.1(a), shippers have a number of options to minimize or alleviate the assessment of an SOC daily imbalance charge. One option is for shippers to resolve the previous day's imbalance through the “catch-up nomination” process by which a shipper submits a nomination to utilize its previous day's imbalance to serve its demand instead of bringing on more flowing gas. El Paso maintains a table in its Passport system which alerts El Paso and an affected shipper if it has a daily imbalance in existence on the SOC day. El Paso states that a number of shippers submitted catch-up nominations to help mitigate the assessment of an SOC daily imbalance charge for that period. Subsequent to lifting the February 6 and 7, 2011 SOC – Pack, however, El Paso discovered that certain locations were not populated on the SOC declaration table for February 6 and 7, 2011. As a result of this error, some shippers did not have the full information and capability needed to minimize the SOC daily imbalance charges (i.e., an accurate operational flow report and the ability to submit a catch-up nomination). Therefore, El Paso requests waiver of the SOC daily imbalance charges assessed at locations not identified on the applicable SOC table in Passport.³

9. El Paso further states that a penalty waiver does not change a shipper's status of having incurred a penalty. Accordingly, shippers who incurred COC or SOC penalties, whether those penalties are waived or not, will still be considered “offending shippers” who incurred the penalties, and will not share in the SOC/COC penalty amounts collected during February 2011 and credited to El Paso's shippers who did not incur COC or SOC penalties. Similarly, El Paso states that, due to its request for waiver of the “higher-of rule” to allow for the lower COC daily imbalance charge to be invoiced for February 4, 2011, those shippers would be “offending shippers” and would not be eligible to share in the SOC/COC penalty dollars during February 2011.

10. El Paso states that it has tariff discretion to waive penalties/charges pursuant to GT&C Section 18.1, but that due to the circumstances surrounding the February Weather

² Appendix C of El Paso's filing indicates that three shippers were assessed either an hourly scheduling penalty or an MDO violation charge for February 4, 2011. El Paso proposes to assess these shippers the COC daily imbalance charge instead.

³ Appendix D of the filing lists the four shippers who were assessed penalties at the five delivery locations affected by this error.

Event and the Commission's Inquiry in Docket No. AD11-9-000, El Paso believes it is appropriate to apprise the Commission of its proposed penalty/charge waivers and to seek the Commission's approval. El Paso states that, of the \$6,937,904 total penalty amount for this period, it requests that the Commission grant waiver of penalties totaling \$6,050,738, as discussed above. El Paso states that it will adjust the shippers' invoices within 45 days of a Commission order, should the Commission grant the requested waiver.

11. Public notice of the filing was issued on July 21, 2011. Interventions and protests were due as provided in section 154.210 of the Commission's regulations (18 C.F.R. § 154.210 (2011)). Pursuant to Rule 214 (18 C.F.R. § 385.214 (2011)), all timely filed motions to intervene and any unopposed motion 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 the proceeding or place additional burdens on existing parties. Comments in support of the filing were submitted by the El Paso Municipal Customer Group; New Mexico Gas Company, Inc.; PSEG Energy Resources & Trade LLC and Odessa-Ector Power Partners, L.P.; Southwest Gas Corporation; and Texas Gas Service Company, a Division of ONEOK, Inc. Southern California Gas Company and San Diego Gas & Electric Company neither protest nor take a position on whether grant of the waiver request is appropriate but state that penalties are essential incentives to creating discipline on the El Paso system by rationalizing shipper performance with contractual obligation.

12. Southwest Gas states that it does not necessarily agree with every statement made by El Paso about shipper responses to or preparedness for the cold weather event. Southwest Gas and the Indicated Shippers also assert that a supply *force majeure* should result in an automatic waiver of SOC/COC penalties.⁴ Both Southwest Gas and Indicated Shippers do, however, support the proposed waiver, even though they may object to certain characterizations and positions taken by El Paso, and assert that the benefits of the waiver be broadened.

13. The Indicated Shippers, for example, object to El Paso's statement that a shipper that incurs a penalty, even if El Paso waives that penalty, would not be entitled to share in

⁴ See n.14 of El Paso's filing expressing its position on this issue: "Some shippers' requests were based on claims that *force majeure* circumstances should have relieved their obligations to stay within daily and hourly scheduled quantities/entitlements...[El Paso] does not agree that a lack of supply allows customers to take natural gas quantities at a level greater than the pipeline receives on the customer's behalf, or to avoid automatically the incurrence of associated penalties authorized by the tariff." Since El Paso has effectively waived penalties in this *force majeure* situation, this disagreement is moot here.

any of the penalty revenues. Pursuant to GT&C Section 14.2(a), “a monthly credit will not be provided to a Shipper that incurred a SOC and/or COC penalty during a Critical Condition in that Month.” The Indicated Shippers argue that the term “incurred” has a particular meaning that requires a party to “bring down upon oneself,” or to become liable through one’s own actions. Arguing that, in these circumstances, the shipper did not bring down the assessment of penalties upon itself, the Indicated Shippers maintain that the shipper is not “offending” for purposes of sharing in the penalty revenues for SOC/COC daily imbalance penalties. The Indicated Shippers therefore request that the Commission require El Paso to share SOC/COC daily imbalance penalty revenues with shippers whose SOC/COC daily imbalance penalties have been waived and to share Critical Condition daily unauthorized overrun penalty revenues with shippers whose Critical Condition daily unauthorized overrun penalties have been waived. The Indicated Shippers also state that El Paso’s filing is vague regarding sharing penalty revenues from (1) Critical Condition Hourly Scheduling Penalties and (2) Critical Condition MDO/MHO violation penalties. The Indicated Shippers point out that the tariff provisions governing these two penalties require El Paso to share these two types of penalty revenues with all shippers regardless of whether a shipper incurred such a penalty during a critical condition in the month. Therefore, the Indicated Shippers argue that El Paso must share these two types of penalty revenues with all shippers, regardless of whether they are offending shippers or not.⁵

14. On August 26, 2011, El Paso filed a motion for leave to answer and an answer. Under Rule 213(a)(2), answers to protests are not permitted.⁶

15. As an initial matter, the Commission finds that the only issue before it is whether the penalty waivers as proposed by El Paso are reasonable and should be granted. El Paso is not proposing to modify or waive the penalty revenue crediting provisions in its tariff. Whether the crediting of revenues should differ from the tariff, or whether a supply *force majeure* event should qualify shippers for an automatic waiver of SOC/COC penalties, is not relevant to deciding whether the waivers that El Paso has proposed should be granted. Because we find El Paso’s proposed waiver of its penalty provisions is reasonable and unopposed, we shall not impose the further changes sought by certain shippers.

16. The penalty waiver is supported by the acute stresses on El Paso’s system during the February Weather Event, which made it extremely difficult and often impossible for both the pipeline and its shippers to operate normally. The El Paso request for waiver is

⁵ Consistent with its tariff, El Paso’s petition for waiver at 10 indicates that revenues from these two types of penalties will in fact be credited to all shippers.

⁶ 18 C.F.R. § 385.213(a)(2) (2011).

not opposed by any commenter, although some suggest modifications or raise other issues. The Commission will therefore grant El Paso's request for waiver as proposed.

17. Lastly, the Commission finds that granting waiver of El Paso's penalty provisions for shippers does not necessarily affect a shipper's classification as an "offending" shipper that has incurred the penalty under GT&C Section 14.2. The fact that a penalty-triggering offense occurred is separate and distinct from the waiver of the penalties arising from that offense. The Commission therefore finds that El Paso may waive penalties for a shipper but still reasonably classify that shipper as having incurred said penalties under its tariff.

By direction of the Commission.

Nathaniel J. Davis, Sr.,
Deputy Secretary.