

143 FERC ¶ 61,187
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony Clark.

El Paso Natural Gas Company, L.L.C.

Docket No. RP13-786-000

ORDER ACCEPTING AGREEMENTS AND TARIFF RECORDS

(Issued May 30, 2013)

1. On April 5, 2013, El Paso Natural Gas Company, L.L.C. (El Paso) filed revised tariff records¹ reflecting non-conforming negotiated and discount rate agreements and a letter agreement between El Paso and Arizona Public Service Company (APS) (collectively, the Agreements). The Agreements will supersede and cancel five transportation service agreements and amend one operator point aggregation service agreement between El Paso and APS to resolve issues concerning Article 11.2 of the 1996 Settlement.² The Commission will accept the Agreements and the associated tariff records, effective June 1, 2013, as discussed below.

Background/Details of the Filing

2. El Paso states that issues concerning the validity and applicability of Article 11.2 of El Paso's settlement (the 1996 Settlement) have been a source of debate and litigation between El Paso and its shippers, including APS, for more than eight years. Currently, issues pertaining to Article 11.2 (including Article 11.2(a) and 11.2(b)) are pending in El Paso's recent system-wide rate cases at Docket Nos. RP08-426-000 and

¹ See Appendix for a list of the revised tariff records.

² Article 11.2 of the 1996 Settlement in Docket No. RP95-363-000 between El Paso and its customers places certain limitations on the rates that El Paso can charge to shippers that were parties to that Settlement. See *El Paso Natural Gas Co.*, 79 FERC ¶ 61,028 (1997), *reh'g denied*, 80 FERC ¶ 61,084 (1997) and 89 FERC ¶ 61,164 (1999).

RP10-1398-000.³ El Paso states that consistent with the Commission's preference for negotiated dispute resolutions, El Paso has been attempting to resolve the disputes concerning Article 11.2 through individual contract negotiations with its shippers. Accordingly, El Paso states that the Agreements filed in the instant filing are the culmination of a successful resolution of the pending Article 11.2 issues with APS, a major shipper on its system.

3. El Paso states that as part of the settlement negotiation, in exchange for: (1) APS relinquishing its Article 11.2 rights, including the protection of Article 11.2(b); and (2) APS agreeing to term extensions; and in recognition of the competitive alternatives available to APS for transportation service, El Paso renegotiated rates under some of APS's contracts, resulting in the Agreements filed in the instant docket. Specifically, as to APS's two former Article 11.2 contracts, El Paso and APS have entered into new Agreements (Contract Nos. FT39D000 and FT39E000) that replace the Article 11.2(a) rate in Contract Nos. FT24U000 and FT24V000 with a negotiated rate equivalent to the Article 11.2(a) rate level. However, El Paso states that such Agreements (like all of APS's other agreements) will no longer be covered by Article 11.2. El Paso notes that, in conjunction with this settlement agreement, APS agreed to relinquish any rights it previously held pursuant to Article 11.2(b). El Paso also renegotiated the rates under two APS non-Article 11.2 contracts and extended their terms by ten years, one for service under Rate Schedule FT-1 (Contract No. FT39H000) and another under Rate Schedule FTH-8 (Contract No. H822E000). El Paso also amended its service agreement with APS under Rate Schedule OPAS (Contract No. OA22X000) and its discount agreement under Rate Schedule FT-1 (Contract No. FT24T000) to conform to the language found in the Agreements and to extend the term of the discount agreement.

4. El Paso states that the rates agreed to under this portfolio of Agreements reflect a negotiated resolution of Article 11.2 and non-Article 11.2 issues being litigated by El Paso and APS in El Paso's pending rate cases insofar as they affect APS's services and rates. As part of this negotiated resolution, El Paso also agreed to provide APS with certain evergreen provisions in the Agreements replacing the Article 11.2 contracts and a

³ Article 11.2(a) provides that rates for capacity under contract at the time of the 1996 Settlement would be capped, subject to inflation, and that the rate cap would continue to apply until the termination of shippers' transportation service agreements. Article 11.2(b) provides that even if eligible Article 11.2(a) shippers entered into new service agreements in the future, their rates would never include costs attributable to the capacity of its system on December 31, 1995, that becomes unsubscribed or is subscribed at less than the maximum applicable tariff rate.

right of first refusal (ROFR) provision in the other Agreements.⁴ In addition, El Paso states it agreed to remit payment to APS for certain refunds associated with its two most recent rate case proceedings in Docket Nos. RP08-426-000 and RP10-1398-000. El Paso states that the Agreements are a “package deal” and will become effective upon the Commission’s acceptance and/or approval of the Agreements in their entirety without an unacceptable modification or condition on the later of the first day of the month following such acceptance/approval, or June 1, 2013.

5. El Paso states that the non-conforming provisions reflected in the Agreements, in which APS relinquished its Article 11.2 rights and El Paso agreed to make certain refunds, do not affect the quality of service received by any other shipper nor are such provisions unduly discriminatory.

Public Notice, Interventions, Comments and Protest

6. Public notice of the filing was issued on April 8, 2013. 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 unopposed motions to intervene out-of-time 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. An out-of-time protest was filed by New Harquahala Generating Company, LLC (New Harquahala). Comments were filed by the Indicated Shippers,⁷ the El Paso Municipal Customer Group (Municipal Customers),⁸ and jointly by Southern California Gas Company and San Diego Gas & Electric Company (SoCal Gas/San Diego). On May 14, 2013, El Paso filed an answer. On May 20, 2013, New Harquahala

⁴ El Paso states that the inclusion of this language is permissible and conforms under its Tariff in Section 4.12 of the General Terms and Conditions (GT&C) for its evergreen provision and Section 4.14(f) of the GT&C for its ROFR. *See* El Paso’s Non-Conforming Agreements Filing at 5.

⁵ 18 C.F.R. § 154.210 (2012).

⁶ 18 C.F.R. § 385.214 (2012).

⁷ The Indicated Shippers are ConocoPhillips Company and Shell Energy North America (US), L.P.

⁸ The Municipal Customers are the following El Paso distributor-customers: City of Mesa, Arizona; City of Safford, Arizona; City of Benson, Arizona; City of Willcox, Arizona; City of Las Cruces, New Mexico; City of Socorro, New Mexico; City of Deming, New Mexico; the Navajo Tribal Utility Authority; Graham County Utilities, Inc.; and Duncan Rural Service Corporation.

filed an answer to El Paso's answer. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure prohibits answers to protests or answers unless otherwise permitted by the decisional authority.⁹ We will accept the answers of El Paso and New Harquahala because they provided information that has assisted in our decision-making process.

7. Indicated Shippers, the Municipal Customers, and New Harquahala request that the Commission condition any order accepting El Paso's proposed non-conforming agreements with APS on El Paso's providing similar treatment to similarly-situated entities. New Harquahala argues that it and APS are similarly situated and that, unless these agreements with APS are conditioned in this way, they will be unduly discriminatory and preferential under the Natural Gas Act. New Harquahala argues that the Agreements contain contract provisions, contract quantities and contract terms that go beyond the Article 11.2(a) agreements that APS currently has in place, giving APS undue preferences that are not available to New Harquahala and other shippers. In its answer, New Harquahala continues its argument that it is similarly situated to APS, that the provisions of the non-conforming agreements go beyond what is provided by Article 11.2, and that all parties should have access to interim rate case refunds.

8. Indicated Shippers, the Municipal Customers, SoCal Gas/San Diego, and New Harquahala further argue that El Paso should be placed at risk for any and all under-recoveries resulting from the Agreements. Indicated Shippers assert that the Commission's negotiated rate policy is that pipelines "are expected to negotiate rates with their customers in a manner that is not unduly discriminatory and that treats similarly situated shippers similarly."¹⁰ Indicated Shippers contend that the negotiated rate policy places pipelines at risk for the under-collection of costs related to negotiated rate agreements so that a pipeline may not allocate costs from negotiated rate customers to recourse rate customers.¹¹ New Harquahala contends that El Paso should be placed at risk because the Agreements are the result of El Paso's bargain with an Article 11.2 shipper and have nothing to do with what is needed as a result of competition in the transportation markets to retain or obtain shipper subscription.

9. Indicated Shippers argue the Commission should prohibit El Paso from seeking a discount-type adjustment in a future rate proceeding for these negotiated rate agreements

⁹ 18 C.F.R. § 385.213(a)(2) (2012).

¹⁰ *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines; Regulation of Negotiated Transportation Services of Natural Gas Pipelines*, 74 FERC ¶ 61,076, at 61,242 (1996).

¹¹ *Id.*

with APS. In addition, Indicated Shippers assert that El Paso should be at risk for any difference between the refunds El Paso is providing to APS and the refunds that APS would otherwise be entitled to following the Commission's orders in the two pending rate case proceedings. SoCal Gas/San Diego state that, while El Paso represents that its proposed package of agreements resolves APS's 1996 Settlement Article 11.2 "without adversely affecting any other shipper,"¹² El Paso should be required to assume the risk of any revenue shortfall resulting from these new agreements with APS and not be allowed to reallocate any such shortfall to other shippers.

10. El Paso states in its answer that it has no objection to providing similar treatment to similarly-situated shippers, but contends that New Harquahala, Indicated Shippers, and the Municipal Customers are not similarly situated to APS, and thus the agreements with APS are not unduly discriminatory. Indeed, El Paso states that Indicated Shippers did not even attempt to demonstrate that they were similarly situated to APS, and the Municipal Customers effectively concede that they are not. El Paso further states that New Harquahala is not similarly situated because it is not an Article 11.2 shipper, it has contracted for substantially lower quantities than APS has, and unlike APS it lacks the competitive alternatives available to APS. Moreover, according to El Paso, even if these shippers were similarly situated, none of these shippers has affirmatively stated that it is interested in negotiating the same or similar type of negotiated rates and term extensions as APS.

11. El Paso argues further that it is both unnecessary and problematic to condition the acceptance of its agreements with APS by requiring that El Paso treat similarly-situated shippers similarly. It is unnecessary because the Natural Gas Act already obligates El Paso to treat similarly-situated shippers without undue discrimination, and any condition or modification is problematic as it will require that certain procedures be followed in accordance with El Paso's letter agreement with APS, which could needlessly complicate or delay the implementation of the agreements.

12. El Paso also argues that New Harquahala is incorrect in asserting that it is unduly discriminatory for El Paso to provide APS with accelerated refunds in two pending rate cases. El Paso states that the Commission has held that shippers that have not settled claims are not entitled to refunds on the same schedule as those parties that have settled. Therefore, El Paso argues it is reasonable to provide APS with refunds on a different schedule from the schedule for New Harquahala, because APS has agreed to resolve various pending litigated issues, while New Harquahala has not.

¹² El Paso's Non-Conforming Agreements Filing at 1-2.

13. Finally, El Paso contends that the arguments by New Harquahala, Indicated Shippers, and SoCal Gas/San Diego that El Paso is not entitled in a future rate case to recover any revenue shortfall resulting from the APS agreements are at best premature. According to El Paso, the Commission's holding regarding a potential reallocation of an Article 11.2(a) shortfall is not applicable to the APS agreements in this proceeding. Therefore, the future recoverability through a discount adjustment of any costs not recovered by these agreements is governed by the Commission's discount adjustment policy, as applied to negotiated rates, and not by any rulings regarding Article 11.2(a). In this regard, El Paso states that, contrary to Indicated Shipper's suggestion, there is no *per se* ban on a pipeline seeking a discount adjustment for negotiated rate agreements, although a pipeline seeking such adjustment must show there is no harm to others in allowing it.

Discussion

14. If a pipeline and a shipper enter into a contract that materially deviates from the pipeline's form of service agreement, the Commission's regulations require the pipeline to file the contract containing the material deviations with the Commission.¹³ In *Columbia*, the Commission clarified that a material deviation is any provision in a service agreement that: (a) goes beyond filling in the blank spaces with the appropriate information allowed by the tariff, and (b) affects the substantive rights of the parties.¹⁴ The Commission prohibits negotiated terms and conditions of service that result in a shipper receiving a different quality of service than that offered other shippers under the pipeline's generally applicable tariff or that affect the quality of service received by others.¹⁵ However, not all material deviations are impermissible. As the Commission explained in *Columbia*,¹⁶ provisions that materially deviate from the corresponding *pro forma* agreement fall into two general categories: (a) provisions the Commission must prohibit because they present a significant potential for undue discrimination among shippers, and (b) provisions the Commission can permit without a substantial risk of undue discrimination.¹⁷

¹³ 18 C.F.R. § 154.1(d) (2012); 18 C.F.R. § 154.112(b) (2012).

¹⁴ *Columbia Gas Transmission Corp.*, 97 FERC ¶ 61,221, at 62,002 (2001) (*Columbia*).

¹⁵ *Monroe Gas Storage Co., LLC*, 130 FERC ¶ 61,113, at P 28 (2010).

¹⁶ *Columbia*, 97 FERC at 62,003-04.

¹⁷ *Equitrans, L.P.*, 130 FERC ¶ 61,024, at P 5 (2010).

15. The Commission accepts the APS Agreements as permissible non-conforming agreements. As El Paso states, issues pertaining to Article 11.2 have been debated and litigated by El Paso and its shippers in numerous proceedings before the Commission, including two pending rate case proceedings. The Agreements with APS represent a successful resolution of those pending Article 11.2 issues with a major shipper on El Paso's system. The Commission finds that the non-conforming provisions in APS's Agreements are permissible deviations from the form of service agreement because they relate only to the rates paid by APS and will not affect the quality of service for either APS or any other shipper.¹⁸

16. Furthermore, El Paso's agreement to provide certain pending refunds is not unduly discriminatory. Agreeing to provide refunds on an accelerated schedule is reasonable in exchange for APS's agreement to relinquish its Article 11.2 rights. As El Paso states, the terms and conditions of service under the new APS agreements were not changed and are the same as those provided to all shippers under the same rate schedule.¹⁹ In addition, the acceleration of refunds for APS will not affect the level of refunds for El Paso's other shippers, which shall include interest. El Paso states that it will not attempt to offset any refunds provided to APS in excess of what it might have otherwise been required to provide APS against its refund obligation, if any, to New Harquahala and other shippers.²⁰

17. The commenters generally request that the Commission condition the order accepting the Agreements to require El Paso to provide similarly-situated shippers with a similar deal. The Commission finds such a condition unnecessary. The Natural Gas Act prohibits all natural gas companies from providing service on an unduly discriminatory basis. In this regard, El Paso states that it would provide similar treatment to similarly-situated shippers. In addition, there is no evidence that El Paso has refused to negotiate a similar deal with any similarly-situated shipper.

18. The Commission also finds that it is unnecessary to condition this order by placing El Paso at risk for any undercollections related to the Agreements or by prohibiting El Paso from seeking a discount adjustment to its rate design volumes in a future NGA section 4 rate case based on these Agreements. To the extent that El Paso seeks a

¹⁸ *Columbia Gas Transmission Corp.*, 101 FERC ¶ 61,337, at P 38 (2002). *Northern Natural Gas Co.*, 110 FERC ¶ 61,321, at P 12 (2002). The ROFR and evergreen language in the Agreements are not non-conforming since they conform to the provisions in El Paso's Tariff.

¹⁹ May 13 El Paso Answer at p. 10, n.13.

²⁰ *Id.*, p. 11.

discount-type adjustment for negotiated rates in a future NGA section 4 rate case, Section 4.18(d) of its GT&C requires that any such adjustment must not adversely affect recourse rate shippers.²¹ Moreover, any decision regarding El Paso's ability to adjust its rate design volumes based on the negotiated and discounted rates offered to APS is appropriately addressed at such time as El Paso files a new NGA section 4 rate case including such a proposed discount adjustment.²² It is premature to address such issues when El Paso has not made such a proposal. Until El Paso files a new rate case, the rates of its other shippers are unaffected by the instant Agreements. In addition, El Paso has stated that it will not seek to modify its refund obligation to its other shippers if the refunds provided to APS are in excess of what it might have otherwise been required to provide APS.

The Commission orders:

The Commission accepts the Agreements filed in the instant filing and the tariff records shown in the Appendix, effective June 1, 2013.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

²¹ See *Tennessee Gas Pipeline Co.*, 135 FERC ¶ 61,208, at PP 205-208 (2011), describing the burden the pipeline must satisfy under this tariff language in order to obtain a discount-type adjustment for negotiated rates.

²² *Northern Natural Gas Co.*, 113 FERC ¶ 61,119, at PP 23-33 (2005).

Appendix

**El Paso Natural Gas Company, L.L.C.
FERC NGA Gas Tariff
EPNG Tariffs**

Tariff Records Accepted Effective June 1, 2013

[Part I: Overview, Section 1 - Table of Contents, 15.0.0](#)

[Part VII: Non-Conforming, , 10.0.0](#)

[Part VII: Non-Conforming, Section 9 - Arizona Public Service Company #OA22X000, 3.0.0](#)

[Part VII: Non-Conforming, Section 9.1 - Arizona Public Service #OA22X000 Exhibit A, 3.0.0](#)

[Part VII: Non-Conforming, Section 25 - Arizona Public Service Company Letter Agreement, 0.0.0](#)

[Part VII: Non-Conforming, Section 26 - Arizona Public Service Company #FT24T000, 0.0.0](#)

[Part VII: Non-Conforming, Section 26.1 - Arizona Public Service #FT24T000 Exhibit A, 0.0.0](#)

[Part VII: Non-Conforming, Section 26.2 - Arizona Public Service #FT24T000 Exhibit B, 0.0.0](#)

[Part VII: Non-Conforming, Section 27 - Arizona Public Service Company #FT39H000, 0.0.0](#)

[Part VII: Non-Conforming, Section 27.1 - Arizona Public Service #FT39H000 Exhibit A, 0.0.0](#)

[Part VII: Non-Conforming, Section 27.2 - Arizona Public Service #FT39H000 Exhibit B, 0.0.0](#)

[Part VII: Non-Conforming, Section 28 - Arizona Public Service Company #H822E000, 0.0.0](#)

[Part VII: Non-Conforming, Section 28.1 - Arizona Public Service #H822E000 Exhibit A, 0.0.0](#)

[Part VII: Non-Conforming, Section 28.2 - Arizona Public Service #H822E000 Exhibit B, 0.0.0](#)

[Part VII: Non-Conforming, Section 29 - Arizona Public Service Company #FT39D000, 0.0.0](#)

[Part VII: Non-Conforming, Section 29.1 - Arizona Public Service #FT39D000 Exhibit A, 0.0.0](#)

[Part VII: Non-Conforming, Section 29.2 - Arizona Public Service #FT39D000 Exhibit B, 0.0.0](#)

[Part VII: Non-Conforming, Section 29.3 - Arizona Public Service #FT39D000 Exhibit C, 0.0.0](#)

[Part VII: Non-Conforming, Section 30 - Arizona Public Service Company #FT39E000, 0.0.0](#)

[Part VII: Non-Conforming, Section 30.1 - Arizona Public Service #FT39E000 Exhibit A, 0.0.0](#)

[Part VII: Non-Conforming, Section 30.2 - Arizona Public Service #FT39E000 Exhibit B, 0.0.0](#)

[Part VII: Non-Conforming, Section 30.3 - Arizona Public Service #FT39E000 Exhibit C, 0.0.0](#)