

155 FERC ¶ 61,200  
FEDERAL ENERGY REGULATORY COMMISSION  
WASHINGTON, DC 20426

May 25, 2016

In Reply Refer To:  
El Paso Natural Gas Company, L.L.C.  
Docket No. RP16-872-000

El Paso Natural Gas Company, L.L.C.  
P.O. Box 1087  
Colorado Springs, CO 80944

Attention: Francisco Tarin  
Director, Regulatory Affairs

Dear Mr. Tarin:

1. On April 25, 2016, El Paso Natural Gas Company, L.L.C. (El Paso) filed tariff records<sup>1</sup> reflecting a non-conforming negotiated rate transportation service agreement (TSA No. FT3GQ000) between El Paso and Anadarko Energy Services Company (Anadarko) for firm transportation service under Rate Schedule FT-1. El Paso requests that the Commission permit the referenced tariff provisions to become effective May 25, 2016. Waiver of the Commission's 30-day notice requirement<sup>2</sup> is granted and the referenced tariff records are accepted, effective May 25, 2016, subject to conditions, as discussed below.

2. Public notice of the filing was issued on April 26, 2016. Interventions and protests were due on or before May 9, 2016, as provided in section 154.210 of the Commission's regulations.<sup>3</sup> Pursuant to Rule 214,<sup>4</sup> all timely motions to intervene and any unopposed motions to intervene out-of-time filed before the issuance date of this order are granted.

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<sup>1</sup> See Appendix.

<sup>2</sup> 18 C.F.R. § 154.207 (2015).

<sup>3</sup> *Id.* § 154.210.

<sup>4</sup> *Id.* § 385.214.

Granting late interventions at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties. No protests or adverse comments were filed.

3. The Commission has stated that 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.<sup>5</sup> In *Columbia Gas Transmission Corp.*, 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.<sup>6</sup> The Commission prohibits negotiated terms and conditions of service that result in a shipper receiving a different quality of service than that offered to other shippers under the pipeline's generally applicable tariff or that affect the quality of service received by others.<sup>7</sup> However, not all material deviations are impermissible. As the Commission explained in *Columbia Gas*,<sup>8</sup> 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.

4. El Paso's agreement with Anadarko contains several non-conforming provisions that the Commission finds permissible, specifically: Recovery for Carbon Tax and Greenhouse Gas Costs; Term of Agreement and Construction Language; Contractual Right of First Refusal and One Time Extension Right; Creditworthiness; and Negotiated Rates. These provisions do not affect the service to any other shipper and do not present a risk of undue discrimination; thus, these provisions are permissible material deviations from the form of service agreement.

5. The Commission, however, has concerns with the proposed Limitation of Liability provision in paragraph 15 of the TSA. El Paso states in its transmittal letter that paragraph 15 of the TSA limits each party's liability to the other for any damages.<sup>9</sup>

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<sup>5</sup> 18 C.F.R. §§ 154.1(d), 154.122(b).

<sup>6</sup> *Columbia Gas Trans. Corp.*, 97 FERC ¶ 61,221, at 62,002 (2001) (*Columbia Gas*).

<sup>7</sup> *Monroe Gas Storage Co., LLC*, 130 FERC ¶ 61,113, at P 28 (2010).

<sup>8</sup> *E.g.*, *Columbia Gas*, 97 FERC at 62,003-04; *Equitrans, L.P.*, 130 FERC ¶ 61,024, at P 5 (2010).

<sup>9</sup> Transmittal at 3.

El Paso explains that, “[b]ased on this provision, neither El Paso nor Anadarko will be liable to the other for special, indirect, consequential (including loss of profits), incidental or punitive damages except to the extent such damages arise out of such party’s gross negligence, willful misconduct, or bad faith actions.”<sup>10</sup> El Paso states that this non-conforming provision is included to “further emphasize” what section 25.1 of the General Terms and Conditions (GT&C) of El Paso’s tariff already provides.<sup>11</sup>

6. Paragraph 15 of the TSA, however, does not appear to match El Paso’s description of it. In particular, paragraph 15 does not include the exception for “gross negligence, willful misconduct or bad faith actions” as El Paso described in the transmittal letter. Paragraph 15 states:

Limitation of Liability: No party shall be liable to any other party under this agreement for any exemplary, special, indirect, incidental, punitive or consequential damages of any nature, including lost profits, however arising even if such party has been made aware of the possibility of such damages or lost profits.

7. Furthermore, while El Paso asserts that paragraph 15 is included to further emphasize what the tariff already provides, a reading of the tariff indicates that paragraph 15 differs from section 25.1 of the GT&C, which states:

Each party to the Executed TSA shall bear responsibility for all of its own breaches, tortious acts, or tortious omissions connected in any way with the Executed TSA causing damages or injuries of any kind to the other party or to any third party, unless otherwise expressly agreed in writing between the parties. Therefore, the offending party as a result of such offense shall hold harmless and indemnify the non-offending party as a result of such offense shall hold harmless and indemnify the non-offending party against any claim, liability, loss, or damage whatsoever suffered by the non-offending party or by any third party. As used herein: the term “party” shall mean a corporation or partnership entity or individual and its officers, agents, employees and contractors; the phrase “damages or injuries of any kind” shall include without limitation litigation expenses, court costs, and

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

attorneys' fees; and the phrase "tortious acts or tortious omissions" shall include without limitation sole or concurrent simple negligence, gross negligence, recklessness, and intentional acts or omissions.

8. The inconsistencies between the description of paragraph 15 in El Paso's transmittal and the proposed language contained in paragraph 15 of the TSA raise concerns about the extent to which this liability provision is intended to deviate from the liability provision of El Paso's GT&C. Generally, the Commission's policy on limitations of liability disfavors limiting liability in situations of gross negligence, bad faith, and willful misconduct by excluding liability for indirect or consequential damages.<sup>12</sup> The Commission finds that El Paso has not supported a finding that paragraph 15 will not affect the service to other shippers or present a risk of undue discrimination.

9. Accordingly, although the other nonconforming aspects of the TSA appear permissible, the intent of the liability provision in paragraph 15 is unclear. The Commission therefore rejects the limitation of liability provision in paragraph 15 of the non-conforming negotiated rate agreement with Anadarko, and accepts the proposed tariff records in the Appendix subject to El Paso either filing a revised agreement to modify or remove the liability limitation provision, or providing an explanation to support the inclusion of paragraph 15. El Paso must resolve the inconsistency between the description of the limitation of liability provision in the transmittal letter which seems consistent with Commission policy, and the language in paragraph 15 itself, which seems inconsistent with the description provided in the transmittal.

10. El Paso is directed to make a compliance filing within 30 days consistent with the findings in this letter order.

By direction of the Commission.

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>12</sup> See *Enable Gas Transmission, LLC Formerly CenterPoint Energy Gas Transmission Company, LLC*, 152 FERC ¶ 61,052, at PP 140-161 (2015).

Appendix

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

Tariff Records Accepted Effective May 25, 2006, Subject to Conditions

[Part I: Overview, Section 1 - Table of Contents, 42.0.0](#)

[Part VII: Non-Conforming, 36.0.0](#)

[Part VII: Non-Conforming, Section 1 - Anadarko Energy Services  
Company#FT3GQ000, 4.0.0](#)

[Part VII: Non-Conforming, Section 1.1 - Anadarko Energy #FT3GQ000 Exhibit A, 4.0.0](#)

[Part VII: Non-Conforming, Section 1.2 - Anadarko Energy #FT3GQ000 Exhibit B, 6.0.0](#)