

109 FERC ¶ 61,146
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

El Paso Natural Gas Company

Docket No. RP05-15-000

ORDER ACCEPTING TARIFF SHEET
SUBJECT TO CONDITION

(Issued November 3, 2004)

1. On October 4, 2004, El Paso Natural Gas Company (El Paso) filed a revised tariff sheet¹ and two transportation service agreements (TSAs) for the Commission's review and information as potential non-conforming agreements. The Commission finds that the TSAs submitted by El Paso contain provisions that are material deviations from its form of service agreement, but that these deviations are permissible. The Commission therefore accepts the non-conforming agreements and accepts El Paso's proposed tariff sheet to be effective November 3, 2004, subject to the modification discussed below. This order is in the public interest because it clarifies that these non-conforming contract provisions can be permitted without substantial risk of undue discrimination.

I. Background

2. El Paso states that in 2003, it began a comprehensive review of its existing Contract Demand (CD) TSAs, in light of recent Commission orders explaining its material deviation policy. El Paso states that it identified a number of contract provisions that do not appear in its tariff or form of service agreement that may be considered non-conforming provisions. El Paso submitted those provisions for Commission review in Docket No. RP00-336-025. In an April 19, 2004 order, the Commission rejected the filing stating that it was premature for El Paso to submit the TSAs for Commission review because some of the contracts were unexecuted.² In addition, the Commission found that the contracts contained provisions not related to compliance with Commission

¹ 1st Rev Twenty-First Revised Sheet No. 1, Second Revised Volume No. 1-A.

² 107 FERC ¶ 61,057 (2004). The order also rejected a related filing in Docket No. RP00-336-018.

directives in Docket No. RP00-336, the Capacity Allocation Proceeding, and were therefore beyond the scope of that proceeding. The Commission directed El Paso to file any executed agreements that contain provisions that materially deviate from El Paso's form of service agreement in a new docket.

3. El Paso subsequently submitted a tariff filing in Docket No. RP04-492-000 revising its form of service agreement to add a number of provisions so that contracts executed in the future containing those provisions would not be considered non-conforming. Those provisions would allow El Paso to negotiate an evergreen provision and minimum and maximum pressure commitments. The Commission accepted those tariff provisions in a September 22, 2004 Order.³

II. Instant Filing

4. El Paso states that, consistent with the Commission's April 19, 2004 Order, it has continued its review of all provisions in its executed TSAs for consistency with Commission orders and has identified a number of contract provisions that do not appear in its tariff or form of service agreement that may be considered non-conforming provisions. El Paso states that the great majority of these potential non-conforming provisions derive from its form of service agreement which does not use a "fill-in-the-blank" format. El Paso explains that, in some cases, it has dealt with potential non-conforming provisions by submitting tariff changes to make those terms available to all similarly-situated shippers.⁴ However, El Paso states, its TSAs still contain a number of provisions that do not constitute "fill-in-the-blank" items that may or may not be deemed substantive in nature. El Paso states that, out of an abundance of caution, it has submitted all these provisions for Commission review.

5. El Paso submitted for Commission review two Rate Schedule FT-1 CD TSAs, one with Allegheny Energy Supply Company, LLC (Allegheny) and the other with Reliant Energy Services, Inc. (Reliant). El Paso states that the potential non-conforming provisions in these two TSAs are also found in 32 other executed TSAs. El Paso states that it submitted the Allegheny and Reliant TSAs as sample TSAs to save the Commission and El Paso's customers the administrative burden of reviewing numerous TSAs with the same provisions.

³ 108 FERC ¶ 61,284 (2004).

⁴ For example, El Paso notes that the Commission approved El Paso's tariff filing providing for redesignating points. 106 FERC ¶ 61,103 (2004).

6. In addition, El Paso submitted a revised Tariff Sheet No. 1 to reference the Allegheny and Reliant TSAs as non-conforming agreements. If the Commission accepts the tariff sheet and concludes that the other TSAs with similar provisions should similarly be listed, El Paso requests that the Commission so state in its order. In addition, El Paso has deleted from Sheet No. 1 an MGI Supply, Ltd., TSA that has been terminated.

III. Public Notice and Protests

7. Notice of El Paso's filing was issued on October 7, 2004. Interventions and protests were due as provided in section 154.210 of the Commission's regulations, 18 C.F.R. §154.210 (2004). Pursuant to Rule 214, 18 C.F.R. § 385.214 (2004), all timely filed motions to intervene and any motions to intervene out-of-time filed before the issuance of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt this proceeding or place additional burdens on existing parties.

8. Texas Gas Service Company, a Division of ONEOK, Inc. (Texas Gas Service) filed comments. Texas Gas Service states that El Paso has not shown that these non-conforming provisions should not be included in the tariff and made available to all shippers, as the Commission instructed in the April 19 Order. In addition, Texas Gas Service states that the Commission's policy regarding the filing of non-conforming service agreements performs an essential market monitoring function that protects other market participants from unduly discriminatory practices by pipelines. Texas Gas Service urges the Commission not to relax its filing requirements but to require strict compliance to the filing of each and every non-conforming TSA. Texas Gas Service states that granting El Paso's request would allow El Paso to execute non-conforming TSAs without Commission review or approval and would run the risk of undue discrimination.

IV. Discussion

9. Under section 4(c) of the Natural Gas Act (NGA), pipelines must file "all contracts which in any manner affect or relate to" the pipeline's rates and services. Section 154.1(b) of the Commission's regulations⁵ implements this provision and provides that pipelines must file all contracts related to their services. Section 154.1(d)⁶ provides that any contract that conforms to the form of service agreement set forth in the pipeline's tariff need not be filed, but that any contract that deviates in any material aspect from the form of service agreement set forth in the pipeline's tariff must be filed.

⁵ 18 C.F.R. § 154.1(b) (2004).

⁶ 18 C.F.R. § 154.1(d) (2004).

10. As the Commission explained in *Columbia Gas Transmission Corp (Columbia)*,⁷ the exemption from the requirement that each customer service agreement must be filed with the Commission is based on a finding that the section 4 filing requirement has already been satisfied by the pipeline's previous filing of the *pro forma* service agreement. Where a customer's service agreement conforms to the *pro forma* service agreement (and the other provisions of the pipeline's tariff), the Commission's prior review and approval of the *pro forma* service agreement and the tariff have accomplished the purpose of the NGA section 4 filing requirement. Since the Commission and other interested parties have had an opportunity to determine that the form of service agreement provided for in the tariff is just and reasonable and non-discriminatory, there is no need to review subsequent conforming contracts to determine if they comply with the requirements of the NGA.

11. However, for this procedure to satisfy the filing requirements of NGA section 4, the customer's service agreement must truly conform to the form of service agreement. There is such conformity where a service agreement contains only the approved language of the form of service agreement, with blank spaces for filling in such information as the name of customer, etc., completed in a manner consistent with the tariff.⁸ However, where the service agreement contains a provision not in the approved language of the form of service agreement and that provision (1) goes beyond filling in the blank spaces with the appropriate information allowed by the tariff and (2) affects the substantive rights of the parties, the Commission cannot be considered to have already reviewed the service agreement when it reviewed the *pro forma* service agreement. In such case, the contract contains a provision affecting the substantive rights of the parties which the Commission has never seen before. Since NGA section 4 requires the filing of all contracts which affect the pipeline's service "in any manner," the statute requires the filing of such a service agreement.

12. The Commission has defined a material deviation as "any provision of a service agreement which goes beyond the filling in of the spaces in the form of service agreement with the appropriate information provided for in the tariff and that affects the substantive rights of parties."⁹ Once a service agreement has been found to deviate materially from the form of service agreement in the tariff, the Commission must then determine whether to approve the non-conforming agreement. The Commission bases this determination upon whether the material deviation presents a significant potential for undue discrimination among customers. The Commission has also held that the pipeline

⁷ 97 FERC ¶ 61,221 (2001).

⁸ 18 C.F.R. § 154.110 (2004).

⁹ *Columbia*, 97 FERC ¶ 61,221 at 62,002 (2001).

must explain why the non-conforming provisions are specific to a particular shipper and why the provision should not be included in the tariff and made available to all shippers.

13. The Commission will apply these general principles in reviewing the contracts submitted by El Paso. As discussed below, the potential non-conforming provisions in El Paso's filing include operating provisions under Article VIII of its Rate Schedule FT-1 form of service agreement and miscellaneous provisions under Article IX. In addition, there are deviations related to the currently effective form of service agreement.

A. Article VIII, Other Operating Provisions

14. Article VIII of El Paso's form of service agreement permits El Paso and the shipper to specify other operating provisions that apply to service under the TSA. El Paso states that because the form of service agreement states that Article VIII is to be used to specify other operating provisions, El Paso had previously viewed this article as a "fill-in-the-blank" and routinely added these provisions to TSAs. However, El Paso states that it no longer includes such operating provisions in its contracts in light of the Commission's clarifications to its material deviation policy.

15. El Paso states that the Allegheny and Reliant TSAs contain two operating provisions that were a product of El Paso's conversion from sales to transportation service under Order No. 436 and its global settlement in Docket No. RP88-44-000 and have been carried over in the firm TSAs entered since that time. The first is a provision stating that the TSA does not constitute any implied waivers or intentional forfeiture of rights under Order Nos. 436, 451, 500 or 636. The second provision states that the shipper will make all reasonable efforts to operate or cause its producer suppliers to operate so that all necessary volumes are tendered to El Paso at the receipt points in the TSA. El Paso states that this operator supply provision indicates that El Paso will not be required to deliver the contracted quantities for the shipper if the operator fails to deliver the scheduled quantities.

16. The Commission finds that these provisions do not affect the substantive rights of the parties and do not present the potential for a significant risk of undue discrimination among customers. In these circumstances, the Commission will approve the non-conforming agreements.

17. El Paso states that it no longer includes such operating provisions in its contracts in light of the Commission's clarifications to its material deviation policy. However, El Paso's current form of service agreement includes as Article VIII a similar provision for including specific operating conditions for individual shippers. The Commission clarifies that if El Paso includes specific operating conditions in individual contracts, it must file those contracts as non-conforming contracts and explain why the provisions should not be included in its tariff and be made available to all shippers.

B. Article IX, Miscellaneous Provisions

18. Article IX of El Paso's form of service agreement provides for miscellaneous contract provisions. The Allegheny and Reliant TSAs contain the following provisions that El Paso states were unique to that shipper's service but that are not specifically addressed in the form of service agreement.

1. Description of Contract Rate

19. El Paso states that its form of service agreement does not have a "blank" for rate because the form of service agreement contemplates that all TSAs will be at the maximum rate. El Paso states that in Reliant's TSA, a new rate paragraph was included merely to restate Reliant's agreement to pay the applicable maximum tariff rates.¹⁰ El Paso does not believe that a rate provision indicating a shipper's agreement to pay the maximum tariff rates would cause a TSA to be considered a non-conforming agreement. El Paso states that it has since added a "blank" for a rate provision to its form of service agreement.¹¹

20. The Commission made clear in *Columbia* that the method used to include terms in a form of service agreement can be determinative in deciding whether a particular provision constitutes a material deviation. The Commission explained that certain provisions, such as flow rate and pressure obligations, would not be material deviations if the form of service agreement is drafted to include provisions concerning such matters with blanks to be filled in. However, the Commission stated, if the pipeline has not drafted its *pro forma* service agreement to have a blank in which a number can be filled in to address the matter, then the addition of a clause covering it is a material deviation.¹²

21. Therefore, the addition of a provision stating that the shipper will pay the maximum rate is a material deviation if that provision is not included in the form of service agreement. Because this provision merely restates that the TSA will be at the maximum rate as opposed to a discounted rate, this provision does not affect the substantive rights of parties and thus does not present a significant risk of undue discrimination among shippers. The Commission will therefore approve the non-conforming agreements.

¹⁰ El Paso notes that there are other instances where El Paso and the shipper have agreed to a discounted rate and a discount rate provision has been added to the TSA.

¹¹ 108 FERC ¶ 61,284 (2004).

¹² 97 FERC ¶ 61,221 at 62,002 (2001).

2. Rights to Redesignate Primary Delivery Points

22. Allegheny's TSA contains a provision to allow it to redesignate primary delivery points with five days notice if it agrees to continue to pay the same reservation rate. In Docket No. RP04-110-000, the Commission approved El Paso's proposal to permit shippers to redesignate primary rights with three days notice and clarified that the shipper will continue to pay the same reservation rate when it designates an upstream delivery point.¹³ El Paso concludes that the provision in Allegheny's TSA merely reiterates the rights to redesignate primary points now found in El Paso's tariff. In accordance with the tariff, Allegheny and other shippers with this provision will be allowed to redesignate primary delivery points with three days notice instead of the five days indicated in their TSAs.

23. This provision is a material deviation from the form of service agreement that was in effect at the time these agreements were executed. However, as El Paso points out, the Commission has since approved a tariff revision that provides a redesignation right to all shippers on three days notice.¹⁴ Since the revised tariff provision gives all shippers the redesignation right and governs the redesignation rights of the parties to this non-conforming agreement, the Commission finds that the non-conforming provisions do not present a potential for undue discrimination among customers. In these circumstances, the Commission will not require El Paso to change the agreement.

3. TSA Addendum

24. Paragraph 9.4 in Allegheny's TSA incorporates an attached addendum. El Paso explains that it started the procedure of attaching an addendum to a TSA when it was remarketing a significant portion of its capacity to California delivery points. El Paso states that the addendum sets forth procedures for on-line competitive bidding and lists such things as the rate requirements, terms and conditions for bidding, and bid evaluation methodology. El Paso states that the addendum facilitated the electronic execution of the TSA by combining the competitive bidding requirements into the TSA. El Paso states that this procedure greatly simplified the contracting process and provided the shipper a contract number for scheduling purposes shortly after the capacity was awarded. El Paso states that there are 17 other TSAs in addition to Allegheny's with an attached addendum with only slight wording variations for rate, volume, term, and receipt and delivery points, etc. El Paso states that these items are considered fill-in-the-blank and permitted to vary from contract to contract. El Paso states that it has since stopped the practice and no longer incorporates such addenda in its new contracts.

¹³ 106 FERC ¶ 61,103 (2004).

¹⁴ El Paso Natural Gas Co., 106 FERC ¶ 61,103 (2004).

25. The addendum relates to competitive bidding procedures for specific capacity and therefore it applies prior to the award of the capacity and execution of the TSA. Further, El Paso states that it no longer uses this addendum in its new contracts. Therefore, the addendum does not affect any current awards of capacity and does not present a potential for undue discrimination among customers. In these circumstances, the Commission will not require modification of the existing contracts.

26. One final provision in Allegheny's TSA and a number of others is a provision stating that Block I capacity has alternate receipt point rights from San Juan receipt points. El Paso states that this provision reiterates section 4.5(b)(i) of the tariff. Because the provision simply restates what is in the tariff, it does not present a potential for undue discrimination among shippers and the Commission will not require El Paso to revise its executed TSAs.

4. Reference to Capacity Allocation Proceeding

27. The Allegheny and Reliant TSAs contain provisions acknowledging the agreement of the parties to be bound by any changes ultimately approved by the Commission in the Capacity Allocation Proceeding.

28. While the inclusion of this provision in the TSA may be a deviation from the form of service agreement, it is not a material deviation because it does not affect the substantive rights of the parties. All parties are bound by the changes approved by the Commission in the Capacity Allocation Proceeding regardless of whether this provision is included in the agreement.

C. Changes in the Form of Service Agreement

29. El Paso states that the Allegheny and Reliant TSAs reflect the form of service agreement in effect in 2000 and 2001. El Paso explains that certain provisions do not precisely match the currently effective form of service agreement but that these differences should not be considered non-conforming provisions since they do match the form of service agreement in effect when they were executed and do not confer substantive rights to the shipper.

30. Specifically, El Paso states, paragraph 1.3 in the TSAs contains a phrase reaffirming that El Paso's delivery obligation is limited to a shipper's contract quantities. El Paso states that it no longer adds this phrase to new TSAs. In addition, the Allegheny and Reliant TSAs specify the contract's termination date in paragraph 5.2. El Paso states that prior to the recent changes to its form of service agreement, it used paragraph 5.2 to insert the appropriate contract term language and/or evergreen provision. The currently effective form of service agreement now includes a separate "fill-in-the-blank" paragraph for instances where parties mutually agree to a contractual evergreen provision.

31. Finally, El Paso states that paragraphs 1.1, 2.1 and 2.2 of the form of service agreement and Exhibits A and B were recently revised to add references to the receipt/delivery point combinations approved by the Commission in the Capacity Allocation Proceeding in Docket No. RP00-336-000 and to list the respective receipt/delivery point combinations on the exhibits for each FT-1 TSA.¹⁵ El Paso states that the TSAs submitted herein reflect the previously approved version of this wording and not this most recent change.

32. The Commission finds that these minor deviations do not affect the substantive rights of the parties and further that they do not present the potential for undue discrimination. Therefore, we will accept these deviations in the existing contracts.

D. Necessity for Refiling Provisions

33. El Paso states that the contract provisions submitted for review here are also contained in 32 other executed and effective TSAs. El Paso states that it is submitting the Allegheny and Reliant TSAs as sample TSAs in order to save the Commission and El Paso's customers the administrative burden of reviewing the numerous TSAs with the same provisions. El Paso states that this approach is consistent with the Commission's findings in a November 26, 2002 letter order in Docket No. RP03-62-000 where the Commission found that a risk sharing add-on provision contained in a particular TSA, but also included in other TSAs, was a permissible deviation from El Paso's form of service agreement and that El Paso was not required to file with the Commission the other contracts containing the same provision.¹⁶ El Paso further notes that the Commission stated, in its prior order rejecting El Paso's submittal of TSAs for Commission review, that provisions previously reviewed by the Commission need not be submitted.¹⁷ El Paso therefore states that it does not intend to submit the other 32 executed TSAs for Commission review since they contain no potential non-conforming provisions other than those described herein.

34. Texas Gas Service argues that El Paso's request that the Commission not require filing and review of similar non-conforming TSAs on a forward-going basis is inconsistent with the Commission's market monitoring goals. Texas Gas Service states that the filing of such agreements protects other market participants from unduly

¹⁵ El Paso cites 104 FERC ¶ 61,232 (2003). El Paso notes that the references to receipt/delivery point combinations are proposed to be modified again in El Paso's Order No. 637 proceeding in Docket No. RP04-251-000.

¹⁶ 101 FERC ¶ 61,262 (2002).

¹⁷ 107 FERC ¶ 61,057 (2004) at P12.

discriminatory practices by pipelines and the Commission should require strict compliance as to the filing of every non-conforming TSA.

35. The Commission finds that to the extent that there are existing service agreements that contain provisions verbatim to the non-conforming provisions approved above, El Paso is not required to file each of these agreements. However, El Paso must list these agreements on its tariff sheet identifying non-conforming agreements and indicate that the non-conforming provisions are verbatim to those approved by the Commission here. Further, if the provisions are not verbatim to those approved here, El Paso must file them as non-conforming agreements. This ruling applies only to existing executed agreements and does not give El Paso a forward-going exemption from the filing requirement. El Paso's future contracts must conform to its current form of service agreement or must be filed as non-conforming agreements.

The Commission orders:

(A) El Paso's revised tariff sheet is accepted, subject to modification, effective November 3, 2004.

(B) The non-conforming TSAs are accepted as discussed above.

(C) Within 15 days of the date of issuance of this order, El Paso is directed to refile Tariff Sheet No. 1 revised to include all agreements containing provisions identical to the non-conforming provisions discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.