UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

El Paso Natural Gas Company Docket No. RP06-102-000

ORDER ACCEPTING TARIFF SHEETS

(Issued December 16, 2005)

1. On November 18, 2005, El Paso Natural Gas Company (El Paso) filed revised tariff sheets[1] to revise certain bid evaluation options available for capacity release transactions to provide for multi-month releases with varying monthly contract quantities. El Paso also proposed limits on permanent releases in situations involving varying monthly contract quantities. The proposed tariff sheets are consistent with Commission policy, as discussed below. Therefore, the revised tariff sheets are accepted, to be effective December 19, 2005, as proposed.

## Background

2. El Paso states that on September 1, 2003, it implemented the provisions of its Docket No. RP00-336-000 capacity allocation proceeding which provided, among other things, for the conversion of former full requirements shippers to contract demand shippers and for the assignment of primary receipt rights to individual receipt point(s) or supply pools. El Paso further states that, as a result of this process, its contracts now reflect contract entitlements on a monthly basis. El Paso's capacity release provisions are

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[1] 1st Rev Eighth Revised Sheet No. 336, Original Sheet No. 336A, Second Revised Sheet No. 343, 1st Rev Second Revised Sheet No. 344, and 1st Rev Third Revised Sheet No. 345 to its FERC Gas Tariff, Second Revised Volume No. 1-A.

set forth in section 28 of its General Terms and Conditions (GT&C). Section 28.10(b) contains several different evaluation methods, any one of which the releasing shipper can choose. El Paso asserts that some of these bid evaluation methods are formulated so that only releases for equal monthly quantities can be evaluated. Therefore, currently, a shipper who wants to release varying monthly contract quantities is required to post separate, individual one-month releases for each monthly amount, which is administratively burdensome for the releasing shipper, the replacement shipper, and El Paso.

**Instant Filing**

3. El Paso proposes to revise the capacity release bid evaluation options in section 28.10 so that bids posted for multi-month releases with varying monthly quantities can be evaluated in a single offer, regardless of the bid evaluation method chosen by the releasing shipper. El Paso contends that the proposed changes will provide shippers greater flexibility and reduce their administrative burden when releasing capacity.

4. El Paso also proposes to revise section 28.4(b) to clarify that a releasing shipper "may only permanently release over an annual period either a fixed and constant percentage of its transportation contract demand or a fixed contract quantity for the receipt, delivery and path being released." El Paso contends that this provision will ensure that shippers will not permanently release capacity that is contracted for on an annual basis on a monthly or seasonal basis and potentially leave El Paso with capacity that it may not be able to remarket when the contract terminates. El Paso further contends that this provision is similar to those approved in its Docket No. RP05-122-000 proceeding, which requires shippers to make point re-designations based on either a fixed and constant percentage of the shipper's transportation contract demand or a fixed contract quantity, unless El Paso , on a not unduly discriminatory basis, otherwise agrees.[2]

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[2] *Citing El Paso Natural Gas Company*, 110 FERC ¶ 61,085 (2005) (*January 31, 2005 El Paso order*).

**Notice, Interventions, and Protests**

5. Public notice of the filing was issued on November 23, 2005. Interventions and protests were due as provided in section 154.210 of the Commission's regulations (18 C.F.R. § 154.210 (2005)). Pursuant to Rule 214 (18 C.F.R. § 385.214(2005)), any timely filed motion to intervene is granted unless an answer in opposition is filed within 15 days of the date such motion is filed. Any motions to intervene out-of-time filed before the date of this order are granted pursuant to 18 C.F.R. § 214(d), since the Commission finds that granting intervention at this stage of the proceeding will not disrupt this proceeding or place additional burdens on existing parties. Salt River Project Agricultural Improvement and Power District (Salt River), El Paso Electric Company (El Paso Electric), Phelps Dodge Corporation (Phelps Dodge), El Paso Municipal Customer Group (EPMCG), and Texas Gas Service Company, a division of ONEOK, Inc. (Texas Gas Service) filed protests.

6. No party protests El Paso's proposed revisions to the bid evaluation methods in section 28.10(b). The protestors generally object to El Paso's proposal to limit permanent releases over an annual period to either a fixed and constant percentage of its transportation contract demand or a fixed contract quantity for the receipt, delivery, and path being released. The protestors generally argue that there is no valid need or basis for the proposal, as discussed in detail below.

**Discussion**

7. The Commission will accept El Paso's proposed revisions to be effective December 19, 2005. El Paso's revisions to its capacity release bid evaluation option provisions in section 28.10(b) to accommodate multi-month releases with varying monthly contract quantities will provide shippers with greater flexibility and will reduce administrative burdens on both the shippers and El Paso.

8. The Commission also finds that the proposed requirements concerning permanent capacity releases are reasonable. The Commission set forth its general policy concerning permanent capacity releases in El Paso's Order No. 636 restructuring proceeding,[3] when it stated that:

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[3] *El Paso Natural Gas Company*, 61 FERC ¶ 61,333 at 62,312 (1992) (*El Paso restructuring order*).

> Section 284.243(b) and (e) provide that firm shippers must be permitted, unconditionally, to release their capacity on a permanent or short-term basis and the pipeline must allocate the released capacity to the person offering the highest rate (not over the maximum) and offering to meet any other conditions of the release. However, of relevance here, section 284.243(f) states that, unless otherwise agreed by the pipeline, the contract of the releasing shipper will remain in full force and effect. We clarify that the pipeline may not unreasonably refuse to relieve a releasing shipper of liability under the contract where there is a permanent release of capacity.
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> For example, if the release is permanent, that is for the remaining term of the contract, and the replacement shipper offers to pay the maximum rates, it would be unreasonable for El Paso to refuse to relieve the releasing shipper from the service agreement to reflect the release. On the other hand, it would be reasonable for the pipeline to refuse to release the shipper from its continued liability when the replacement shipper has not agreed to pay the maximum rate. In any event, the pipeline's discretion must be exercised in a non-discriminatory manner.

9. Therefore, the pipeline may refuse to relieve a releasing shipper from liability under its contract with the pipeline on a reasonable basis even though the releasing shipper has released all (or part) of its capacity for the remaining term of its contract. As the Commission stated in *Texas Eastern Transmission Corporation*, 82 FERC ¶ 61,118 at 61,438 (1998):

> It is clear from *Overthrust*[[4]] that even when the maximum rate will be paid by a replacement shipper, the Commission will allow a pipeline to demonstrate that in the circumstances of a particular permanent capacity release transaction, withholding a release of liability would be reasonable and therefore that a release should not be required.

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[4] *Citing Overthrust Pipeline Company*, 63 FERC ¶ 61,287 (1993) and 64 FERC ¶61,380 (1993).

10. Therefore, it is reasonable for a pipeline to relieve a releasing shipper from liability under its contract only in situations in which the pipeline will be financially indifferent.[5] Here, El Paso is permitting shippers to make releases under which the replacement shippers will obtain contracts with contract demands that vary by month. El Paso is also proposing tariff language providing that it will not agree to a permanent release (*i.e.* relieve the releasing shipper from liability under its contract) when the releasing shipper releases only part of its capacity, unless the release is for uniform monthly contract demands or a uniform percentage of the releasing shipper's own varying monthly contract demands. The protestors argue that there is no valid basis for El Paso's proposal. We find that El Paso has presented a reasonable basis for why it would not be financially indifferent in this type of situation. In the absence of the proposed limitations on contract liability relief, El Paso could be left with the liability for the remaining capacity that it may not be able to remarket when the releasing shipper's contract terminates.

11. In *NUI Corporation (City Gas Company of Florida Division) v. Florida Gas Transmission Company*, 92 FERC ¶ 61, 044 (2000)(*NUI*), the Commission considered whether a shipper has the right during the right of first refusal process to selectively reduce quantities in any season in responding to a third-party bid or whether the existing shipper can be restricted to a uniform proportionate reduction across seasons. The Commission found that permitting a selective reduction could leave the pipeline with less valuable capacity which it would have trouble reselling and therefore, would unfairly limit the pipeline's ability to remarket the capacity and could ultimately lead to higher rates to other shippers who would have to cover the costs of the unsold capacity.[6] The same reasoning applies to this case. The release of a disproportionate level of the releasing shipper's demands to a replacement shipper could divide the capacity in such a way that the most valuable portion is covered by one contract (either the releasing or replacement shipper's contract), while the less valuable part of the contract is covered by the other contract. Therefore, if the shipper holding this less valuable capacity terminates its contract, while the other shipper renews its contract, the pipeline could be left with the less valuable capacity to remarket.

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[5] *Texas Eastern Transmission Corporation, Order on Reh'g and Clarification,* 83 FERC ¶ 61,092 (1998).

[6] *NUI* at 61,119.

12. Several protestors argue that standards other than those applied in the *El Paso restructuring case* should be applied in this proceeding. El Paso Electric asserts that, in the *January 31, 2005 El Paso order*, the Commission approved certain proposed limitations on point re-designations that were combined with tariff language that permitted El Paso to reach agreements with its shippers as to any other quantities for point re-designations on a not unduly discriminatory basis. El Paso Electric argues that the Commission should require El Paso to permit the release of varying monthly quantities on a seasonal basis to the extent that such releases are operationally feasible or, alternatively, the Commission should require El Paso to reach case-specific agreements with releasing shippers on a nondiscriminatory basis. EPMCG and Texas Gas Service argue that El Paso's proposal is inconsistent with the Commission's statement in the *January 31, 2005 El Paso order* that "El Paso cannot withhold capacity based on some unspecified analysis of economic risks and benefits."[7] Phelps Dodge argues that the Commission specifically rejected an economic benefits test in the *January 31, 2005 El Paso order*. El Paso Electric and EPMCG contend that El Paso failed to provide any operational justifications for its proposed limitations. Texas Gas Service argues that the only restriction the Commission allows on a permanent capacity release is that a pipeline may refuse to allow a permanent capacity release if it has a reasonable basis to conclude that it will not be financially indifferent to the release and El Paso has not shown that its proposed restriction is necessary to ensure that it will be financially indifferent, citing *Texas Eastern Transmission, LP*, 112 FERC ¶ 61,235 (2005) (*Texas Eastern*).

13. As the Commission found above, El Paso has provided a reasonable basis for its proposal to limit contract liability relief related to capacity releases. The tariff language approved in the *January 31, 2005 El Paso order* to which El Paso Electric refers was related to the limitations on point re-designations considered in that case and not the limits on contract liability relief for permanent capacity release being considered in this case. Further, the Commission rejected the analysis of economic benefits test in that case to which the protestors refer because it was vague and not included in the tariff.[8] In this case, the limits on El Paso's relief on contractual liability for permanent capacity release are stated clearly in the proposed tariff. The Commission noted in *Texas Eastern* that the financial indifference of the pipeline is a reasonable factor to consider in the

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[7] *Citing* 110 FERC ¶ 61,085 at P 15.

[8] 110 FERC ¶ 61,085 at P 15.

determination of reasonableness of relieving the shipper from its contractual liability. We found above that El Paso has presented a reasonable basis for why it is not financially indifferent in the situation presented in this case. But, contrary to Texas Gas Service's argument, El Paso is not restricting the rights of shippers to release capacity.

14. Salt River and Texas Gas Service contend that the proposal is inconsistent with section 284.8(b) of the Commission's regulations[9] which states that firm shippers must be permitted to release their capacity, in whole or in part, on a permanent or short-term basis, without restriction on the terms and or conditions of the release. The requirement that firm shippers be permitted to release their capacity on a permanent basis was recognized in the *El Paso restructuring order*. However, as noted in the *El Paso restructuring order*, the Commission's capacity release regulations also provide that, unless otherwise agreed to by the pipeline, the contract of the shipper releasing capacity will remain in full force and effect.[10] El Paso's proposal in this case concerns the restrictions the pipeline can impose on the releasing shipper's liability to the pipeline.

15. EPMCG also argues that the proposed revision is anti-competitive because it impedes the capacity release market and is contrary to the comparability goals of Order No. 636 because the restrictions are not applied to El Paso's capacity. EPMCG's arguments are rejected. El Paso has not proposed any restrictions on the release of capacity in this case. The proposed restrictions apply only to relief from contract obligations with El Paso. Texas Gas Service contends that it appears that El Paso is inappropriately attempting to associate contract extensions with capacity release, citing *Northwest Pipeline Corporation*, 111 FERC ¶ 61,231 at P 28 (2005). However, that case involved a proposal to subject pre-arranged, permanent capacity releases at the maximum rate to competitive bidding and a finding that the pipeline would be no worse off under

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[9] *Citing* 18 C.F.R. §284.8(b) (2005).

[10] 18 C.F.R. § 284.8(f) (2005).

the prearranged capacity release. Here, by contrast, there is no restriction on the release of capacity, only reasonable restrictions on the release of the shippers from their contract liabilities.

The Commission orders:

El Paso's revised tariff sheets listed in footnote No. 1 of this order are accepted to become effective December 19, 2005.

By the Commission.

( S E A L )

Magalie R. Salas,
Secretary.