

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

January 26, 2006

In Reply Refer To:
El Paso Natural Gas Company
Docket No. RP06-162-000

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

Attention: Catherine E. Palazzari
Vice President

Reference: Non-conforming Critical Meter Limit Agreement

Dear Ms. Palazzari:

1. On December 29, 2005, El Paso Natural Gas Company (El Paso) filed revised tariff sheets,¹ a Critical Meter Limit (CML) Agreement with UNS Gas, Inc. (UNS), and related contract exhibits for the Commission's review and information as a non-conforming agreement. El Paso requests that the Commission accept the CML Agreement and exhibits and permit the revised tariff sheets to be effective December 31, 2005. The Commission finds that the CML Agreement does 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 agreement and accepts El Paso's proposed tariff sheets to be effective December 31, 2005, subject to the condition discussed below.

Background

2. El Paso states that UNS currently holds firm capacity rights on El Paso's system under a number of firm transportation service agreements (TSAs) with expiration dates through August 31, 2011 that represent approximately 125,000 Mcf per day of firm capacity rights. UNS' distribution system serves various geographic areas and communities within the state of Arizona, including numerous communities north of the Phoenix metropolitan area, including Prescott and Sedona, Arizona. Those firm loads are

¹ Second Revised Sixth Revised Sheet No. 2, First Revised Sheet No. 3, and Sheet Nos. 4-9, FERC Gas Tariff, Second Revised Volume No. 1-A.

served off El Paso's Maricopa lateral, which also serves the load requirements of the Phoenix area. UNS' TSAs provide contractual delivery rights at the delivery code (D-Code)² level rather than at the actual delivery meter locations. El Paso states that DCITZPHX is the D-Code that has been established and used historically for nominating and scheduling UNS' requirements to this geographic area on El Paso's system.

3. Delivery commitments at meters within a D-Code are an issue in El Paso's general rate case proceeding in Docket No. RP05-422-000.³ There, El Paso proposed, among other things, to contract at the delivery meter location unless a delivery point operator agreed to aggregate its meters to a D-Code pursuant to new Rate Schedule OPAS.⁴ On October 4, 2005, El Paso submitted a report identifying the initial level for the maximum delivery obligations for each existing and proposed D-Code on its system. The report reflected splitting UNS' existing D-Code, DCITZPHX, into two new D-Codes, DCITZSED and DCITZPRC, as well as a listing of the maximum delivery obligations El Paso used to model its system beginning January 1, 2006.

4. El Paso stated, in a recent rate case filing,⁵ that it was continuing to work with individual shippers on agreements to define firm rights at the meter level with D-Codes, and that if it and its shippers reached an agreement for contract reformation of a shipper's D-Codes and the establishment of maximum firm delivery obligations at the meters served under the TSAs, El Paso would file such agreement for the Commission's review as a potential material deviation.

Instant Filing

5. El Paso states that the CML Agreement with UNS reflects the parties' agreement regarding the future structure and allocation of firm capacity, including the maximum firm delivery commitment at each meter (critical meter limit or CML) that will apply within certain of UNS' D-Codes beginning January 1, 2006. El Paso explains that it used the term CML instead of maximum delivery obligation to avoid confusion, but that the

² El Paso states that a D-Code is a theoretical delivery point established by El Paso which permits the aggregation of volumes at the meter(s) within the D-Code for contracting, nominating, scheduling and billing/payment purposes.

³ 112 FERC ¶ 61,150 (2005).

⁴ By letter order issued December 12, 2005 in Docket No. RP05-422-003, the Commission accepted a Partial Settlement deferring implementation of certain new services, including Rate Schedule OPAS, until April 1, 2006.

⁵ See El Paso's December 5, 2005 Reply Comments Regarding Technical Conference Issues.

effect of the terminology usage is the same: to specify the firm rights that a shipper has at the individual meter within a D-Code. El Paso states that the CML Agreement with UNS is expected to be a temporary agreement that would expire upon execution of a Rate Schedule OPAS agreement. El Paso states that the defined rights contained in the CML Agreement will allow a better and higher level of firm service. El Paso further states that UNS has agreed to greater specificity with D-Codes to provide El Paso with operational certainty that allows El Paso to make available point-by-point limitations that meet UNS' business needs. El Paso asserts that the balancing of more defined rights with the ability to enforce those limitations to protect other shippers is just and reasonable.

6. Specifically, El Paso states that it could not agree to allow additional firm volumes to be contracted for at the existing DCITZPHX D-Code, under the existing D-Code structure, without affecting the rights of other firm shippers. By breaking this D-Code into three D-Codes, reallocating volumes between the three D-Codes, and establishing firm rights at the individual meter level, El Paso states that it can provide for increased firm contract rights in the future and ensure that the capacity is not subject to a prior claim of another customer.

7. Paragraph 1 of the CML Agreement acknowledges that the DCITZPHX D-Code will be split into three D-Codes. Paragraph 2 acknowledges that UNS' existing firm delivery rights at DCITZPHX will be reallocated between DCITZPHX and the two new D-Codes. Paragraph 2 further acknowledges UNS' agreement that El Paso has the right to limit deliveries to the firm rights at a meter as part of calling a strained or critical operating condition (SOC/COC). The CML Agreement acknowledges that, while UNS will continue to schedule at the aggregated D-Code, the firm rights are at the delivery meter and thus the SOC/COC provisions are applicable to the delivery meter. El Paso explains that the tariff provisions related to SOC/COC still apply to UNS but that the basis for any penalty will be determined by the geographic level (D-Code or meter level) at which the SOC/COC is declared. These provisions adapt the tariff provisions related to SOC/COC for a shipper's rights and obligations at the delivery meter. El Paso states that should it at any time grant terms to a similarly situated shipper that are materially different than those set forth in UNS' CML Agreement, El Paso will file for approval of those terms, and, when approved, UNS may replace its terms in total with those other terms.

8. Paragraph 9 requires UNS to enter into a Rate Schedule OPAS agreement, if the Commission approves the rate schedule, and provides that the CML Agreement will terminate on the effective date of UNS' Rate Schedule OPAS agreement or the date the Commission issues an order. El Paso states that the remaining paragraphs deal with the administrative requirements of the tariff and the agreement. Exhibit X to the CML Agreement illustrates the rationalization of UNS' capacity at the three D-Codes as well as other D-Codes listed in each TSA to be effective January 1, 2006. El Paso is also

submitting an Exhibit A for each TSA conforming to the pro forma Rate Schedule FT-1 Form of Service Agreement which reflects the volumes by month at each D-Code.

9. El Paso states that the CML Agreement for the three new D-Codes places UNS in the same defined meter level status as all other shippers will be at the end of the MDQ Adjustment period, including a specific mechanism to ensure that UNS cannot harm other shippers in shifting loads among the points within these D-Codes. El Paso states that UNS must still participate in the three open seasons described in El Paso's December 5, 2005 Reply Comments in Docket No. RP05-422-000 to further define its MDQ distribution at other D-Codes, enter into new services and convert its MDQ levels (including CMLs) at points to maximum delivery obligations.

Request for Waiver

10. El Paso states that UNS has been concerned, during its contract review process, over its upcoming winter peaking requirements and has wanted certainty as to its firm rights effective January 1, 2006. As part of the contract review process, UNS submitted requests to redesignate certain firm delivery point entitlements to other points. Because of a "black out period" to implement Order No. 637 changes, El Paso's system has only recently been able to accept and process UNS' redesignation requests and to reflect the volumes at the new redesignated locations. As a result, El Paso and UNS were not able to finalize the CML Agreement until December 16, 2005. El Paso thus requests that the Commission accept the CML Agreement and exhibits and waive the filing requirements of section 154.207 of its regulations to permit the revised tariff sheets⁶ to become effective on December 31, 2005.

Public Notice

11. Public notice of El Paso's filing was issued on January 5, 2006, with comments, protests or interventions to be filed in accordance with section 154.210 of the Commission's regulations. All timely motions to intervene and all motions to intervene out of time filed before the issuance of this order are granted pursuant to Rule 214 of the Commission's Rules of Practice and Procedure. Granting late intervention at this early stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties.

12. Comments were filed by UNS; Arizona Public Service Company (APS); Southwest Gas Corporation; and Texas Gas Service, a Division of ONEOK, Inc. UNS filed in support of the CML Agreement. APS states that the CML Agreement raises the

⁶ El Paso has revised Sheet No. 2 to reference the CML Agreement as a non-conforming agreement. Sheet No. 3 has been submitted for pagination purposes only, and Sheet Nos. 4-9 are reserved for future use.

issue of whether preferential access is being given to some shippers outside the maximum delivery obligation allocation process and the open season for new service nominations. Because there is no opportunity to confirm El Paso's representation that no shipper's capacity rights will be impacted by this type of agreement, APS requests that any approval of this CML Agreement, or any other similar side negotiations, be subject to the outcome of the maximum delivery obligation allocation process, the open season process (and adjustments, as necessary), and the outcome in the technical conference in Docket No. RP05-422-000 to insure that no party has been harmed by this advance election and that all parties have the same opportunities to allocate/reallocate capacity. Similarly, Texas Gas Service states that, while it has no objection to the Commission approving the CML Agreement, that approval should in no way prejudice any party's rights to contest the justness and reasonableness of El Paso's Rate Schedule OPAS and maximum delivery obligation proposals in Docket No. RP05-422-000.

Discussion

13. 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 regulations⁷ implements this provision and provides that pipelines must file all contracts related to their services. Section 154.1(d)⁸ 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.

14. As the Commission explained in *Columbia Gas Transmission Corp. (Columbia)*,⁹ 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.

⁷ 18 C.F.R. § 154.1(b) (2005).

⁸ 18 C.F.R. § 154.1(d) (2005).

⁹ 97 FERC ¶ 61,221 (2001).

15. 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.¹⁰ 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 a case, the contract contains a provision affecting the substantive rights of the parties that the Commission has never seen before. Since NGA section 4 requires the filing of all contracts that affect the pipeline's service "in any manner," the statute requires the filing of such a service agreement.

16. 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 the parties."¹¹ 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 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.

17. The Commission finds that the CML Agreement is a permissible material deviation from El Paso's form of service agreement. As UNS states in its comments, the CML Agreement does not provide UNS with any additional capacity but allows UNS to better utilize the capacity already allocated to UNS to more efficiently meet the demands of its human needs customers. As El Paso states, the CML Agreement will ensure that UNS cannot harm other shippers in shifting loads among the points within the subject D-Codes.

18. 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. The CML Agreement is a temporary agreement that terminates upon execution of a Rate Schedule OPAS agreement. In addition, in light of El Paso's statements that it is continuing to work with individual shippers on agreements to define

¹⁰ 18 C.F.R. § 154.110 (2005).

¹¹ *Columbia*, 97 FERC ¶ 61,221 at 62,002 (2001).

firm rights at the meter level within D-Codes while awaiting Commission action on its Rate Schedule OPAS and maximum delivery obligation proposals, the Commission will require that El Paso offer similarly situated customers similar CML Agreements. To address the commenters' concerns regarding prejudgment of the maximum delivery obligation and open season processes in the pending rate case in Docket No. RP05-422-000, the Commission will condition acceptance of the CML Agreement upon the outcome of the rate case proceeding. Further, for good cause shown, the Commission will grant waiver of the filing requirements of section 154.207 to permit the revised tariff sheets to become effective December 31, 2005.

By direction of the Commission.

Magalie R. Salas,
Secretary.