

126 FERC ¶ 61,162
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

February 23, 2009

In Reply Refer To:
El Paso Natural Gas Company
Docket No. RP09-284-000

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

Attention: Catherine E. Palazzari, Vice President

Reference: Order Nos. 712 and 712-A Compliance Filing

Dear Ms. Palazzari:

1. On January 26, 2009, El Paso Natural Gas Company (El Paso) filed revised tariff sheets¹ to comply with the Commission's directives in Order Nos. 712 and 712-A² and to reflect certain housekeeping changes. In Order Nos. 712 and 712-A, the Commission revised its regulations to promote a more efficient capacity release market by lifting the maximum rate ceiling on capacity releases of one year or less. The Commission also facilitated retail open access programs and the use of asset management agreements by exempting associated capacity releases from bidding requirements. The revised tariff sheets listed in footnote No. 1 are accepted effective February 25, 2009, as proposed, subject to the conditions discussed below.

¹ Ninth Revised Sheet No. 214A, Sixth Revised Sheet No. 286, Eighth Revised Sheet No. 339, Third Revised Sheet No. 339A, Seventh Revised Sheet No. 340, Second Revised Sheet No. 341A, Fourth Revised Sheet 342, Fifth Revised Sheet No. 346, Sixth Revised Sheet No. 349, Thirteenth Revised Sheet No. 350, and Fifth Revised Sheet No. 353 to FERC Gas Tariff, Second Revised Volume No. 1A.

² *Promotion of a More Efficient Capacity Release Market*, Order No. 712, 73 Fed. Reg. 37,058 (June 30, 2008), FERC Stats & Regs. ¶ 31,271 (2008), *order on reh'g*, Order No. 712-A, 73 Fed. Reg. 72,692 (December 1, 2008), FERC Stats & Regs. ¶ 31,284 (2008).

2. El Paso's filing proposes several changes to its General Terms and Conditions (GT&C) to provide that capacity releases of one-year or less are not subject to the maximum rate cap. El Paso also proposes modifications to clarify and revise the bidding requirements for capacity release transactions associated with an asset management agreement (AMA) or a state-approved retail open access program. El Paso proposes several other modifications that clarify its capacity release provisions, as well as has some housekeeping revisions.

3. El Paso's filing was noticed on January 29, 2009, with interventions and protests due on or before February 9, 2009. Atmos Energy Corporation (Atmos) filed comments pertaining to flow through of discounts and MGI Supply LTD. (MGI Supply) filed comments pertaining to refunds as discussed further below. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,³ the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Granting late intervention at this stage of the proceeding will not disrupt this proceeding or place additional burdens on existing parties.

4. On February 17, 2008, El Paso filed an answer to the comments filed by Atmos and MGI Supply. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure⁴ prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept El Paso's answer because it has provided information that assisted us in our decision-making process.

5. Atmos asks the Commission to require El Paso to include provisions allowing the "flow-through" of discounts from releasing shippers to their asset managers. For example, Atmos states that it is unclear whether and to what extent El Paso will permit a releasing shipper's asset manager to pay the same discounted usage and fuel rates that the pipeline provided to the releasing shipper. Atmos suggests that El Paso should clarify (or propose) a policy allowing the asset manager/replacement shipper to receive the same discounted usage and fuel rates applicable to the releasing shipper, particularly since a general refusal to allow "pass-through" of such discounts would impede asset management transactions, contrary to Order Nos. 712 and 712-A.

6. In its answer, El Paso argues that Order No. 712 did not address the flow-through of discounted rates from the releasing shipper to an asset manager and thus, Atmos' proposal is outside the scope of this proceeding. El Paso further argues that its tariff does

³ 18 C.F.R. § 385.214 (2008).

⁴ 18 C.F.R. § 385.213(a)(2) (2008).

not allow discounts for fuel or usage. El Paso explains that its rates are designed based on a Straight-Fixed Variable (SFV) rate design methodology, and therefore, the minimum and maximum usage rates are identical.

7. The issue of whether a pipeline must provide an asset manager/replacement shipper the same discounted or negotiated usage and fuel rates as it has given the releasing shipper only arises to the extent that the pipeline has provided such discounts or negotiated rates to the releasing shipper. The Commission does not permit pipelines to offer discounts below their minimum rates, which are based on the variable costs allocated to the service to which the rate applies.⁵ Therefore, El Paso is correct that as a pipeline using an SFV rate design, it cannot discount its usage charges because those usage charges only contain variable costs. The Commission has also held that pipelines may not discount their fuel retention rates, because fuel and lost and unaccounted for (LAUF) gas are variable costs.⁶ Thus, the issue of the “flow-through” of discounted usage and fuel charges to an asset manager/replacement shipper does not arise on El Paso’s system. However, pipelines with negotiated rate authority may enter into negotiated rate agreements which are not bounded by their tariff maximum and minimum rates. El Paso has negotiated rate authority, and thus does have authority to enter into negotiated rate agreements providing for fuel retention rates (and usage charges) that vary from those in its tariff.

8. The Commission has held that the usage charge to be paid by the replacement shipper is a matter between the replacement shipper and the pipeline, and the releasing shipper cannot bind the pipeline to accept any particular usage charge from the replacement shipper. Therefore, the pipeline “generally should not be required to give the replacement shipper the same discount” of the usage charge that it gave the releasing shipper.⁷ In *El Paso*, the Commission explained that:

the discount in the usage charge negotiated between the releasing shipper and El Paso is related only to the contract between the releasing shipper and the pipeline and to the transportation services actually performed by El Paso for the

⁵ 18 C.F.R. § 284.10(c)(4)(ii) and (5)(ii)(A) (2008).

⁶ *Mississippi River Transmission Corp.*, 98 FERC ¶ 61,119 (2002).

⁷ *El Paso Natural Gas Co.*, 61 FERC ¶ 61,333, at p. 62,309 (1992) (*El Paso*).

releasing shipper under that contract and is not relevant to other contracts and services to other shippers, including replacement shippers.⁸

9. While pipelines are not subject to a blanket requirement that they must give replacement shippers the same usage charge discounts (or negotiated usage and fuel rates) given to the releasing shipper, pipelines are subject to the Commission's general policy that selective discounts must be given on a not unduly discriminatory basis to similarly situated shippers.⁹ These same policies apply to negotiated usage and fuel charges.

10. El Paso is correct that Order No. 712 did not modify the Commission's existing policy concerning the pipeline's offering usage charge discounts to replacement shippers.¹⁰ Nor did Order No. 712 address any issue concerning the offering of negotiated usage and fuel charges to replacement shippers. Order No. 712's modification of the Commission's regulations to facilitate AMAs does raise the following issues in this proceeding:

(1) whether it would be unduly discriminatory for El Paso to deny an asset manager/replacement shipper the same negotiated usage and fuel and LAUF charge that was provided to the releasing shipper, at least during periods when the asset manager is using the released capacity to satisfy the delivery or purchase obligation contained in the release to the asset manager;¹¹

(2) if a negotiated rate agreement between El Paso and the releasing shipper provides that the discount or negotiated rate is only applicable at certain specified receipt or delivery points as permitted by Commission policy,¹² should the asset manager/replacement shipper's use of those points be considered to be within the usage

⁸ *Id.*

⁹ See *Williston Basin Interstate Pipeline Co.*, 85 FERC ¶ 61, 247, at p. 62,028-30 (1998), and cases cited, for a discussion of this policy.

¹⁰ *Texas Eastern Transmission, LP*, 125 FERC ¶ 61,396, at P 21 (2008).

¹¹ See § 284.8(h)(3) of the Commission's regulations, as revised by Order No. 712-A (defining a release to an asset manager).

¹² *Williston Basin Interstate Pipeline Co.*, 110 FERC ¶ 61,210, at P 5 and 22, *reh'g denied*, 112 FERC ¶ 61,038, at P 19 (2005).

contemplated by El Paso when it granted the negotiated rate to the releasing shipper? For this reason, should El Paso be required to offer the same negotiated rate to the asset manager/replacement shipper at those points, but not at any other point?

(3) whether El Paso should be required to include in its tariff a provision concerning the circumstances under which it would provide similar negotiated usage and fuel charges to an asset manager/replacement shipper; or

(4) whether the circumstances of individual releases to asset managers are sufficiently case-specific that pipelines should be allowed to decide whether to grant negotiated usage and fuel and LAUF charges to the asset manager/replacement shipper on a case-by-case basis, subject to a general requirement of no undue discrimination.

11. Before deciding these issues, the Commission requires additional information from El Paso, and will give the parties an opportunity to provide supplemental comments. In this regard, the Commission directs El Paso to file the following information: (1) how many of El Paso's existing shipper contracts include negotiated usage and fuel rates, (2) how many of any such contracts limit the negotiated rate to specific points, (3) a general description of how El Paso intends to determine whether to grant negotiated usage and fuel charges to asset manager/replacement shippers, and (4) what factors it will consider in determining whether to grant such negotiated rates.

12. El Paso is directed to file this additional information in a compliance filing within 30 days of the date of this order. Parties may file additional comments within 20 days of the date of El Paso's compliance filing.

13. El Paso filed to revise section 28.24 of the GT&C of its tariff to state that for releases that become effective on or after July 30, 2008, the rate paid by a replacement shipper in any capacity release transaction with a term of one year or less which is not subject to the maximum rate limitation will be deemed to be a final rate and is not subject to refund. El Paso states that this language is supported by Order No. 712 and is consistent with *Texas Eastern Transmission, LP*, where the Commission stated that a capacity release transaction of one year or less has a market-based rate and would not, therefore, be subject to refund.¹³

14. MGI Supply argues that El Paso's filing does not fully reflect the Commission's decision in *Texas Eastern*. MGI Supply contends that El Paso should be required to revise section 28.24 of its GT&C to state that although replacement shippers receiving

¹³ *Texas Eastern Transmission, LP*, 125 FERC ¶ 61,396 (2008) (*Texas Eastern*).

service under short-term capacity release agreements may not be eligible to share in rate case refunds, the associated releasing shippers paying rates higher than the refund level will be fully entitled to receive such refunds. In its answer, El Paso argues that its proposed change to section 28.24 of its GT&C is consistent with *Texas Eastern* and that MGI Supply's request is extrinsic to this proceeding.

15. In *Texas Eastern*, the Commission found that it was consistent with Order No. 712 to deem rates paid by replacement shippers for terms of one year or less to be final and not subject to refund.¹⁴ However, the Commission also stated that a releasing shipper paying a recourse rate higher than the maximum just and reasonable rate determined in a rate case would be eligible for refunds because Order No. 712 did not remove any maximum rates for the pipeline's sale of its own capacity.¹⁵

16. The Commission finds that the discussion in *Texas Eastern* provides El Paso with sufficient guidance on this issue and that the tariff revisions suggested by MGI supply are unnecessary. While El Paso must follow the policy set forth in *Texas Eastern*, the Commission will not require El Paso to modify its tariff accordingly.

By direction of the Commission. Commissioner Kelliher is not participating.

Kimberly D. Bose,
Secretary.

¹⁴ *Id.*

¹⁵ *Id.*