

128 FERC ¶ 61,205
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

El Paso Natural Gas Company

Docket No. RP08-21-001

ORDER ON REHEARING

(Issued August 28, 2009)

1. On December 31, 2007, the Indicated Shippers¹ requested rehearing of the Commission's November 29, 2007 order in the above-captioned docket.² The November 29 Order accepted El Paso's proposal to modify its strained operating condition (SOC) tariff provisions in compliance with its 2006 Rate Case Settlement.³ As discussed below, the Commission denies the Indicated Shippers' request for rehearing of the November 29 Order.

I. Background

2. Article 6.1(b) of the 2006 Rate Case Settlement provides that the settling parties will work to develop proposed revisions to El Paso's tariff to (1) delineate the circumstances under which El Paso should declare an SOC; and (2) require El Paso to explain its actions in the event it does not declare an SOC under those circumstances. On October 9, 2007, El Paso filed revised tariff sheets in this proceeding to, among other things, clarify the procedures that El Paso must undertake prior to the declaration of an SOC. El Paso also proposed to permit shippers to net imbalances within an SOC or

¹ The Indicated Shippers are BP America Production Company; BP Energy Company; Coral Energy Resources, L.P.; Chevron Natural Gas, a division of Chevron U.S.A. Inc.; Occidental Energy Marketing Inc.; and ConocoPhillips Company.

² *El Paso Natural Gas Co.* 121 FERC ¶ 61,219 (2007) (November 29 Order).

³ On December 6, 2006, parties submitted a settlement resolving El Paso's rate case in Docket No. RP05-422-000, *et al.* (2006 Rate Case Settlement). The Commission accepted the 2006 Rate Case Settlement on August 31, 2007. *El Paso Natural Gas Co.*, 120 FERC ¶ 61,208 (2007).

Critical Operation Condition (COC) area if certain conditions were met (e.g., if El Paso identifies a supply failure).

3. The Indicated Shippers filed a protest to the filing, arguing that El Paso's proposal to permit netting was insufficient and that El Paso should waive SOC/COC penalties during a *force majeure* event (such as a supply failure). The Indicated Shippers also argued that El Paso should not require confirmation of a corrective nomination before allowing shippers to net imbalances during an SOC.

4. In the November 29 Order, the Commission accepted El Paso's proposal. The Commission determined that the Indicated Shippers' request to waive penalties during *force majeure* events was beyond the scope of the changes proposed in this proceeding.⁴ The November 29 Order further stated that El Paso's limits on netting were reasonable because they would encourage shippers to act appropriately during an SOC.⁵

II. Request for Rehearing

5. In their request for rehearing, the Indicated Shippers argue that the Commission erred in the November 29 Order by (1) failing to require El Paso to waive SOC/COC penalties in cases of *force majeure*; and (2) accepting El Paso's proposed limitations on netting imbalances during SOC/COC events. El Paso filed an answer to the rehearing request on February 28, 2008.

A. Waiver of SOC/COC Penalties

6. In its October 9, 2007 filing, El Paso proposed to allow the netting of imbalances when, among other things, (1) the SOC/COC penalties are due entirely, or in significant part, to the failure of supplying interconnects to make scheduled deliveries to El Paso; and (2) the supply failure is specifically noted in the SOC notice.

7. On rehearing, the Indicated Shippers assert that penalties should be waived where a shipper is unable to comply with an SOC/COC event due to circumstances beyond the control of the shipper. The Indicated Shippers contend that if a shipper cannot comply with an SOC/COC event because of circumstances that are out of the shippers' control, penalties will not accomplish their intended effect of deterring shippers from engaging in certain conduct.

⁴ November 29 Order, 121 FERC ¶ 61,219 at P 14.

⁵ *Id.*

8. The Indicated Shippers argue that this issue is not beyond the scope of the filing because El Paso's proposal would limit a shipper's current tariff rights to declare a *force majeure* event and to suspend its obligations to perform under its transportation service agreement (TSA). The Indicated Shippers explain that the Commission has a long-standing policy of waiving imbalance penalties when a shipper is unable to perform its obligations due to *force majeure* events. The Indicated Shippers also note that El Paso's tariff currently permits a shipper to suspend its obligations under its TSA when it issues notice of a *force majeure* event to El Paso. As a result, the Indicated Shippers conclude that SOC/COC penalties should be waived for a shipper if that shipper is unable to comply with the SOC/COC declaration due to events beyond the control of the shipper, which the shipper could not have avoided through the exercise of reasonable diligence.

9. El Paso replies that the November 29 Order correctly determined that the *force majeure* issue raised by the Indicated Shippers is beyond the scope of the filing. El Paso notes that its proposal does not address the existing *force majeure* provisions which the Indicated Shippers seek to modify under section 5 of the Natural Gas Act (NGA). El Paso states that the Indicated Shippers misconstrue the current *force majeure* provisions by focusing on a select portion of El Paso's tariff. El Paso asserts that a full reading of its *force majeure* provisions demonstrates that a shipper is not excused from all penalties during a *force majeure* event if the shipper could reasonably avoid such penalties through the exercise of due diligence. Furthermore, El Paso notes that section 33(h)(i) of the SOC/COC procedures in its tariff specifies that during an SOC/COC event, an SOC/COC Daily Imbalance Charge will be assessed. El Paso further states that the Commission rejected attempts by shippers in the last rate case to require El Paso to waive all penalties during a *force majeure* event.

10. El Paso contends that its current penalty structure encourages shippers to use reasonable diligence so that shippers avoid imbalances and conduct harmful to the system. El Paso explains that the current penalty structure encourages a shipper to reduce its gas "takes" to match the quantity of gas that has been scheduled or, alternately, to seek other supply sources. El Paso argues that if all penalties were waived, a shipper would have no incentive to discontinue taking gas or to arrange for alternative supply sources. El Paso concludes that the current SOC/COC penalty structure provides adequate incentives to encourage shippers to perform reasonable actions to protect the system and other shippers.

11. *Commission Determination.* The Commission affirms its finding in the November 29 Order that the issue of waiving SOC/COC penalties during *force majeure* events is beyond the scope of this proceeding. In compliance with section 6.1(b) of the 2006 Rate Case Settlement, El Paso filed in this proceeding revised SOC/COC tariff provisions to clarify and expand the procedures for declaring an SOC/COC. While El Paso's existing SOC/COC provisions permitted netting of delivery point imbalances under certain circumstances, El Paso's proposal expanded a shipper's ability to net

imbalances in two ways. First, El Paso proposed to allow receipt point netting similar to the netting already allowed for delivery points. Second, El Paso proposed to add a provision to allow netting if the SOC is due entirely or in significant part to a supply failure and if such supply failure is noted in the SOC declaration. If such conditions exist, El Paso would permit netting within the SOC area if (1) the shipper's imbalances are in the opposite direction of the SOC (i.e., if a shipper generated a net pack daily imbalance during a draft SOC or if a shipper generated a net draft daily imbalance during a pack SOC),⁶ and (2) El Paso's review after the SOC event indicates that such netting did not place greater risk on other shippers or system integrity. Thus, El Paso's filing expands the circumstances under which shippers can net imbalances during an SOC if their actions benefit the system and do not adversely impact other shippers. As a result of this proposal, shippers' exposure to SOC/COC penalties will be reduced or eliminated.

12. El Paso's proposal did not include any changes to its *force majeure* provisions. Nor did El Paso's proposal limit or modify shippers' current rights under the tariff with respect to *force majeure* events. However, on rehearing, the Indicated Shippers request that the Commission require El Paso to waive SOC/COC penalties during cases of *force majeure*. Such a request would require a change to the *force majeure* provisions of El Paso's tariff. Because El Paso did not propose to revise these provisions of its tariff, the Indicated Shippers' request for rehearing is beyond the scope of this proceeding.⁷

B. Confirmation of Corrective Nominations

13. El Paso's proposal limited a shipper's ability to net imbalances during an SOC/COC event by requiring that a shipper submit a corrective nomination to El Paso to be confirmed prior to taking corrective action. The Indicated Shippers argue that this limitation contradicts an earlier Commission decision that required El Paso to clarify its tariff so that a Rate Schedule PAL (park and loan) shipper would not be subject to PAL

⁶ A draft SOC/COC occurs when flow variances exacerbate a low linepack condition (i.e., when shippers under-deliver gas at receipt points or overtake gas at delivery points), and a pack SOC/COC occurs when flow variances exacerbate a high linepack condition (i.e., when shippers over-deliver gas at receipt points or under-take gas at delivery points).

⁷ Moreover, the Commission has found that the absence of a waiver of penalties during *force majeure* events is not unjust and unreasonable. *See El Paso Natural Gas Co.*, 114 FERC ¶ 61,305, at P 279 (2006) (rejecting Salt River Project Agricultural Improvement and Power District's (Salt River) request to require El Paso to waive all penalties during *force majeure* situations and explaining that Salt River's request related to Salt River's use of the system and its contractual relationship with its suppliers, and not to El Paso's provision of transportation service).

penalties if El Paso was unable to confirm a valid nomination due to operational constraints.⁸ The Indicated Shippers argue that this precedent supports their position that shippers should not be penalized (through a limitation on netting point imbalances in the affected SOC/COC area) when the shipper is attempting to correct the imbalance. The Indicated Shippers further argue that El Paso's proposal is unreasonable because during an SOC/COC event, shippers will not know whether their imbalances will be netted, due to the fact that netting is an accounting procedure that is performed after the conclusion of a SOC/COC event. As such, the Indicated Shippers argue that El Paso's proposal requires shippers to fulfill an obligation that is beyond their control and will fail to appropriately influence shipper activity.

14. El Paso replies that netting is not simply an accounting procedure. El Paso explains that confirmation of corrective nominations is essential to ensure that a shipper nomination is a legitimate effort to remedy the problem. El Paso argues that imbalances will likely continue if shippers believe that they can automatically net imbalances during an SOC/COC to minimize penalties.

15. El Paso states that the Indicated Shippers' comparison of the SOC/COC penalties to PAL penalties is misplaced because the circumstances in the PAL case are different from those in the instant proceeding. El Paso explains that in the PAL case, shippers were subject to the forfeiture of gas if a nomination was unconfirmed at the termination of the contract. El Paso explains that PAL service is an interruptible balancing service that is available only after El Paso has determined capacity is available on its existing facilities and El Paso has the operational flexibility to accommodate the service. El Paso states that, in contrast, during an SOC/COC event, El Paso is attempting to control a strained or critical operating situation on the system and maintain system integrity. El Paso states that accurate and verifiable communication between El Paso and its shippers (e.g., through confirmation of corrective nominations) is essential to maintaining system integrity and ensuring that any shipper action taken during an SOC/COC event does not counter El Paso's other efforts to resolve operational issues.

16. *Commission Determination.* The Commission denies the Indicated Shippers' request for rehearing on this issue. El Paso's existing tariff provides for the netting of delivery point imbalances only if El Paso has confirmed a shipper's corrective nomination. In the instant proposal, El Paso clarified the wording of that provision, and added a similar netting provision for receipt point imbalances. Thus, El Paso's proposal to require confirmation of corrective nominations is not an entirely new proposal and has been approved by the Commission before in the context of the netting of delivery point imbalances. The Commission finds that such confirmation will provide an incentive for

⁸ The Indicated Shippers cite *El Paso Natural Gas Co.*, 111 FERC ¶ 61,276, at P 5 (2005).

shippers to take the appropriate action in situations where system integrity is threatened. Confirmation of a corrective nomination is an important element in the communication between pipeline and shipper to ensure safe and reliable service. Because El Paso's decision to allow netting in SOC/COC events provides an incentive for shippers to submit corrective nominations, it is reasonable to require confirmations to assure that those nominations are realistic and beneficial. As indicated in the November 29 Order, the Commission gives pipelines reasonable operational deference in establishing emergency operating procedures, such as the ones at issue here.⁹ Therefore, the Commission denies the Indicated Shippers' request for rehearing.

The Commission orders:

The Indicated Shippers' December 31, 2007 request for rehearing is denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

⁹ See *El Paso Natural Gas Co.*, 114 FERC ¶ 61,305, at P 51 (2006).