

129 FERC ¶ 61,170
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

El Paso Natural Gas Company

Docket Nos. RP09-117-001
RP09-117-002

ORDER ON REHEARING AND COMPLIANCE FILING

(Issued November 23, 2009)

1. On October 15, 2009, El Paso Natural Gas Company (El Paso) filed revised tariff sheets¹ to modify its fuel tracker mechanism and the Fuel and Lost and Unaccounted-For (L&U) retention percentages applicable to transportation service on El Paso's system to be effective October 1, 2009. El Paso's filing followed our October 1, 2009 order² which required El Paso to file revised tariff sheets modifying El Paso's fuel tracker mechanism to remove deemed costs and non-fuel related costs. On November 2, 2009, El Paso filed a request for rehearing and clarification of our October 1 Order. As discussed herein, the Commission grants rehearing in part. The revised tariff sheets filed by El Paso on October 15, 2009, are accepted to be effective October 1, 2009, as discussed below.

I. Background

2. On November 26, 2008, El Paso proposed to revise its Fuel and L&U retention percentages to be effective January 1, 2009 (November 26, 2008 Filing). The fuel percentages filed by El Paso were calculated pursuant to the fuel tracker mechanism in Article 26 of the General Terms and Conditions (GT&C) of El Paso's tariff, accepted by

¹ Eighteenth Revised Sheet No. 29 and Fourth Revised Sheet No. 323 to its FERC Gas Tariff, Second Revised Volume No. 1A.

² *El Paso Natural Gas Co.*, 129 FERC ¶ 61,006 (2009) (October 1 Order).

the Commission in Docket No. RP05-422-000,³ and implemented in Docket No. RP07-88-000.⁴ The November 26, 2008 filing calculated the fuel retention percentages using (1) a current period fuel and L&U percentage based upon the prior October 1 through September 30 period; and (2) a volumetric true-up computed by comparing the volumetric retention during the prior October 1 through September 30 period against actual volumetric fuel use and L&U experienced. The mainline fuel retention percentage, but not the other retention percentages, incorporated a cost and revenue true-up. The cost and revenue true-up adjusted for the changes in value of gas over time related to fuel and L&U as well as other linepack and gas balance adjustments. The costs incorporated by the cost and revenue true-up were not necessarily related to the actual purchase and sale of gas. The cost and revenue true-up incorporated values for gas at the time an underage or overage occurred using El Paso's Monthly System Cash Out Index Price and incorporated monthly "accrued costs" or "accrued revenues" that resulted from monthly revaluations of gas and fuel balances in accordance with the fixed asset methodology of accounting.

3. Several protests were filed to El Paso's annual fuel filing. On December 30, 2008, the Commission issued an order accepting and suspending the proposed revised fuel retention percentages, to be effective January 1, 2009, and establishing a technical conference to address the issues raised by the filing.⁵ The technical conference was held on February 26, 2009. Subsequently, the parties to the proceeding filed initial and reply comments. After the parties submitted their post-technical conference comments, the Commission issued its July 31 CIG Order.⁶ In the July 31 CIG Order, the Commission rejected a proposed fuel tracker filing by CIG, an El Paso affiliate, that used a methodology nearly identical to the one used by El Paso.

4. In the October 1 Order following the technical conference, the Commission acted pursuant to section 5 of the Natural Gas Act (NGA)⁷ to order El Paso to modify its fuel

³ *El Paso Natural Gas Co.*, 114 FERC ¶ 61,305, at P 207-208 (2006).

⁴ *El Paso Natural Gas Co.*, 117 FERC ¶ 61,361 (2006), *order on compliance*, 120 FERC ¶ 61,152 (2007).

⁵ *El Paso Natural Gas Co.*, 125 FERC ¶ 61,372 (2008) (December 30, 2008 Order).

⁶ *Colorado Interstate Gas Company*, 128 FERC ¶ 61,117 (2009) (July 31 CIG Order).

⁷ 15 U.S.C. § 717d (2006).

tracker mechanism to remove “deemed” costs⁸ and non-fuel costs. The order further directed El Paso to include in its upcoming annual fuel tracker filing a true-up to reconcile the difference in costs recovered under the prior fuel tracker mechanism from October 1, 2009, through December 31, 2009, and those that would have been recovered under the fuel tracker mechanism established in the October 1 Order (the “October-December true-up”).

A. Compliance Filing

5. On October 15, 2009, El Paso filed revised tariff sheets. In this filing, El Paso revised Section 26.6(a) (ii) of its GT&C to remove the cost and revenue component of its fuel mechanism. With the removal of the cost and revenue component, El Paso explains that the mainline fuel adjustment true-up will be determined as the difference between (1) the actual quantities of mainline fuel experienced by El Paso during the applicable data collection period; and (2) the quantities of mainline gas retained for fuel by El Paso during the period. As a result, El Paso explains that its tariff now only includes a volumetric fuel tracker.

6. El Paso also proposed to increase its retention percentage for mainline fuel from 2.56 percent to 2.65 percent effective October 1, 2009. El Paso states that the increase results from the removal of the cost and revenue component from its fuel retention percentages.

7. El Paso states that implementing the increased fuel percentage in October may cause difficulties for its shipper community, especially since many shippers had entered into month-long business transactions. El Paso states that while the revised fuel rate is effective October 1, 2009, it will allow shippers to nominate quantities for the remainder of October 2009 without requiring nomination adjustments for the revised fuel retention percentage effective October 1. El Paso states that for October 2009, the difference between the quantities that were actually nominated under the former system and the fuel that will be assessed using the new fuel retention percentages will be managed as a fuel imbalance on the applicable transportation service agreements. El Paso states that in the event that a shipper is affected by the fuel imbalance, it will work with the shipper to ensure that no penalty applies as a result of the transition in October from the old fuel retention percentage to the new fuel retention percentage.

⁸ Deemed costs are costs which have not yet been expended or realized through an arms-length cash transaction with a third party. July 31 CIG Order, 128 FERC ¶ 61,117 at P 34.

8. Public notice of El Paso's filing was issued on October 19, 2009, with protests due on or before October 27, 2009.⁹ On October 27, 2009, the Indicated Shippers¹⁰ filed a protest. On November 3, 2009, El Paso filed an answer to the Indicated Shippers' protest. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2009), 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.

9. The Indicated Shippers state that El Paso's proposal to revise the mainline fuel percentage is contrary to the October 1 Order. The Indicated Shippers contend that in the October 1 Order, the Commission required El Paso to include a true-up in its "next annual fuel tracker filing," to be effective on January 1, 2010. The Indicated Shippers further aver that El Paso's proposal to make the new fuel percentages effective October 1, 2009, is inconsistent with its tariff, which provides that new fuel percentages are to be effective January 1 of each calendar year.

10. The Indicated Shippers further assert that El Paso's decision to file rates effective October 1, 2009, rather than waiting until January 1, 2010, will upset October and November markets. The Indicated Shippers assert that October nominations have already been made and November nominations will have been made prior to a Commission order on the compliance filing.

11. The Indicated Shippers also assert that El Paso did not provide any work papers to substantiate the adjustments it made to the mainline fuel retention percentage. The Indicated Shippers state that the additional work papers are necessary to verify that the 0.09 percent adjustment to the mainline fuel retention percentage (the increase from 2.56 percent to 2.65 percent) removes all non-fuel and deemed costs.

12. In its Answer, El Paso states that its compliance filing properly implemented the October Order. El Paso states that to comply with the Commission's directive to

⁹ Occidental Energy Marketing, Inc., NJR Energy Services Company, and Atmos Energy Corporation filed motions to intervene in Docket No. RP09-117-001. PSEG Energy Resources & Trade, LLC, MGI Supply Ltd., Arizona Public Service Company, New Mexico Gas Company, Inc., and the Arizona Corporation Commission filed motions to intervene in Docket No. RP09-117-000 following our December 30, 2008 Order but prior to the October 1 Order. The Commission finds that granting the unopposed motions to intervene will not adversely affect this proceeding, nor harm the other parties. Accordingly, the Commission grants the motions to intervene.

¹⁰ The Indicated Shippers are BP America Production Company and BP Energy Company, ConocoPhillips Company, and Occidental Energy Marketing, Inc.

incorporate information from October 1, 2009, through December 31, 2009, in its next annual filing would contravene Section 26.3(a)(ii) of its GT&C, which provides that the annual fuel and L&U percentages effective January 1 of each year must be derived from the data collection period ending the prior September 30. Thus, El Paso states that it is contrary to its tariff for El Paso to charge or credit any amounts from October 1, 2009, through December 31, 2009, in the fuel retention percentages to be effective January 1, 2010.

13. El Paso further states that no additional work papers are required to support its calculation of the revised fuel retention percentage since the proposed tariff sheet clearly shows the removal of the cost and revenue component. El Paso explains that the revisions to Tariff Sheet No. 29 show the removal of the “System Linepack, Fuel, L&U and Other Gas Balance Adjustment Factor,” which, as indicated by the strikethrough on the redlined tariff sheets, results in an increase of 0.09 percent. El Paso further states that the derivation of the “System Linepack, Fuel, L&U and Other Gas Balance Adjustment Factor” was explained in the November 26, 2008 filing. Thus, El Paso states that with the removal of that factor, the fuel retention percentage effective October 1, 2009, is derived by subtracting a 0.02 percent volumetric true-up percentage from the mainline fuel collection period percentage of 2.67 percent which results in a mainline fuel retention percentage of 2.65 percent.

B. El Paso’s Request for Rehearing

14. El Paso states that it is not seeking rehearing of the general policy decision made in the October 1 Order to remove the cost and revenue component of its fuel tracker mechanism. However, El Paso states that it seeks rehearing and clarification regarding the implementation of the exclusion of the cost and revenue true-up component.

15. El Paso requests that the Commission clarify that the October 1 Order required El Paso to remove its cost and revenue true-up component in its entirety from its fuel tracker. El Paso states that failure to remove this provision in its entirety would be inconsistent with the Commission’s earlier decisions striking similar provisions from the fuel tracking mechanisms of El Paso affiliates.¹¹

16. El Paso also requests that the Commission clarify that it required El Paso to remove the reimbursement percentage associated with the cost and revenue true-up component effective October 1, 2009. If this was not the Commission’s intention, then El Paso asserts that the October 1 Order erred by requiring El Paso to maintain the cost and revenue true-up through December 31, 2009. El Paso states that the Commission

¹¹ Citing July 31 CIG Order, 128 FERC ¶ 61,117; *Wyoming Interstate Company, Ltd.*, 129 FERC ¶ 61,001 (2009).

further erred by requiring El Paso to include in its next annual fuel tracker filing the difference between the costs recovered under the prior fuel tracker mechanism with a cost and revenue true-up from October 1, 2009, through December 31, 2009, and those that would have been recovered under the revised fuel tracker mechanism excluding the cost and revenue true-up component as established by the October 1 Order. El Paso states that the necessary data for the October 1, 2009, through December 31, 2009 period will not be available at the time it makes its next fuel tracker filing in late November 2009.

17. Moreover, El Paso asserts that the inclusion of data for the October 1, 2009 through December 31, 2009 period is inconsistent with El Paso's tariff, which provides that the data used to calculate its fuel tracking mechanism to be effective January 1, 2010 will use a data collection period that begins October 1, 2008 and that ends September 30, 2009. Thus, data for October 1, 2009, through December 31, 2009 falls outside the data collection period.

18. El Paso states that to avoid disruption to customers, for the month of October, it will treat the difference between the amounts of the fuel assessed under the old mechanism and the amount of fuel assessed under the revised mechanism as a fuel imbalance and will work to ensure no penalty applies because of the fuel issue.

19. El Paso states that the Commission also erred by not removing the entire cost and revenue true-up component effective January 1, 2009. El Paso states that in the proceeding in which it first proposed its fuel tracker, El Paso explained the inclusion of the cost and revenue true-up related to an adjustment for gas cost timing differences and certain non-fuel related costs. Further El Paso states that subsequently it filed two annual tracker filings with work papers explaining the operation of its tracker mechanism in Docket Nos. RP07-88-000 and RP08-106-000. El Paso states that the Commission's prior approval of its fuel tracker mechanism with the cost and revenue true-up was tantamount to legal error. As a result, El Paso states that it paid to shippers millions of dollars that it otherwise would not have owed.

20. El Paso also states that the Commission has equitable power to return the parties to the position that they would have occupied had a legal error not been made. El Paso argues that since the Commission has the power to correct an error after judicial review, the Commission should also be able to exercise its equitable power when it recognizes an error itself.

21. El Paso states that the Commission accepted and suspended the retention percentages effective since January 1, 2009, subject to refund and the outcome of a technical conference. Thus, El Paso states that the shippers were on notice that the Commission was examining El Paso's fuel tracker and that the fuel retention percentages were subject to change.

II. Discussion

A. Rehearing

1. Removal of the Entire Cost and Revenue True-Up

22. The October 1 Order required the removal of deemed costs and non-fuel costs from El Paso's fuel tracker mechanism. As discussed below, we find that El Paso's October 15 filing complies with that directive. In response to El Paso's request for clarification, we find that El Paso's removal of the cost and revenue true-up from its fuel tracker mechanism is consistent with the October 1 Order. Accordingly its request for rehearing on this issue is unnecessary and is denied.

2. October-December Transition True-Up

23. The Commission grants El Paso's request for rehearing of the October 1 Order's requirement that El Paso include the October-December transition true-up in its fuel retention percentages for the annual period starting January 1, 2010.

24. The October 1 Order altered El Paso's fuel retention mechanism to exclude the cost and revenue true-up effective the date of the order. The fuel retention percentages are derived from and dependent upon the practices established by the underlying fuel tracker mechanism in El Paso's tariff. However, rather than requiring an immediate change to the fuel retention percentages, the Commission ordered the inclusion of an October-December transition true-up to resolve discrepancies in El Paso's fuel collections resulting from continuation of El Paso's prior fuel retention percentages from October 1, 2009, through December 31, 2009.

25. However, on rehearing, El Paso has provided convincing arguments that the October-December transition true-up proposed in the October 1 Order may be difficult to implement. El Paso will file in late November 2009 its new fuel retention percentages for the period starting January 1, 2010. However, El Paso explains that at the time of this filing, data will not be available for the entire October 1, 2009, through December 31, 2009 period. Thus, the appropriate quantity for the October-December transition true-up will be difficult to determine.

26. Given the difficulties with the implementation of the October-December transition true-up, the Commission finds that on rehearing and in El Paso's compliance filing, El Paso has proposed a reasonable means for transitioning from the prior mechanism with regard to the fuel percentages effective October 1, 2009, through December 31, 2009. Accordingly, we grant El Paso's request for rehearing on this issue. The purpose of the October-December true-up was to address promptly any differences in El Paso's recovery as a result of the percentages calculated pursuant to the old mechanism and the appropriate recovery under the new mechanism for October 1, 2009, through

December 31, 2009. The methodology proposed by El Paso, which includes its commitment to ameliorate any adverse impact on customers, accomplishes this same objective and renders any need for the October-December transition true-up moot.

27. Thus, consistent with our directive in the October 1 Order to change El Paso's fuel tracker mechanism and the purpose of the October-December true-up, El Paso's fuel retention percentage starting October 1, 2009, will reflect the removal of the cost and revenue true-up. To avoid disruptions to shippers with month-long contracts, to the extent a shipper has nominated quantities in October and November of 2009 pursuant to the former fuel retention percentage, El Paso will not require a nomination adjustment for the revised fuel retention percentage made effective October 1, 2009. In these situations, El Paso may assess an imbalance to each shipper to reconcile the difference in fuel recovered under the prior fuel tracker mechanism and those that would have been recovered under the revised fuel tracker mechanism. Such imbalances may not result in or contribute to an imbalance penalty charge. El Paso originally proposed to provide such an accommodation for October 2009, but, given the concerns expressed by the Indicated Shippers regarding disruptions to November markets, the Commission finds that El Paso must provide this accommodation for November 2009 as well.

3. January 1, 2009 Effective Date for the Revised Mechanism

28. The Commission denies El Paso's rehearing request to remove the cost and revenue true-up effective January 1, 2009, as opposed to October 1, 2009. Contrary to El Paso's assertions, equity does not provide a basis for eliminating the cost and revenue true-up component from the fuel tracker mechanism effective January 1, 2009.

29. El Paso's request is inconsistent with the requirements of section 5 of the NGA. As the October 1 Order stated, the Commission's authority under section 5 is prospective only,¹² and changes to the fuel tracker mechanism may only be implemented after the Commission has identified the changes that must be made.¹³ The Commission did not specify any changes to the fuel tracker mechanism until the issuance of the October 1, 2009 Order, which required the removal of deemed costs and non-fuel costs.

30. Although the Commission may take steps to remedy retroactively its own errors after reversal by a court on appeal,¹⁴ as El Paso acknowledges, such circumstances do not

¹² October 1 Order, 129 FERC ¶ 61,006 at P 41.

¹³ *City of Anaheim v. FERC*, 558 F.3d 521, at 525 (2009).

¹⁴ See, e.g., *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1074-1075 (D.C. Cir. 1992).

directly apply to this case because our October 1 Order was not responding to a reversal from a court. Nor is the Commission's remedial authority following a court's reversal of a Commission decision analogous to the situation presented here. Rather, the Commission's prior acceptance of El Paso's fuel tracker mechanism was not subject to ongoing appeal or rehearing requests. Thus, the fuel tracker mechanism, including the cost and revenue true-up, was the lawful, effective mechanism for El Paso to recover its fuel costs.

31. While the December 30, 2008 Order exercised the Commission's authority under section 4 of the NGA to impose suspension and refund provisions on the fuel retention percentages in the November 26, 2008 filing, this section 4 action was only focused on whether the newly filed percentages conformed to El Paso's then-existing tariff, incorporated erroneous data, or contained other calculation errors. There was no finding prior to or in the October 1 Order that the fuel percentages in the November 26, 2008 filing did not conform with the pre-existing tariff or contained calculation errors. Rather, the October 1 Order found that the existing, underlying fuel tracker mechanism in section 26 of El Paso's GT&C was unjust and unreasonable under section 5 of the NGA. Thus, the fuel retention percentages on file between January 1, 2009, and September 30, 2009, were the lawful fuel retention percentages until our October 1 Order found that the underlying mechanism used to determine those percentages was unjust and unreasonable. Since that determination can only apply prospectively, the lawful percentages prior to October 1, 2009, must remain unchanged.

32. Furthermore, the equities do not support El Paso's position that it is entitled to recover the additional costs incurred as a result of the cost and revenue true-up back to January 1, 2009. El Paso itself proposed the prior mechanism with both a volumetric and cost and revenue true-up and made annual adjustments pursuant to that mechanism. The tariff sheets implementing the cost and revenue true-up mechanism were accepted at El Paso's behest. El Paso made a business decision to propose and implement a complex fuel tracker mechanism that ultimately was found to be unjust and unreasonable. Under such circumstances, El Paso is not entitled to any recovery in equity.

B. Compliance Filing

33. The Commission accepts the tariff sheets filed by El Paso to comply with our October 1 Order. The October 1 Order required El Paso to remove deemed costs and non-fuel costs from its fuel tracker mechanism. El Paso's proposed modifications to section 26 of its tariff are consistent with this requirement.

34. As discussed in our disposition of El Paso's rehearing request, the Commission also accepts El Paso's revised fuel retention percentages to be effective October 1, 2009. The revision to the fuel retention percentages is consistent with our October 1 Order's requirement that El Paso remove deemed costs and non-fuel costs from its fuel tracker mechanism. As discussed previously, to accommodate shippers for the months of

November and October, El Paso shall permit nominations consistent with the former fuel percentage of 2.56 percent. El Paso shall treat any resulting under-collections as an imbalance to that shipper without penalty.

35. Furthermore, the Commission determines that El Paso correctly calculated the new fuel retention percentage resulting from the removal of the cost and revenue true-up. In its compliance filing, El Paso removed the “System Linepack, Fuel, and L&U and Other Gas Balance Adjustment” from the calculation of the mainline fuel charge on Eighteenth Revised Sheet No. 29. The 0.09 increase in the mainline fuel retention percentage that results from the removal of this term is supported by the work papers already filed by El Paso in its November 26, 2008 filing in Docket No. RP09-117-000.¹⁵

The Commission orders:

(A) Clarification and rehearing of the October 1 Order is granted in part, as discussed in the body of this order.

(B) El Paso’s proposed tariff sheets in footnote 1 are accepted subject to the conditions described in this Order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹⁵ See Tab 1, Page 3 of November 26, 2008 filing in Docket No. RP09-117-000.