

132 FERC ¶ 61,015  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Marc Spitzer, Philip D. Moeller,  
and John R. Norris.

El Paso Natural Gas Company

Docket No. RP10-153-001

ORDER DENYING REHEARING

(Issued July 7, 2010)

1. On January 28, 2010, Freeport-McMoran Corporation (FMC) filed a request for rehearing of the Commission's December 29, 2009 order issued in this proceeding.<sup>1</sup> The December 29 Order accepted the tariff sheets<sup>2</sup> filed by El Paso Natural Gas Company (El Paso) on November 17, 2009, to adjust El Paso's Article 11.2(a) rates for inflation, pursuant to El Paso's rate case settlement in Docket No. RP95-363-000, *et al.* (1996 Settlement),<sup>3</sup> and section 37.3 of the General Terms and Conditions (GT&C) of El Paso's Volume No. 1A Tariff. For the reasons discussed below, the Commission denies rehearing.

**I. Background**

2. Under section 37.3 of El Paso's tariff, El Paso annually increases the Article 11.2(a) rates for inflation to be effective on January 1. Because these rates are billed on a per dekatherm basis, the rates are adjusted for Btu content prior to the application of the inflation factor. In Docket No. RP10-153-000, El Paso proposed to increase the base reservation rates by the minimum allowable 1.00 percent.<sup>4</sup> El Paso stated that no Btu

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<sup>1</sup> 129 FERC ¶ 61,286 (2009) (December 29 Order).

<sup>2</sup> Eighth Revised Sheet No. 374, First Revised Sheet No. 374A to El Paso's FERC Gas Tariff, Second Revised Volume No. 1A.

<sup>3</sup> Article 11.2 of the 1996 Settlement between El Paso and its customers places certain limitations on the rates that El Paso can charge to shippers that were parties to that Settlement. *See El Paso Natural Gas Co.*, 79 FERC ¶ 61,028 (1997), *reh'g denied*, 80 FERC ¶ 61,084 (1997) and 89 FERC ¶ 61,164 (1999).

<sup>4</sup> *See* El Paso filing at 2. The adjustment is limited to 93 percent of the increase in  
(continued)

adjustment was required in this docket because the most recent system-wide Btu conversion factor (a 1.017 Btu conversion factor), filed in Docket No. RP08-426-000, was the same applied in the 2009 inflation adjustment filing in Docket No. RP09-119-000.<sup>5</sup>

3. FMC filed a protest requesting that the Commission require El Paso to revise its inflation adjustment to reflect a currently effective system-wide average Mcf-Dth conversion factor of 1.024.<sup>6</sup> FMC suggested that using El Paso's proposed system-wide Mcf-Dth conversion factor resulted in Article 11.2(a) rates that are approximately 2.5 to 7 cents per Dth higher than rates derived from the revised system-wide Mcf-Dth conversion factor.<sup>7</sup> FMC requested that if the corrected rates do not take effect on January 1, 2010, and El Paso continues to charge the currently-effective 2009 Article 11.2(a) rates, the Commission require that all amounts collected after January 1, 2010 be subject to refund.

4. In the December 29 Order, the Commission found El Paso's Article 11.2(a) rate inflation adjustments to be just and reasonable pursuant to the terms of the 1996 Settlement,<sup>8</sup> as altered by the 2007 Settlement in Docket No. RP05-422-000, *et al.*<sup>9</sup> The Commission found that FMC had not shown that El Paso's use of the currently-effective system-wide Mcf-Dth conversion factor was unjust and unreasonable, and was not persuaded to substitute FMC's alternate system-wide Mcf-Dth conversion factor.

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the Implicit Price Deflator to the Gross Domestic Product (GDP-IPD) as published by the Department of Commerce's Bureau of Economic Analysis (BEA). The annual increase in rates may never be more than 4.5 percent or less than one percent of the prior year's total base rates.

<sup>5</sup> El Paso measures gas and converts its transportation agreements from Mcf, a volumetric unit, to Dth, a thermal unit, to align its contracting practices with the manner in which natural gas business is transacted.

<sup>6</sup> See FMC protest at 3. FMC claims that the Btu per cubic foot data provided in response to a discovery request in the pending rate case in Docket No. RP08-426-000 results in a system-wide Mcf-Dth conversion factor of 1.024.

<sup>7</sup> See FMC protest at 4. In addition, FMC provides calculations of the Article 11.2(a) reservation and usage rates using the 1.024 Btu conversion factor in Exhibit C.

<sup>8</sup> See *El Paso Natural Gas Co.*, 79 FERC ¶ 61,028 (1997), *reh'g denied*, 80 FERC ¶ 61,084 (1997) and 89 FERC ¶ 61,164 (1999).

<sup>9</sup> See *El Paso Natural Gas Co.*, 120 FERC ¶ 61,208 (2007) (2007 Settlement).

## II. Request for Rehearing

5. FMC argues that the Commission acted arbitrarily and capriciously by (1) improperly treating El Paso's methodology for calculating its annual Article 11.2(a) inflation adjustment using a Btu adjustment factor of 1.017 as a "settled practice;" (2) creating a presumption in favor of El Paso without explaining its reason for doing so; and (3) supporting its finding that El Paso's 1.017 Btu conversion factor is just and reasonable without substantial evidence.

6. FMC contends that the Commission improperly assumed that El Paso's use of a 1.017 Btu conversion factor for adjusting El Paso's Article 11.2(a) rates for inflation was a settled practice. To the contrary, FMC asserts that El Paso filed a new methodology for calculating the inflation adjustment that is inconsistent with El Paso's settled practice, and should not have been accorded a just and reasonable presumption by the Commission. FMC contends that there is no binding precedent to support El Paso's use of a 1.017 Btu conversion factor because El Paso's most recent Article 11.2(a) inflation adjustment in Docket No. RP09-119-000 was not approved by the Commission, but accepted by the Commission via delegated letter order.<sup>10</sup>

7. Moreover, FMC observes that the language contained in letter orders specifically states that the Commission's acceptance of the filing should not be construed as constituting approval of the filing.<sup>11</sup> FMC argues that the Commission's regulations governing section 4 rate change filings require all elements of a pipeline's case-in-chief to be supported by test period data, but none was included in the filing. FMC suggests that the Commission assumes in error that the use of a 1.017 Mcf-Dth conversion factor in the 2007 Settlement is also to be accorded precedential weight. FMC argues that all elements of the 2007 Settlement were agreed to by the parties with the express understanding that the entire settlement constituted a negotiated settlement.<sup>12</sup> FMC observes that section 18.2 of the 2007 Settlement provided that nothing in the stipulation shall be deemed a settled practice. FMC asserts that in order to determine the existence of the status quo or a settled practice with regard to the proper methodology for calculating adjusted Article 11.2(a) rates for inflation, the Commission must reconsider the effective methodology previously in effect.

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<sup>10</sup> See *El Paso Natural Gas Co.*, Docket No. RP09-119-000 (December 11, 2008) (unpublished letter order).

<sup>11</sup> See FMC rehearing request at 10.

<sup>12</sup> *Id.* at 12.

8. FMC contends that the settled practice of the system-wide Mcf-Dth conversion factor was established during the ten-year term that the 1996 Settlement was in effect. For the ten-year term of the 1996 Settlement, FMC states that El Paso's inflation rate adjustment was calculated using a system-wide Btu conversion factor of 1.023.<sup>13</sup> FMC points out that in the 2007 Settlement, which governed rates for the period 2006-2008, the parties agreed to use a different Btu conversion factor (1.010) for adjusting the Article 11.2(a) rates for the term of that settlement.<sup>14</sup>

9. FMC states that in El Paso's first Article 11.2(a) inflation adjustment filing following the end of the 2007 Settlement,<sup>15</sup> El Paso used another system-wide Mcf-Dth conversion factor of 1.017. FMC contends that El Paso supported the proposed conversion factor on the basis that the delivered heating values on its system were different from those at the time of the 1996 Settlement. FMC contends that at the time of El Paso's filing in Docket No. RP09-119-000, November 2008, it had no evidentiary basis to dispute El Paso's assertion that system-wide heating values supported a factor of 1.017 as opposed to the 1996 factor of 1.023. FMC asserts that it obtained information in a data response in the current Docket No. RP08-426-000 rate case proceeding that supported a Btu conversion factor of 1.024 rather than 1.017. Consequently, based on the above, FMC argues that the Commission's decision to approve El Paso's use of a 1.017 system-wide Mcf-Dth conversion factor was arbitrary and capricious.

### **III. El Paso's Answer**

10. On April 28, 2010, El Paso filed a motion for leave to file answer and answer to FMC's request for rehearing. El Paso asserts that the system-wide Mcf-Dth conversion factor used in this case (1.017) and in the prior inflation adjustment filing in Docket No. RP09-119-000 was filed in Docket No. RP08-426. El Paso indicates that prepared testimony explicitly explained how the conversion factor was calculated using the Btu factors contained in its tariff.<sup>16</sup> Consequently, it rejects FMC's contention that it had used a conversion factor directly derived from, related to or resulting from the most recent Btu study.

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<sup>13</sup> *Id.* at 13.

<sup>14</sup> *Id.* at 3.

<sup>15</sup> *Id.* at 4 (citing El Paso Transmittal at 3 in Docket No. RP09-119-000).

<sup>16</sup> El Paso rehearing answer at 5 (citing Prepared Direct Testimony of M. Catherine Rezendes, page 34, line nos. 2-17, filed in Docket No. RP08-426-000 on June 30, 2008 (designated as Exhibit No. PRG-139)).

11. El Paso observes that while FMC argues that the 2007 Settlement does not establish the status quo for purposes of the assignment of burdens under the Natural Gas Act, FMC posits that the term of the 1996 Settlement in Docket No. RP95-363-000 establishes the pre-existing rate design. El Paso points out that both settlements contain similar language which provides that nothing in the settlements shall be deemed as a “settled practice” as the court interpreted that term in *Public Service Commission of New York v. FERC*.<sup>17</sup> Consequently, El Paso argues that the very similar language in the 2007 Settlement on “settled practice” cannot disqualify it from establishing the status quo for purposes of burden and not at the same time disqualify the 1996 settlement. Moreover, El Paso states that the 1996 Settlement specifically provides that it shall not be used as the basis for establishing burden of proof.<sup>18</sup>

12. Finally, El Paso maintains that although the 1.017 conversion factor is calculated using the heating value conversion factors reflected in its tariff, it mistakenly identified where those factors were located. It admits it erroneously stated that the factors were located in Section 37.1 of the General Terms and Conditions of its tariff rather than Section 40. It asserts that the location of the heating value conversion factors is immaterial.

#### **IV. FMC’s Answer**

13. On May 5, 2010, FMC filed an answer in opposition to El Paso’s motion and answer. It argues that the Commission should not allow El Paso’s motion and answer because it is untimely and procedurally deficient. FMC contends that the El Paso transmittal letter speaks for itself, and there was no support for the use of the 1.017 factor other than the assertion that the same factor was being used in its general section 4 rate filing in Docket No. RP08-426-000. With regard to the location of the 1.017 conversion factor, FMC asserts that it is not reflected in Section 40 of El Paso’s General Terms and Conditions. FMC acknowledges that neither the 2007 Settlement nor the 1996 Settlement established a settled practice, but nevertheless argues that the use of the 1.023 factor for a 10-year period (the term of the 1996 Settlement) should constitute a settled practice.

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<sup>17</sup> 642 F.2d. 1335 (D.C. Cir. 1980).

<sup>18</sup> 1996 Settlement, Section 18.3.

**V. Discussion****Procedural**

14. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure,<sup>19</sup> provides that an answer to a request for rehearing is generally not allowed unless otherwise ordered by the decisional authority. In the instant case, the Commission will allow El Paso's answer because it supplies information that will assist the Commission in reaching a decision in this proceeding. Likewise, the Commission will also allow FMC's answer.

**VI. Discussion**

15. The Commission denies FMC's request for rehearing. The heating value conversion factors used to calculate the system-wide Mcf-Dth conversion factor of 1.017 are reflected in El Paso's tariff,<sup>20</sup> and as a consequence it is reasonable to rely upon them. We are not persuaded that the data provided by FMC supports rejecting El Paso's proposal to continue use of the current system-wide conversion factor and replacing it with FMC's alternate system-wide Mcf-Dth conversion factor of 1.024. While FMC has provided the documents obtained from discovery,<sup>21</sup> it failed to justify how such data is relevant in the instant proceeding. Further, FMC acknowledges that it had no basis upon which to challenge the 1.017 factor until it obtained the average Btu content of all the gas received and delivered by El Paso system-wide in response to a discovery request it submitted to El Paso in its Docket No. RP08-426-000 rate case proceeding. However, El Paso states that the data it provided in the discovery response was not intended to calculate a system-wide Mcf-Dth conversion factor for El Paso's system. As stated above, El Paso proposed the same 1.017 conversion factor in that proceeding as it did in the instant proceeding. In the discovery response, El Paso provided FMC with discrete historical conversion factors which FMC subsequently used in this proceeding to

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<sup>19</sup> 18 C.F.R. § 385.213(a)(2) (2010).

<sup>20</sup> See Original Sheet No. 226A GT&C Section 4.22 (Heating Values). On March 2, 2010, as amended March 4, 2010, El Paso filed revised tariff sheets in Docket Nos. RP10-454-000 and RP10-454-001, respectively, to make miscellaneous clean-up changes to various sections of the El Paso tariff in accordance with the implementation of the Commission's electronic tariff filing requirements as set forth in Order No. 714 (124 FERC ¶ 61,270 (2008)) and the conversion of the El Paso tariff from a sheet-based to a section-based tariff. Subsequently, GT&C Section 40 was moved to a new GT&C Section 4.22. See *El Paso Natural Gas Co.*, Docket Nos. RP10-454-000 and RP10-454-001 (March 22, 2010) (unpublished letter order).

<sup>21</sup> See FMC protest Tab A.

calculate a system-wide conversion factor of 1.024. FMC has not sufficiently met its burden of demonstrating to the Commission that either El Paso's heating value conversion factors or the methodology used to calculate the proposed system-wide Mcf-Dth conversion factor are unjust and unreasonable and that its proposed calculations of an alternate conversion factor are just and reasonable.

16. While the 1.023 factor that FMC argues as settled practice was used for an extended period during the term of the 1996 Settlement, the very document that proposed it specifically stated that its use would not establish a settled practice. El Paso's currently-effective tariff contains the heating value conversion factors used to calculate the system-wide conversion factor to adjust the rates for Btu content prior to the application of the inflation factor. Those heating value conversion factors were proposed and accepted in the Docket No. RP08-426-000 proceeding and were the basis for the inflation adjustment in the 2009 inflation adjustment filing. It is immaterial that El Paso initially misidentified the tariff provisions that contain the underlying areas and points from which the overall 1.017 conversion factor is derived. They are still part of the tariff and have not been changed, or shown to be unjust and unreasonable. In the instant proceeding, El Paso is proposing to apply an inflation adjustment to the currently-effective Article 11.2 rates that already are based on the overall 1.017 conversion factor derived from the sub-factors in its tariff. As such, El Paso reasonably asserts that no additional Btu adjustment is required at this time.<sup>22</sup> The Commission concurs, and finds that the existing tariff-based conversion factor has not been shown to be unjust and unreasonable. Nor do the arguments and data presented by FMC persuade the Commission to require that the overall 1.017 conversion factor be replaced with a different overall conversion factor derived from data in another proceeding that were never intended, tested, or scrutinized for use in El Paso's periodic inflation adjustments.

The Commission orders:

FMC's request for rehearing is denied.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>22</sup> See El Paso transmittal at 2.