133 FERC ¶ 61,043
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

October 15, 2010

In Reply Refer To:
El Paso Natural Gas Company
Docket No. RP10-1311-000

El Paso Natural Gas Company
P.O. Box 1087
Colorado Springs, CO 80994

Attention: Susan C. Stires, Director
Regulatory Affairs

Reference: Shell Energy North America, L.P. Non-Conforming Transportation Service Agreements

Ladies and Gentlemen:

1. On September 17, 2010, El Paso Natural Gas Company (El Paso) submitted revised tariff records[1] reflecting three nearly identical non-conforming transportation service agreements (TSA) with Shell Energy North America, L.P. (Shell). El Paso also submitted the three non-conforming service agreements for review and acceptance. For the reasons discussed below, the Commission will accept the tariff records effective October 18, 2010, subject to conditions.

2. El Paso states that it has provided transportation service to Shell pursuant to Rate Schedule FT-1 TSA No. 9TBL, which contains certain non-conforming provisions that were reviewed and accepted by the Commission. El Paso explains that it recently amended and restated this agreement and executed two new Rate Schedule FT-1

[1] See Appendix.

agreements. According to El Paso, these new agreements reflect similar terms and conditions of service. El Paso also provides a description of each of the potentially non-conforming provisions.

3. The first potentially non-conforming provision relates to the right of first refusal (ROFR) clause in the service agreements. El Paso states that section 4.14 of the General Terms and Conditions (GT&C) of El Paso's tariff provides for El Paso and a shipper to mutually agree to include a ROFR clause in their agreement. El Paso states that it and Shell agreed to include a contractual ROFR in the three filed agreements. El Paso states that paragraph 12 in each of the TSAs states that both El Paso and Shell will have a ROFR with regard to the contract. El Paso states that while the ROFR provision found in the Rate Schedule FT-1 pro forma service agreement enables the parties to mutually agree to an extension of the contract, the pro forma service agreement does not detail the specific extension rights nor provide an end date for that extension. As such, El Paso states that the ROFR provision renders the agreements potentially non-conforming.

4. The second potentially non-conforming provision in the agreements is a termination right stating that, in the event that the minimum rate provided in El Paso's tariff ever exceeds the discounted rate, Shell shall have the right to terminate the agreement upon not less than thirty days notice to El Paso. According to El Paso, this provision ensures that Shell receives the benefit of the discounted rates for its contracts. El Paso states that this provision was included as a fill-in-the-blank rate term and allows Shell to terminate its TSAs upon thirty days notice should the agreed-upon discounted rate no longer apply.

5. Lastly, El Paso notes that each of these agreements contains a footnote in Exhibit B stating that the discounted reservation rate will apply to all alternate receipt and delivery points specified in the agreements. El Paso states that while its tariff provides for the use of alternate points and discounts in sections 8.1(f) and 4.17 of the GT&C, Exhibit B in El Paso's pro forma agreements does not currently provide for this flexibility within the agreements. El Paso states that it will file to update its pro forma agreements in the near future to allow for such flexibility.

6. Public notice of El Paso's filing was issued on September 20, 2010, with comments and protests due on or before September 29, 2010. No protests or adverse comments were filed.

7. The Commission finds that the ROFR provision is permissible because the GT&C of El Paso's tariff provides that parties may negotiate a ROFR provision and that El Paso will enter into agreements with ROFR provisions on a not unduly discriminatory basis.

Similarly, the Commission finds that the provision regarding discounts at alternate points is permissible because El Paso's tariff provides for alternate points and discounts.[2]

8. However, because of the potential for undue discrimination, the Commission finds that the termination right provision does constitute an impermissible deviation from the pro forma service agreement.

9. If a pipeline and a shipper enter into a contract that materially deviates from the pipeline's form of service agreement, the Commission's regulations require the pipeline to file the contract containing the material deviations with the Commission.[3] In *Columbia Gas Transmission Corporation*,[4] the Commission clarified that a material deviation is any provision in a TSA that (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.[5]

10. In the instant case, the termination right provision in the Shell TSAs provides Shell with a substantive right that is not available to all similarly situated shippers that obtain service pursuant to El Paso's tariff. Therefore, the provision is an impermissible deviation from the Form of Service Agreement and the TSAs must either be renegotiated to conform to the existing Form of Service Agreement, or El Paso must provide this substantive right to all similarly situated shippers by filing revised tariff records (1) making this termination right available to all shippers through a generally applicable tariff provision, and (2) amending its Form of Service Agreement to allow for such a provision.[6] El Paso's compliance filing, reflecting the renegotiation of the TSAs or the

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[2] Because El Paso plans to file to revise Exhibit B of its pro forma agreements to include the flexibility to apply discounts to specified alternate points, future agreements with this provision will no longer be non-conforming.

[3] 18 C.F.R. §154.1(d) (2010).

[4] 97 FERC ¶ 61,221 (2001) (*Columbia*).

[5] In *Natural Gas Pipeline Negotiated Rate Policies and Practices*, 104 FERC ¶ 61,134, at P 27 (2003), the Commission stated "[s]ince there would appear to be no reason for the parties to use language different from that in the form of service agreement other than to affect the substantive right of the parties, this effectively means that all language that is different from the form of service agreement should be filed with the Commission." *Id*. P 32.

[6] *See ANR Pipeline Co.*, 97 FERC ¶ 61,252, at 62,118 (2001).

revised tariff revisions making the termination right generally available, must be made 30 days from the date of this order.

By direction of the Commission.

Kimberly D. Bose,
Secretary.

Appendix

El Paso Natural Gas Company
EPNG Tariffs
FERC NGA Gas Tariff

Accepted Effective October 18, 2010

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Non-Conforming Agreements, 0.0.0
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Non-Conforming Agreements, Shell Energy North America (US), L.P. #9TBL Exhibit B, 0.0.0
Non-Conforming Agreements, Shell Energy North America (US), L.P. #FT2WU000, 0.0.0
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Non-Conforming Agreements, Shell Energy North America (US), L.P. #FT2WV000 Exhibit A, 0.0.0
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