

133 FERC ¶ 61,253  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

El Paso Natural Gas Company

Docket No. RP10-1398-001

ORDER DENYING REHEARING AND GRANTING CLARIFICATION

(Issued December 23, 2010)

1. This order addresses requests for rehearing or clarification of the Commission's October 29, 2010 suspension order<sup>1</sup> filed by El Paso Natural Gas Company (El Paso), Gila River Power, L.P. (Gila River), and the Joint Petitioners.<sup>2</sup> The rehearing petitioners raise several arguments concerning whether certain issues related to Article 11.2 of the 1996 settlement<sup>3</sup> should be addressed at the hearing established in this proceeding. For the reasons discussed below, the Commission denies the requests for rehearing filed by El Paso and Gila River, and grants the request for clarification filed by the Joint Petitioners.

**Background**

2. On September 30, 2010, El Paso filed revised tariff records proposing a rate increase for existing services and changes to certain terms and conditions of service. El Paso filed primary and alternate tariff records and proposed an effective date of November 1, 2010.

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<sup>1</sup> *El Paso Natural Gas Co.*, 133 FERC ¶ 61,104 (2010) (October 29 Order).

<sup>2</sup> The Joint Petitioners are UNS Gas, Inc.; Tucson Electric Power Company; Texas Gas Service Company, a division of ONEOK, Inc.; Salt River Project Agricultural Improvement and Power District; and Arizona Electric Power Cooperative, Inc.

<sup>3</sup> Article 11.2 capped the rates for certain shippers' contracts, subject to an annual escalation factor, and established certain cost recovery limitations for El Paso. *See El Paso Natural Gas Co.*, 79 FERC ¶ 61,028, *reh'g denied*, 80 FERC ¶ 61,084 (1997).

3. El Paso's primary and alternate tariff records reflect different methods of allocating certain facility costs to Article 11.2(a) contracts. The primary tariff records included rates applicable to Article 11.2 contracts that do not exceed the amount calculated pursuant to Article 11.2(a) of the 1996 settlement. The alternate tariff records included rates applicable to Article 11.2 contracts that exceed the amount calculated pursuant to Article 11.2(a) to reflect an allocation of certain facilities costs, consistent with El Paso's interpretation of Commission orders that provide for the recovery of those expansion costs from "all shippers."<sup>4</sup>

4. On October 29, 2010, the Commission issued an order accepting and suspending El Paso's primary tariff records, to be effective April 1, 2011, subject to refund and conditions and the outcome of the hearing established in the order. The order also rejected the alternate tariff records.

5. On November 29, 2010, requests for rehearing or clarification were filed by El Paso, Gila River and the Joint Petitioners.

6. On December 7, 2010, the El Paso Municipal Customer Group filed a motion to answer and answer to the requests for rehearing and clarification of El Paso and Gila River. Pursuant to Rule 713(d) of the Commission's Rules of Practice and Procedure, "[t]he Commission will not permit answers to requests for rehearing."<sup>5</sup> Accordingly, the El Paso Municipal Customer Group's filing is rejected.

### **Requests for Rehearing or Clarification**

7. El Paso asserts that the Commission erred by rejecting its alternate tariff records. EL Paso claims that the alternate tariff records, which allocate the costs of post-1995 capacity to Article 11.2(a) contracts and would result in a rate in excess of the Article 11.2(a) rate cap, is not a modification of Article 11.2 of the 1996 settlement and is based on its understanding that the costs of post-1995 capacity can be allocated to all shippers. El Paso asserts that even if the alternate tariff records were properly rejected, the Commission should make clear that the cost allocation issue raised by the alternate tariff records remains an issue in the proceeding. El Paso contends that such a result is required because the Commission's rejection of the alternate tariff records might be interpreted as a resolution on the merits of the cost allocation raised by the alternate tariff records.

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<sup>4</sup> El Paso cites *El Paso Natural Gas Co.*, 114 FERC ¶ 61,290, at P 69 (2006).

<sup>5</sup> 18 C.F.R. § 385.713(d) (2010).

8. Gila River asserts that the Commission should grant rehearing to reject both the primary and alternate tariff records because El Paso has no right to reallocate Article 11.2 costs to non-Article 11.2 shippers. Gila River contends that the October 29 Order wrongly requires Gila River to subsidize its competitors' preferential rates which, if anything, should be paid for by the pipeline. Gila River submits that the 1996 settlement contains no provision vesting El Paso with the right to reallocate such costs, and El Paso has failed to make any convincing showing in this or any other proceeding that it satisfies the Commission's discount rate adjustment policy (a prerequisite for reallocation). At a minimum, Gila River argues that the Commission should accept the alternate tariff records, which fairly apportion cost responsibility to all customers, and take appropriate action to soften the adverse impact of the rate increases, given that refunds cannot and will not adequately protect merchant electric generators, such as Gila River.

9. Joint Petitioners assert that the issue of the duration of Article 11.2 rate protection is not ripe for review and is inappropriate for consideration in the hearing set for this proceeding. Joint Petitioners state that, in its rate filing, El Paso presented limited testimony on its theory of the duration of Article 11.2 rate protection. El Paso contends that when a shipper exercises its right of first refusal (ROFR) under an existing Article 11.2 contract, it executes a new contract and that the new contract would not be entitled to Article 11.2 rights. Joint Petitioners state that El Paso attempted to raise this precise issue on rebuttal in Docket No. RP08-426-000. In response, Joint Petitioners argued that this matter of a shipper's contract rights is not ripe for review because it was inappropriately raised for the first time by El Paso on rebuttal and, in any case, none of the applicable contracts' primary terms would expire during El Paso's test period in Docket No. RP08-426-000.

10. Joint Petitioners state that in the instant proceeding, El Paso attempts to reassert this issue by arguing that "because some of [the Article 11.2] contracts are likely to expire during the period the rates filed in this case are in effect ... [it] is likely to have an effect on EPNG's revenues."<sup>6</sup> However, Joint Petitioners submit that El Paso fails to explain that none of the applicable contracts' primary terms will expire during El Paso's test period in this proceeding. Joint Petitioners state that El Paso's test period ends March 31, 2011. Joint Petitioners assert that El Paso's own Exhibit No. EPG-122 clearly shows that the primary terms of the first set of Article 11.2 contracts will not expire until August 31, 2011. Joint Petitioners state that this is five months after the end of El Paso's test period. Joint Petitioners argue that this matter will not be an actual case or controversy, if at all, until such a dispute arises and a party requests adjudication in a separate proceeding. Joint Petitioners contend that, absent an actual case or controversy,

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<sup>6</sup> Exh. No. EPG-211 at 55:15-21.

El Paso is seeking an advisory opinion on a core settlement right, which the Commission cannot render.

### **Discussion**

11. The requests for rehearing and clarification filed in this proceeding are the latest chapter in the continuing saga of Article 11.2 of El Paso's 1996 settlement and the still unanswered question of whether that settlement provision continues to be just and reasonable and/or in the public interest. The Joint Petitioners simply seek clarification whether the duration of Article 11.2 is an issue that is ripe for review in this proceeding. On the other hand, El Paso and Gila River are attempting to open another front in the continuing battle over Article 11.2 of the 1996 settlement by pressing for a merits determination on issues that are currently pending in the Docket No. RP08-426-000 general rate case proceeding. As discussed below, the Commission grants the clarification requested by the Joint Petitioners and denies the requests for rehearing of El Paso and Gila River.

12. Joint Petitioners request the Commission clarify that the issue of the duration of Article 11.2 rate protection is not ripe for review and is inappropriate for consideration in the hearing set for this proceeding. The Commission grants the Joint Petitioners' request. As the Joint Petitioners point out, El Paso's own exhibit recognizes that the primary terms of the first set of Article 11.2 contracts do not expire until August 31, 2011, which is well beyond the end of the test period of this filing of March 31, 2011. The Commission agrees with the Joint Petitioners that the issue of the duration of Article 11.2 contracts will not be an issue until such a dispute arises and a party requests adjudication in a separate proceeding. The Commission finds that it is not appropriate to have the parties to this proceeding expend resources on an issue that will not occur until after the end of the test period for the proposed rates. The Commission will review the issue of the duration of the Article 11.2 contracts when an actual dispute arises concerning the expiration of an Article 11.2 contract and all the facts and circumstances of the dispute are known.

13. El Paso and Gila River make similar arguments. El Paso argues that the Commission erred by not accepting the alternate tariff records or at least finding that the cost allocation issue raised by the alternate tariff records should be set for hearing. Gila River argues that both the primary and alternate tariff records should have been rejected. Gila River asserts that, lacking rejection of both, it is the alternate tariff records that should have been accepted. Gila River additionally contends that the Commission failed to address its concern that the refund obligation does not protect merchant generators such as Gila River.

14. In its Docket No. RP10-1398-000 filing, El Paso presented the Commission with both primary and alternate tariff records. Thus, El Paso gave the Commission a choice as to which tariff records to accept. The Commission's acceptance of the primary tariff

records necessarily precluded the acceptance of the alternate tariff records because only one set of tariff records can be in effect at one time. El Paso essentially argues that although it gave the Commission a choice of tariff records to accept, the Commission made the wrong choice. The Commission finds that it made the correct choice because the primary tariff records continue the rate protections of Article 11.2(a). The Commission accepted tariff sheets in El Paso's earlier Docket No. RP08-426-000 rate case for the same reasons.<sup>7</sup> With respect to the primary tariff records, El Paso itself stated, "[t]he rate consequences are therefore identical to the tariff sheets that the Commission accepted subject to refund in Docket No. RP08-426-000."<sup>8</sup> By accepting the primary tariff records the Commission is merely maintaining the status quo pending the outcome of the hearing in Docket No. RP08-426-000 to determine whether, among other things, Article 11.2 continues to be just and reasonable and/or in the public interest and whether the related cost shifts result in discriminatory and/or anti-competitive rates. The purpose of making this filing subject to the outcome of the Docket No. RP08-426-000 rate case was, in part, to make sure that any determinations made with respect to Article 11.2 would be made based on a fully litigated record and would then apply here. Acceptance of the alternate tariff records would have upset the status quo while the many complex issues surrounding Article 11.2 are awaiting final determination. The Commission further finds that Article 11.2 contract issues will be eligible for litigation in this case only to the extent that they are not finally decided in Docket No. RP08-426-000. Accordingly, El Paso's request for rehearing is denied.

15. Gila River reiterated many of the same arguments that it made in Docket No. RP08-426-002. The Commission addressed these arguments in its recent November 10, 2010 order in Docket No. RP08-426-002, which addressed requests for rehearing of El Paso's 2008 rate case.<sup>9</sup> As to Gila River's argument that the Commission should have either rejected all of El Paso's tendered tariff records or at least accepted the alternate tariff records, the Commission's determination, as discussed above, to maintain the status quo and continue the Article 11.2 rate protections equally applies to Gila River's argument. Contrary to Gila River's argument, its concerns over the financial impact of Article 11.2 have been acknowledged by the Commission. As the Commission recognized in its November 10, 2010 order, Gila River had the opportunity to present its arguments concerning competitive harm, financial impact, rate disparity, and cost causation in the Docket No. RP08-426-000 rate case. While it may not fully allay Gila River's concerns, the Commission appropriately exercised its full statutory authority by

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<sup>7</sup> *El Paso Natural Gas Co.*, 133 FERC ¶ 61,129, at P 46 (2010).

<sup>8</sup> El Paso's November 29, 2010 Request for Rehearing at 4.

<sup>9</sup> *El Paso Natural Gas Co.*, 133 FERC ¶ 61,129, at P 46-48 (2010).

suspending El Paso's primary proposed rates for the full five-month suspension period subject to refund. Accordingly, Gila River's request for rehearing is denied.

16. As the Commission recognized in its November 10, 2010 order, the Commission has not yet had the opportunity to rule on whether the application of Article 11.2 results in just and reasonable rates. The upcoming initial decision in Docket No. RP08-426-00 will give the Commission the opportunity to make its decision based on a completed hearing record. By accepting the primary tariff records and maintaining the status quo of the Article 11.2 rate protections, the Commission's intent is to prevent re-litigation of identical issues in this rate case prior to a final determination on these Article 11.2 issues in the Docket No. RP08-426-000 rate proceeding.

The Commission orders:

- (A) The Joint Petitioners' request for clarification is granted.
- (B) El Paso's and Gila River's requests for rehearing are denied.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.