

144 FERC ¶ 61,004
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

El Paso Natural Gas Company, L.L.C.

Docket No. RP13-787-000

DECLARATORY ORDER

(Issued July 2, 2013)

1. On April 5, 2013, El Paso Natural Gas Company, L.L.C. (El Paso) filed a petition for declaratory order (Petition) pursuant to Rule 207 of the Commission's Rules of Practice and Procedure¹ requesting that the Commission resolve a dispute with its shippers over application of the right of first refusal (ROFR) obligations in its tariff and related contracts to certain settlement rates expiring August 31, 2013. El Paso asks the Commission to clarify whether it is required to continue to provide service to shippers UNS Gas Inc. (UNS) and Texas Gas Service Company, a Division of ONEOK, Inc. (Texas Gas) at settlement rates when the current service agreements expire, or whether Texas Gas and UNS (and any other bidders) will bid for the capacity at rates up to the maximum recourse rate under ROFR provisions in El Paso's tariff.

2. As discussed below, the Commission finds that the UNS and Texas Gas transportation service agreements (TSA) will expire by their terms on August 31, 2013. The settlement rates in question apply to service provided under a service agreement that was in effect when the 1996 Settlement was executed.² Consequently, after the expiration of the current TSAs, service will be provided under a new service agreement

¹ 18 C.F.R. § 385.207 (2012).

² *El Paso Natural Gas Co.*, 79 FERC ¶ 61,028 (1996 Settlement Order), *reh'g denied*, 80 FERC ¶ 61,084 (1997) (1996 Settlement Rehearing Order). El Paso filed an updated version of the stipulation and agreement to include conforming changes agreed to with various shippers on June 10, 1997 in Docket No. RP95-363-008 (1996 Settlement). Although El Paso and others reference language from an earlier version of the settlement, we do not rely on this disputed language, and thus need not address in this order which version of the language is effective.

that is not afforded rate protection under the terms of the 1996 Settlement. On that basis, and as discussed more fully below, the Commission grants the declaration requested by El Paso that it is not required to provide service to UNS and Texas Gas at settlement rates after the current service agreements expire on August 31, 2013.

I. Background

3. El Paso currently serves UNS and Texas Gas at rates established under Article 11.2 of the 1996 Settlement, which has been interpreted in a series of previous orders.³ In the 1996 Settlement, El Paso accepted up-front “risk sharing” payments from certain shippers in exchange for certain protections from future rate increases during the term of the shippers’ then-effective TSAs. Article 11.2(a) of the 1996 Settlement provided that rates for capacity then under contract by eligible shippers would be capped, subject to inflation, and that the rate cap would continue to apply until the termination of shippers’ TSAs:

11.2 Firm TSAs In Effect on December 31, 1995, That Remain in Effect Beyond January 1, 2006. This paragraph 11.2 applies to any firm Shipper with a TSA that was in effect on December 31, 1995, and that remains in effect, in its present form or as amended, on January 1, 2006, but only for the period that such Shipper has not terminated such TSA. El Paso agrees with respect to such Shippers that, in all rate proceedings following the term of this Stipulation and Agreement:

(a) Base Settlement Rate Escalated. El Paso will not propose to charge a rate applicable to service under such TSA during the remainder of the term thereof that exceeds the base settlement rate established under paragraph 3.2(a) applicable to such Shipper, as adjusted pursuant to paragraphs 3.2(b) and 3.5 through the term of this Stipulation and Agreement, as escalated annually thereafter through the remainder of the term of such TSA using the procedure specified by paragraph 3.2(b) unless and until such TSA is terminated by the Shipper.

(b) Unsubscribed Capacity Costs. El Paso agrees that the firm rates applicable to service to any Shipper to which this

³ The history of the 1996 Settlement and related litigation is summarized in *El Paso Natural Gas Co.*, Opinion No. 517, 139 FERC ¶ 61,095, at PP 7-13 (2012).

paragraph 11.2 applies will exclude any cost, charge, surcharge, component, or add-on in any way related to the capacity of its system on December 31, 1995, to deliver gas on a forward haul basis to the Shippers listed on *Pro Forma* Tariff Sheet Nos. 33-35, that becomes unsubscribed or is subscribed at less than the maximum applicable tariff rate as escalated pursuant to paragraph 3.2(b). El Paso assumes full cost responsibility for any and all existing and future step-downs or terminations and the associated [contract demand (CD)]/billing determinants related to the capacity described in this subparagraph (b).

4. After the 1996 Settlement was executed, El Paso was unable to meet all firm customer service requests as demands on the system grew.⁴ In response to complaints over the resulting service curtailments, the Commission directed El Paso to file a system-wide capacity allocation proposal, which El Paso filed on March 28, 2001.⁵ The Commission addressed capacity shortfall and related issues in the Capacity Allocation Proceeding in a May 31, 2002 order and several subsequent orders.⁶ The Capacity Allocation Proceeding addressed shipper complaints and resolved the capacity shortfall by directing El Paso to assign specific receipt point rights (instead of using system-wide receipt points) and convert firm requirements shippers' contracts to service with specific contract demand (CD) limits up to available capacity, so that service to one firm shipper would not adversely affect firm service to others.⁷

⁴ See *El Paso Natural Gas Co.*, 114 FERC ¶ 61,290 (2006) (March 20 Order), *reh'g denied*, 124 FERC ¶ 61,227, at P 9 (2008) (September 5 Order), *reh'g denied*, 132 FERC ¶ 61,155 (2010), *aff'd sub nom., Freeport-McMoRan Corp. v. FERC*, 669 F.3d 302 (D.C. Cir. 2012) (*Freeport*).

⁵ September 5 Order, 124 FERC ¶ 61,227 at P 10.

⁶ *El Paso Natural Gas Co.*, Order on Capacity Allocation and Complaints, 99 FERC ¶ 61,244, *clarified*, 100 FERC ¶ 61,285 (2002), *order on reh'g*, 104 FERC ¶ 61,045 (2003), *reh'g*, 106 FERC ¶ 61,233 (2004) (Capacity Allocation Proceeding), *aff'd, Arizona Corp. Comm'n v. FERC*, 397 F.3d 952 (D.C. Cir. 2005).

⁷ September 5 Order, 124 FERC ¶ 61,227 at P 10.

5. In 2006, several shippers, including UNS and Texas Gas, sought additional flexibility provided by new flexible hourly services proposed by El Paso and converted a part of their service to hourly service.⁸ In the resulting revised TSAs that replaced the historic TSAs, the shippers and El Paso agreed that the Article 11.2 protections would continue to apply during the term of the new TSAs. The revised TSAs were filed with and accepted by the Commission as non-conforming agreements.⁹ To provide for the continued application of Article 11.2, the new service agreements state:

Article 11.2 of the 1996 Settlement Stipulation and Agreement in Docket No. RP95-363 will apply to this Transportation Service Agreement unless otherwise decided by the Commission or by the Court of Appeals or the Supreme Court.¹⁰

The new service agreements do not incorporate the rollover rights in the historic TSAs and instead state that El Paso's ROFR provisions in its tariff will apply:

Right-Of-First-Refusal. Upon mutual agreement of the Parties, the right-of-first-refusal, pursuant to [section 4.14(f)] of the General Terms and Conditions, shall apply to this Agreement.¹¹

6. In El Paso's 2008 and 2010 rate proceedings, the Commission declined to address whether Article 11.2 protection would extend beyond the end of a shipper's contract term. The Commission found the issue not ripe because no party had requested adjudication of a dispute arising upon the expiration of the primary term of a particular

⁸ The new services were approved by the Commission in Docket No. RP05-422-000. March 20 Order, 114 FERC ¶ 61,290 at P 61.

⁹ See *El Paso Natural Gas Co.*, Docket No. RP06-418-000 (July 21, 2006) (delegated letter order) (accepting two agreements with UNS under Rate Schedule FT-1) and *El Paso Natural Gas Co.*, Docket No. RP06-600-000 (October 18, 2006) (delegated letter order) (accepting two agreements with Texas Gas under Rate Schedule FT-1).

¹⁰ *E.g.*, UNS TSA § 16. El Paso provides copies of 2009 versions of the revised TSAs with extensions in Appendix A to the Petition.

¹¹ *E.g.*, UNS TSA § 12. The TSAs cite "section 20.16(f)," which is redesignated section 4.14(f) in El Paso's eTariff.

Article 11.2 contract.¹² While the hearings in the 2008 and 2010 rate proceedings were being held, El Paso and Texas Gas and UNS extended the terms of the new service agreements to August 31, 2013.

7. In February 2013, El Paso received notifications from Texas Gas and UNS to exercise their ROFR rights under the El Paso tariff.¹³ In the notifications, the shippers asserted that the service agreements resulting from their exercise of the ROFR must continue to provide the rate protections in Article 11.2(a). UNS stated that it was exercising ROFR rights for the total transportation contract demand of each of its TSAs and that any resulting extension or replacement TSAs will need to be identical to the current TSAs, including Section 16, which incorporates the Article 11.2(a) rate protections. Texas Gas likewise asserted that any extension to the TSAs would need to be identical to the existing TSAs, including the Article 11.2(a) rate protections.

II. Petition

8. El Paso requests the Commission to declare that (1) the four TSAs subject to the settlement that are currently held by UNS and TGS will expire by their own terms on August 31, 2013, and, as a consequence, (2) the Article 11.2(a) settlement rate will not apply to any subsequent agreement arising out of UNS' and Texas Gas' exercise of their ROFR or any agreement with a new shipper that may acquire the capacity through the ROFR process, and (3) after August 31, 2013, El Paso may charge UNS and Texas Gas, and other shippers securing this capacity, up to the maximum non-Article 11.2(a) recourse rate for the capacity currently served under the expiring contracts.¹⁴ El Paso also asserts that UNS and TGS are not eligible for protection under Article 11.2(b) when the current contracts expire, because the Commission has already held that Article 11.2(b) applies only to shippers that hold an Article 11.2(a) contract.¹⁵

9. El Paso states that when a shipper submits a notification that it intends to exercise its ROFR, El Paso must then post for bidding the terms and conditions for the capacity becoming available, including the rate. Then, El Paso must make the capacity available

¹² Opinion No. 517, 139 FERC ¶ 61,095 at P 332 (citing *El Paso Natural Gas Co.*, 133 FERC ¶ 61,253, at P 12 (2010) (denying rehearing and clarifying 2011 rate case suspension order)).

¹³ UNS' and Texas Gas' notifications are provided in Appendix B in the Petition. The ROFR is provided for in Section 4.14 of El Paso's FERC NGA Tariff.

¹⁴ Petition at 23-24.

¹⁵ *Id.* at 24 n.31 (citing March 20 Order, 114 FERC ¶ 61,290 at P 61).

under an open season for 20 business days, subject to the shipper's right to match the offer. El Paso requests the Commission's declaration so that it can resolve the disagreement concerning the rate terms that apply to the capacity served under the expiring contracts. In light of the imminent expiration of the UNS and Texas Gas TSAs, El Paso asserts that the issue is now ripe and requests a Commission order no later than July 12, 2013.

10. According to El Paso, its Commission-approved tariff requires a shipper to execute a new contract containing the rates and terms matched or agreed to during the ROFR process. El Paso concludes that, whether UNS and TGS match a rate bid or negotiate a different rate in the absence of an acceptable bid, their existing contracts expire by their own terms and will be replaced by new service agreements without the Article 11.2(a) rate protections. El Paso asserts that, after the expiration of the existing TSAs, it is not required to accept an offer at less than the applicable maximum recourse rate.

11. El Paso relies on section 4.14(e)(i) of its tariff to support its claim that any service will be provided under a new service agreement:

The existing Shipper is entitled to transportation under a *new TSA* upon the expiration of its contract, if such Shipper agrees to pay the maximum applicable tariff rate for all or a portion of the contract quantity for which no acceptable bid was received; however, to obtain a right-of-first-refusal, Shipper must agree to a *new TSA* for all or a portion of the contract quantity for which no acceptable bid was received for a term of at least one Year. In the alternative, Shipper may continue to receive service under a *new TSA* if Transporter and Shipper mutually agree within the ten Business Days to a discounted rate and term.¹⁶

12. El Paso argues that under the plain language of Article 11.2, the settlement rate protections will no longer apply to the capacity held by UNS and Texas Gas under their old Article 11.2(a) contracts after they expire in August 2013. El Paso cites Article 11.2(c) as indicating that the Article 11.2(a) protections would apply after a contract rollover term. El Paso argues that because the provision specifies that it applies to a rollover term, it excludes new contracts entered into following application of a ROFR. Article 11.2(c) states:

¹⁶ See Petition at 8-9 (quoting section 4.14(e)(i) (emphasis added)).

Following the term of this Stipulation and Agreement, any Shipper to which this paragraph 11.2 applies may, at the end of the primary or rollover term of its TSA, reduce its billing determinants or CD without losing the protection of this paragraph 11.2. At the request of any Shipper, El Paso will amend the Shipper's TSA to include the provisions of this paragraph 11.2.

13. El Paso argues that Article 11.2(c) implicitly demonstrates that the parties to the 1996 Settlement did not intend that Article 11.2 protection would apply to a continuation of service effectuated through the ROFR process and the execution of a new TSA. El Paso relies on the fact that Article 11.2(c) specifies that the "term" for purposes of Article 11.2 may include a period that has been extended pursuant to a rollover provision, but does not specify any similar treatment of new contracts executed pursuant to the ROFR process. El Paso notes that ROFR protections were used in the time prior to the 1996 Settlement and concludes that the parties would have included a reference to ROFRs if they intended that exercise of a ROFR would cause Article 11.2(a) rate protections to continue.

14. El Paso argues that recognizing continued rate protection is inconsistent with a ROFR provision. Unlike an evergreen provision, a ROFR provides protection from pre-granted abandonment, but only if the shipper matches a rate up to the maximum rate applicable for service. El Paso concludes that a ROFR only entitles a shipper to continue long-term transportation service at a just and reasonable rate. El Paso asserts that a party bidding on the capacity is not entitled to Article 11.2(a) rate protection, and must therefore bid up to the maximum recourse rate, which UNS and Texas Gas would be obliged to match. El Paso states that the Commission's treatment of contracts for new services establishes that Article 11.2 does not apply to new contracts.¹⁷

15. El Paso asserts that the fact that Article 11.2 also provides that the rate caps will apply to eligible contracts "until such TSA is terminated by Shipper" does not mean that Article 11.2 applies until a shipper takes some affirmative action to terminate a contract. According to El Paso, the Commission ruled in the March 20 Order that contract expirations nullify the protection of Article 11.2. Specifically, El Paso refers to the Commission's holding under Article 11.2(b), that "a shipper is eligible for the protection of Article 11.2(b) only for as long as it has a contract in effect that was in effect on December 31, 1995. When these contracts expire or are terminated by the shipper, the protections will no longer apply."¹⁸ El Paso argues that the term requiring termination by

¹⁷ Citing March 20 Order, 114 FERC ¶ 61,290 at PP 47-49.

¹⁸ March 20 Order, 114 FERC ¶ 61,290 at P 61.

a shipper was intended to protect the shippers from termination by El Paso, not provide for the continuation of Article 11.2(a) protections when contracts expire by their own terms.

16. El Paso also cites statements made by UNS in its protest in Docket No. RP08-426-000 indicating that the rate provisions are binding “through the remainder of the term” of each TSA, which UNS understood to be expiring in 2011 (before the contract was extended).¹⁹ El Paso notes that UNS and Texas Gas subsequently claimed that El Paso used the 2006 contract reformation process to compel them to enter into new contracts and that they did not therefore terminate those contracts within the meaning of Article 11.2.²⁰ According to El Paso, the Commission rejected the argument that shippers were compelled to execute new contracts in its order in Docket No. RP05-422-000, where the Commission stated that shippers were free to continue taking service under their existing contracts.²¹ El Paso therefore concludes that the shippers chose to convert some of their FT-1 entitlements to hourly services.

17. El Paso further asserts that its representations in the 2006 contract reformation process were intended to provide assurances that the shippers were not relinquishing their Article 11.2 rights during the terms of the specific contracts or their right to advocate issues then being litigated. El Paso claims that no indication of the parties’ intent to extend the Article 11.2 protections beyond the terms of the TSAs appears in the revised TSAs or UNS’ or Texas Gas’ pleadings in the 2006 contract reformation proceedings. According to El Paso, if that were the parties’ intention, it would have appeared in the pleadings at the time the revised TSAs were filed.

¹⁹ El Paso cites UNS’ July 15, 2008 protest in Docket No. RP08-426-000 at 10, which states:

In reviewing this section, the rate escalation protection has two predicates: (i) the TSA must have been effect in its present form or as amended on January 1, 2006; and (ii) the TSA has not been terminated by the shipper. If these two predicates are satisfied, the rate escalation protections for certain shippers are binding through the remainder of the term of each applicable TSA (i.e., until 2011 for UNS).

²⁰ El Paso cites UNS’ July 8, 2010 initial brief in Docket No. RP08-426-000 at 8-9 and Texas Gas’ July 8, 2010 initial brief in Docket No. RP08-426-000 at 38.

²¹ Petition at 22 (citing March 20 Order, 114 FERC ¶ 61,290 at P 52 (“Shippers are free to choose to keep their existing FT-1 contracts and retain the protections of the Article 11.2(a) rate cap.”)).

III. Responsive Pleadings

18. Notice of El Paso's Petition was published in the Federal Register, with comments, protests and interventions due May 3, 2013. Southern California Gas Co. and San Diego Gas & Electric Co. (SoCalGas and SDG&E) filed comments in support of El Paso's position. Texas Gas filed a protest and UNS filed comments contesting El Paso's position, and Arizona Electric Power Coop., Inc. (AEPCO), ConocoPhillips Co. (ConocoPhillips), Freeport McMoRan Corp. (Freeport McMoRan) and Salt River Project Agricultural Improvement and Power District (Salt River) filed comments supporting Texas Gas and UNS. El Paso filed an answer to the parties opposing its request, and Salt River and Texas Gas each filed an answer to El Paso's answer.²² El Paso filed a second answer responding to Texas Gas. Pursuant to Rule 214 (18 C.F.R. § 385.214 (2012)), all timely filed motions to intervene and any unopposed motion to intervene out-of-time filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties. While answers to protests and to answers are not permitted by the Commission's procedural rules, the Commission here has waived that prohibition inasmuch as the additional responsive filings have aided the Commission in reaching a decision.

A. Comments Supporting Petition

19. SoCalGas and SDG&E agree with El Paso that because there is no evergreen or rollover provision in any of the four TSAs, those TSAs will expire by their terms on August 31, 2013. Accordingly, they argue that the capacity should be posted for bidding up to the applicable non-Article 11.2(a) recourse rates and, going forward, the capacity will not be eligible for Article 11.2 rates.

B. Texas Gas Service Protest and UNS Comments

20. UNS claims that it has taken no action to terminate its two current Article 11.2(a) TSAs with El Paso, citing requests to El Paso that the TSAs be extended. UNS argues that the plain language of Article 11.2 indicates that the Article 11.2(a) rate cap applies until a shipper takes action to terminate its TSA or acquiesces in such termination. Texas Gas likewise argues that the language of Article 11.2 does not support El Paso's position,

²² Salt River's and Texas Gas' answers emphasize that El Paso's then-applicable tariff provided for a negotiable option either to terminate on a date certain or roll-over the historic TSAs, and contests the importance of El Paso's filing the guidelines in Docket No. RP06-368-000. Salt River asserts the reality of the process under the guidelines seemed more a "take it or leave it" ROFR approach, rather than a matter of mutual agreement to enter into a new agreement.

claiming that the termination of its TSAs in 2006 and replacement with the revised service agreements was a “unilateral decision” by El Paso.²³ UNS and Texas Gas rely on Article 11.2(d) which states that “Termination by El Paso of the TSA of a Shipper subject to this paragraph 11.2 shall not terminate such Shipper’s rights to the protections afforded by this paragraph 11.2.”

21. Texas Gas disputes the relevance of the Commission’s observation in the March 20 Order that shippers electing to sign up for new flexible services must execute a new contract for those services, noting that the Commission also observed that shippers that wished to keep their existing contracts were free to do so and could retain the Article 11.2 rate cap.²⁴ Texas Gas argues that the Commission resolved the issue in prior orders. In the March 20 Order, the Commission reviewed the modifications ordered to revise the contracts from full requirements to contract demand and found that the amendments would not terminate Article 11.2 rate protections:

The amendment of the contracts to comply with the Commission’s order cannot be considered termination by the shipper of its TSA. Further, nothing in the Commission’s orders required El Paso to replace the [firm requirement] contracts with entirely new contracts or to make any changes to the contracts other than to implement the conversion of [firm requirements] to CD service. If El Paso chose to issue new contracts, then it was El Paso’s choice and cannot be considered termination by the shippers.²⁵

22. Texas Gas also cites the Commission’s statement in the September 5 Order emphasizing that the Article 11.2 rate cap applied until terminated by the shipper.²⁶ Texas Gas reports that it sought to maintain its Article 11.2 service and never sought to terminate its service agreement. Furthermore, Texas Gas notes that its historic Article 11.2 service agreement contained rollover provisions, which were only replaced as a result of El Paso’s termination of those agreements. Texas Gas concludes that the holdings in the March 20 and the September 5 Orders indicate that El Paso’s choice to terminate shippers’ original TSAs and issue the revised TSAs when shippers entered into

²³ Texas Gas Protest at 18, 23.

²⁴ *Id.* at 19 (citing March 20 Order, 114 FERC ¶ 61,290 at P 52).

²⁵ March 20 Order, 114 FERC ¶ 61,290 at P 41; Texas Gas Protest at 20-21.

²⁶ Texas Gas Protest at 20-21 (citing September 5 Order, 124 FERC ¶ 61,227 at PP 17-18, 45).

contracts for new hourly services cannot be considered termination by the shippers. According to Texas Gas, the new service agreements are “more akin to ‘amended’ contracts” than to “new” contracts.²⁷

23. UNS argues that the Commission’s statement that “[w]hen [Article 11.2(a)] contracts expire or are terminated by the shipper, the [Article 11.2(b)] protections will no longer apply” is consistent with its position.²⁸ According to UNS, the Commission was merely acknowledging that there is no difference between a shipper providing notice of termination and a shipper agreeing that the TSA terminates upon expiration of the primary term of the Article 11.2 service agreement. According to UNS, the 1996 Settlement dictates that it is the shipper that decides when the Article 11.2(a) protections end.²⁹

24. UNS argues that since the 1996 Settlement lacks a uniform expiration date, it would be illogical for the settling parties to agree to provide certain shippers greater rights based on their pre-existing contract terms. UNS states:

[b]ecause Article 11.2 provides that the shippers receive rate protections until a shipper terminates its TSA, the expiration date of the primary term of a TSA is not controlling. As such, all eligible shippers could receive rate protections for an equal period of time.³⁰

25. Texas Gas claims that the provision of rollover rights to some customers while failing to provide it similar treatment under the revised TSAs represents unlawful discrimination under the Natural Gas Act.³¹

26. UNS contests El Paso’s reliance on Article 11.2(c), cited above, claiming that the provision is either irrelevant, or merely reflects that the prior service agreements incorporated a primary term and a rollover provision. According to UNS, sole reliance on Article 11.2(c) would require ignoring the statements in Article 11.2(a) concerning termination by the shipper.

²⁷ *Id.* at 22 n.61.

²⁸ September 5 Order, 124 FERC ¶ 61,227 at P 18.

²⁹ UNS Comments at 7.

³⁰ *Id.* at 15.

³¹ Texas Gas Protest at 28.

27. Texas Gas objects to El Paso's Petition as an attempt to abrogate the Article 11.2 contracts. Texas Gas claims that it never sought to terminate its Article 11.2 TSAs. Texas Gas objects to El Paso's claim that the service agreements expire by their terms, arguing that El Paso unilaterally terminated its historic Article 11.2 TSAs in 2006.

28. To support its alleged non-acquiescence to termination of its Article 11.2 TSAs, Texas Gas cites the Commission's rejection of El Paso's position in the 2005 rate case in Docket No. RP05-422-000, where El Paso had argued that changes required by the capacity allocation proceeding justified abrogation of the contracts.³² Texas Gas also objects to El Paso's imposition of its implementation guidelines, which required that "Contractual ROFR rights will be included in any new FT-1 agreement."³³ Texas Gas claims that the implementation guidelines have never been filed with the Commission for stand-alone review.³⁴

29. Texas Gas contests El Paso's reliance on prior Commission statements that contracts for new hourly services or expansion capacity are not entitled to Article 11.2(a) rate protection.³⁵ Texas Gas argues that the nature of its Article 11.2 service has not

³² El Paso's requests to abrogate contracts were rejected by the Commission and upheld by the court. March 20 Order, 114 FERC ¶ 61,290; September 5 Order, 124 FERC ¶ 61,227, *order on reh'g*, 132 FERC ¶ 61,155, *aff'd*, *Freeport*, 669 F.3d 302.

³³ Texas Gas Protest at 11.

³⁴ *But see* El Paso's May 24, 2006 request for waivers of certain penalties in implementing the contract reformation process in Docket No. RP06-368-000 at 3 & n.7, which provided the guidelines for bidding for new services. Texas Gas protested the guidelines on June 8, 2006, raising filed rate issues later resolved by settlement in Docket No. RP05-422-000, *et al. El Paso Natural Gas Co.*, 120 FERC ¶ 61,208, at P 13 (2007) (summarizing settlement as providing customers with significantly lower rates, eliminating pancaked rates and providing rate and service stability during three-year settlement period, while allowing customers to adjust to the new services and terms and conditions of service and avoid the time and expense of litigation). In its answer, Texas Gas maintains that its protest was preserved because the settlement permitted parties to pursue pending litigation positions. El Paso counters that no issues were left unresolved in Docket No. RP06-368-000 after settlement. June 19, 2013 Answer at 2. The then-pending issues were ultimately resolved with *Freeport*, 669 F.3d 302.

³⁵ Texas Gas Protest at 12-13 (citing March 20 Order and September 5 Order which affirmed that shippers are free to keep their existing contracts and retain the Article 11.2 protections and stated "if shippers elect to sign up for the new services, the contracts for these services will not meet the conditions of Article 11.2 protection." September 5 Order, 124 FERC ¶ 61,227 at P 102).

changed since 1996 and does not change under the new TSAs. Consequently, Texas Gas argues that the Commission's prior holdings do not specifically address the situation in the subject Petition.

30. Texas Gas also cites statements in El Paso's transmittal letters accompanying various filings of the revised TSAs in Docket Nos. RP06-660-000 and RP07-40-000 indicating that the shippers rights under Article 11.2 were preserved and that executing the revised TSAs would not affect the parties' positions on the continued validity of Article 11.2. Texas Gas notes that the Commission previously stated that the agreements do not convey a new transportation term or condition or affect the substantive rights of the parties.³⁶

31. Texas Gas objects to El Paso's reliance on the Commission's ROFR policies, claiming that this cannot obviate the Commission's previous holding that El Paso must make a public interest showing required by the *Mobile-Sierra* doctrine in order to be relieved of its obligations under Article 11.2.³⁷

32. According to Texas Gas, "El Paso's decision to terminate TGS' pre-existing Article 11.2 FT-1 TSAs and impose the ROFR provisions do not terminate TGS' Article 11.2 rights under the terms of Article 11.2(d), as interpreted in the March 20 Order."³⁸ Texas Gas argues that the Commission rejected El Paso's position that it cannot be forced to absorb Article 11.2 shortfalls, as discounts, in Opinion No. 517. Texas Gas concludes that El Paso's current position, that it may collect higher rates following the ROFR process as with a discount contract that is replaced through a ROFR, is a collateral attack on Opinion No. 517. Texas Gas states, "El Paso's arguments that it cannot be forced to absorb the discounts unless or until the shipper terminates its TSA is an impermissible collateral attack on Opinion No. 517."³⁹ Texas Gas contests El Paso's claim that El Paso may seek a maximum recourse rate in the ROFR process, arguing that the provision in

³⁶ *Id.* at 15 (citing delegated letter orders in Docket No. RP06-600-000 (Oct. 18, 2006) and Docket No. RP07-40-001 (Nov. 29, 2006)).

³⁷ *Id.* at 25. *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) (*Mobile*); *Federal Power Comm'n v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Sierra*).

³⁸ Texas Gas Protest at 26 (citing March 20 Order, 114 FERC ¶ 61,290 at P 41).

³⁹ *Id.*

Order No. 637 on which El Paso relies was directed at vintage rates, and the Commission found in Opinion No. 517 that Article 11.2 rates were not vintage rates.⁴⁰

33. If the Commission does not reject El Paso's position outright, Texas Gas requests a hearing to consider all relevant facts, including circumstances surrounding the 2006 re-contracting process, whether El Paso's agreeing to rollover rights for some customers but not others is unduly discriminatory,⁴¹ whether El Paso's unilateral termination of the historic Article 11.2 TSAs permit it to evade settlement obligations, whether the 2006 termination of the historic TSAs constitutes termination of a service agreement by a shipper, whether El Paso's assurances that Article 11.2 rights are preserved estop it from arguing that the terms of the revised TSA prejudice Texas Gas' arguments concerning the continued validity of Article 11.2, whether continuation of Texas Gas' new FT-1 TSAs constitutes a new or different service that was not previously offered by El Paso such that a new contract was needed and whether subsequent iterations of Texas Gas' FT-1 service agreements constitute amendments within the meaning of Article 11.2's prefatory language.

C. Comments Supporting UNS and Texas Gas

34. Freeport McMoran Corp. intervened and filed comments objecting to El Paso's characterization of the rates as discounted rates, citing the Commission's ruling in Opinion Order No. 517. ConocoPhillips supports the Freeport-McMoRan comments. In addition, ConocoPhillips claims that the Commission addressed El Paso's obligation to continue to provide rate protection under Article 11.2 after the primary term of a TSA in the September 5 Order.⁴² ConocoPhillips cites the Commission's statement, "[t]hus, under the terms of Article 11.2(a), El Paso agreed to continue the 1996 Settlement rates, as escalated for inflation in accordance with Paragraph 3.2(b), for contracts that were in effect at the time of the 1996 Settlement and that remained in effect on January 1, 2006, unless and until the shipper terminates its TSA."⁴³

⁴⁰ Opinion No. 517, 139 FERC ¶ 61,095 at P 300.

⁴¹ *See also* Salt River at 7 (citing rollover provision in Southwestern agreement).

⁴² 124 FERC ¶ 61,227 at P 17 (quoting Article 11.2 (d): "Termination by El Paso of the TSA of a Shipper subject to this paragraph shall not terminate such Shipper's rights to the protections afforded by this paragraph 11.2").

⁴³ *Id.* P 18.

35. Salt River supports the shippers' arguments. In addition, Salt River claims that the ROFR provision is inconsistent with El Paso's then-effective tariff which provided for termination on a date certain or rollover rights or ROFR provisions upon mutual agreement of the parties.

D. Answers

36. On May 28, 2013, El Paso filed an answer to the comments and protests opposing its requested declaratory order. El Paso distinguished the operation of a rollover provision from a ROFR provision, which like a rollover permits the shipper to retain capacity but unlike a rollover requires the shipper to sign a new contract after the bidding process. El Paso disputes that it is terminating the contracts within the meaning of Article 11.2(d) because the contracts are expiring by their own terms and argues that it did not terminate the contracts by failing to agree to an extension.⁴⁴

37. El Paso also contests the shippers' claims that El Paso terminated their historic FT-1 service in 2006, citing the March 20 Order at P 53 where the Commission noted that shippers were free to retain their historic service. El Paso concludes that the shippers were not required to participate in the contract reformation process. El Paso notes that Texas Gas and UNS bargained for and received substantial contract demand reductions in 2006 in exchange for agreeing to the contract reformation guidelines, including the ROFR provisions. El Paso states that its guidelines for re-contracting were filed with the Commission, and in fact were protested by Texas Gas, but that the proceeding ultimately settled. Thus, El Paso claims that Texas Gas and other parties are precluded by that settlement from contesting the service agreements they executed, after enjoying the benefits of the settlement and service agreements for seven years.

38. El Paso argues that the language of Article 11.2 limits the settlement rate protections to rates charged "during the term" of the TSA (citing Article 11.2(a) and the Article 11.2 caption). El Paso objects to the shippers' interpretations of its statements in cover letters that the filings would not prejudice Article 11.2 rights, explaining that these statements were made in response to customer concerns that by entering into the new contracts they would be seen as waiving or abandoning their Article 11.2 protections, such as claims that Article 11.2 would apply to new contracts for hourly services. Thus, according to El Paso, the statements were made to assure customers they would not be waiving their then-pending litigation positions.

⁴⁴ El Paso argues that the language of Article 11.2 stating that protections continue until terminated by the shipper is merely a reflection of the fact that historic versions of the agreements gave both El Paso and shippers the right to terminate service on one year notice.

39. El Paso disputes Texas Gas and UNS' allegation that El Paso discriminatorily allowed some customers but not others to retain rollover provisions in their new contracts. El Paso explains that Southwest Gas Corp. (Southwest), with whom it agreed to a new rollover provision as opposed to a ROFR provision, is not similarly situated to Texas Gas or UNS because Southwest is a significantly larger customer than Texas Gas and UNS. Furthermore, Southwest approached El Paso about negotiating the rollover provision in 2009 when the value of El Paso's capacity was falling due to the economic downturn and competition from other pipelines. El Paso reports that it agreed to the rollover provision to avoid the potential for a significant capacity turnback by Southwest.⁴⁵ El Paso argues that competitive circumstances and differences in contract volumes justify the differential rate treatment resulting from exercise of Southwest's rollover.

40. Finally, El Paso argues that an evidentiary hearing is not required, stating that the Commission has elsewhere resolved similar issues of settlement interpretation without a hearing.⁴⁶

IV. Discussion

41. The Commission finds that an evidentiary hearing is not required to ascertain the parties' intent under the 1996 settlement and newly executed agreements. The fact is that the shippers did execute the new TSAs; consequently, they cannot be considered contracts of adhesion with respect to the new ROFR clause, as they are contracts between sophisticated business entities and objections to the terms of their execution were resolved by settlement of the parties. Accordingly, as explained in more detail below, the Commission interprets Article 11.2 as only applying to the old TSAs not the current TSAs with ROFR provisions replacing the rollover provisions.⁴⁷ The Commission further finds that consistent with El Paso's tariff provisions governing ROFR rights, following the expiration of these current service agreements, Article 11.2 of the 1996 Settlement will not apply to the service taken by UNS and Texas Gas under any new contracts executed pursuant to the revised TSAs' ROFR provisions. Consequently, the Commission grants El Paso's Petition. El Paso should follow the ROFR provisions in its

⁴⁵ In addition, Southwest agreed to relinquish one of its two Article 11.2(a) contracts.

⁴⁶ El Paso May 28, 2013 Answer at 34 (citing *El Paso Natural Gas Co.*, 104 FERC ¶ 61,045 at P 107; *El Paso Natural Gas Co.*, 114 FERC ¶ 61,305, at P 169 (2006)).

⁴⁷ By agreement of the shippers and El Paso, the revised TSAs provide that the Article 11.2 rate protections apply during the outstanding term of the revised TSAs.

tariff concerning the application of maximum recourse rates to the UNS and Texas Gas service after the expiration of the current service agreements.

42. In 2006, El Paso offered to renegotiate shippers' service agreements to accommodate their taking hourly service. El Paso agreed to permit Article 11.2 shippers to reduce their existing Rate Schedule FT-1 contract entitlements and convert those entitlements to Rate Schedule FTH hourly service. Thus, shippers could retain Article 11.2 contracts with reduced entitlements and contract for hourly services without increasing their overall entitlements. In exchange for the ability to retain the Article 11.2 rates for the term of the reformed contract, El Paso required that the evergreen provision in the pre-existing service agreements be replaced with the ROFR language. A number of Article 11.2 shippers opted to renegotiate their Article 11.2 agreements at this time. The current revised TSAs were filed with the Commission and accepted.⁴⁸ Consequently, when the current service agreements expire, UNS and Texas Gas will have to obtain new service agreements under the ROFR procedures in the El Paso tariff.⁴⁹

43. Article 11.2(a) requires El Paso to charge UNS and Texas Gas settlement rates "applicable to service under such TSA during the remainder of the term thereof . . . unless and until such TSA is terminated by the Shipper." Thus, Article 11.2 applies to rates under "such TSA," which is identified by Article 11.2 as "a TSA that was in effect on December 31, 1995, and that remains in effect, in its present form or as amended, on January 1, 2006, but only for the period that such Shipper has not terminated such TSA." Consequently, Article 11.2 does not apply when an Article 11.2 TSA expires or is terminated by agreement of El Paso and the shipper – the successor TSA is not provided rate protection by Article 11.2.

44. Shippers seek to rely on the language in Article 11.2 – which indicates that the settlement rate protections remain in effect unless terminated by the shipper – to argue that Article 11.2 rate protections should apply beyond the term of their current service agreements. Specifically, Article 11.2(a) states that settlement rates apply to service under a settlement service agreement "unless and until such TSA is terminated by the Shipper." Moreover, the preamble states that Article 11.2 applies to a shipper with a service agreement that was in effect on December 31, 1995 and that remains in effect on January 1, 2006, "but only for the period that such [s]hipper has not terminated such TSA." However, adopting the shippers' position would ignore the defining language in

⁴⁸ *El Paso Natural Gas Co.*, Docket No. RP06-418-000 (July 21, 2006) (delegated letter order) and *El Paso Natural Gas Co.*, Docket No. RP06-600-000 (October 18, 2006) (delegated letter order). Therefore, the "primary" term language in Article 11.2(c) does not apply to Texas Gas' and UNS' agreements.

⁴⁹ See section 4.14(e) of El Paso's tariff, quoted above.

Article 11.2(a) which limits that Article's rate cap only to service under the service agreements that were in effect on December 31, 1995. In addition, as noted by El Paso, the rate protections in Article 11.2 apply "during the remainder of the term" of the applicable old TSAs including any rollovers, but not to any revised agreements entered into by the parties that was not a simple rollover, but a new TSA with different terms governing successor contracts.

45. After the UNS and Texas Gas service agreements expire on August 31, 2013, service will be provided under new service agreements according to the current ROFR provisions. El Paso, UNS and Texas Gas agreed to this process when the ROFR language was adopted and the contracts revised to permit UNS and Texas Gas to convert a portion of their FT-1 entitlements to FTH service to take advantage of flexible hourly services in 2006 without increasing their total entitlements. Thus, we cannot agree with the protesting shippers' claims that El Paso unilaterally terminated the pre-2006 service agreements. Acceptance of the 2006 contract reformation offer was voluntary. The record reflects that El Paso and the shippers bargained to reform the contracts in 2006, retain the Article 11.2 rate protections through the remaining term of the contracts, and terminate the contracts subject to the ROFR rights at the contract expiration date. Thus, we find that UNS and Texas Gas did terminate their old service agreements in the contract reformation process by agreeing to new agreements with ROFR provisions in place of the rollover provisions of their historic TSAs.

46. Shippers' suggestions that the ROFR provision should be ignored, deemed invalid, or replaced with rollover rights are inconsistent with the language of the current service agreements. As such, these arguments represent collateral attacks on the Commission's orders accepting the current service agreements. In particular, Texas Gas cites the Commission's March 20 Order, which states "[i]f El Paso chose to issue new contracts, then it was El Paso's choice and cannot be considered termination by the shippers."⁵⁰ We interpret this language differently. As noted above, the record reflects that El Paso did not unilaterally issue new contracts. Instead, the revised service agreements were developed through negotiation with the shippers, who sought to reform the contracts to permit them to take advantage of hourly services without increasing total entitlements. The existence of the signed service agreements demonstrates that the revised service agreements were the result of bilateral negotiations and were not El Paso's sole choice. Thus, it is not a matter of El Paso's unilateral termination of the historic Article 11.2 TSAs that caused the Article 11.2 protections to expire; rather, termination was effectuated by the shippers' acceptance of the proffered ROFR provisions that are embodied in the revised TSAs between El Paso and the shippers. Notwithstanding some shippers' arguments to the contrary, this is not a matter of El Paso's contravening the

⁵⁰ March 20 Order, 114 FERC ¶ 61,290 at P 41.

1996 Settlement, and no standard of review issue for proposed “changes” to the 1996 Settlement is implicated. However reluctant may have been their acquiescence to El Paso’s offer of new terms, these terms were ultimately accepted and finalized as part of the subsequently filed revised TSAs.

47. Finally, the shippers read too much into statements made by El Paso in its transmittal letters accompanying the filing of the new service agreements which stated that the provisions of the new service agreements would not modify or waive any rights or obligations of the parties under Article 11.2. We find these statements were only intended to indicate that the 1996 Settlement provisions would not be affected through the term of the new service agreements. In addition, Article 11.2 clearly anticipates that the shippers have the right to terminate their service agreements and, with such termination, give up their right to the rate protections of Article 11.2. Consistent with the terms of the revised TSAs, shippers should have understood that upon termination of their service agreements, through the operation of the ROFR provisions, their Article 11.2 rate levels might not be renewed in a subsequent contract. Consequently, we do not find any inconsistency in El Paso’s statements made in filing the revised TSAs that would bar our determination in this proceeding that the settlement rates authorized under Article 11.2 of the 1996 Settlement would not apply to new service taken by the shippers pursuant to El Paso’s right of first refusal procedures in its tariff.

The Commission orders:

El Paso’s Petition is granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.