

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell, and Joseph T. Kelliher.

El Paso Natural Gas Company,  
Complainant

Docket No. RP02-23-000

v.

Phelps Dodge Corporation,  
Respondent

ORDER DENYING COMPLAINT

(Issued February 18, 2004)

1. On October 26, 2001, El Paso Natural Gas Company (El Paso) filed a complaint against Phelps Dodge Corporation (Phelps Dodge) pursuant to Section 5 of the Natural Gas Act (NGA). El Paso contends that Phelps Dodge installed new facilities that enabled it to receive increased volumes of natural gas under its then-effective full requirements (FR) Transportation Service Agreement (TSA) with El Paso.<sup>1</sup> However, El Paso maintains that this action by Phelps Dodge made it necessary for El Paso to expand its Silver City Lateral so that it could continue to meet the requirements of the FR customers receiving gas through the Silver City Lateral. El Paso asks the Commission to require Phelps Dodge to bear the costs of the Silver City Lateral expansion.

2. As discussed below, the Commission denies the complaint. El Paso has failed to provide adequate support for its claim that Phelps Dodge should bear the costs of the expansion of the Silver City Lateral facilities because Phelps Dodge's construction of

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<sup>1</sup> Full requirements customers do not have volumetric limitations specified in their contracts; therefore, El Paso is obligated to transport an FR customer's full requirements each day. The TSA is included as Attachment A to the affidavit filed by El Paso in support of its complaint. However, in a series of orders issued in Docket No. RP00-336, *et al.*, the Commission required that FR contracts be converted to contract demand (CD) contracts effective September 1, 2003. *See, e.g.*, *El Paso Natural Gas Co.*, 105 FERC ¶ 61,130 (2003).

additional facilities made the expansion necessary. This order is in the public interest because it resolves a dispute between the parties in accordance with the provisions of the TSA and prevents the pipeline from improperly shifting costs to the customer.

### **BACKGROUND**

3. El Paso states that the Silver City Lateral, which is located in southwestern New Mexico, extends approximately 46 miles northward from the pipeline's southern mainline system. El Paso explains that, near the end of the lateral, it branches into two lines, one of which extends northeast to the Hurley and Bayard delivery points, and the other of which extends northwest to the Tyrone Mills and Silver City delivery points.<sup>2</sup>

4. El Paso states that one of the FR customers served by the Silver City Lateral is Phelps Dodge, which takes deliveries at the Tyrone Mills delivery point, as well as at the Hurley delivery point for service at the Chino Mines. El Paso further states that the other FR customer served through the lateral is Public Service Company of New Mexico (PNM), a local distribution company (LDC) serving residential and commercial customers behind the Silver City, Tyrone Residential, and Bayard delivery points.

5. According to El Paso, in late 2000, Phelps Dodge sought installation of an additional delivery point near the existing Hurley delivery point to allow high pressure delivery to its new electric generating facilities at the Chino Mines. However, El Paso maintains that capacity limitations on the Silver City Lateral caused it to condition its installation of the delivery point on either: (1) an agreement between Phelps Dodge and PNM addressing allocation of the existing capacity, or (2) a mutually agreeable expansion of the Silver City Lateral. While it acknowledges that it discussed cost-sharing proposals with Phelps Dodge, El Paso emphasizes that they were unable to reach agreement concerning responsibility for the costs of the expansion. Despite that, continues El Paso, Phelps Dodge unilaterally installed a fuel gas compressor at the Chino Mines, which enabled Phelps Dodge to take additional quantities of natural gas through the existing Hurley delivery point. El Paso asserts that, because the addition of Phelps Dodge's new electric generation facility would cause the load to exceed the existing peak

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<sup>2</sup> El Paso's Form 567 (Annual Flow Diagrams), which was filed with the Commission on June 2, 2003, indicates that the Silver City Lateral consists of 4, 5, 6, and 8-inch diameter pipe extending approximately 46 miles northward from the interconnect with Line Nos. 1100 and 1103 on El Paso's southern mainline system. From the point where the Silver City Lateral branches into two lines, a dual 6-inch pipeline extends northeast to the Hurley and Bayard delivery points, and 5 and 8-inch lines extend northwest to the Tyrone Mills and Silver City delivery points.

day capacity of the Silver City Lateral and jeopardize the pipeline's ability to serve the anticipated coincident peak of both FR customers, El Paso expanded the Silver City Lateral in late 2001. El Paso states that it acted without a commitment from Phelps Dodge to bear any of the \$3.6 million costs of the expansion<sup>3</sup> so that it could avoid possible pro rata allocations that would adversely impact service to PNM's residential and other human-needs customers.

6. El Paso explains that, Phelps Dodge again sought connection of the new delivery point to serve the Chino mines when it learned of the expansion, although Phelps Dodge continued to refuse to bear any of the costs of the Silver City Lateral expansion. However, explains El Paso, it agreed to connect the new Chino Mines delivery point following completion of the lateral expansion, subject to Phelps Dodge's agreement that doing so would not constitute a waiver of any claim against Phelps Dodge or an admission that El Paso should bear the costs of the lateral expansion.

7. According to El Paso, the maximum design deliverability of the Silver City Lateral prior to the proposed expansion was 27 MMcf/d. El Paso states that delivery pressure from the mainline into the lateral was approximately 700-750 p.s.i.g. and that pressure-reducing regulators were necessary at two locations on the lateral upstream of the Hurley delivery point. Additionally, El Paso maintains that historic peak day deliveries to PNM had been as high as 7.4 MMcf/d at the Silver City delivery point and 1.5 MMcf/d at the Bayard delivery point. El Paso emphasizes that, absent the additional 8 MMcf/d necessary to serve Phelps Dodge's new facilities, the capacity of the lateral would have been sufficient to serve both FR customers.<sup>4</sup>

8. El Paso states that it has engaged in private negotiations with Phelps Dodge, but has not sought to use the Commission's dispute resolution services with respect to the disputed costs. However, should the Commission determine that its alternative dispute resolution process should be employed in this proceeding, El Paso states that it is willing to participate with Phelps Dodge in that process. On the other hand, Phelps Dodge expresses doubt that further discussions, even before a mediator or settlement judge, would be productive.

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<sup>3</sup> El Paso completed the expansion and placed the facilities in service on November 29, 2001, at a cost of \$3,159,260.00. See Docket No. CP02-312-000, El Paso's filing at 26 (April 30, 2002).

<sup>4</sup> Complaint of El Paso Natural Gas Company, Sworn Affidavit of John Connor at 1-2 (October 26, 2001).

**NOTICE, INTERVENTIONS, PROTESTS, AND ANSWER**

9. Public notice of El Paso's complaint was issued on October 30, 2001, with interventions, protests, and Phelps Dodge's answer due November 15, 2001. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, timely, unopposed motions to intervene in this proceeding are granted.<sup>5</sup> Additionally, Arizona Public Service Company and Pinnacle West Energy Corporation filed a joint motion to intervene one day out of time. The Commission will grant their late-filed motion to intervene, which will not cause any delay in the proceeding or undue burdens for any other party.

10. In its answer, Phelps Dodge contends that El Paso has failed to meet the burden of proof required by NGA Section 5 to show that the load associated with Phelps Dodge's new facilities made it necessary for El Paso to expand the Silver City Lateral. Phelps Dodge challenges El Paso's factual assertions regarding the capacity of the Silver City Lateral, past peak load on the lateral, and past service levels to Phelps Dodge. Phelps Dodge also maintains that the requirements of the Chino cogeneration unit are not an additional level of service, but rather are within El Paso's current contractual obligations to Phelps Dodge. Phelps Dodge submits that El Paso should seek recovery of the costs of looping the Silver City Lateral in its next rate case after its current settlement expires at the end of 2005. Finally, Phelps Dodge asserts that El Paso should have sought a declaratory order from the Commission rather than filing a complaint.

11. ONEOK Energy Marketing and Trading Company, L.P., (ONEOK) filed comments emphasizing that other proceedings pending before the Commission also involve the issue of FR service.<sup>6</sup> ONEOK asks the Commission to ensure that no action is taken in this docket that would prejudice ONEOK's claims in the other proceedings. Pacific Gas and Electric Company (PG&E) protested El Paso's complaint, arguing that the pipeline has failed to show good cause why the Commission should address in a complaint proceeding what is essentially a billing dispute with one of its customers rather than a violation of statutory standards or regulatory requirements, as contemplated by NGA Section 5 and Rule 206 of the Commission's Rules and Regulations.<sup>7</sup>

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<sup>5</sup> 18 C.F.R. § 385.214 (2003).

<sup>6</sup> ONEOK cites Docket Nos. RP00-139 and RP01-484. These proceedings are consolidated with the proceedings in Docket No. RP00-336-000, et al., in which the Commission, inter alia, required El Paso's FR contracts to be converted to CD service.

<sup>7</sup> PG&E cites 18 C.F.R. § 385.206 (2003); Public Service Co. of New Hampshire v. New Hampshire Electric Cooperative, Inc., 55 FERC ¶ 61,028, at 61,078 (1991). (Commission does not sit as a "collection agency.")

12. On November 14, 2003, the Commission's Staff issued data requests to El Paso seeking additional information to aid in analysis of the issues in this case. On December 12, 2003, and December 19, 2003, El Paso submitted its responses. On January 9, 2004, Phelps Dodge filed an answer to El Paso's data responses. The Commission will accept the answer filed by Phelps Dodge, which also has provided additional information relevant to the issues before the Commission in this proceeding.

## **DISCUSSION**

13. As discussed below, the Commission will deny the complaint because El Paso has failed to provide adequate support for its contentions. The Commission finds that the additional service to Phelps Dodge is consistent with the requirements of the TSA.

### **El Paso's Position**

14. El Paso first contends that the Commission has jurisdiction to resolve this proceeding because it requires application of prior Commission decisions interpreting the Phelps Dodge TSA, interpretation of prior settlements between El Paso and its customers, and an analysis of El Paso's tariff provisions.<sup>8</sup> El Paso also emphasizes the need for consistency in Commission decisions relating to the pipeline's FR service.

15. El Paso asserts that the TSA establishes the shipper's obligation to reimburse El Paso for the costs of the lateral expansion. El Paso explains that the TSA requires it to transport a quantity of natural gas sufficient to supply "the requirements of [Phelps Dodge] in serving mining, smelting and metallurgical operations situated in each community or area shown on ... [an exhibit to the TSA]."<sup>9</sup> El Paso acknowledges that, because Phelps Dodge is an FR customer, the TSA does not specify an actual quantity for the Hurley, Tyrone Residential, or Bayard Delivery Points. However, El Paso argues that its obligation to deliver Phelps Dodge's full requirements is "limited by operational and capacity limitations existing from time to time for the facilities at each Delivery Point" and that the pipeline is not required to construct additional facilities necessary to make deliveries of natural gas in quantities exceeding such operational and capacity limitations, except as required by the stipulation and agreement filed in Docket No. RP88-44-000,

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<sup>8</sup> El Paso cites Phelps Dodge Corp. v. El Paso Natural Gas Co., 84 FERC ¶ 61,043, order on reh'g, 87 FERC ¶ 61,297, order on settlement and reh'g, 89 FERC ¶ 61,265 (1999).

<sup>9</sup> El Paso cites section 1.1 of the TSA.

which limits El Paso's obligation to construct only such facilities as are "economically justifiable." El Paso further states that the TSA also provides that, if the shipper constructs new facilities and desires to obtain gas supplies for those facilities, El Paso will seek authorization to construct additional delivery points, subject to certain limitations contained in section 8.3 of the TSA, which determines cost responsibility.<sup>10</sup>

16. El Paso claims additional support in the previous Commission orders addressing the TSA. According to El Paso, the earlier proceeding involved a proposal by Phelps Dodge to add a new plant to its contract, which would have required installation of new facilities. El Paso asserts that the Commission construed the TSA as requiring Phelps Dodge to pay for the facilities to serve the new plant. Moreover, states El Paso, the Commission also found that the reimbursement obligation was consistent with sections 13.3 and 13.7 of the General Terms and Conditions (GT&C) of El Paso's tariff. While Phelps Dodge argued that new or expanded laterals necessary to serve new loads and new delivery points under an FR contract were existing contractual commitments, El Paso states that the Commission rejected that argument.<sup>11</sup>

### **Phelps Dodge's Answer**

17. Phelps Dodge responds that El Paso has failed to show that Phelps Dodge must bear the cost of the new facilities at issue here. Phelps Dodge challenges El Paso's reliance on provisions in its tariff and the TSA, asserting that the only pertinent contractual language is found in section 13.7 of El Paso's tariff. According to Phelps Dodge, the tariff requires El Paso to pay for the upgrades to the Silver City Lateral to meet its contractual commitments. Phelps Dodge cites the Commission's order on rehearing in the previous complaint proceeding, in which the Commission construed the term "contractual commitments" as obligating the pipeline to bear all lateral line expenditures necessary for it to meet its historical levels of service to FR customers such as Phelps Dodge.<sup>12</sup>

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<sup>10</sup> Although the parties refer to section 8.3 of the TSA, the copy of the TSA attached to the complaint shows that the language they cite is found in section 8.2.

<sup>11</sup> Phelps Dodge Corp. v. El Paso Natural Gas Co., 87 FERC ¶ 61,297, at 62,186 (1999).

<sup>12</sup> Phelps Dodge cites Phelps Dodge Corp. v. El Paso Natural Gas Co., 87 FERC ¶ 61,297, at 62,186 (1999). Phelps Dodge also points out that it had sought rehearing of the Commission's order, but that the request was withdrawn as part of the settlement resolving the case. Phelps Dodge Corp. v. El Paso Natural Gas Co., 89 FERC ¶ 61,265 (1999).

18. Phelps Dodge maintains that the increased service for the Chino cogeneration unit does not constitute an “additional” level of service. Rather, argues Phelps Dodge, the level of service required to meet its needs is less than the level of service previously provided at Chino and Tyrone during the periods 1970-1971 and 1981, the only periods for which Phelps Dodge has data.<sup>13</sup>

19. Phelps Dodge further contends that service levels in 1981 for Phelps Dodge and PNM combined reached 29,919 Mcf/d, well in excess of the lower 27 MMcf/d deliverability capacity alleged by El Paso at the time of its complaint.<sup>14</sup> Phelps Dodge suggests that the manner in which El Paso now chooses to operate its system may have reduced the deliverability of the line. According to Phelps Dodge, El Paso is now operating the Silver City Lateral at a substantially lower pressure (700-790 p.s.i.g.) than the maximum allowable operating pressure (MAOP), which Phelps Dodge asserts is 850 p.s.i.g. Phelps Dodge cites the Affidavit of Steven W. Hinton, attached to its answer, arguing that it shows that, if the engineering analyses undertaken by El Paso are adjusted to MAOP, the peak deliverability of the line is increased to approximately 32 MMcf/d.

20. Moreover, claims Phelps Dodge, most of the engineering analyses relied on by El Paso assumed a California mainline flow in the 600 p.s.i.g. range. Phelps Dodge cites the Hinton affidavit, which suggests that El Paso is using an artificially low supply pressure to reach a predetermined result. Phelps Dodge also speculates that El Paso may have been attempting to transfer to a customer the costs of deferred capital improvements that El Paso neglected to make in the past several decades. In support, Phelps Dodge points out that El Paso last added any looping to the Silver City lateral in 1967, almost 35 years ago.<sup>15</sup>

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<sup>13</sup> Phelps Dodge cites the Affidavit of Michael D. McElrath attached to its answer.

<sup>14</sup> Phelps Dodge states that, even within El Paso, opinions as to the peak deliverability of this lateral line seem to vary. Although El Paso asserts in the complaint that the “maximum deliverability capacity” is 27 MMcf/d, Phelps Dodge points to identical letters sent by El Paso’s president to Phelps Dodge and PNM, and attached to the Complaint as Attachments F and G, in which the capacity of the line is stated to be 25 MMcf/d.

<sup>15</sup> Phelps Dodge cites the Affidavit of Steven W. Hinton (attached to its answer) at 6-7.

21. Phelps Dodge also suggests other possible explanations for the discrepancy between the claimed capacity of the line and its historical usage, but emphasizes that none of these reasons renders Phelps Dodge responsible for the costs of the lateral expansion. For example, Phelps Dodge argues that El Paso may have failed to identify the actual maximum deliverability on the Silver City Lateral, in which case the data that El Paso has offered to support its request are fatally flawed. Another possibility, continues Phelps Dodge, is that the maximum deliverability on the line may have decreased over time due to El Paso's failure to maintain the facility or because of Department of Transportation pressure restrictions. Alternatively, adds Phelps Dodge, El Paso may have chosen to operate the California mainline at lower pressures than it did in the past, but if it were to operate the California mainline at or near its certificated pressure levels, there would continue to be sufficient pressure and throughput to accommodate the Phelps Dodge requirements. Finally, concludes Phelps Dodge, usage by other shippers may have increased.

22. According to Phelps Dodge, the other tariff and TSA provisions on which El Paso relies, by their terms are irrelevant to the claims advanced in El Paso's complaint.<sup>16</sup> For example, states Phelps Dodge, the TSA obligates shippers to bear the cost of facilities constructed at delivery points to increase the total level of transportation service provided and the costs of new receipt points that they use exclusively. However, argues Phelps Dodge, the addition of the 8 MMcf/d required to serve the new cogeneration unit at Chino, together with El Paso's claimed peak usage of 15 MMcf/d, does not increase Phelps Dodge's peak usage over the usage level it received in 1970-1971 and 1981, as documented by El Paso's own data.<sup>17</sup> Indeed, adds Phelps Dodge, it can manage its full requirements at Chino Mines, including the load associated with its cogeneration unit, via the existing Hurley delivery point without the looping that El Paso planned to add. Phelps Dodge points out that it was doing so at the time of its answer to the complaint.

23. Phelps Dodge argues that section 8.3 [sic] states that "all other facilities shall be included in El Paso's cost of service ... unless such facilities are solely necessary to

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<sup>16</sup> Phelps Dodge states that section 13.3 of the tariff does not apply because it is conditioned on an agreement in writing that additional facilities are needed. However, Phelps Dodge emphasizes that no such writing exists in this case. According to Phelps Dodge, Exhibit B of the TSA addresses the scope of El Paso's obligation to build additional facilities to provide new service, an issue not before the Commission in this case because the service to Phelps Dodge is not new service, and El Paso already made a voluntary decision to loop the Silver City Lateral.

<sup>17</sup> Phelps Dodge cites McElrath Affidavit at 3-4.

receive from or deliver gas to Shipper.” According to Phelps Dodge, the enhancements to the Silver City Lateral are not solely necessary to serve Phelps Dodge because PNM also relies on the enhancements to the Silver City Lateral.<sup>18</sup> Phelps Dodge again cites the Hinton affidavit, which states that there is no physical impediment on the lateral that would prevent El Paso from supplying the lateral with gas at a pressure near its California mainline 837 p.s.i.g. MAOP.<sup>19</sup>

24. Phelps Dodge next asserts that prior actions by El Paso support a finding that the lateral line looping costs should be borne by the pipeline. Phelps Dodge cites two earlier instances in which El Paso reinforced portions of the Silver City Lateral,<sup>20</sup> and contends that in both cases, El Paso did not attempt to recover the associated costs from any shipper taking service on the line, but instead sought recovery of the costs by including them in its embedded cost of service in its next rate case. According to Phelps Dodge, El Paso should seek recovery in a rate proceeding of the \$3.6 million at issue in this case.

25. Moreover, continues Phelps Dodge, the offer that it made during business negotiations does not obligate it to pay the cost of looping the Silver City Lateral. Phelps Dodge emphasizes that it withdrew the offer,<sup>21</sup> and it argues that El Paso may not use a withdrawn offer as a basis for its claim here.<sup>22</sup> Additionally, continues Phelps Dodge, circumstances have changed materially since Phelps Dodge made and withdrew the offer. Phelps Dodge asserts that it identified to El Paso viable alternatives to address the situation, including offering to pay El Paso to allow Phelps Dodge to be connected upstream of the pressure-regulated Hurley delivery point. However, states Phelps Dodge, El Paso refused that option.

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<sup>18</sup> Phelps Dodge cites Connor Affidavit ¶¶ 4-5.

<sup>19</sup> Phelps Dodge cites Hinton Affidavit at 5.

<sup>20</sup> Phelps Dodge cites El Paso Natural Gas Co., 38 FPC 65 (1967); El Paso Natural Gas Co., 38 FPC 471 (1967).

<sup>21</sup> Phelps Dodge cites McElrath Affidavit at 10-11.

<sup>22</sup> Indeed, states Phelps Dodge, had such an offer been made in the context of this proceeding, El Paso would be precluded from making any mention of it. See Rule 602, 18 C.F.R. § 385.602 (2003).

### **Commission Analysis**

26. The Commission denies El Paso's complaint because El Paso has failed to provide adequate support for its claim that the unilateral actions of Phelps Dodge in adding facilities made it necessary for El Paso to incur approximately \$3.6 million in costs to expand the Silver City Lateral.

27. First, the Commission rejects Phelps Dodge's argument that the Commission does not have jurisdiction of this matter or that El Paso should have sought a declaratory order. In the previous complaint by Phelps Dodge against El Paso, which sought to require El Paso to add delivery points to the TSA, the Commission stated as follows:

[T]he Commission concludes that it is appropriate for it to review this dispute. The Commission possesses special expertise on matters relevant to this dispute, including the nature of full requirements service, the operation of delivery point facilities, ... as well as an understanding of how the capacity of delivery points and connecting pipelines can be measured.<sup>[23]</sup>

28. In that proceeding, the Commission addressed the TSA at issue here, as well as the provisions of El Paso's tariff cited by the parties in the instant proceeding. Having previously found that it had jurisdiction over a similar dispute between these parties involving the provisions of the tariff and the TSA that El Paso claims control the decision here, it would be illogical for the Commission to refuse jurisdiction in the instant case.

29. As the Commission found in the previous complaint proceeding, "We start with the tariff since its provisions will govern unless modified in some respect by the [TSA]. The parties cite sections 13.3 and 13.7 as the provisions addressing cost responsibility for new facilities."<sup>24</sup> Those sections state as follows:

13.3 Unless otherwise provided in the executed Transportation Service Agreement, in the event El Paso and Shipper agree in writing that additional facilities are necessary in order to implement the service provided under the executed Transportation Service Agreement, Shipper agrees to reimburse El Paso for all expenditures associated

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<sup>23</sup> Phelps Dodge Corp. v. El Paso Natural Gas Co., 84 FERC ¶ 61,043, at 61,183 (1999) (footnote omitted).

<sup>24</sup> Phelps Dodge Corp. v. El Paso Natural Gas Co., 87 FERC ¶ 61,297, at 62,186 (1999).

with the construction and installation of such facilities which shall be owned, operated and maintained by El Paso.<sup>25</sup>

- 13.7 El Paso shall construct, replace, or recondition laterals (at its own expense) to comply with contractual commitments, or to conform to Department of Transportation or other safety related requirements. El Paso shall also construct laterals, as requested by a Shipper, when that Shipper has agreed to reimburse El Paso for the construction and related costs. For purposes of this section 13.7, “laterals” shall mean any pipeline extension (other than mainline extension) built from an existing pipeline facility to deliver gas to one or more customers, including new delivery points and enlargements or replacements of existing laterals.<sup>26</sup>

In the instant case, the parties have cited no other provisions of El Paso’s tariff that are applicable to the issues before the Commission. As a result, the Commission affirms that these provisions, unless modified by the TSA, establish the responsibilities of the parties with respect to the costs of the Silver City Lateral expansion.

30. In the previous complaint proceeding, the Commission addressed at length the meaning of these two tariff sections. The Commission found that section 13.3 is broad because it includes “all expenditures” and does not qualify the types of facilities required. However, the Commission recognized that section 13.7 generally is consistent with section 13.3, but addresses laterals that the shipper has requested the pipeline to construct. The Commission further determined that the term “laterals” includes, inter alia, new delivery points and enlargements or replacements of existing laterals, although the Commission pointed out that the first sentence of section 13.7 qualifies the shipper’s responsibility to reimburse the pipeline so that El Paso is responsible for constructing, replacing, or reconditioning laterals at its own expense to comply with “contractual commitments, or to conform to ... safety related requirements.”<sup>27</sup> The Commission rejected interpretations of “contractual commitments” advanced by both parties, reasoning as follows:

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<sup>25</sup> FERC Gas Tariff, Second Revised Volume No. 1A, Original Sheet No. 248.

<sup>26</sup> FERC Gas Tariff, Second Revised Volume No. 1A, First Revised Sheet No. 249.

<sup>27</sup> Phelps Dodge Corp. v. El Paso Natural Gas Co., 87 FERC ¶ 61,297, at 62,186 (1999).

We think the only logical way to construe “contractual commitments” is with reference to service a pipeline is currently providing to a shipper under a service agreement. This section articulates a pipeline’s ongoing obligation to maintain its facilities in a manner that will allow it to meet its current service commitments at any point in time and to operate its pipeline in compliance with all applicable safety regulations. If this sentence applied to requests for additional levels of service, service that exceeds either the contract demand (in contracts with stated contract demand limits) or the historical levels of service in a full requirements contract (upon which billing determinants are based), then both section 13.3 and the remainder of section 13.7 would be rendered a nullity, because all lateral construction requested by a shipper would be to comply with contractual commitments, *i.e.*, executed transportation agreements. In other words since all of the construction referenced in sections 13.3 and 13.7 would occur pursuant to the pipeline’s service obligation under an executed transportation service agreement, the first sentence of 13.7 must refer to the limited situation in which a current service obligation requires it to construct facilities to maintain the capacity of the system to meet that obligation.<sup>28</sup>

The Commission finds no reason to revise its interpretation of these sections of El Paso’s tariff for purposes of the instant case, which relates to a comparable request by Phelps Dodge.

31. In the previous order, the Commission also addressed the relevant provisions of the TSA, prefacing its analysis as follows: “[I]f Phelps Dodge’s service agreement does not qualify or modify these tariff provisions, Phelps Dodge would be responsible for the costs of all the facilities to provide service to its El Paso refinery. The service agreement does, however, qualify the tariff provisions.”<sup>29</sup> Because the same TSA is before the Commission once again in the instant case, the Commission again has reviewed the applicable provisions.

32. Section 8.2 of the TSA, a copy of which is attached to El Paso’s complaint, provides as follows:

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<sup>28</sup> Id.

<sup>29</sup> Id.

- 8.2 In the event additional facilities are constructed in order to increase the level of transportation service provided hereunder, the cost of such facilities shall be borne according to the following principles:
- (a) the cost of facilities constructed at delivery points in order to increase the total quantities of gas delivered to Shipper shall be borne by Shipper;
  - (b) the cost of new receipt point facilities utilized exclusively for the receipt of Shipper's gas shall be borne by Shipper; and
  - (c) the cost of all other facilities shall be included in El Paso's cost of service with the ratemaking treatment thereof to be determined by the Commission unless such facilities are solely necessary to receive from or deliver gas to Shipper, in which event (a) and (b) above shall apply.

33. In the previous complaint proceeding, the issue before the Commission was whether El Paso or Phelps Dodge was required to bear the costs of additional looping of a delivery lateral. In that case, the Commission found that there was sufficient evidence to persuade the Commission that the addition was solely necessary to serve Phelps Dodge.<sup>30</sup>

34. In its answer to El Paso's complaint in the instant proceeding, Phelps Dodge contended that El Paso has failed to meet the burden of proof required by NGA Section 5 to show that the load associated with Phelps Dodge's new facilities made it necessary for El Paso to expand the Silver City Lateral. Phelps Dodge challenged El Paso's factual assertions regarding the capacity of the Silver City Lateral, past peak load on the lateral, and past service levels to Phelps Dodge. In sum, Phelps Dodge argued that the requirements of the Chino cogeneration unit are not an additional level of service, but rather are within El Paso's current contractual obligations to Phelps Dodge.

35. El Paso's complaint did not provide sufficient evidence to resolve these contentions. The Staff's data requests afforded El Paso an additional opportunity to meet its burden of proof in this complaint proceeding. However, the Commission has reviewed the record, including El Paso's responses to the data requests, but finds that El Paso has not demonstrated that the additional gas required by Phelps Dodge to serve its new facilities is beyond the obligations of the FR TSA between the parties.

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<sup>30</sup> Phelps Dodge Corp. v. El Paso Natural Gas Co., 87 FERC ¶ 61,297, at 62,187 (1999).

36. El Paso does not refute Phelps Dodge's assertion that its current usage, including the increased deliveries at the Chino Mines, is less than its historical peak usage. The Commission concludes that Phelps Dodge's current usage is within the meaning of contractual commitments, as defined in section 13.7 of El Paso's tariff, and is not new service. While Phelps Dodge has added facilities that increase its usage on the lateral, the resulting level of usage is within its historical usage and thus within El Paso's contractual commitment.

37. El Paso argues that a lower pressure of 600 p.s.i.g. is required to assure deliveries under a range of operating conditions. If El Paso determined that, because of the lower operating pressure, the capacity of the lateral is no longer sufficient to meet its contractual commitment to Phelps Dodge and PNM, El Paso is required to construct those facilities at its own expense to meet its contractual obligations. Accordingly, the complaint is denied.

The Commission orders:

As discussed in the body of this order, the Commission denies the complaint and finds that El Paso must bear the costs of the Silver City Lateral expansion.

By the Commission. Commissioner Kelly not participating.

( S E A L )

Linda Mitry,  
Acting Secretary.