

148 FERC ¶ 61,043
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

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

Docket No. RP14-728-000

City of Las Cruces, New Mexico; City of Mesa,
Arizona; ConocoPhillips Company; Freeport-McMoRan
Corporation; Navajo Tribal Utility Authority;
New Mexico Gas Company, Inc. and Southwest Gas
Corporation

Docket No. RP14-773-000

v.

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

(Not Consolidated)

ORDER ON COMPLAINT AND PETITION FOR DECLARATORY ORDER

(Issued July 17, 2014)

1. This order responds to both the April 10, 2014 petition for declaratory order (Petition) filed by El Paso Natural Gas Company, L.L.C. (El Paso),¹ and a related Complaint filed April 25, 2014 by shippers contesting El Paso's efforts to terminate certain transportation service agreements (TSAs)² and substitute the rates in the TSAs

¹ Filed under Rule 207 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.207 (2013).

² El Paso seeks to terminate TSAs with the following entities: the cities of Las Cruces, New Mexico (Las Cruces) and Mesa, Arizona (Mesa); ConocoPhillips Company (ConocoPhillips); Freeport-McMoRan Corporation (Freeport-McMoRan); Navajo Tribal Utility Authority; New Mexico Gas Company, Inc. (New Mexico Gas) and Southwest Gas Corporation (Southwest Gas) (together referred to as Shippers).

established in a 1996 Settlement with a rate established after operation of the right of first refusal (ROFR) provisions of El Paso's tariff. The Commission finds that El Paso's proposal to terminate the TSAs and apply the ROFR provisions in the General Terms and Conditions (GT&C) of its tariff³ is inconsistent with Article 11.2 of the stipulation and agreement filed in Docket No. RP95-363-000, *et al.*, (1996 Settlement), which establishes rate levels that apply until the underlying TSA is terminated by the shipper.⁴ Therefore, the Commission finds that El Paso's attempts to terminate the TSAs and either establish a new rate through its ROFR procedures or substitute a new service agreement providing for future application of the ROFR procedures are inconsistent with the 1996 Settlement. As El Paso has not justified terminating the TSAs, the Commission directs El Paso to fulfill its obligation under the 1996 Settlement to charge only the rates established by that settlement to shippers whose service under the TSAs were unilaterally terminated by El Paso. The Commission also directs El Paso to withdraw any notice of termination to a shipper who declined to enter into the ROFR process as proposed and structured by El Paso.

I. Background

2. El Paso currently serves the Shippers at rates established in Article 11.2 of the 1996 Settlement, which has been interpreted in a series of previous orders.⁵ 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 (emphasis added):

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

³ The ROFR provisions are found in GT&C section 4.14(f) of El Paso's tariff.

⁴ *El Paso Natural Gas Co.*, 79 FERC ¶ 61,028, *reh'g denied*, 80 FERC ¶ 61,084 (1997) (*1996 Settlement Order* and *1996 Settlement Rehearing Order*). El Paso filed an updated version of the 1996 Settlement to include conforming changes agreed to with various shippers on June 10, 1997 in Docket No. RP95-363-008.

⁵ 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).

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 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).

(c) 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.

(d) **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**.

3. After the 1996 Settlement was executed, El Paso was unable to meet all firm customer service requests as demands on the system grew.⁶ 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, 2001.⁷ The Commission addressed capacity shortfall and related issues in the Capacity Allocation Proceeding in a May 31, 2002 order and several subsequent orders.⁸ 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 full requirements (FR) 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.⁹

4. In 2013, the Commission reviewed an earlier El Paso petition requesting a declaratory order stating that El Paso was correct to apply its ROFR procedures to shippers that replaced the historic TSAs featuring rollover rights with TSAs incorporating the tariff ROFR provisions.¹⁰ The Commission found that El Paso was not obligated to continue the Article 11.2 rate protections under the new TSAs, which were amended *by mutual agreement with the shippers*.

5. On March 26, 2014, Shippers each received notice from El Paso to terminate their TSAs in accordance with the terms of the contracts. Several Shippers responded to El Paso's letters contesting the notice of termination, contending that El Paso does not have the right to terminate the contracts and citing protections under (1) Article 11.2 of

⁶ 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*).

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

⁸ *El Paso Natural Gas Co.*, Order on Capacity Allocation and Complaints, 99 FERC ¶ 61,244 (2002), *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).

⁹ *September 5 Order*, 124 FERC ¶ 61,227 at P 10.

¹⁰ *El Paso Natural Gas Co.*, 144 FERC ¶ 61,004 (2013) (*2013 Declaratory Order*).

the 1996 Settlement, (2) section 37.2(a) of the GT&C of El Paso's tariff,¹¹ and (3) Commission precedent. El Paso responded that its termination right is both embodied in the contracts and in Article 11.2(d) of the 1996 Settlement. Further, El Paso argued that GT&C section 37 does not specify that the pipeline cannot terminate the agreement. In its correspondence, El Paso indicated that if the shippers exercised their ROFR pursuant to GT&C section 4.14 of El Paso's tariff, the new agreement would be eligible for an Article 11.2(a) rate.

II. Petition

6. El Paso states that GT&C section 4.14(b) of its tariff requires it to post rates, terms and conditions applicable to capacity becoming available under expiring contracts that are subject to a ROFR. According to El Paso, a prior Commission order held that former Article 11.2(a) customers would be subject to maximum recourse rate and ROFR provisions of El Paso's tariff following the expiration of their current service agreements.¹² El Paso requests clarification as to what rate an existing Article 11.2(a) shipper has to match under the ROFR procedures to retain capacity, given the multitude of cases addressing the Commission's policy on allocative efficiency.¹³

¹¹ GT&C section 37.2 provides as follows:

Pursuant to the Commission's [March 20 Order], this Section 37 is applicable to firm Rate Schedule FT-1 and FT-2 transportation service provided under applicable TSAs ("Section 37 TSAs") to the contracted Shippers that are parties to the [1996 Settlement].

And, in section 37.2(a):

When Section 37 TSAs expire or are terminated by the shipper, the rights listed in this Section 37 shall no longer apply to such TSAs.

¹² El Paso Petition at 10 (citing *2013 Declaratory Order*, 144 FERC ¶ 61,004 (reviewing rates for service to two customers that had agreed to amend their TSAs to incorporate ROFR provisions)).

¹³ Citing *Texican v. Southern Natural Gas Co.*, 129 FERC ¶ 61,270 (2009); *Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services*, Order No. 637, FERC Stats. & Regs. ¶ 31,091 at 31,280, 31,288; *reh'g denied*, Order No. 637-B, 92 FERC ¶ 61,062 (2000),

(continued...)

7. El Paso claims that the protections of Article 11.2 of the 1996 Settlement do not override the posting and bidding requirements of its tariff, absent reformation of the TSAs to remove bilateral evergreen provisions. El Paso states that taking service under contracts with the evergreen provisions evidences that the parties contemplated that either party could terminate the TSA and thereby trigger the ROFR posting and bidding requirements in the tariff.¹⁴

8. According to El Paso, “Nowhere in the 1996 Settlement are Article 11.2(a) shippers specifically relieved from the obligation to match competitive bids at non-[Article]-11.2 maximum recourse rates.”¹⁵ El Paso hypothesizes that to find that it is obligated to accept an Article 11.2 rate over a higher ROFR bid would be finding that the 1996 Settlement takes precedence over the ROFR provisions and the Commission’s policies regarding the evaluation of discounted rates in a competitive bidding process.¹⁶

9. El Paso indicates its willingness to honor the rights set forth in the 1996 Settlement by making the capacity under the terminated TSAs available for bid under the ROFR procedures, and, if no third party bids above the settlement rate, providing service to the current shipper at settlement rates.¹⁷ In support of its interpretation, El Paso states that the 1996 Settlement was adopted after the relevant tariff provisions, but did not

aff’d in part and remanded in part sub nom. Interstate Natural Gas Ass’n of America v. FERC, 285 F.3d 18 (D.C. Cir. 2002), *order on remand*, 101 FERC ¶ 61,127, at P 20 (2002), *order on reh’g*, 106 FERC ¶ 61,088, at P 17 (2004), *aff’d sub nom. American Gas Ass’n v. FERC*, 428 F.3d 255 (D.C. Cir. 2005).

¹⁴ El Paso Petition at 11.

¹⁵ *Id.* at 12.

¹⁶ *Id.* at 13-14. El Paso cited by way of analogy *ProGas USA Inc. v. Iroquois*, 116 FERC ¶ 61,033 (2006) (*ProGas*), which stated that a shipper may be required to match a bid higher than its current maximum rate in “certain very limited circumstances,” such as where a pipeline is fully subscribed, charges incremental vintage rates, and a shipper must match a bid above the existing shipper’s current maximum vintage rate. According to El Paso, the situation is similar to Article 11.2, because the settlement rates are lower than the maximum recourse rates.

¹⁷ *Id.* at 15.

expressly modify the tariff. Therefore, the provisions of the tariff and Article 11.2 should be construed “harmoniously.”¹⁸

10. El Paso responds to the argument that the settlement protections include the rate cap in Article 11.2(a) as frustrating the Commission’s policies on allocative efficiency. El Paso continues, stating “it would require a myopic view of the 1996 Settlement which disregards the entirety of the regulatory framework that was in place in 1995-1996, and continues in place today.”¹⁹ El Paso cites the “whole agreement” rule for contract interpretation as “a preference that contracts be interpreted in a manner which gives reasonable meaning to all its parts and avoids conflict or surplusage of its provisions.”²⁰ El Paso also asks the Commission to analyze the protections of Article 11.2(d) in the context of the Commission’s broader regulatory framework, which promotes competition and competitive bidding.

11. El Paso requests a declaratory order stating that the rate to be posted in a ROFR open season is the maximum recourse rate and that Shippers must match competing bids up to the maximum recourse rate, but would be permitted to retain the capacity at settlement rates if there are no competing bids.

III. Complaint

12. Shippers request that the Commission issue an order rejecting El Paso’s attempt to terminate their Article 11.2(a) TSAs. First, Shippers argue that the unambiguous language of Article 11.2(a) of the 1996 Settlement provides that the TSAs can only be terminated by the shipper. Second, Shippers state that the Commission has ruled on numerous occasions that Article 11.2(a) TSAs can only be terminated by the shipper or when the TSAs terminate by their own terms.²¹ Third, Shippers contend the Commission has already found that section 37.2(a) of the GT&C of El Paso’s tariff provides that Article 11.2(a) TSAs can only be terminated by the shippers (or expire on their own terms).²² Fourth, Shippers note that El Paso acknowledged that the purpose of

¹⁸ *Id.* at 14-15.

¹⁹ *Id.* at 15.

²⁰ *Id.* (citing cases).

²¹ Citing *March 20 Order*, 114 FERC ¶ 61,290 at P 61; *September 5 Order*, 124 FERC ¶ 61,227 at PP 17-18, 45; *2013 Declaratory Order*, 144 FERC ¶ 61,004.

²² Citing *2005 Rate Case Compliance Order*, 115 FERC ¶ 61,395 at PP 23-25.

Article 11.2(d) was to take contract termination rights away from El Paso in order to protect Article 11.2 TSAs with rollover provisions.²³

13. Shippers argue that El Paso's "offer" to substitute the Article 11.2(a) TSAs with contracts with "regulatory ROFR rights" is an illegal effort to eliminate Article 11.2. Further, they argue that El Paso's petition for declaratory order is a retraction of its April 2014 offers to replace the terminated TSAs with "new" TSAs, which would continue Article 11.2(a) rate protections.²⁴ Shippers cite GT&C section 37 of El Paso's tariff, which incorporates the Article 11.2 settlement protections, and argue that, if there are provisions in a tariff that conflict with a service agreement, the tariff controls.²⁵

14. Shippers request the Commission to direct El Paso to "cease its never-ending, frivolous and harassing litigation tactic of challenging each Commission ruling that affirms and reaffirms [El Paso's] Article 11.2 obligation."²⁶ Shippers state that such a ruling is necessary to "stymie [El Paso's] repeated collateral attacks on previous rulings"²⁷ which "waste the Commission's and the parties' resources by forcing relitigation of the same, already decided issues." Therefore, Shippers request that

²³ Complaint at 18 (citing El Paso's May 28, 2013 Answer in the *2013 Declaratory Order* proceeding, Docket No. RP13-787-000 at 13-14).

²⁴ *Id.* at 7.

²⁵ Citing *Tennessee Gas Pipeline Co.*, 65 FERC ¶ 61,224, at 62,126 (1993):

We clarify that, in general, the GT&C controls the service agreement. However, parties to a service agreement may negotiate contract terms that go beyond, but do not contradict, those terms contained in the GT&C. We affirm that all service agreements, which incorporate the GT&C by reference, are subject to modifications based on any future revisions in the GT&C. However, if parties specifically negotiate an exception to the general rule, then that exception would apply regardless of future modifications.

²⁶ Complaint at 4.

²⁷ *Id.*

El Paso's "never-ending efforts to evade its Article 11.2 obligations should be soundly rejected once and for all."²⁸

IV. Responsive Pleadings

15. Notice of El Paso's Petition was published in the Federal Register, with comments, protests and interventions due May 12, 2014. ConocoPhillips, Southwest Gas, Freeport-McMoRan, El Paso Municipal Customer Group (Municipals)²⁹ and New Mexico Gas filed motions to intervene in the declaratory order proceeding. Shippers filed a joint protest and asked the Commission to hold the declaratory order proceeding in abeyance pending resolution of the Complaint. Southern California Gas Company and San Diego Gas & Electric Company (SoCalGas/San Diego) filed a motion to intervene and comments. El Paso filed an answer to the protests and comments on May 22, 2014 (May 22 Answer).

16. Notice of the Complaint was published in the Federal Register, with comments, protests and interventions due May 15, 2014. El Paso filed an Answer to the Complaint (May 15 Answer). New Mexico Gas; Municipals; Texas Gas Service Company, a Division of ONE Gas, Inc.; Apache Nitrogen Products, Inc. and SoCalGas/San Diego filed motions to intervene in the Complaint proceeding.

17. SoCalGas/San Diego filed comments in both the Complaint and the declaratory order proceeding noting that an issue has been raised on rehearing of Opinion No. 517 concerning the continuing effect of language omitted from the final version of the 1996 Settlement filed June 10, 1997 in Docket No. RP95-363-008.³⁰ In the declaratory order proceeding SoCalGas also notes that the issue decided last year in the Docket No. RP13-787-000 declaratory order proceeding would have been moot if the Commission were to grant rehearing on the issue in that proceeding.

²⁸ *Id.* at 29.

²⁹ Consisting of the Cities of: Mesa, Safford, Benson and Willcox, Arizona; the Cities of Las Cruces, Socorro and Deming, New Mexico; the Navajo Tribal Utility Authority; Graham County Utilities, Inc.; and Duncan Rural Service Corp.

³⁰ Opinion No. 517, 139 FERC ¶ 61,095 at P 255 (rejecting proposal to revisit Commission's prior determinations that *Mobile-Sierra* standard of review applies to changes in rates under the 1996 Settlement based on an exhibit that was excluded by the presiding judge consisting of an amendment to the 1996 Settlement that did not appear in the final, filed version).

18. 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. 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. Shippers Protest, Docket No. RP14-728-000

19. Shippers argue that El Paso has no right to terminate their TSAs. Shippers question El Paso's characterization of its actions as continuing the protections of Article 11.2, because application of the ROFR procedures could change the rate for service. Shippers state that El Paso's proposal to require a shipper to pay a rate higher than that set forth in the 1996 Settlement to retain capacity is inconsistent with Article 11.2(a), which prohibits El Paso from charging a rate higher than the settlement rate. Shippers characterize El Paso's actions as an attempt to avoid the contractual obligations of the 1996 Settlement. Shippers argue that El Paso has failed to demonstrate that modification of its obligations is in the public interest to justify changing the terms of the 1996 Settlement.

20. Shippers object to any reliance on the *2013 Declaratory Order* and distinguish their TSAs as not expiring on their own terms. Shippers rebut El Paso's policy positions stating that efficiency cannot trump contractual rights and that the Commission's policies include equally important concerns such as the obligation to honor settlements and to protect captive shippers from pipeline monopoly power. Shippers indicate that Article 11.2 shippers do not need to rely upon the tariff ROFR provisions to retain their contracted pipeline capacity because Article 11.2 and GT&C section 37 prohibit El Paso from terminating an Article 11.2 shipper's rate protections and related contract capacity rights in the first place.³¹ According to Shippers, the specific terms of Article 11.2 and GT&C section 37 show the intent of the parties to the 1996 Settlement agreement and override El Paso's generalized claim that such shippers must undergo the ROFR process to maintain their capacity but at a rate that would likely be higher than the settlement rate.³²

³¹ Protest at 18 (citing *March 20 Order*, 114 FERC ¶ 61,290 at PP 41, 58; *September 5 Order*, 124 FERC ¶ 61,227 at PP 18, 45, 118; *El Paso Natural Gas Co.*, 115 FERC ¶ 61,395, at P 25 (2006) (*2005 Rate Case Compliance Order*); *2013 Declaratory Order*, 144 FERC ¶ 61,004 at P 43).

³² *Id.* (citing *Arkansas Elec. Coop. Corp. v. Entergy Arkansas, Inc.*, 117 FERC ¶ 61,099, at P 52 (2006) (rejecting interpretation of Power Purchase Agreement that

(continued...)

21. Shippers characterize El Paso's position as disregarding section 37 of its tariff and instead creating a conflict by citing the inapplicable open-season ROFR provisions. Shippers dispute El Paso's suggestion that they should have sought to revise their TSAs to reflect the protections of the 1996 Settlement, stating that such an effort was unnecessary. According to Shippers, the bilateral termination provision in their historic TSAs was modified by virtue of Article 11.2(a) of the 1996 Settlement and GT&C section 37 of the tariff.

22. Shippers cite El Paso's explanation, filed in the *2013 Declaratory Order* proceeding, that the express purpose of subsection Article 11.2(d) was to take away El Paso's bilateral termination rights, leaving only those of the shipper.³³

23. Shippers contest El Paso's reliance on *ProGas*, 116 FERC ¶ 61,033 as unsupported. Shippers state that *ProGas* sets forth the requirements for making a shipper bid over its current maximum rates. To do so the pipeline: (1) must have vintages of capacity; (2) be fully contracted; (3) a competing shipper must bid a rate for the capacity that is above the existing shipper's current maximum rate; and (4) the pipeline must have an approved mechanism in place for reallocating costs between the historic and incremental rates so all rates remain within the pipeline's cost of service.³⁴ According to Shippers, El Paso cannot meet the criteria established in *ProGas* because: (1) El Paso has no vintaged capacity; the Commission has rejected the concept of vintaged capacity under the 1996 Settlement, and "Article 11.2 rates are not vintage rates;" (2) El Paso

conflicted with the express language of the billing mechanism and stating that "[i]n the interpretation of a contract, specific and exact terms have a greater weight than general language."), Restatement of the Law of Contracts, Second Edition, § 203, Standards of Preference in Interpretation (1981) and *Southwestern Elec. Coop., Inc. v. FERC*, 347 F.3d 975 at 982-983 (D.C. Cir. 2003) ("Where specific contractual provisions are irreconcilably in conflict with more general ones, the specific provisions control"), *reh'g denied, Arkansas Elec. Coop. Corp. v. Entergy Arkansas, Inc.*, 119 FERC ¶ 61,314 (2007), *petition for review denied sub nom., Entergy Servs., Inc. v. FERC*, 568 F.3d 978 (D.C. Cir. 2009)).

³³ Protest at 22 (citing Complaint at 18 and El Paso's May 28, 2013 Answer in Docket No. RP13-787-000).

³⁴ *Id.* at 23 (citing *ProGas*, 116 FERC ¶ 61,033 at P 17). *See also Regulation of Short-term Natural Gas Transportation Services, and Regulation of Interstate Natural Gas Transportation Services*, Order No. 637-A, FERC Stats. & Regs. ¶ 31,589, at 31,636 (2000) (clarifying that a reallocation mechanism must be adopted to prevent over-recovery of the pipeline's revenue requirement).

merely alleges that “the pipeline is nearing full subscription;” (3) El Paso assumes that there are bidders at the maximum rate for its capacity at the same time it grants huge discounts; and (4) El Paso has no incremental rates.³⁵

24. Shippers object to El Paso’s claims that Article 11.2 protections are somehow retained even if that settlement capacity is subjected to the competitive bidding processes under the ROFR. Shippers characterize such claims as defying logic and common sense, since bids exceeding the protected Article 11.2 rate are likely to result in either the loss of the capacity or the Article 11.2 shipper paying a higher rate than that specified in the 1996 Settlement. Shippers ask that the Commission defer acting on the Petition until after it has addressed the claims in the Complaint, or deny the Petition as unsupported because El Paso has not shown that it is in the public interest to make the changes to the 1996 Settlement that would be required to permit application of the ROFR procedures.

B. El Paso’s May 15 Answer to the Complaint, Docket No. RP14-773-000

25. In its May 15 Answer, El Paso argues that it has the legal right to terminate the TSAs, citing the termination provisions in the agreements. El Paso therefore disputes the Shippers’ position that Article 11.2 prevents contract termination or reflects an intent to keep the contracts in place for as long as the shippers desired to keep them.³⁶ El Paso clarifies that, in the *2013 Declaratory Order* proceeding, it only acknowledged that Article 11.2 protections can be terminated only by the shippers.³⁷ El Paso states that there is a distinction between its right to terminate the TSAs and the effect of such termination and also states that the tariff and Article 11.2(d) govern the effect of termination.

26. El Paso suggests that termination of the Shippers’ Article 11.2 rights is not imminent, citing its Petition acknowledging such rights.³⁸ El Paso clarifies that its negotiating position with the shippers who received notices of cancellation is that the shipper would be eligible for the Article 11.2(a) rate if no competing shippers bid in the

³⁵ *Id.* (citing *El Paso Natural Gas Co.*, Opinion No. 528, 145 FERC ¶ 61,040, at P 24 (2013) and El Paso Petition at 14).

³⁶ El Paso May 15 Answer at 6 (responding to Complaint at 10-11).

³⁷ *Id.* at 7 (citing May 28, 2013 Answer in Docket No. RP13-787-000 at 13-14).

³⁸ *Id.* at 10 (citing Petition at 14, which discusses the possibility that Article 11.2 rates may survive if no higher bids are submitted under the ROFR procedures).

open season and disputes the Shippers' characterization of its position that it would "honor the Article 11.2(a) rate" under a new TSA until it expired.

27. El Paso claims that it would be unlawful to fail to offer new TSAs in accordance with its Commission-approved ROFR process upon termination. El Paso opines that it should not be denied the rights available to it under its tariff, and acknowledges that it is possible that the ROFR process will result in termination of Shippers' Article 11.2 rights. El Paso claims that Article 11.2 was never meant to run in perpetuity and states that contracts running in perpetuity are disfavored.³⁹

28. El Paso distinguishes the Commission's earlier holdings on the perpetual nature of the Article 11.2 contracts as being vastly different than those addressed in Opinion No. 517. El Paso states that in this proceeding it is not asking that Article 11.2 be abrogated, but for the Commission to find "that TSAs subject to Article 11.2 should not be artificially extended in direct contravention of their express termination provisions."⁴⁰ El Paso claims that to do so would not reflect the parties' intentions in 1996. El Paso claims that if the parties to the 1996 Settlement had not intended for El Paso to have the right to terminate the TSAs, there would be no need for Article 11.2(d).

29. El Paso states that the Commission has not yet decided whether El Paso has a right to terminate the TSAs or what rate would be required thereafter. El Paso concludes that the principles of *res judicata* and *stare decisis* do not apply. El Paso states that it is not seeking to upset or overturn the foundational orders cited by Shippers, but states that "it is important to appreciate" that the orders are "narrowly focused on the effect of Article 11.2" following termination of the TSAs.⁴¹

³⁹ El Paso May 15 Answer at 13 (citing *Baum Associates v. Society Brand Hat Co.*, 477 F.2d 255, 258 (8th Cir. 1973) (noting general rule against enforcing obligations in perpetuity); *Independent Oil and Gas Assoc. of West Virginia*, 13 FERC ¶ 63,052 (1980) ("Suffice it to say that while the law may not favor contract terms of unlimited duration, the commission does not frown upon contracts of some lesser indefinite duration"). *But see*, Opinion No. 517, 139 FERC ¶ 61,095 (rejecting predictions that Article 11.2 will have a negative impact on the El Paso system in perpetuity as justifying abrogation of Article 11.2(a)).

⁴⁰ El Paso May 15 Answer at 14.

⁴¹ *Id.* at 15. El Paso cites the Complaint at 13, which in turn cites the Commission's holdings in the *March 20 Order*, 114 FERC ¶ 61,290, and the *September 5 Order*, 124 FERC ¶ 61,227 at P 17, that Article 11.2 would still apply even if El Paso chose to issue new contracts to implement the changes directed in the Capacity

(continued...)

30. In the face of the suggestion that El Paso is seeking to shroud its motivations, engage in improper litigation tactics or act inconsistently with Commission precedent, El Paso claims that it is only seeking to limit the applicability of Article 11.2 to the extent permitted by the TSAs, the 1996 Settlement, and the Commission's prior orders. El Paso states that it is seeking guidance on the effect on a shipper's rights of termination of the contract by El Paso. El Paso summarizes the rate impacts of the 1996 Settlement over the years. El Paso indicates that it seeks to rely on the Commission's holding in the *2013 Declaratory Order* proceeding to the effect that a TSA expiring by its own terms is no longer subject to the 1996 Settlement.⁴²

31. El Paso opines that the Commission "should not allow shippers to manipulate the regulatory process by precluding El Paso from terminating contracts with clear, unequivocal and reciprocal termination provisions."⁴³ El Paso cites again the Commission's allocative efficiency policies and touts its "demonstrated record" of collaborating with its customers.⁴⁴

32. El Paso urges the Commission to dismiss the "ancillary attack" on its April 10 Petition, claiming that it had a clear right to terminate the TSAs and asserting that the Shippers "have a clear right to continue their service in accordance with the ROFR provisions of [El Paso's] tariff."⁴⁵ El Paso claims that "these issues are not in legitimate controversy." In an aside, El Paso notes that ConocoPhillips did not exercise its ROFR rights. El Paso concludes that ConocoPhillips is no longer eligible for transportation service pursuant to the ROFR rights that would have been available pursuant to TSA 97YG.⁴⁶

Allocation Proceeding. "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."

⁴² El Paso May 15 Answer at 15-16.

⁴³ *Id.* at 16.

⁴⁴ *Id.* at 16-17 (citing contract negotiations with Arizona Public Service Company, Docket No. RP13-786-000, Salt River Project Agricultural Improvement and Power District, Docket No. RP14-206-000, and UNS Gas, Inc., Docket No. RP13-1231-000).

⁴⁵ *Id.* at 17.

⁴⁶ *Id.* at 17 n.30.

33. In light of its opinion that the general ROFR provisions limit the specific protections of Article 11.2, El Paso asks the Commission “to focus its attention” on the critical issue of how to evaluate competing bids in a ROFR open season where the shipper is entitled to continued Article 11.2 rate protection and other potential bidders are not, and provide it the guidance it needs to understand the availability and cost of the scarce, valuable remaining capacity on the El Paso system.⁴⁷

C. El Paso’s May 22 Answer to the Protests, Docket No. RP14-728-000

34. In its May 22 Answer, El Paso takes pains to argue that it is not improperly generating controversy by attempting to apply its ROFR procedures to nullify the rate protections and termination provisions established in Article 11.2. El Paso argues it is the Shippers who are improperly trying to generate controversy in attempting to rebut El Paso’s claim that the ROFR provisions could be used to change the rates provided for in the 1996 Settlement. El Paso cites the Shippers’ assertion in the protests that the bargained-for settlement terms, and the tariff provisions that reflect those terms, trump the pre-existing tariff ROFR provisions. According to El Paso, “it is not challenging the application of Article 11.2(d) or any other aspect of the 1996 Settlement. Rather, it is seeking the Commission’s guidance on the full extent of Protestors’ Article 11.2 protections relative to the ROFR process in EPNG’s tariff.”

D. Shippers’ May 30, 2014 Answer to El Paso’s May 15 Answer, Docket No. RP14-773-000

35. Shippers submitted an answer to El Paso’s May 15 Answer on May 30, 2014. Shippers argue that El Paso failed to refute the allegations made in the Complaint. Therefore, Shippers take the position that El Paso has conceded the issues raised therein. Shippers highlight their position that language in the 1996 Settlement was added to prevent El Paso from unilaterally terminating the TSAs and thereby terminating the settlement protections. Shippers disagree with El Paso’s position that there is no ambiguity in the termination provisions, because El Paso fails to address the impact of the Article 11.2(d) language preserving the shippers’ rights to the protections afforded by Article 11.2 on the TSA termination provisions.

36. Shippers counter El Paso’s reliance on a public policy against contracts in perpetuity, citing the fact that Article 11.2 lacks a sunset provision, unlike other provisions of the 1996 Settlement. Shippers declare that El Paso should not be relieved

⁴⁷ *Id.* at 17-18.

of what it now views in hindsight as an improvident bargain.⁴⁸ Shippers object to El Paso's treatment of ConocoPhillips, the first shipper to receive a cancellation notice. Shippers cite El Paso's assertion that ConocoPhillips is no longer eligible for transportation service pursuant to the ROFR provisions because it did not exercise its ROFR rights as construed by El Paso.

V. Discussion

37. The Commission declines to grant the clarifications requested in El Paso's Petition, which seeks a determination as to what rate will apply under El Paso's ROFR procedures for capacity made available upon El Paso's termination of the shippers' Article 11.2 TSAs. Those TSAs, the terms for continued service, and the rates to be applied for such service are governed by Article 11.2 of the 1996 Settlement. To permit El Paso to instead apply its ROFR procedures to establish rates and terms for continued service is inconsistent with the 1996 Settlement, which states that shippers have a right to receive service at settlement rates until each shipper terminates its TSA.

38. The Commission grants the Complaint and finds that El Paso's proposal to apply its ROFR bidding procedures is unlawful, because it is inconsistent with the terms of Article 11.2 of the 1996 Settlement.⁴⁹ Article 11.2 provides that termination by El Paso of a shipper's TSA does not terminate the shipper's right to the protections under Article 11.2, including the right to settlement rates and the right to receive those rates until the shipper terminates its TSA. Consequently, it is not necessary to apply the ROFR procedures for the shippers to maintain service, nor to establish the rate to be charged because the 1996 Settlement already provides the applicable terms. To apply the ROFR procedures to extinguish the shippers' right to continued service at settlement rates until they terminate their contracts is inconsistent with the 1996 Settlement and therefore unlawful and not just and reasonable.

⁴⁸ Shippers May 30 Answer at 13. Shippers state (at 19) that El Paso should be precluded from bringing this argument based on the Commission's prior holding that (citing the Commission's finding that abrogating Article 11.2 not in the public interest, Opinion No. 517 at PP 232-33).

⁴⁹ The Commission finds no procedural error in the Shippers' Complaint. El Paso takes pains in its Petition to assume that it has the right to terminate the shippers' TSAs and that such termination may result in curtailment of Article 11.2 protections. The Commission's disposition of the Complaint makes clear that El Paso's assumptions in this regard were unfounded and Complainants correctly framed the scope of this inquiry to address the factual and legal issues underlying El Paso's actions.

39. El Paso's Petition appears to hinge on its assertion that "Section 4.14(b) of [El Paso's] Tariff requires [El Paso] to post the terms and conditions, including the rate, applicable to capacity becoming available under expiring contracts subject to a ROFR."⁵⁰ However, El Paso fails to establish, or even argue, that the shippers are subject to a ROFR. Section 4.14(b) states that a ROFR is "available" for qualifying shippers. However, Article 11.2 shippers, such as the Shippers, need not rely on the ROFR process for possible continuation of Article 11.2 rate protection, since Article 11.2 itself already states that termination of a TSA by El Paso does not extinguish the protections of Article 11.2.

40. Under the Article 11.2 protections, eligible shippers are entitled to service at settlement rates and subject to the settlement provisions, namely the right to receive service at settlement rates until the shipper decides to terminate its TSA. Indeed, the Commission has earlier addressed this very issue in the *March 20 Order* in Docket No. RP05-422-000, where it stated:

Article 11(d) of the [1996] Settlement further provides that termination of the TSA by El Paso shall not terminate the shipper's rights under Article 11. In this case, the modification of the contract [from full requirements (FR) to contract demand (CD) service] was not initiated by the shipper, but was ordered by the Commission under section 5 of the NGA. 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 FR contracts with entirely new contracts or to make any changes to the contracts other than to implement the conversion of FR 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.⁵¹

41. After years of litigating the issue and contesting the Commission's position that the protections of Article 11.2 continue to apply, El Paso can hardly claim to be unfamiliar with this controlling precedent. Nevertheless, El Paso fails to acknowledge the Commission's prior holding that termination by El Paso of a shipper's TSA does not

⁵⁰ El Paso Petition at 10.

⁵¹ *March 20 Order*, 114 FERC ¶ 61,290 at P 41; *September 5 Order*, 124 FERC ¶ 61,227 at P 45, *aff'd*, *Freeport*, 669 F.3d 302.

terminate the shipper's rights under Article 11.2 of the 1996 Settlement.⁵² In its May 15 Answer, El Paso acknowledges the portion of the Complaint relying on the *March 20 Order*, but provides only a cursory, conclusory argument that *stare decisis* should not apply. El Paso states:

It is important to appreciate, however, that those orders are narrowly focused on the effect of Article 11.2 following the lawful termination of the Subject TSAs pursuant to their terms.⁵³

42. However, since the Commission's holdings in those orders, which made clear that the effect of Article 11.2 following the lawful termination of a TSA is that Article 11.2 would continue to apply to eligible shippers unless the termination was sought by the shipper, it can hardly be suggested that the holdings are not relevant to El Paso's efforts to terminate the TSAs and thereby limit or terminate the protections of the 1996 Settlement that are embodied in Article 11.2.

43. If the shipper does not terminate its TSA, it is entitled to receive service at the settlement rate until it chooses to terminate its TSA. It is not necessary for the shipper to participate in the ROFR procedures or to match a bid to establish that it continues to be eligible for service at the settlement rates, because it is already entitled to such service and rates under the terms of the 1996 Settlement. El Paso's proposal to substitute the ROFR provisions to retain a shipper's entitlement to service for the requirement that a shipper receive service at Article 11.2(a) rates until it terminates its TSA is inconsistent with Article 11.2 of the 1996 Settlement. In the alternative, the only way to read the ROFR provisions in harmony with the 1996 Settlement would be to find that under the ROFR procedures, the Article 11.2 rates would determine the maximum price for capacity for settlement shippers. Under the ROFR procedures, the capacity from the terminated TSAs is to be awarded to the shipper bidding the maximum price under the tariff for the capacity. Article 11.2 of the 1996 Settlement provides that an eligible shipper is entitled to continued service at the settlement rate, and therefore, Article 11.2 would establish the maximum price for the capacity. In effect, such shippers would meet their "maximum winning bid" requirement under the ROFR by simply bidding their Article 11.2 rate.

⁵² Under the Commission's regulations, pleadings such as El Paso's Petition must include the relevant facts, Rule 203, 18 C.F.R. § 385.203(a)(6), and answers must specifically rebut the allegations made in complaints. Rule 213, 18 C.F.R. § 385.213.

⁵³ El Paso May 15 Answer at 15.

44. As such, El Paso's proposal to apply the ROFR provisions for an eligible shipper to retain its entitlement to service and potentially establish a different rate that will apply is unlawful, because it is inconsistent with the 1996 Settlement. In the Complaint, Shippers state that El Paso is suggesting that they execute new service agreements incorporating a provision that states that El Paso's ROFR provisions will apply upon expiration of the new TSA. The protections granted to shippers under Article 11.2 are continuing, and those protections include the discretion to choose when to abandon such rate protections by terminating their TSAs. El Paso's attempt to substitute alternate termination procedures is inconsistent with the 1996 Settlement and not just and reasonable and unlawful.

45. The gist of El Paso's position appears to be that the act of singling out these eligible shippers and terminating their TSAs is somehow analogous to the facts in the *2013 Declaratory Order* proceeding, where the Commission found that Article 11.2 protections would not continue to apply to shippers whose TSAs were expiring according to terms agreed to by the shipper.⁵⁴ However, we reject El Paso's reliance on the *2013 Declaratory Order* holding in this proceeding. In the *2013 Declaratory Order*, the Commission reviewed TSAs that expired, by their own terms, on set expiration dates, subject to a ROFR. These TSAs were executed by agreement with the shippers in exchange for the opportunity to revise their existing contracts and obtain new, flexible services. Those facts are not present here, where the Shippers have not sought nor agreed to contract reformation. The TSAs at issue here are not expiring by their own terms on an expiration date established in the agreement, and the Shippers did not and do not agree to application of the ROFR procedures to establish the terms for new service thereafter. El Paso cannot equate its attempt to terminate the TSAs with the provisions that the

⁵⁴ *2013 Declaratory Order*, 144 FERC ¶ 61,004 at P 43:

Article 11.2(a) requires El Paso to charge . . . 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.

shippers agreed to for a date-certain expiration date, which were central to the *2013 Declaratory Order*.

46. Article 11.2 of the 1996 Settlement itself provides that the two situations must be treated differently. That is, Article 11.2 indicates that its protections apply to service under “such TSAs,” indicating that the settlement protections run with the service agreements as revised. Furthermore, the protections continue until the TSA is “terminated by the shipper.” As to the facts in this case, Article 11.2(d) specifically states that the protections of Article 11.2 will continue to apply if El Paso terminates the TSAs. Thus, Article 11.2 provides for different results when a shipper agrees that its TSA shall terminate, as was the case in the *2013 Declaratory Order* proceeding, and when El Paso unilaterally terminates a TSA. El Paso cannot unilaterally strip away the protections of the 1996 Settlement by forcing a ROFR-based reformation of the contracts while offering no consideration that would make such a contract reformation consistent with a shipper’s bargained-for relinquishment of its Article 11.2 protections.

47. El Paso has singled out these shippers and terminated their TSAs in order to curtail their rights and protections under the 1996 Settlement, by replacing the right to continue Article 11.2(a) rates until they terminate the TSAs with rates established through the ROFR procedures and new TSAs that will explicitly provide for application of the ROFR procedures at the end of a set term. Not only is this not just and reasonable as inconsistent with the 1996 Settlement, these actions are unduly discriminatory as to these shippers. El Paso cannot insist on new contract terms, such as adoption of the ROFR procedures at the end of the term of a new TSA, that are inconsistent with the 1996 Settlement, absent agreement of the parties to change their bargain. Unlike the facts addressed in the Capacity Allocation Proceeding or the *2013 Declaratory Order* proceeding, El Paso has no operational justification for its actions and it is not offering any valuable consideration to induce the shippers to change the bargain. Instead, the terminations appear to be one more effort by El Paso to be rid of the obligations of the 1996 Settlement. As such we reject the terminations. As El Paso has provided no other justification for terminating and amending the existing TSAs, the Commission grants the Complaint and in the exercise of its remedial authority, finds El Paso’s notices of termination are unlawful. The Commission directs El Paso to honor the 1996 Settlement rates and the existing TSAs in full force and effect. The Commission directs El Paso to withdraw its notices of termination and, on compliance, to notify the Commission when such withdrawal has been accomplished and the status quo has been restored.

48. Regarding El Paso’s remaining positions, El Paso’s allocative efficiency arguments are policy arguments that do not override the specific terms of the 1996 Settlement, as the Commission has already determined that the terms of the

1996 Settlement are fair and reasonable and in the public interest.⁵⁵ As for El Paso's suggestion that the tariff takes precedence over the specific terms of the settlement, we find such an interpretation is unsupported and would inappropriately nullify the negotiated terms of the settlement.⁵⁶

49. El Paso's last argument is that the provisions of Article 11.2 must be read "harmoniously" with the tariff's ROFR provisions. El Paso proposes to apply the ROFR provisions and "honor" the 1996 Settlement rates if no other bidders come forward. However, such an interpretation does not square with the promises of Article 11.2 that its protections apply "unless and until" terminated by a shipper and of Article 11.2(d) 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." The Commission finds that a harmonious reading of Article 11.2 and the ROFR provisions is that Article 11.2 shippers have already negotiated the right to their service entitlement and the applicable rates. Thus, these shippers do not need to avail themselves of the ROFR process in El Paso's tariff. El Paso's proposal does not present a harmonious reading that interprets the ROFR provisions in light of Article 11.2 because El Paso fails to give effect to the terms of Article 11.2 which state that an eligible shipper is entitled to settlement rates until the shipper terminates its TSA.⁵⁷

50. Furthermore, El Paso fails to recognize that the Article 11.2 rates are also protected in the tariff itself. GT&C section 37 states:

Pursuant to the Commission's [March 20 Order], this
Section 37 is applicable to firm Rate Schedule FT-1 and FT-2
transportation service provided under applicable TSAs

⁵⁵ *El Paso Natural Gas Co.*, 79 FERC ¶ 61,028, *reh'g denied*, 80 FERC ¶ 61,084 (1997) (approving Article 11.2 of the 1996 Settlement resolving El Paso's rate case in Docket No. RP95-363-000).

⁵⁶ GT&C section 4.14(a) states that the "right of first refusal" is available for expiring discounted contracts. However, the Commission does not interpret that statement to abrogate the continuing contract rights provided for in the 1996 Settlement and reflected in GT&C section 37.

⁵⁷ *March 20 Order*, 114 FERC ¶ 61,290 at P 41; *September 5 Order*, 124 FERC ¶ 61,227 at P 45, *aff'd*, *Freeport*, 669 F.3d 302 at 306 ("Article 11.2 capped the rates El Paso could charge after the Settlement term ended to any shipper with a [contract] that was in effect on December 31, 1995, and that remain[ed] in effect, in its present form or as amended, on January 1, 2006" (internal quotation marks omitted)).

(“Section 37 TSAs”) to the contracted Shippers that are parties to the [1996 Settlement].

And, in section 37.2(a):

When Section 37 TSAs expire or are terminated by the shipper, the rights listed in this Section 37 shall no longer apply to such TSAs.

The tariff therefore already incorporates and reflects the Article 11.2 protections, in contradiction to El Paso’s suggestion that the settlement rights must be curtailed in favor of the terms in the tariff. Moreover, under the interpretive maxim “*expressio unius, exclusio alterius*,” the absence of any mention of termination by El Paso in section 37.2(a) makes this tariff provision a bar to any diminishment of an Article 11.2 shipper’s rights by El Paso’s unilateral termination of the shipper’s TSA.

51. The Commission finds that a harmonious interpretation must give meaning to the provisions of Article 11.2 granting the shippers a right to settlement rates until the shipper terminates its TSA.⁵⁸ Consequently, we find that such a harmonious interpretation is that termination of a TSA by El Paso does not represent an end to the term of a protected TSA as would a termination *by the shipper*, which is the only means under Article 11.2 to terminate such a shipper’s protections under the 1996 Settlement. Instead, the Commission finds, consistent with its prior holding, that termination by El Paso of a shipper’s TSA “cannot be considered termination of the contract by the shipper” and does not extinguish the protections of Article 11.2.⁵⁹ Otherwise, El Paso’s

⁵⁸ See *Southwest Power Pool, Inc.*, 109 FERC ¶ 61,010, at P 25 (2004), stating:

Our ruling conforms to the generally accepted canons of contract interpretation; which require that: (1) a contract should be interpreted as an integrated whole; (2) provisions of a contract should normally not be interpreted as being in conflict; and (3) a more particular and specific clause of contract should prevail over a more general clause.

⁵⁹ *September 5 Order*, 124 FERC ¶ 61,227 at P 45:

Article 11.2 applies to the rates of El Paso’s eligible shippers for the period that the “*Shipper has not terminated such TSA*,” and Article 11.2(a) specifically states that the rate cap applies to these shippers “unless and until such TSA is terminated *by the shipper*.” The amendment of the FR contracts to comply

(continued...)

interpretation and efforts to extinguish the rights under Article 11.2 would impermissibly nullify the shippers' right to the protections of Article 11.2, including service at the settlement rates which continues until the shipper terminates its TSA. In sum, the better interpretation is that the specific and later negotiated terms of the 1996 Settlement supersede El Paso's general tariff provisions, such as those related to the ROFR process, with the result that Shippers have a specific right to continue to receive service at Article 11.2(a) rates until each *shipper* terminates its TSA, as reflected in GT&C section 37.

52. Finally, the Shippers request the Commission to direct El Paso to cease its attempts to invalidate its Article 11.2 obligations. The Commission notes that El Paso has argued in various proceedings that its Article 11.2 obligations, which were established in the 1996 Settlement, no longer apply.⁶⁰ The Commission further notes that

with the Commission's orders in that proceeding cannot be considered termination of the contract *by the shipper*. Thus, the Commission affirms its finding that Article 11.2 applies to the former FR shippers and therefore denies El Paso's request for rehearing.

Also *see* P 45 n.38:

As the Commission explained in the March 20 Order, the Commission did not require El Paso to replace the [full requirements] contracts with entirely new contracts or to make any changes to the contracts other than those necessary to implement the conversion of FR to CD service. If El Paso chose to issue new contracts, then that was El Paso's choice and not termination by the shipper.

⁶⁰ *Capacity Allocation Rehearing*, 104 FERC ¶ 61,045 at PP 92-93 (rejecting arguments that abrogation of the 1996 Settlement was required because the circumstances that made the 1996 Settlement just and reasonable no longer existed due to operational changes on the El Paso system); *March 20 Order*, 114 FERC ¶ 61,290 at PP 36-37, (deferring to a hearing consideration of El Paso's arguments that the changes ordered in the Capacity Allocation Proceeding terminated the Article 11.2 obligations under the 1996 Settlement and finding that the more stringent public interest standard applied to determine whether changes were warranted), a settlement on this issue was accepted in *El Paso Natural Gas Co.*, 120 FERC ¶ 61,208 (2007). *See also* Opinion No. 517, 139 FERC ¶ 61,095 at PP 232-255 (rejecting El Paso arguments that Article 11.2 was no longer in the public interest under *Mobile Gas*, 350 U.S. 332; *Sierra*, 350 U.S. 348); Opinion No. 528, 145 FERC ¶ 61,040 at PP 450-452 (reaffirming that *Mobile-Sierra*

(continued...)

El Paso has tried to shift the costs associated with its Article 11.2 obligations onto other customers.⁶¹ The Commission has addressed the myriad of El Paso's arguments and has always reached the same conclusion: Article 11.2 of the 1996 Settlement entitles eligible shippers to service at settlement rates until the shipper agrees to terminate its TSA or a shipper's TSA expires.⁶² In sum, the Commission anticipates that this order, along with the other orders clarifying El Paso's obligations under Article 11.2, will provide sufficient clarity to bring to an end El Paso's repeated attempts to avoid, transfer, or negate the effectiveness of those obligations, rather than continue efforts to renegotiate or honor them.

The Commission orders:

(A) The Commission declines to provide the declaration requested in El Paso's Petition.

standard applies and finding no changed circumstances sufficient to revisit the Opinion No. 517 decision).

⁶¹ *March 20 Order*, 114 FERC ¶ 61,290 at P 61 (“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.”); *September 5 Order*, 124 FERC ¶ 61,227 at PP 17-18 (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,” and stating “Thus, 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.”).

⁶² Opinion No. 528, 145 FERC ¶ 61,040 at P 474; Opinion No. 517, 139 FERC ¶ 61,095 at P 290 (“El Paso may not reallocate to non-Article 11.2(a) shippers any shortfall arising as a result of Article 11.2(a) rates being lower than recourse rates.”).

(B) Shippers' Complaint is granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.