FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

June 30, 2006

In Reply Refer To:
El Paso Natural Gas Company
Docket No. RP06-374-000

El Paso Natural Gas Company
Post Office Box 1087
Colorado Springs, CO 80944

Attention: Richard Derryberry, Director
Regulatory Affairs

Reference: Non-conforming Transportation Service Agreements

Dear Mr. Derryberry:

1. On May 31, 2006, El Paso Natural Gas Company (El Paso) filed a revised tariff sheet[1] and seven firm transportation service agreements (TSAs) with Salt River Project Agricultural Improvement and Power District (Salt River) for the Commission's review and information as non-conforming agreements. El Paso requests that the Commission accept the agreements and the revised sheet, effective July 1, 2006. The Commission finds that the TSAs do contain provisions that are material deviations from El Paso's form of service agreement but that these deviations are permissible. The Commission therefore accepts the non-conforming agreements and accepts El Paso's proposed tariff sheet effective July 1, 2006, as proposed.

[1] Third Revised Sheet No. 2A to FERC Gas Tariff, Second Revised Volume No. 1-A.

Background

2. On June 30, 2005, in Docket No. RP05-422-000, El Paso filed tariff sheets to implement, among other things, a general system-wide rate change as well as various new service rate schedules. By order issued July 29, 2005, the Commission accepted and suspended the tariff sheets to become effective January 1, 2006, subject to conditions and the outcome of the hearing and technical conference.[2] On March 20, 2006, the Commission issued an order on post-settlement issues that addressed the applicability of Article 11.2 from El Paso's 1996 Settlement.[3] On March 29, 2006, El Paso submitted an Offer of Partial Settlement that proposed, among other things, to conditionally waive the implementation of new services until June 1, 2006.[4] On April 4, 2006, El Paso filed tariff sheets in compliance with the March 20 Order that, among other things, added a new Section 37, Article 11.2 Provisions, to its tariff.[5]

3. On April 20, 2006, in Docket No. CP06-57-000, the Commission issued a certificate of public convenience and necessity authorizing El Paso to acquire the East Valley Lateral from Salt River (April 20 Order).[6] In its certificate application in that proceeding, El Paso included a Purchase and Sale Agreement (PSA) that contains the terms of the parties' agreement with respect to the purchase/sale of the East Valley Lateral. In its application, El Paso stated that Exhibit B of the PSA included certain non-monetary compensation considerations that affect Salt River's existing firm transportation agreements with El Paso. El Paso states that those non-monetary compensation considerations have been memorialized in the TSAs that are submitted in the instant filing. The April 20 Order required El Paso to file the potentially non-conforming TSAs with the Commission.

Instant Filing

4. El Paso states that it has engaged in contract reformation discussions with Salt River over the last several months and that, as a result, Salt River has restructured its existing firm TSAs. Salt River has entered into one new TSA for traditional Rate

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[2] *El Paso Natural Gas Co.*, 112 FERC ¶ 61,150 (2005).

[3] *El Paso Natural Gas Co.*, 114 FERC ¶ 61,290 (2006).

[4] *El Paso Natural Gas Co.*, Docket Nos. RP05-422-008 and RP06-226-001 (May 30, 2006) (unpublished letter order) (accepting the Offer of Partial Settlement).

[5] The filing is pending Commission action.

[6] *El Paso Natural Gas Co.*, 115 FERC ¶ 61,074 (2006).

Schedule FT-1 service and six TSAs for New Services to be effective concurrently with the implementation of the New Services on June 1, 2006. El Paso states that the TSAs included in this filing contain several potentially material provisions that are not included in the applicable form of service agreement.

5. El Paso states that Salt River was willing to sell the East Valley Lateral to El Paso provided that, after the sale, Salt River received the same level of service from El Paso and was kept in the same financial position as it was when it owned and operated the East Valley Lateral for its own use. El Paso states that it therefore agreed to provide Salt River certain non-monetary commitments, described below, to ensure that these conditions are maintained.

Provisions Related to the East Valley Lateral

6. El Paso states that Salt River's Rate Schedule FT-1 TSA contains several potentially material provisions related to the East Valley Lateral that have been incorporated from the PSA and which are not contained in the *pro forma* service agreement. Paragraph 9.5 provides that El Paso will install compression, if needed, to maintain its future binding pressure commitment of 525 psig at Salt River's Kyrene plant based on Salt River's 2006 transportation service levels. This provision also addresses the future rate treatment of any costs incurred for additional compression and states that El Paso will not charge Salt River an incremental rate for such compression costs.

7. El Paso states that El Paso's tariff and the applicable *pro forma* agreements allow El Paso to agree to pressure commitments. El Paso states that Salt River wanted assurances that, after completion of the sale of the lateral, El Paso would continue to provide this minimum delivery pressure commitment at Kyrene via the East Valley Lateral capacity without risk of being assessed an incremental rate if additional capacity is required in the future.

8. El Paso states that Paragraph 9.6 provides that El Paso will keep all current Salt River plants in one D-Code on a going-forward basis.[7] El Paso states that, prior to the sale, Salt River had the flexibility to use the lateral capacity at its own discretion to provide service to its Santan Power Plant and could balance the operational requirements of that plant with the service it received from other El Paso delivery points at its other power plants located in the Phoenix area. With the sale of the lateral, Salt River wanted assurances that it would be able to continue the same flexibility in operating all of its

[7] A D-code is a cluster of delivery points and represents an aggregation of individual meters into a delivery zone to facilitate gas scheduling. *See El Paso Natural Gas Co.*, 115 FERC 61,074 (2006).

current Phoenix area power plants. El Paso states that it agreed to establish a single D-Code for Salt River to permit the requested flexibility.

9. El Paso states that these sales conditions, which it characterizes as "non-monetary," are intended to keep Salt River, the City of Mesa, and Southwest Gas in the same operational and financial positions as they were in before the sale of the East Valley Lateral to El Paso. El Paso requests the Commission accept these provisions as permissible non-conforming provisions because these provisions are unique to Salt River and because the East Valley Lateral capacity is available to El Paso's shippers only because Salt River has agreed to sell the East Valley Lateral to El Paso. El Paso states that the Commission recognized, in its certificate order, that the East Valley Lateral acquisition will benefit El Paso's system by relieving capacity limitations on El Paso's Phoenix-area laterals, thereby allowing it to better define transportation rights and meet expected customer hourly and daily delivery obligations and provide greater operational flexibility. El Paso states that accepting the provisions as permissible deviations from the *pro forma* agreement is consistent with other Commission actions that accepted requests to acquire pipeline capacity that include conditions on the use of the capacity following the acquisition.[8]

Governing Law Provision

10. El Paso states that Paragraph 9 in the Rate Schedule FT-1 TSA and Paragraph 15 in the Rate Schedule FT-H TSAs contain the same provision regarding governing law that was included in the Rate Schedule OPAS agreement with Salt River that El Paso submitted for the Commission's review as a non-conforming provision in Docket No. RP06-369-000.[9] El Paso states that this provision clarifies the parties' agreement to use Arizona law to determine any questions regarding Salt River's unique status as a political subdivision of the State of Arizona and any privileges and immunities related to such status. El Paso states that, except for this limited exception, Colorado law applies to all matters related to Salt River's agreements and El Paso's tariff.

11. El Paso states that the Commission should accept this provision as a permissible non-conforming provision since it is not unduly discriminatory and applies only to Salt River because of its unique status. El Paso further states that the provision does not afford Salt River any substantive transportation rights nor does it affect the rights of other similarly situated delivery point operators.

[8] El Paso cites *Equitrans, L.P., Three Rivers Pipeline Co.*, 91 FERC ¶ 61,041 (2000).

[9] *El Paso Natural Gas Co.*, Docket No. RP06-369-000 (June 21, 2006) (unpublished letter order).

Article 11.2 Provision

12. Article 11.2 of the 1996 Settlement between El Paso and its customers places certain limitations on the rates that El Paso can charge to shippers that were parties to that Settlement.[10] El Paso's primary tariff sheets reflected the termination of Article 11.2, the first alternate tariff sheets reflected the continued application of Article 11.2 for eligible contract demand shippers, and the second alternate sheets reflected the continued application of Article 11.2 for all eligible shippers.

13. El Paso states that Salt River's Rate Schedule FT-1 TSA contains a provision in Paragraph 9.4 that states that Article 11.2 rights apply to the TSA. El Paso states that it agreed to add a provision stating that Article 11.2 applied to the TSA, subject to Commission order, to provide Salt River additional contractual assurance during the pendency of El Paso's rate case proceeding. El Paso states that this contractual commitment allowed Salt River to go forward with conversion of its contract portfolio to New Services knowing that its rights under Article 11.2 were preserved while various issues, including the applicability of Article 11.2, were being decided by the Commission and, potentially, the courts. El Paso states that it also revised the rate language in Paragraph 3.1(a), which is fill-in-the-blank, to state that Salt River will pay the Article 11.2 rates set forth in the tariff. El Paso states that the Commission should accept this provision as a permissible material deviation because the provision enables Salt River to transition to El Paso's New Services environment effective June 1, 2006 while preserving the parties' litigation positions. El Paso further states that this provision is unique to Article 11.2 shippers and does not adversely affect other shippers or convey a new term and condition of service.

Exhibit A

14. El Paso states that Exhibit A to Salt River's Rate Schedule FT-H TSAs is slightly different from the Exhibit A contained on Sheet No. 480D in the FT-H *pro forma* agreement. El Paso states that these differences are due to informational display and do not constitute material changes. El Paso states that it intends to update Sheet No. 480D to make the informational display for Exhibit A consistent with that for Salt River's FT-H TSAs.

Public Notice

15. Public notice of El Paso's filing was issued on June 2, 2006, with comments, protests or interventions to be filed in accordance with section 154.210 of the

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[10] *See El Paso Natural Gas Co.*, 79 FERC ¶ 61,028, *reh'g denied*, 80 FERC ¶ 61,084 (1997).

Commission's regulations. All timely motions to intervene and all motions to intervene out of time filed before the issuance of this order are granted pursuant to Rule 214 of the Commission's Rules of Practice and Procedure. Granting late intervention at this early stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties. No protests or adverse comments were filed.

Discussion

16. Under section 4(c) of the Natural Gas Act (NGA), pipelines must file "all contracts which in any manner affect or relate to" the pipeline's rates and services. Section 154.1(b) of the Commission's regulations implements this provision and provides that pipelines must file all contracts related to their services.[11] Section 154.1(d) provides that any contract that conforms to the form of service agreement set forth in the pipeline's tariff need not be filed, but that any contract that deviates in any material aspect from the form of service agreement set forth in the pipeline's tariff must be filed.[12]

17. As the Commission explained in *Columbia Gas Transmission Corp.,* the exemption from the requirement that each customer service agreement must be filed with the Commission is based on a finding that the section 4 filing requirement has already been satisfied by the pipeline's previous filing of the *pro forma* service agreement.[13] Where a customer's service agreement conforms to the *pro forma* service agreement (and the other provisions of the pipeline's tariff), the Commission's prior review and approval of the *pro forma* service agreement and the tariff have accomplished the purpose of the NGA section 4 filing requirement. Since the Commission and other interested parties have had an opportunity to determine that the form of service agreement provided for in the tariff is just and reasonable and non-discriminatory, there is no need to review subsequent conforming contracts to determine if they comply with the requirements of the NGA.

18. However, for this procedure to satisfy the filing requirements of NGA section 4, the customer's service agreement must truly conform to the form of service agreement. There is such conformity where a service agreement contains only the approved language of the form of service agreement, with blank spaces for filling in such information as the name of customer, etc., completed in a manner consistent with the tariff. However, where the service agreement contains a provision not in the approved language of the form of service agreement and that provision (1) goes beyond filling in the blank spaces with the appropriate information allowed by the tariff and (2) affects the substantive

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[11] 18 C.F.R. § 154.1(b) (2005).

[12] 18 C.F.R. § 154.1(d) (2005).

[13] 97 FERC ¶ 61,221 at 62,002 (2001).

rights of the parties, the Commission cannot be considered to have already reviewed the service agreement when it reviewed the *pro forma* service agreement. In such a case, the contract contains a provision affecting the substantive rights of the parties that the Commission has never seen before. Since NGA section 4 requires the filing of all contracts that affect the pipeline's service "in any manner," the statute requires the filing of such a service agreement.

19. The Commission has defined a material deviation as "any provision of a service agreement which goes beyond the filling in of the spaces in the form of service agreement with the appropriate information provided for in the tariff and that affects the substantive rights of the parties." Once a service agreement has been found to deviate materially from the form of service agreement in the tariff, the Commission must then determine whether to approve the non-conforming agreement. The Commission bases this determination upon whether the material deviation presents a significant potential for undue discrimination among customers. The Commission has also held that the pipeline must explain why the non-conforming provisions are specific to a particular shipper and why the provision should not be included in the tariff and made available to all shippers.

20. The Commission finds that the Salt River TSAs are permissible material deviations from El Paso's form of service agreement. As El Paso states in its filing, the East Valley Lateral non-conforming provisions are unique to Salt River and are intended to keep Salt River in the same operational and financial position as before the sale of the East Valley Lateral to El Paso. The benefits to El Paso's system derived from the East Valley Lateral capacity are available only because Salt River agreed to sell the lateral to El Paso. Acceptance of these non-conforming provisions is consistent with previous Commission precedent.[14]

21. Consistent with our action in Docket No. RP06-369-000,[15] the Commission accepts the governing law provision as a permissible material deviation from the *pro forma* agreement. El Paso's agreement to use Arizona law to determine any questions regarding Salt River's unique status as a political division of the State of Arizona will not create any exceptions to El Paso's tariff requirements and will not afford Salt River any substantive transportation rights. In addition, this agreement will not affect the rights of other similarly situated delivery point operators.

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[14] *Equitrans, L.P., Three Rivers Pipeline Co.*, 91 FERC ¶ 61,041 at 61,151 (2000).

[15] *El Paso Natural Gas Co.*, Docket No. RP06-369-000 (June 21, 2006) (unpublished letter order).

22. The Commission accepts the Article 11.2 provision as a permissible material deviation from the *pro forma* agreement. This provision is unique to the Article 11.2 shippers and does not adversely affect other shippers or convey a new term or condition of service.

23. The Commission further finds that the differences on Sheet No. 480D due to informational display are not material changes and will be consistent with the *pro forma* agreement once El Paso updates it *pro forma* agreement in a future filing.

24. The Commission finds that these provisions do not affect the substantive rights of the parties and do not present the potential for a significant risk of undue discrimination among customers. The Commission therefore accepts the non-conforming agreements and El Paso's proposed tariff sheet effective July 1, 2006.

By direction of the Commission.

Magalie R. Salas,
Secretary.