

152 FERC ¶ 61,038
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Philip D. Moeller, Cheryl A. LaFleur,
Tony Clark, and Colette D. Honorable.

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

Docket Nos. RP12-816-001
RP12-816-002

ORDER ON REHEARING AND COMPLIANCE

(Issued July 16, 2015)

1. On July 20, 2012, the Commission issued an order accepting proposed tariff records to voluntarily reduce El Paso Natural Gas Company, L.L.C.'s (El Paso) currently-effective short-term firm and interruptible rates which became effective April 1, 2011 in Docket No. RP10-1398-000, El Paso's 2011 Rate Case, subject to refund.¹ El Paso made its voluntary rate reduction filing to ensure that the short-term firm and interruptible rates filed in the 2011 Rate Case conformed with the Commission's determinations in Opinion No. 517, which addressed rate issues raised in El Paso's previous rate filing.² In the 2011 Rate Case, El Paso proposed to charge for its short-term firm and interruptible services a rate equal to 250 percent of the maximum reservation component of the recourse rate applicable to long-term firm service (plus the applicable commodity component). The Commission rejected a similar proposal, made in El Paso's prior 2008 rate proceeding, in Opinion No. 517. Rather than continue to collect the higher rates subject to refund, El Paso proposed in this proceeding to reduce the short-term firm service rates and interruptible service rates to the corresponding long-term rate levels on an interim basis and to move those rates into effect.

¹ *El Paso Natural Gas Co.*, 140 FERC ¶ 61,063 (2012) (letter order) (July 20 Order).

² *El Paso Natural Gas Co.*, Opinion No. 517, 139 FERC ¶ 61,095 (2012), *rev'g*, 134 FERC ¶ 63,002 (2011).

2. In the July 20 Order, the Commission accepted El Paso's reduced short-term firm and interruptible rates effective July 1, 2012, "subject to the ultimate outcome in Docket Nos. RP08-426-000 and RP10-1398-000."³ In addition, the Commission directed El Paso to submit a further compliance filing to apply all the rate determinations directed by Opinion No. 517 to its 2011 Rate Case rates. El Paso made the required compliance filing, submitting *pro forma* tariff records as consistent with the Commission's July 20 Order and determinations in Opinion No. 517.⁴ El Paso anticipated that the new *pro forma* tariff records would become effective after the Commission issued its order on the Initial Decision in Docket No. RP10-1398-003⁵ and rehearing of Opinion No. 517. In this order, the Commission accepts El Paso's filing of *pro forma* tariff records as being generally consistent with the compliance requirement and the Commission's prior directives, as discussed below. In addition, the Commission confirms that issues with respect to placing the short-term firm and interruptible compliance rates into effect and refunds will be addressed in Docket No. RP10-1398-000, *et al.*, where the Commission will address the Initial Decision on the remand issue and rehearing of Opinion No. 528. Consideration of the short-term firm and interruptible rates with the remainder of El Paso's 2011 Rate Case will permit comprehensive treatment of the issues raised in these proceedings.

3. El Paso filed on August 20, 2012 a request for rehearing of the July 20 Order. Also on that day, El Paso submitted a compliance filing required by the July 20 Order. In this order, the Commission reviews El Paso's *pro forma* tariff records, as discussed below, and confirms that further compliance and refunds with respect to the short-term firm and interruptible rates will be directed in the Commission's order addressing outstanding issues with respect to El Paso's current rate case in RP10-1398-000. Additional changes in response to the Commission's determinations will be addressed in the subsequent order on compliance and rehearing and addressing the Initial Decision in Docket No. RP10-1398-003.

³ July 20 Order, 140 FERC ¶ 61,063 at P 13.

⁴ Under the NGA, *pro forma* tariff records are not effective until the pipeline files actual tariff records implementing the *pro forma* tariff records as approved by the Commission.

⁵ The Initial Decision addresses the Commission's partial remand in this proceeding to its Office of Administrative Law Judges to consider the effect of Article 11.2(b) of the 1996 Settlement on El Paso's rates. *El Paso Natural Gas Co.*, Opinion No. 528, 145 FERC ¶ 61,040 (2013), *rev'g*, Initial Decision, 139 FERC ¶ 63,020 (2012) (2011 Rate Case Initial Decision).

I. Background

4. This proceeding is related to El Paso's 2008 and 2011 rate proceedings, as more fully discussed below. On June 30, 2008, El Paso filed a general rate case filing pursuant to section 4 of the Natural Gas Act (NGA) to implement a number of changes to its tariff, including new services, a rate increase, and changes in certain terms and conditions of service (2008 Rate Case). The Commission accepted and suspended El Paso's primary tariff records, to become effective on January 1, 2009, subject to refund and conditions, and established procedures for a technical conference and hearing.⁶

5. On March 13, 2010, El Paso filed an uncontested settlement on the majority of the issues in this case (2010 Settlement). The settlement, which was approved by the Commission on April 28, 2010,⁷ reserves four issues for hearing and determination on the merits: (1) the acquisition costs for Line 1903; (2) the appropriate capital structure; (3) the appropriate rate design for the maximum recourse rate for interruptible transportation service (IT), interruptible parking and lending service (PAL), and short-term firm transportation rates; and (4) issues related to Article 11.2 of the 1996 Settlement. The 2010 Settlement provides that the resolution of the issues relating to capital structure and Line 1903 will not affect the settlement rates or revenues during the term of the 2010 Settlement, but instead will go into effect with the effective date of the rates established in El Paso's subsequent rate case, the 2011 Rate Case. The hearing on the four reserved issues commenced on May 18, 2010 and concluded on June 8, 2010.

6. On September 30, 2010, El Paso filed another general section 4 rate case in Docket No. RP10-1398-000 (2011 Rate Case). The Commission accepted and suspended the primary tariff records, to be effective April 1, 2011, subject to refund and conditions and the outcome of the hearing established in the order.⁸ Thus, the rates determined in the Docket No. RP08-426-000 proceeding are effective for a locked-in period from January 1, 2009 through March 31, 2011. As noted above, the Commission's

⁶ *El Paso Natural Gas Co.*, 124 FERC ¶ 61,124 (2008) (2008 Rate Case Suspension Order), *reh'g denied*, 133 FERC ¶ 61,129 (2010), *clarification and rehearing dismissed as moot*, 134 FERC ¶ 61,170 (2011).

⁷ *El Paso Natural Gas Co.*, 131 FERC ¶ 61,077 (2010) (letter order).

⁸ *El Paso Natural Gas Co.*, 133 FERC ¶ 61,104 (2010) (2011 Rate Case Suspension Order), *reh'g denied*, 133 FERC ¶ 61,253 (2010) (affirming that Article 11.2 issues will be decided in the instant proceeding – Docket No. RP08-426-000 – and clarifying that the issue of the duration of Article 11.2 rate protection is not ripe for review because no Article 11.2 contracts expire prior to the end of the test period).

determinations on capital structure and Line 1903 take effect only with the acceptance of the rates filed in Docket No. RP10-1398-000. Furthermore, in Docket No. RP10-1398-000, the Commission accepted the proposed tariff records subject to the outcome of the hearing in Docket No. RP08-426-000 regarding the four reserved issues. El Paso moved its proposed primary tariff records into effect on April 1, 2011, and has been collecting revenues produced by the subject-to-refund rates since that date. The evidentiary hearing was conducted before an Administrative Law Judge from October 25 to December 16, 2011, and an Initial Decision was issued in Docket No. RP10-1398-000 on June 18, 2012.⁹ The opinion and order on Initial Decision was issued on October 17, 2013 (Opinion No. 528).¹⁰

7. On May 4, 2012, the Commission issued Opinion No. 517 in El Paso's 2008 Rate Case proceeding in Docket No. RP08-426-000.¹¹ In Opinion No. 517, the Commission made the following findings: (1) El Paso's depreciable plant account should only include the \$10.5 million attributable to El Paso's investment in Line 1903, as determined by splitting the total acquisition costs on a per mile basis with the unused portion of the acquired pipeline located in California;¹² (2) El Paso's proposed capital structure should be adjusted to remove a \$615 million loan to parent and \$145 million in undistributed subsidiary earnings from equity capitalization for ratemaking purposes;¹³ (3) El Paso's proposed short-term firm and interruptible rates are unjust and unreasonable;¹⁴ and (4) the Article 11.2(a) rates remain just and reasonable, and El Paso may not reallocate to non-Article 11.2(a) shippers or contracts any shortfall arising as a result of Article 11.2(a) rates being lower than recourse rates.¹⁵ In Ordering Paragraph (C) of Opinion No. 517, the Commission required El Paso to file revised tariff records and rates, including

⁹ 2011 Rate Case Initial Decision, 139 FERC ¶ 63,020.

¹⁰ Opinion No. 528, 145 FERC ¶ 61,040.

¹¹ Opinion No. 517, 139 FERC ¶ 61,095. The order on rehearing and compliance to Opinion No. 517 is issued concurrently with this order.

¹² *Id.* PP 51-52. The Commission also found that El Paso had failed to substantiate its claim that it needed to make an accounting adjustment to remove accumulated depreciation and deferred income tax that it attributed to the unused California segment that was purchased with Line 1903.

¹³ *Id.* P 86.

¹⁴ *Id.* P 186.

¹⁵ *Id.* PP 235, 290.

proposed accounting and workpapers, reflecting the Commission's rulings within 30 days of the date of the order on Initial Decision. In Ordering Paragraph (D), the Commission also required that within 30 days of a final order in this case, El Paso must refund amounts recovered in excess of the just and reasonable rates approved by the Commission.

8. On June 4, 2012, El Paso and other parties filed requests for rehearing and/or clarification of Opinion No. 517 in Docket No. RP08-426-017. On June 8, 2012, El Paso filed revised tariff records in Docket No. RP12-806-000 to comply with Opinion No. 517 by reducing the short-term firm and interruptible rates for the locked-in period of January 1, 2009 through March 31, 2011.

9. On June 20, 2012, in Docket No. RP12-816-000, El Paso filed revised tariff records to voluntarily reduce the currently-effective short-term firm and interruptible rates which became effective April 1, 2011 in Docket No. RP10-1398-000. On July 20, 2012, the Commission accepted the proposed tariff records in partial compliance and directed El Paso to file revised tariff records in Docket No. RP12-816-000 to adjust the Docket No. RP10-1398-000 rates to reflect all the rulings in Opinion No. 517, in particular those related to capital structure, Line 1903, and Article 11.2.¹⁶ On August 20, 2012, El Paso filed a request for rehearing of the July 20 Order in Docket No. RP12-816-002 and a compliance filing in Docket No. RP12-816-001.

10. On November 28, 2012, the Arizona Utilities Group filed a motion to expedite Commission decisions in Docket Nos. RP08-426-000, RP12-806-000, and RP12-816-000. Answers in support of the motion were filed by the Indicated Shippers on November 30, 2012, and Freeport-McMoRan Corporation on December 4, 2012. El Paso filed an answer on December 10, 2012.

II. Docket No. RP12-816-002 (Request for Rehearing of the July 20 Order)

11. In its July 20 Order, the Commission accepted El Paso's proposed tariff records, subject to El Paso filing further revisions, to reduce certain currently-effective rates for short-term firm and interruptible services, in consideration of Opinion No. 517.¹⁷ The Commission found that El Paso had failed to adjust the Docket No. RP10-1398-000 tariff records and rates to comply fully with the directives of Opinion No. 517 and directed El Paso to file revised tariff records in Docket No. RP12-816-000 to adjust the Docket No. RP10-1398-000 rates to reflect all the rulings in Opinion No. 517.

¹⁶ July 20 Order, 140 FERC ¶ 61,063.

¹⁷ *Id.*

El Paso filed a request for rehearing of the July 20 Order. El Paso's compliance filing to the July 20 Order is discussed later in this order.¹⁸

A. El Paso's Request for Rehearing

12. El Paso requests rehearing of the July 20 Order and requests that the Commission reverse the requirement that El Paso file lower interim rates implementing the rulings made in Opinion No. 517 and allow El Paso to withdraw its concurrently filed compliance filing. At a minimum, El Paso requests that the Commission clarify either (1) that it will not act on the compliance filing until after it issues orders on rehearing of Opinion No. 517 and on exceptions to the Initial Decision in the 2011 Rate Case or (2) that it will authorize El Paso to impose a surcharge in the event the rates ultimately approved in the 2011 Rate Case are higher than rates placed into effect in compliance with the July 20 Order.

13. El Paso argues that the Commission erred by finding that El Paso failed to comply fully with Opinion No. 517 by not reducing its rates in the 2011 Rate Case. El Paso states that Opinion No. 517, which was issued in the 2008 Rate Case, does not specifically require El Paso to adjust its rates in the 2011 Rate Case. El Paso states that the fact that Article 5.4 of the 2010 Settlement reserved the issue of the appropriate rate design for short-term rates for hearing in the 2008 Rate Case does not suggest in any way that the same Article requires the rulings in Opinion No. 517 on capital structure and Line 1903 to be implemented in the 2011 Rate Case prior to the conclusion of that case. El Paso contends that those conclusions, drawn by the Commission in the July 20 Order at PP 10-11, are not logically supported by their factual premises.

14. El Paso argues that the fact that the Commission required it to file revised rates for the locked-in period of the 2008 Rate Case to reflect its rulings in Opinion No. 517 does not suggest that it also required El Paso to adjust its rates on an interim basis in the 2011 Rate Case. El Paso asserts that Ordering Paragraph (C) does not mention the 2011 Rate Case at all, nor is such a rate adjustment required by the 2010 Settlement. El Paso argues that the Commission's assertion that such a rate adjustment in another docket may not be prohibited by that settlement does not transform such a rate adjustment into a requirement of either the 2010 Settlement or Opinion No. 517.

15. El Paso argues that the parties could have expressly agreed in the 2010 Settlement that El Paso would implement the resolution of the four reserved issues in the middle of the next rate case, but they did not. Similarly, the Commission could have expressly ordered in Opinion No. 517 that El Paso change its rates in the 2011 Rate Case, but it

¹⁸ Texas Gas Service's answer was withdrawn on August 7, 2014.

did not do so. El Paso concludes that the Commission should reverse its conclusion that El Paso failed to comply with Opinion No. 517.

16. El Paso argues that the Commission erred by effectively resolving issues pending in the 2011 Rate Case by summary disposition based on rulings in Opinion No. 517. El Paso argues that the July 20 Order summarily disposes of the issues relating to equity capital structure, Line 1903, and Article 11.2(a) in the 2011 Rate Case without any attempt to apply its resolutions of those issues in Opinion No. 517 to the facts of the 2011 Rate Case, or to ascertain whether there were any new or changed facts pertaining to those issues in dispute. El Paso asserts that there are numerous facts in the 2011 Rate Case record that are in dispute, including facts and data from a new test period, that will not be finally decided until the Commission issues an order on exceptions to the Initial Decision. El Paso argues that the disputed facts render an interim rate reduction inappropriate where the disputed facts relate specifically to an issue addressed in Opinion No. 517, and also where the disputed facts relate to the overall cost of service or potential rate levels to be used as the starting point from which to implement the Commission's rulings.

17. El Paso gives as an example the July 20 Order's directive to El Paso to "make adjustments to ensure that Article 11.2 shortfalls are not reallocated to other [non-Article 11.2(a)] shippers."¹⁹ El Paso asserts that whether there is an Article 11.2(a) shortfall, and if so what the amount of the shortfall is, are hotly contested issues in the 2011 Rate Case. El Paso states that the Presiding Judge found that Article 11.2(a) rates are "a unique category of maximum recourse rates" and that, consequently, there was no Article 11.2 shortfall.²⁰ El Paso thus seeks confirmation that there is no Article 11.2(a) shortfall to remove from its rates. To the extent the Commission intended El Paso to reduce its rates to reflect the removal of a shortfall greater than zero, El Paso requests rehearing.²¹

18. El Paso argues that the application of the Commission's findings in Opinion No. 517 to the specific facts in the record in the 2011 Rate Case were not adjudicated in Opinion No. 517 and instead must be resolved by the Commission on exceptions to the Initial Decision in the 2011 Rate Case. Moreover, El Paso contends that there is no need for interim rates, given the Commission's authority to require El Paso to provide its shippers refunds, with interest, at the conclusion of the proceeding.

¹⁹ July 20 Order, 140 FERC ¶ 61,063 at P 14.

²⁰ El Paso cites the Initial Decision, 139 FERC ¶ 63,020 at P 299.

²¹ El Paso Rehearing at 11 n.11.

19. Similarly, El Paso argues that the Commission's requirement to remove from rate base a part of the purchase price of Line 1903 before all the issues in the 2011 Rate Case have been decided is also improper. El Paso states that the Commission found there was insufficient evidence in the 2008 Rate Case record to support adjustments to El Paso's depreciation accounts that corresponded to the plant account adjustments required by Opinion No. 517. El Paso argues, however, that the evidence in the 2011 Rate Case supports these adjustments and that the Commission should accept them in that case. El Paso contends that, if it is required to remove the plant from rate base on an interim basis, it should be permitted to make the related adjustments on an interim basis because the removal of plant from rate base is inextricably linked to the corresponding plant-related account adjustments. Alternatively, if the Commission does not permit El Paso to make these adjustments now, it should not require El Paso to reduce its plant now.

20. El Paso further argues that the Commission's interim rate relief requirement ignores the fact that the resolution of cost of service and other rate components could have the effect of increasing El Paso's rates above the ordered interim rate levels. El Paso contends that the level of the cost of service from which to remove costs has not been determined nor has the level of billing determinants upon which to design El Paso's rates. El Paso gives three reasons why the Commission's directive to reduce rates prior to a decision on exceptions to the Initial Decision in the 2011 Rate Case is egregious and inequitable: (1) the combination of increased test period costs and a decrease in billing determinants would, all other things being equal, result in higher rates; (2) the rates approved at the conclusion of the case will not include the voluntary \$20 million cost of service reduction that was reflected in the motion rates but will not be included in the rates approved at the conclusion of the case, which also may lead to higher rates; and (3) the resolution of cost allocation and/or rate design issues could result in some shippers paying higher rates for certain services, while others pay lower rates.

21. El Paso concludes that there are a number of moving parts currently pending in the 2011 Rate Case that could result in rates that are higher than the interim rates contemporaneously filed in compliance with the July 20 Order and could change the amount of costs that the Commission has required El Paso to remove from its rates. El Paso asserts that it is arbitrary and capricious for the Commission to require El Paso to file such interim rates pending resolution of such issues.

22. El Paso states that the Commission's statement in the July 20 Order that it will determine "whether any subsequent adjustments are needed based on the Commission's review of the initial decision in Docket No. RP10-1398-000 and requests for rehearing in Docket No. RP08-426-000" suggests that the Commission will not act on the compliance filing until after it issues both an order on rehearing of Opinion No. 517 and an order on the Initial Decision in the 2011 Rate Case. El Paso requests that the Commission confirm that it will not act on El Paso's compliance filing, or otherwise order El Paso to place lower rates in the 2011 Rate Case into effect, prior to its issuance of both of the

aforementioned orders. Absent such confirmation, El Paso seeks rehearing. If the Commission does not agree, El Paso seeks clarification that it will be allowed to surcharge shippers for the difference between the interim rates accepted by the Commission in compliance with the July 20 Order and any higher rates ultimately approved in the 2011 Rate Case.

23. El Paso argues that the Commission has recognized that it would not be equitable to impose on regulated companies the risk of under-collections due to rate changes ordered by the Commission. El Paso cites several cases where the Commission (1) declined to require refunds where a decision on rate design or cost allocation results in some rates increasing and others decreasing²² or (2) delayed the effectiveness of a section 5 decrease in some rates to have the decrease coincide with the effectiveness of a further section 4 increase in other rates.²³ El Paso argues that the need for surcharge authority is particularly required in this instance because the under-collection would be caused by an interim Commission order requiring lower rates, as opposed to the normal resolution of the pipeline's rate case at the conclusion of the proceeding.

24. El Paso therefore requests that the Commission reverse the requirement in the July 20 Order that El Paso file lower interim rates and allow El Paso to withdraw its compliance filing. At a minimum, El Paso requests that the Commission (1) clarify that it will not act on the compliance filing until after it issues orders on rehearing of Opinion No. 517 and on exceptions to the Initial Decision in the 2011 Rate Case or (2) that it will authorize El Paso to impose a surcharge in the event the rates ultimately approved in the 2011 Rate Case are higher than rates placed into effect in compliance with the July 20 Order.

B. Commission Determination

25. In Docket No. RP12-806-000, El Paso filed compliance tariff records to comply with the Commission's determinations in Opinion No. 517. In addition, El Paso filed revised, *pro forma* tariff records in this proceeding to address rates for its currently-effective short-term firm and interruptible rates which became effective April 1, 2011,

²² See *Black Oak Energy, L.L.C.* 136 FERC ¶ 61,040, at P 25 (2011); *Transcontinental Gas Pipe Line Corp.*, 8 FERC ¶ 61,138, at 61,536 (1979); *Connecticut Light and Power Co.*, Opinion No. 114-A, 15 FERC ¶ 61,056 (1981).

²³ El Paso cites *Occidental Chemical Corp. v. PJM Interconnection, L.L.C., et al.*, 110 FERC ¶ 61,378, at P 10 (2005) (citing *Great Lakes Gas Transmission, L.P.*, Opinion No. 368, 57 FERC ¶ 61,140 at 61,549 (1991)); *Tennessee Gas Pipeline Co.*, 46 FERC ¶ 61,113, at 61,443 (1989).

subject to refund. Without the voluntary filing, those rates would be processed along with El Paso's remaining tariff changes being reviewed in El Paso's 2011 Rate Case in Docket No. RP10-1398-000. Consequently, the Commission will not require El Paso to implement interim rates or interim refunds. The revised *pro forma* tariff records filed in this proceeding will be processed along with the rates and tariff records that were accepted subject to refund in Docket No. RP10-1398-000. El Paso's compliance filing has helped clarify the integrated nature of the two rate case proceedings in Docket Nos. RP08-426-000 and RP10-1398-000. We see no need to remove it from the record.

26. The July 20 Order required El Paso to file interim rates, but stated:

When the Commission acts on the rates proposed in the compliance filings made in Docket No. RP12-806-000 and in response to this letter order, the Commission will address any remaining issues concerning the implementation of the compliance rate, including the scope and timing of any refunds required in the Docket No. RP10-1398-000 rate case, and whether any subsequent adjustments are needed based on the Commission's review of the Initial Decision in Docket No. RP10-1398-000 and requests for rehearing in Docket No. RP08-426-000.²⁴

27. Thus, the Commission contemplated implementing refunds concurrent with the Docket No. RP10-1398-000 refunds. The Commission is issuing its order on rehearing and compliance in Docket Nos. RP08-426-017 (Opinion No. 517-A) and RP12-806-000 concurrent with this order and will issue the order on rehearing and compliance with Opinion No. 528 subsequently. With the issuance of Opinion No. 517-A, the 2008 Rate Case rates in Docket No. RP08-426-000 will be final and refunds will be forthcoming. The 2011 Rate Case rates in Docket No. RP10-1398-000 are subject to refund, with interest, so our action here will not affect the ultimate refunds provided to shippers. Although the four issues addressed in the 2008 Rate Case were not to be relitigated in the 2011 Rate Case, other issues in the 2011 Rate Case (such as cost of service, rate design, and return on equity) would impact the calculation of interim rates. Requiring interim rates and refunds would create a difficult, burdensome, and ultimately unnecessary proceeding. Our decision not to require implementation of interim rates and refunds will avoid the need for surcharge authority and will simplify the compliance proceeding. Since the Commission has now clarified the intended refund-implementation sequence as discussed above, El Paso's request for rehearing (which was in the alternative to obtaining such clarification) has become moot.

²⁴ July 20 Order, 140 FERC ¶ 61,063 at P 15.

28. El Paso additionally seeks confirmation that there is no Article 11.2(a) shortfall to remove from its rates. El Paso asserts that the Presiding Judge in the Docket No. RP10-1398-000 proceeding found that there is no Article 11.2(a) shortfall; therefore, to the extent the Commission intended El Paso to reduce its rates to reflect the removal of a shortfall greater than zero, El Paso requests rehearing. The Commission denies El Paso's request. As the Commission explained in Opinion No. 528, the Article 11.2 revenue shortfall is the rate differential between Article 11.2(a) rates and recourse rates. If Article 11.2(a) rates are lower than recourse rates, there is a revenue shortfall that El Paso may not reallocate to non-Article 11.2(a) shippers. Opinion No. 528 found that there was a shortfall in the 2011 Rate Case and that El Paso may not reallocate that shortfall.²⁵ Our action in the instant filing is consistent with that finding.

III. Docket No. RP12-816-001 (Compliance Filing to July 20 Order)

29. In its August 20 compliance filing, El Paso filed *pro forma* tariff records to adjust the Docket No. RP10-1398-000 rates to (1) decrease the equity component of El Paso's capital structure by certain amounts, (2) exclude approximately \$25.6 million associated with Line 1903 from rate base, and (3) ensure that Article 11.2(a) shortfalls are not reallocated to other shippers. El Paso states that compliance presents a number of issues, primarily because the facts in the Docket No. RP10-1398-000 proceeding involve a different record and test period, resulting in an updated value of the items that were at issue in Docket No. RP08-426-000. El Paso further states that its rebuttal evidence in Docket No. RP10-1398-000 is the best reflection of the current state of the case supporting the subject-to-refund rates because the rebuttal evidence best reflects the known and measurable facts as of the end of the test period in the 2011 Rate Case. El Paso states, however, that it has conservatively interpreted the July 20 Order to contemplate rate changes based on the data underlying the April Motion rates and has attempted to apply the Opinion No. 517 directives to the changing facts that impact the calculation of the rates in Docket No. RP10-1398-000.

30. El Paso states that it did not include any proposed refunds in this filing based on the Commission's statement that the scope and timing of any refunds will be determined when it acts on the compliance filing made in Docket No. RP12-806-000 and "whether any subsequent adjustments are needed based on the Commission's review of the initial decision in Docket No. RP10-1398-000 and requests for rehearing in Docket No. RP08-426-000."²⁶ El Paso requests that the *pro forma* compliance rate reduction

²⁵ Opinion No. 528, 145 FERC ¶ 61,140 at PP 468-474; Opinion No. 517, 139 FERC ¶ 61,095 at PP 256 n.415, 290-291, 300.

²⁶ July 20 Order, 140 FERC ¶ 61,063 at P 15.

made in the instant filing be made effective once the Commission has accepted the tariff records. El Paso interprets the July 20 Order as not providing for such an action until after its review of the Initial Decision in Docket No. RP10-1398-000 and requests for rehearing in Docket No. RP08-426-000.

31. El Paso requests that the Commission make clear that, to the extent the interim reduced rates are required to become effective before rehearing or the Initial Decision in Docket No. RP10-1398-000 are addressed, and if such interim rates are lower than the rates ultimately found to be just and reasonable based on the evidence of the 2011 Rate Case, El Paso may surcharge the appropriate shippers.

A. Public Notice

32. Public notice of El Paso's August 20, 2012 filing was issued on August 22, 2012, allowing protests to be filed on or before September 4, 2012. Pursuant to Rule 214 (18 C.F.R. § 385.214 (2014)), all timely filed motions to intervene and any unopposed motion to intervene out-of-time filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties. Protests were filed by Arizona Public Service Company; the Indicated Shippers;²⁷ Joint Parties;²⁸ New Mexico Gas Company, Inc.; and jointly by UNS Gas, Inc. and Tucson Electric Power Company (UNS/Tucson Electric).²⁹ The protesters generally argue that El Paso has not fully complied with the July 20 Order. As discussed more fully below, they argue that El Paso has improperly used a different calculation of the Article 11.2(a) shortfall and based the calculation on a

²⁷ For the purposes of this pleading, the Indicated Shippers are BP Energy Company and Shell Energy North America (US), L.P. The Indicated Shippers state that Southwest Gas Corporation also supports its protest. ConocoPhillips Company withdrew from the pleading on April 15, 2015 and is no longer a Participant in the proceeding by agreement with El Paso.

²⁸ For the purposes of this pleading, Joint Parties are Gila River Power, LLC; Golden Spread Electric Cooperative, Inc.; New Harquahala Generating Company, LLC; Salt River Project Agricultural Improvement and Power District; Sempra Generation; and Southwestern Public Service Company. Arizona Electric Power Cooperative settled with El Paso and withdrew from the Joint Parties' pleading on April 15, 2015.

²⁹ Texas Gas Service Co., a division of One Gas, Inc., filed a protest as well as an answer to El Paso's request for rehearing. However, by agreement with El Paso it withdrew the pleadings on August 7, 2014.

higher cost of service than was used in its motion rates. They also protest El Paso's request to delay implementation of the revised rates and refunds.

33. On September 21, 2012, El Paso filed an answer to the protests. Under Rule 213(a)(2), answers to protests are not permitted.³⁰

B. Commission Determination

34. The July 20 Order directed El Paso to file revised tariff records in Docket No. RP12-816-000 to adjust the Docket No. RP10-1398-000 rates to reflect all the rulings in Opinion No. 517: to reflect the removal of the excluded items from its capital structure, to exclude from rate base amounts exceeding \$10.5 million for Line 1903, and to make adjustments to ensure that Article 11.2 shortfalls are not reallocated to other shippers. As discussed above, the Commission is not requiring El Paso to adopt interim rates or make refunds. Therefore, the Commission directs El Paso to incorporate the findings in this order when filing rates and tariff records in compliance with the order on rehearing and compliance in Docket No. RP10-1398-000.

1. Capital Structure

35. In Opinion No. 517, the Commission directed El Paso to remove from El Paso's equity capitalization for ratemaking purposes the \$615 million loan balance to El Paso Corporation and the \$145 million of undistributed subsidiary earnings. El Paso states that, as with most cost of service elements, the capital structure, the amount of the loan to parent, and the undistributed subsidiary earnings changed in El Paso's filed case in Docket No. RP10-1398-000. Thus, El Paso states that it adjusted the equity component of its April Motion filing capital structure by using the per book amounts of the loan to parent balance and undistributed subsidiary earnings as of March 31, 2011 reflected in the Docket No. RP10-1398-000 record. El Paso asserts the following two items represent the actual, end-of-test-period amounts: (a) a \$588,970,453 balance of loan to El Paso's parent and (b) \$150,735,070 of undistributed subsidiary earnings.³¹ In Opinion No. 528, the Commission accepted El Paso's end-of-test-period actual amounts as of March 31, 2011 for purposes of computing its capital structure, subject to the Commission's findings in its order on rehearing of Opinion No. 517.³² In that order on rehearing, issued

³⁰ 18 C.F.R. § 385.213(a)(2) (2014).

³¹ El Paso cites Ex. EPG-247 in Docket No. RP10-1398-000 and notes that in P 70 of the Initial Decision in that proceeding, the amount for the undistributed subsidiary earnings included two transposed numbers.

³² Opinion No. 528, 145 FERC ¶ 61,140 at PP 588-90.

concurrent with this order, the Commission denied El Paso's request for rehearing finding that El Paso had failed to demonstrate that the Commission's policies for excluding affiliate advances or subsidiary earnings had changed, or that the earnings or loan balance were accumulated for jurisdictional purposes.

36. The Commission accepts El Paso's adjustments as complying with the July 20 Order. Further action on this issue will be made, if needed, concurrent with the Commission's action on El Paso's remaining tariff records under review in Docket No. RP10-1398-000.

2. Line 1903

37. In Opinion No. 517, the Commission directed El Paso to adjust its rates to exclude from rate base amounts exceeding \$10.5 million for Line 1903, but denied El Paso's request to adjust the depreciable plant accounts to reflect the exclusion of \$25.7 million because it found that El Paso had failed to demonstrate that it booked accumulated depreciation and deferred income taxes assessed on the California segment of the All American pipeline. Based on the evidentiary record, the Commission found that no adjustment was justified at that time. El Paso states that it is reducing its April Motion filing FERC Account No. 101 (gas plant in service) balance by \$25,645,000, leaving a remaining amount of \$10,475,000.

38. In Opinion No. 528, the Commission stated that El Paso should ensure that the compliance rates do not reflect costs or accounting stemming from the fact that it originally proposed to include costs attributable to the unused California segment, which were rejected in Opinion No. 517.³³ In Opinion No. 517-A, issued concurrent with this order the Commission determined that El Paso had provided sufficient evidence to show that it had recorded on its FERC books and records, from December 2005 through the end of the test period, depreciation and accumulated depreciation and income taxes associated with the \$25.7 million excluded from rate base. The Commission therefore accepted El Paso's proposed accounting adjustments, subject to certain changes described therein. The Commission accepts El Paso's adjustments in compliance with the July 20 Order, consistent with the order issued in Docket No. RP12-806-000.

3. Article 11.2(a) Shortfall

39. In Opinion No. 517, the Commission ruled that El Paso may not reallocate to non-Article 11.2(a) shippers or contracts any shortfall arising as a result of Article 11.2(a) rates being lower than recourse rates. The July 20 Order directed El Paso to make adjustments to ensure that Article 11.2 shortfalls are not reallocated to other shippers.

³³ Opinion No. 528, 145 FERC ¶ 61,140 at P 167.

El Paso states that the method to implement this requirement is not completely clear given that El Paso has used in Docket No. RP10-1398-000 a different cost classification, allocation and rate design than that used in the 2008 Rate Case addressed in Opinion No. 517. El Paso states that the 2008 Rate Case rates were settled on a black box basis with the amount of shortfall defined by settlement (\$5.8 million, reduced to \$3.3 million on an opt-in, opt-out basis). El Paso further states that the Presiding Judge in Docket No. RP10-1398-000 found that the Article 11.2(a) rates were a unique category of maximum rates and that there was no shortfall in that proceeding.³⁴

40. El Paso states that, in the Docket No. RP10-1398-000 proceeding, it classified its cost of service between calculated “1995 costs” and “post-1995 costs” and allocated the 1995 costs to all non-Article 11.2(a) and Article 11.2(a) maximum rate contracts. El Paso did not allocate any of the post-1995 costs to the Article 11.2(a) maximum rate contracts. As a result of that cost allocation, El Paso calculated a \$3.1 million April Motion filing difference between the 1995 costs and the Article 11.2(a) rates, which was then reallocated to the non-Article 11.2(a) maximum rate contracts. El Paso states that in this filing (Docket No. RP12-816-001) it has eliminated that second step of its cost allocation process, thus ensuring that the shortfall is not reallocated to non-Article 11.2(a) maximum rate contracts. El Paso further states that the \$3.1 million shortfall has been reduced to \$2.7 million based on the lower cost of service here (discussed below).

41. APS, the Indicated Shippers, Joint Parties, New Mexico Gas, and UNS/Tucson Electric argue that El Paso improperly calculated the Article 11.2 shortfall in its compliance filing. They argue that, as directed by the Commission in the July 20 Order, the calculation is simply the difference between the maximum recourse rates and any lower Article 11.2(a) rates, multiplied by the Article 11.2(a) billing determinants. APS argues that there is no legal basis to avoid this calculation by unilaterally changing the definition of the shortfall to refer only to purported 1995 costs. New Mexico Gas argues that El Paso is collaterally estopped from calculating the shortfall in the manner it proposed here because it is in direct contravention of the Commission’s rulings in Opinion No. 517. New Mexico Gas explains that El Paso’s proposal to bifurcate its cost of service based on the date on which the related facilities were constructed represents, in essence, the same vintaging of costs that the Commission rejected in Opinion No. 517. Joint Parties argue that every other party that addressed the shortfall issue in Docket No. RP10-1398-000 agreed with Joint Parties that the Article 11.2(a) revenue shortfall embedded in El Paso’s current recourse rates includes both the 1995 costs which it now proposes to disgorge, and a much larger post-1995 cost component, which must also be disgorged.

³⁴ El Paso cites the Initial Decision, 139 FERC ¶ 63,020 at P 299 and states that it agrees with the Presiding Judge’s finding.

42. In Opinion No. 528, the Commission found that El Paso's proposed bifurcated cost of service was not just and reasonable, for it would shift unrecovered costs associated with the Article 11.2 settlement rates to non-Article 11.2 shippers. The Commission further found that there is no shortfall amount that El Paso may reallocate to non-Article 11.2(a) shippers and directed El Paso to calculate its maximum recourse rates on a fully allocated basis, without regard to any shortfall reallocation to non-Article 11.2 rates based on the fact that Article 11.2 rates may be lower than recourse rates.³⁵ The Commission will address this issue on rehearing and compliance of Opinion No. 528 in a future order.

4. Cost of Service Adjustment

43. El Paso states that it has designed its compliance rates using the total gross cost of service and other rate elements from its April Motion filing. El Paso states that the April Motion filing included a total gross cost of service of approximately \$620 million but, for purposes of calculating rates, El Paso voluntarily reduced that amount by a one-time adjustment of approximately \$20 million in light of the economic conditions occurring in El Paso's service area. In addition, El Paso states that the \$20 million partially reflected (1) an anticipated deactivation in Docket No. CP11-17-000 of two compressor stations³⁶ and (2) other elements of the cost of service or rate level that may be reduced in litigation or settlement. In the instant filing, El Paso states that it has made the required compliance adjustments to the full \$620 million cost of service. El Paso states that it is entitled to determine rates based on its fully supported and allocated cost of service and that any required reductions to its cost of service should begin from the gross \$620 million cost of service. El Paso states that this is appropriate because it has supported the \$620 million cost of service in its evidence in Docket No. RP10-1398-000.

44. UNS/Tucson Electric and the Indicated Shippers argue that there is no legal basis for El Paso to increase the cost of service by \$20 million. UNS/Tucson Electric assert that the July 20 Order did not authorize El Paso to eliminate the voluntary reduction and that it is thus improper to adjust the cost of service. The Indicated Shippers argue that the only cost of service authorized by the Commission in Docket No. RP10-1398-000 is \$600,431,061 in the April 1, 2011 motion rate filing. The Indicated Shippers state that, while El Paso retracted the \$20 million reduction in rebuttal testimony, the Presiding Judge did not adopt the increase and El Paso did not address the issue in its brief on

³⁵ Opinion No. 528, 145 FERC ¶ 61,140 at PP 473-74.

³⁶ The Commission denied the petition prior to El Paso's April Motion filing. *See El Paso Natural Gas Co.*, 135 FERC ¶ 61,079 (2011).

exceptions. Therefore, the Indicated Shippers conclude that adding back the \$20 million to the cost of service is beyond the scope of this compliance filing and must be rejected. UNS/Tucson Electric agree, arguing that until the Commission acts on the Initial Decision in Docket No. RP10-1398-000, it is improper to adjust the cost of service as proposed by El Paso.

45. The Commission agrees that El Paso's proposal to add back the \$20 million voluntary reduction to its cost of service for purposes of calculating the Article 11.2 shortfall is beyond the scope of this compliance filing. As stated above, El Paso is required to adjust the currently-effective rates which were filed and accepted in the motion rate filing, subject to the outcome of the Docket No. RP10-1398-000 proceeding. The Commission is concerned with El Paso's belief that, having proposed to retract \$20 million from its proposed cost of service and thereby represented the lower figure as its justifiable costs, El Paso nevertheless assumes that it can simply add back foregone costs to replace costs rejected through the Commission's rate determinations. Opinion No. 528 did not directly address El Paso's proposal to address the rate impact of \$20 million cost-of-service reduction in relation to cost disallowances directed by the Commission, because it was not raised on exceptions. Neither did Opinion No. 528 direct El Paso to make the add back. Consequently, the Commission will defer consideration of this issue, until it can be addressed based on the broader cost of service record, including the requests for rehearing and compliance filing in Docket No. RP10-1398-000.

5. Implementation Date

46. New Mexico Gas and the Indicated Shippers oppose El Paso's requested delay in implementation of the revised tariff records and refunds. New Mexico Gas disagrees with El Paso's conclusion that the Commission did not intend to make revised tariff records effective until the completion of the two rate proceedings. New Mexico Gas argues that it is more reasonable to read the July 20 Order as requiring El Paso to make the necessary rate adjustments ordered by Opinion No. 517 effective now, subject to further adjustments, if necessary, in subsequent compliance filings. The Indicated Shippers argue that there is no reason to delay partial refunds. The Indicated Shippers assert that El Paso's concerns about possible surcharges are misplaced since the ultimate Docket No. RP10-1398-000 rates could not be any higher than properly calculated rates in compliance with the July 20 Order.³⁷ The Indicated Shippers argue that the Commission should not delay interim rate relief or refund relief related to these

³⁷ The Indicated Shippers argue that this is true because the compliance rates proposed here are lower than the currently-suspended rates, and they include the unauthorized \$20 million add-back to the cost of service.

three issues by holding current shippers hostage to results of litigation or to other issues in Docket No. RP10-1398-000 which will likely take three years to resolve. New Mexico Gas and the Indicated Shippers conclude that the revised rates should be implemented July 1, 2012, with refunds ordered effective April 1, 2011.

47. As discussed above, the Commission will not require interim rates and refunds. Therefore, El Paso shall incorporate the findings in this order when filing rates and tariff records in compliance with the order on rehearing and compliance in Docket No. RP10-1398-000.

The Commission orders:

(A) El Paso's interim compliance filing is accepted as discussed above, with the clarification that subsequent rate treatment is subject to the outcome of ongoing proceedings in Docket No. RP10-1398-000; with the clarification regarding interim rates and refunds, El Paso's request for rehearing is moot.

(B) El Paso shall reflect and incorporate the findings in this order in a further compliance filing, to be required when the Commission issues an order on rehearing and compliance in Docket No. RP10-1398-000, *et al.*

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.