UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

El Paso Natural Gas Company    Docket No. RP05-160-001

ORDER ON COMPLIANCE FILING

(Issued February 15, 2007)

1. On February 24, 2005, the Commission issued a letter order[1] in this proceeding accepting, subject to conditions, a tariff sheet filed by El Paso Natural Gas Company (El Paso) to provide a timeline for the prospective sale of available firm capacity. On March 11, 2005, El Paso filed tariff sheets to comply with that order.[2] The Commission will accept El Paso's compliance filing, subject to condition, as discussed below.

**Background**

2. On January 25, 2005, El Paso filed a tariff sheet providing a timeline for the prospective sale of available firm capacity. The proposed tariff sheet allowed shippers to reserve capacity on the El Paso system beginning at a future date, but placed limits on the time between the date that service is requested and the date service is to commence. These limits are divided into three time periods based on the length of requested transportation service. Under El Paso's proposal, for service with a term of one year or longer, a shipper must request that service begin no later than three months from the date that the service request is granted. For service with a term of greater than three months, but less than one year, the shipper must request that service begin no later than one month from the date that the request is granted. Finally, under El Paso's proposal, for service of three months or less, the shipper must request that service begin no later than ten business days from the date the request is granted.

3. In the January 25, 2005 filing, El Paso also stated that, given the demands of today's evolving energy markets, it may agree to sell capacity outside this timeline. El Paso therefore proposed exceptions to the timeline that El Paso would consider on a not unduly discriminatory basis, for: (1) capacity associated with an open season,

[1] *El Paso Natural Gas Co.*, 110 FERC ¶ 61,182 (2005) (February 24 Order).

[2] Seventh Revised Sheet No. 289, First Revised Sheet No. 290B, Original Sheet No. 290C, and Third Revised Sheet No. 419 to FERC Gas Tariff, Second Revised Volume No. 1A.

(2) capacity associated with new or incremental supply or markets, (3) capacity that is available due to the termination of an existing contract or the reduction of contracted volume under an existing contract or (4) capacity that is available due to the modification or construction of facilities or the issuance of any necessary certificate authorization.

4. On February 24, 2005, the Commission issued a letter order accepting El Paso's proposal subject to conditions. In that letter order, the Commission stated that El Paso's proposed exceptions regarding capacity associated with either an open season or with new markets were vague and do not deal with the creation of potentially conflicting rights-of-first-refusal (ROFR) between shippers when capacity is sold for more than a year in advance. To resolve this concern, the Commission directed El Paso to refile tariff sheets consistent with the Commission's findings in *Gas Transmission Northwest Corporation*[3] and *Northern Natural Gas Company*.[4] The February 24 Order also directed El Paso to file a tariff revision that either provides more specificity as to what is contemplated under the exemption for new or incremental supply or markets or removes that exemption entirely.

5. Southwest Gas Corporation (Southwest) sought rehearing or clarification of the Commission's February 24 Order. On June 8, 2005, the Commission issued an order[5] on rehearing and clarification that clarified that, consistent with *GTN* and *Northern Natural,* if El Paso sells capacity for future use in an open season, it must use a bidding process that evaluates bids on a net present value (NPV) basis, but that *GTN* and *Northern Natural* do not require El Paso to sell interim capacity using NPV bid evaluation criteria.

**<u>El Paso's Compliance Filing</u>**

6. On March 11, 2005, El Paso tendered revised tariff sheets to comply with the February 24 Order. El Paso states that its filing removes the proposed exemption for new or incremental supply or markets, and adds certain competitive bidding requirements for the sale of future capacity. El Paso states that it has complied with the Commission's directive that it adopt the ROFR limitations described in the *GTN/Northern Natural* decisions, *i.e.*, that a pipeline may limit the ROFR rights of interim capacity if the pipeline follows competitive bidding procedures for the future capacity and awards that capacity using a net present value formula. El Paso states that it proposes to adopt these procedures in this filing. However, El Paso states, it is already required to sell its capacity using the capacity release procedures of its tariff which are duplicative of the interim ROFR requirements. Accordingly, El Paso states, the tariff has been revised to

[3] *Gas Transmission Northwest Corp.*, 109 FERC ¶ 61,141 (2004) (*GTN*).

[4] *Northern Natural Gas Co.*, 109 FERC ¶ 61,388 (2004) (*Northern Natural*).

[5] *El Paso Natural Gas Co*., 111 FERC ¶ 61,374 (2005).

outline the interim ROFR requirements in the Prospective Sale of Available Capacity section while cross-referencing the specific competitive bidding requirements of the capacity release section.

7. Specifically, El Paso states that it has proposed to add the *GTN/Northern Natural* requirements by amending its tariff to provide that if it sells firm capacity on a prospective basis pursuant to the open season exemption to the capacity sales timeline, it will post that capacity for competitive bidding as a pre-arranged transaction and the capacity will be awarded to the bidder making the highest bid determined on an NPV basis. Additionally, the revised tariff provides that any interim capacity created by the prospective sale will be made available to other shippers using the competitive bidding requirements of the capacity release provisions of the tariff, and the posting of the interim capacity will state that it is not available for ROFR rights.

8. El Paso further states that its compliance filing also clarifies the exemption from the timeline for the sale of capacity that involves the construction of facilities. The compliance filing provides that if such a sale involves the reservation of capacity for a future expansion project, the requirements of section 34 of the tariff section will also be applicable. Section 34 provides the bidding procedures and ROFR limitations for capacity reserved for future expansion projects. El Paso states that, while the Commission did not require this change in the February 24 Order, El Paso has proposed the change in response to comments filed by its customers requesting a cross-reference to the tariff section.

## Public Notice and Comment

9. Public notice of El Paso's compliance filing was issued on March 16, 2005, with interventions and protests due as provided in section 154.210 of the 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.

10. Southwest filed a protest to El Paso's compliance filing. El Paso filed an answer to Southwest's protest, and Southwest filed an answer to El Paso's answer. The issues raised by the parties are discussed below.

## Discussion

11. In the *GTN/Northern Natural* decisions, the Commission addressed the issue of ROFR rights for capacity available on an interim basis until the commencement date of a future service agreement. The Commission held that a pipeline may sell such interim capacity without a ROFR if the pipeline follows competitive bidding procedures and awards the future capacity using a net present value formula.

12. As discussed above, El Paso proposes to sell future capacity outside the timeline for sale of prospective capacity in three circumstances: (1) when the capacity is associated with an open season, (2) when the capacity is available due to the termination of an existing contract or the reduction of contracted volume under an existing contract, and (3) when the capacity is available due to the modification or construction of facilities. In its protest, Southwest argues that El Paso's filing does not comply with the Commission's February 24 Order because it is not consistent with the *GTN/Northern Natural* decisions. Specifically, Southwest argues that El Paso's compliance filing does not address the potential conflict between ROFR rights attached to interim capacity sales and future capacity commitments for all three categories of advanced sales that may take place outside of the timeline. In addition, Southwest argues that El Paso's filing does not comply with the *GTN/Northern Natural* standards because it does not require the use of an NPV methodology to award capacity under all three categories. Southwest also states that the language of the compliance filing appears to suggest El Paso will not sell interim capacity that is associated with future capacity commitments involving contract termination/volume reductions, in violation of the Commission's policy prohibiting withholding of capacity. Finally, Southwest states that the proposed tariff language appears to contemplate interim capacity sales only after requests for future capacity commitments are awarded, and that this delay in the sale of interim capacity would violate the Commission's competitive bidding process. These issues are addressed below.

### A. Waiver of ROFR Rights for Interim Capacity

13. Southwest states that El Paso's proposed ROFR waiver is deficient because it applies only to interim capacity associated with future capacity commitments resulting from an open season and, therefore, does not address the potential conflict created between ROFR rights for interim capacity sales and future capacity commitments when the future capacity commitments are associated with contract terminations or reductions or for facility modifications.

14. El Paso responds that, under the Commission's policy, only the open season situation creates a need for waiver of ROFR rights for interim capacity. El Paso contends that there is no interim capacity created in the case of contract terminations or volume reductions. El Paso states that where a contract is terminating or providing for a reduction in contract volumes, the capacity will still be under contract until those events occur. Similarly, with regard to capacity created by facility modification or certificated construction, El Paso states that interim capacity is either nonexistent or irrelevant, except where El Paso proposes to reserve capacity on an interim basis as part of an overall expansion pursuant to its existing tariff authority. When that exception applies, El Paso states that section 34.1(f) of its tariff already provides for waiver of a ROFR on the interim capacity associated with capacity reserved for a future expansion. Thus, El Paso states, it properly limited waiver of ROFR right language to the one situation where the language is needed, *i.e.*, where there is an open season for the sale of future capacity.

15. Southwest responds that El Paso has incorrectly assumed that the only type of advanced sale of capacity created by contract termination or volume reductions is where the advanced sale buyer chooses a service commencement date coterminous with the contract termination or volume reduction date of the previous capacity holder. In fact, Southwest argues, there are situations where the two events are not coterminous, so that interim capacity is created.

**Commission Determination**

**Open Season Exemption**

16. The Commission finds that El Paso's compliance filing provides for the necessary waiver of ROFR rights for interim capacity that is made available by future capacity commitments associated with the open season exemption. Further, the Commission agrees with El Paso that its tariff already provides for waiver of ROFR rights for interim capacity associated with the modification or construction of facilities exemption; section 34 provides for a ROFR waiver for interim capacity associated with capacity reserved for future expansions. Therefore, no change to the proposed tariff is necessary to address that circumstance.

**Contract Termination/Reduction Exemption**

17. The Commission finds that El Paso's proposed tariff provisions are sufficient to prevent potential ROFR rights for interim capacity from conflicting with future capacity contact rights. Proposed section 20.20(c) of the tariff provides that, if El Paso receives a request for service with a commencement date more than a year after the capacity would become available as a result of contract termination or reduction, the request would be posted for competitive bidding using an NPV bid evaluation methodology in order for El Paso to sell the interim capacity without ROFR rights. Thus, as the Commission interprets the tariff, for any such interim capacity resulting from a contract termination or reduction that would otherwise be eligible for a ROFR, section 20.20(c) would apply. The Commission therefore finds that Southwest's concern is already addressed by the proposed tariff language and that no additional change is required here.

**B. The Competitive Bidding Process for Prospective Capacity When ROFR is Waived for Interim Capacity**

18. Southwest argues that the NPV competitive bidding process should apply to all advanced capacity sales outside of the time limits, not just to sales associated with an open season, because of the ROFR implications. Southwest argues that El Paso has failed to comply with the Commission's February 24 Order because the NPV bidding process that is reflected in El Paso's compliance filing is limited by its terms to capacity associated with open seasons and therefore does not apply to the other two categories of advanced capacity sale, *i.e.*, advanced sales associated with capacity made available from contract terminations or volume reductions and capacity made available from facility

modifications or certificate authorizations. Southwest argues that El Paso's revised tariff is not consistent with the *GTN/Northern Natural* policy and therefore does not comply with the Commission's February 24 Order.

19. El Paso responds that the Commission should reject Southwest's argument that sales of future capacity related to the exceptions to the timeline for capacity resulting from contract termination or volume reduction and facility modifications or certificate authorizations must be evaluated on an NPV basis. First, El Paso states, its currently-effective tariff already provides for the evaluation of bids for such capacity. Therefore, El Paso states, it is required to sell its capacity using one of the valuation methods, including NPV, that are an approved part of the capacity release provisions of its tariff. El Paso explains that section 28.10(b)(ii) of its current tariff provides El Paso and any releasing shipper with six possible options for evaluating bids for capacity, including NPV. El Paso states that it does not propose to change these provisions and Southwest has not established why they are no longer just and reasonable. El Paso further argues that the *GTN/Northern Natural* decisions do not require use of NPV as the exclusive methodology. El Paso argues that *GTN* is entirely consistent with El Paso's filing since the NPV method would be followed in any open season for future El Paso capacity. El Paso states that its filing simply adds two non-open season circumstances not specifically addressed and considered in *Northern Natural* and *GTN*.

**<u>Commission Determination</u>**

20. As stated above, in the *GTN/Northern Natural* decisions, the Commission held that a pipeline may sell interim capacity without a ROFR if the pipeline follows competitive bidding procedures and awards the future capacity using a net present value formula. The Commission concludes that El Paso's tariff currently provides for use of the NPV methodology in evaluating bids for future capacity, and that therefore, no changes to the tariff are required. El Paso's tariff provisions regarding open season, at section 20.20(c) of the GT&C, states that capacity will be awarded on the basis of the NPV criteria, and section 34.1(b) of its GT&C states that El Paso may only reserve capacity for a future expansion project if an open season using the NPV bid evaluation methodology has been held or will be held within one year of the date El Paso posts the capacity. El Paso asserts that there will be no interim capacity associated with capacity that becomes available as a result of contract termination or volume reduction. As discussed earlier, in the event such interim capacity becomes available that would otherwise be eligible for a ROFR, proposed section 20.20(c) of El Paso's tariff will apply. The Commission therefore finds that El Paso's tariff, as proposed, will provide for NPV bid evaluation in situations where waiver of ROFR rights for interim capacity arises, consistent with *GTN/Northern Natural*.

**C. <u>Interim Capacity</u>**

21. Southwest states that it is concerned that El Paso's proposed tariff language could be interpreted to permit El Paso to withhold or delay sales of interim capacity. El Paso

responds that there is no basis for Southwest's concern since the Commission's regulations require that interstate pipelines make existing capacity available and El Paso's current tariff complies with this requirement by requiring that available capacity be posted for competitive bidding.

**Commission Determination**

22. Given the Commission's policy prohibiting the withholding of capacity and the existing and proposed El Paso tariff provisions, the Commission finds no basis for Southwest's concern that the interim capacity will be withheld.

**D. Miscellaneous**

23. Sections 20.20 (c)(i) and 20.20 (c)(iii) refer to competitive bidding requirements in section 28.14. Section 28.14 has been modified since the submission of this filing and no longer contains the referenced requirements. El Paso is directed to file revised tariff sheets to correct the reference.

The Commission orders:

(A) The proposed tariff sheets are accepted subject to the condition discussed in the body of this order.

(B) El Paso is directed to refile tariff sheets consistent with this order within 15 days of the issuance of this order.

By the Commission. Commissioner Wellinghoff not participating.

( S E A L )

Magalie R. Salas,
Secretary.