

ORAL ARGUMENT NOT YET SCHEDULED

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 04-1123

**ARIZONA CORPORATION COMMISSION, *ET AL.*
PETITIONERS,
v.
FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.**

**ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION**

**BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

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JUNE 16, 2005

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties:

All parties appearing before the Commission and this Court are listed in Petitioners' Rule 28(a)(1) certificate.

B. Rulings Under Review:

The rulings under review appear in the following orders issued by the Federal Energy Regulatory Commission:

1. *Public Utilities Commission of the State of California v. El Paso Natural Gas Co.*, 105 FERC ¶ 61,201 (2003); and
2. *Public Utilities Commission of the State of California v. El Paso Natural Gas Co.*, 106 FERC ¶ 61,315 (2004).

C. Related Cases:

This case has not previously been before this Court or any other court. FERC counsel are not aware of any related cases pending in this or any other court.

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June 16, 2005

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GLOSSARY

ALJ	Administrative Law Judge
APA	Administrative Procedure Act
<i>BG&E</i>	<i>Baltimore Gas and Electric Co. v. FERC</i> , 252 F.3d 456 (D.C. Cir. 2001)
CD	contract demand
CPUC	Public Utility Commission of the State of California
December 27, 2001 Order	<i>Public Utilities Commission of the State of California v. El Paso Natural Gas Co.</i> , 97 FERC ¶ 61,380 (2001)
El Paso	El Paso Natural Gas Company
EOC	East of California
February 27, 2002 Order	<i>Public Utilities Commission of the State of California v. El Paso Natural Gas Co.</i> , 98 FERC ¶ 61,210 (2002)
FR	full requirements
July 9, 2003 Capacity Allocation Proceeding Order	<i>Public Utilities Commission of the State of California v. El Paso Natural Gas Co.</i> , 104 FERC ¶ 61,045 (2003)
June 11, 2001 Order	<i>Public Utilities Commission of the State of California v. El Paso Natural Gas Co.</i> , 95 FERC ¶ 61,368 (2001)
JSA	Joint Settlement Agreement

March 28, 2001 Order	<i>Public Utilities Commission of the State of California v. El Paso Natural Gas Co.</i> , 94 FERC ¶ 61,338 (2001)
May 2002 Capacity Allocation Proceeding Order	<i>Public Utilities Commission of the State of California v. El Paso Natural Gas Co.</i> , 99 FERC ¶ 61,244 (2002)
MOE	FERC’s Market Oversight and Enforcement Section
MSA	Master Settlement Agreement
NGA	Natural Gas Act
November 14, 2003 Order	<i>Public Utilities Commission of the State of California v. El Paso Natural Gas Co.</i> , 105 FERC ¶ 61,201 (2003)
Phase I ID	<i>Public Utilities Commission of the State of California v. El Paso Natural Gas Co.</i> , 97 FERC ¶ 63,004 (2001)
Phase II ID	<i>Public Utilities Commission of the State of California v. El Paso Natural Gas Co.</i> , 100 FERC ¶ 63,041 (2002)
Rehearing Order	<i>Public Utilities Commission of the State of California v. El Paso Natural Gas Co.</i> , 106 FERC ¶ 61,315 (2004)
Settlement	Joint Settlement Agreement
Settling Parties	CPUC, El Paso, Pacific Gas and Electric Company, Southern California Edison Company, and the City of Los Angeles

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**BRIEF FOR RESPONDENT
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STATEMENT OF THE ISSUES

1. Whether the petition for review should be dismissed as it challenges an unreviewable determination by the Federal Energy Regulatory Commission ("Commission" or "FERC") to approve a contested settlement resolving a complaint.
2. Assuming jurisdiction, whether the Commission appropriately approved the proposed settlement, as modified, in resolution of this complaint proceeding.

STATUTES AND REGULATIONS

Pertinent sections of the Natural Gas Act (“NGA”) and the Commission’s implementing regulations are set out in the Addendum to this brief.

COUNTERSTATEMENT OF JURISDICTION

Petitioners invoke this Court's jurisdiction under NGA § 19(b), 15 U.S.C. § 717r(b). Br. at 1. Under Section 10 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 701(a)(2), however, judicial review is inapplicable "to the extent that . . . agency action is committed to agency discretion by law." As shown in Point I of the Argument below, FERC’s decision to resolve the instant complaint case through settlement is immune from judicial review under APA § 701(a)(2). *Heckler v. Chaney*, 470 U.S. 821, 828, 831-33 (1985); *Baltimore Gas and Electric Co. v. FERC*, 252 F.3d 456, 459-62 (D.C. Cir. 2001) (“*BG&E*”). The petition should, therefore, be dismissed.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

This case involves a resolution of a complaint proceeding through settlement. In response to an April 2000 NGA § 5, 15 U.S.C. § 717d, complaint filed by the Public Utility Commission of the State of California (“CPUC”), R. 1 at 1-40, JA 3-43, the Commission set for hearing before an Administrative Law Judge (“ALJ”) two issues: (1) “whether [El Paso Natural Gas Company (“El

Paso”)] had market power, and if so, exercised it to drive up the price of natural gas at the California border;” and (2) “whether [El Paso] engaged in affiliate abuse or violated the Affiliate Standards in bidding for or awarding the El Paso contracts” *Public Utilities Commission of the State of California v. El Paso Natural Gas Co.*, 94 FERC ¶61,338 at 62,247-48 (“March 28, 2001 Order”), *order on reh’g*, 95 FERC ¶61,368 at 62,389-92 (2001) (“June 11, 2001 Order”), JA 45-67, 68-84.

After the ALJ’s Initial Decision, *Public Utilities Commission of the State of California v. El Paso Natural Gas Company*, 97 FERC ¶63,004 (2001) (“Phase I ID”), issued, FERC remanded on the basis of comments from its Market Oversight and Enforcement Section (“MOE”), R. 366, for investigation into whether, “during the period from November 2000 through March 31, 2001, El Paso made all of its capacity available at its California delivery points as required by the Commission’s regulations.” *Public Utilities Commission of the State of California v. El Paso Natural Gas Company*, 97 FERC ¶ 61,380, 62,740 (2001) (“December 27, 2001 Order”), *order on reh’g*, 98 FERC ¶61,210 (2002) (“February 27, 2002 Order”), JA 180. On remand, the ALJ concluded that “the evidence presented in this new phase of the proceeding shows that [El Paso] failed to post and make available at least 345 MMcf/d of available capacity at its California delivery points” during the November 2000 through March 31, 2001 period. *Public Utilities Commission of*

the State of California v. El Paso Natural Gas Company, 100 FERC ¶ 63,041 at P 6 (2002) (“Phase II ID”), JA 632.

Subsequently, in June 2003, the CPUC, El Paso, Pacific Gas and Electric Company, Southern California Edison Company, and the City of Los Angeles (collectively, “Settling Parties”) submitted a Joint Settlement Agreement (“JSA” or “Settlement”) in resolution of this enforcement proceeding. R. 3271. The Commission approved the Settlement, after considering the merits of all contested issues, with modifications to reflect those issues it found had merit. *Public Utilities Commission of the State of California v. El Paso Natural Gas Company*, 105 FERC ¶ 61,201 (2003) (“November 14, 2003 Order”), *order on reh’g*, 106 FERC ¶ 61,315 (2004) (“Rehearing Order”), JA 1348-1408, 1471-95.

II. STATEMENT OF FACTS

A. Statutory and Regulatory Background

This Court has held that:

the NGA -- the “substantive statute” here -- lacks guidelines against which to measure FERC’s exercise of its enforcement discretion. . . . At every turn the NGA confirms that FERC’s decision how, or whether, to enforce that statute is entirely discretionary. Nowhere does the act place an affirmative duty on FERC to initiate an enforcement action, nor does it impose limitations on FERC’s discretion to settle such an action.

BG&E, 252 F.3d at 460. In fact, “the Natural Gas Act goes even further, and expressly confirms the breadth of the Commission’s enforcement discretion,” as it

“provides that the Commission ‘*may* investigate’ any possible violations.” *Id.* at 461 (quoting NGA §14(a), 15 U.S.C. § 717m(a)) (emphasis added by Court). “FERC’s regulations contain equally discretionary language: the Commission ‘*may*’ initiate administrative proceedings . . . *or take other appropriate action.*” *Id.* (quoting 18 C.F.R. § 1b.7) (emphases and omission by Court). FERC’s regulations on complaints, 18 C.F.R. § 385.206(g), and contested settlements, 18 C.F.R. § 385.602(h), are wholly discretionary as well. *See Laclede Gas Co. v. FERC*, 997 F.2d 936, 944 (D.C. Cir. 1993) (“Rule 602(h) contains no substantive standard.”).

B. Events Leading to the Challenged Orders

1. The CPUC Complaint Proceeding (Docket No. RP00-241)

On April 4, 2000, the CPUC, on behalf of California consumers, filed an NGA §5 complaint alleging: (1) that El Paso manipulated California energy markets by withholding pipeline transportation capacity to drive up natural gas prices in the periods immediately before and during the California energy crisis of 2000-2001; and (2) that El Paso’s award of three transportation contracts to its marketing affiliate was unduly preferential. R. 1 at 1-40, JA 3-43; *see* November 14, 2003 Order at P 1, JA 1348-49. As relief, the complaint sought a declaration that El Paso’s award of the three transportation contracts to its affiliate was unjust and unreasonable and nullification of the contracts. R. 1 at 38, JA 41; *see* November 14, 2003 Order App. A at 1, JA 1400. Alternatively, the complaint

requested that FERC add “anti-hoarding” conditions (*i.e.*, a requirement that El Paso release, on a short-term basis, any unused contract capacity) to the three affiliate contracts. R. 1 at 38, JA 41; *see* November 14, 2003 Order App. A at 1, JA 1400.

The Commission set the complaint for hearing, March 28, 2001 Order at 62,247, JA 48; June 11, 2001 Order at 62,389-92, JA 69-73, which took place from April 3 through April 6, 2001. Phase I ID at 65,015, JA 93. Initial and reply briefs were filed by various California parties and Commission trial staff. *Id.*

On October 9, 2001, the ALJ concluded that, while El Paso “had the ability to exercise market power, the record in this case is not at all clear that [it] in fact exercised market power.” Phase I ID at 65,029, JA 126. The ALJ recommended, therefore, that the portion of the CPUC’s complaint alleging that El Paso exercised market power to drive up natural gas prices at the California border be dismissed. *Id.* On the second issue set for hearing, the ALJ found El Paso had engaged in affiliate abuse that violated the Affiliate Standards in awarding the three contracts to its affiliate. *Id.*

FERC’s MOE staff filed comments on the Phase I ID, asserting that the record “suggests potential violations of section 284.9 [18 C.F.R. §284.9, which requires pipelines to provide interruptible service], but the record is insufficient to

draw the conclusion that a violation occurred because there may be other potential explanations for the existence of unused capacity on the pipeline.” R. 366 at 1, JA 127. Accordingly, MOE “recommend[ed] a more complete investigation of the reasons why capacity went unused on [El Paso’s] pipeline at times during the period November 2000 through March 2001.” *Id.* at 1-2, JA 127-28.

El Paso moved to strike MOE’s comments. R. 369. The CPUC and other California parties opposed the motion, urging further investigation into whether El Paso made all its capacity available from November 2000 through March 2001. R. 374, 375; *see* December 27, 2001 Order at 62,739-40, JA 179.

On December 27, 2001, the Commission denied El Paso’s motion to strike, and “remand[ed] this proceeding to the Chief ALJ for the limited purpose of conducting a hearing to investigate whether, during the period from November 2000 through March 31, 2001, El Paso made all of its capacity available at its California delivery points as required by the Commission’s regulations. The existing record in this proceeding does not provide an adequate basis for resolution of this issue.” December 27, 2001 Order at 62,740, JA 180. “[F]rom the Commission’s review of the existing record, it [was] not clear whether unused capacity was made available for interruptible transportation service during the period from November 2000 through March 31, 2001.” *Id.*, JA 181.

The Commission took this action under its NGA § 5 authority “to establish a hearing to investigate whether a rate or any rule, regulation, practice, or contract affecting a rate is unjust, unreasonable, unduly discriminatory, or preferential,” and its NGA § 14(a), 15 U.S.C. § 717m, authority “to investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any person has violated or is about to violate any provision of [the NGA] or any rule, regulation, or order thereunder, or to aid in the enforcement of the provisions of [the NGA]” February 27, 2002 Order at P 21, JA 310.

The remand hearing was held from March 21 through April 10, 2002. Phase II ID at P 12, JA 633. Initial and reply briefs were filed by various California parties and Commission staff, but Petitioners filed only a reply brief. *Id.*

The ALJ’s September 23, 2002 Phase II ID concluded that “the evidence presented in this new phase of the proceeding shows that [El Paso] failed to post and make available at least 345 MMcf/d of available capacity at its California delivery points” during the November 2000 through March 31, 2001 period. Phase II ID at P 6, JA 632. That conclusion was based on the ALJ’s findings that:

- “210 MMcf/d was not made available because El Paso did not operate its pipeline at the Maximum Allowable [Operating] Pressure (“MAOP”) as it very well could have,” Phase II ID at PP 28, 43-48, JA 638-39, 644-45;
- “35 MMcf/d was not made available because non-essential maintenance was performed [at 2 stations for 14 days at one and 21 days at the other] during the relevant period, which could have been

performed at any time during the heating season,” *id.* at PP 28, 56, JA 639, 648-49;

- “It also appears that [El Paso] could have flowed an additional 100 MMcf/d through the Pecos node to California by using its Lea County receipt point,” *id.* at PP 28, 50-55, JA 639, 646-48; and
- 23.5 MMcf/d was not made available because “El Paso did not have a system in place that would have permitted additional time to fully schedule its system during Run 2 of the [nomination] cycle, as good business practice would indicate it should have in order to fully utilize its capacity,” *id.* at PP 28, 33-38, JA 638-42.

The ALJ rejected El Paso’s explanation that capacity was unavailable because gas was diverted to manage transients, *i.e.*, serve the hourly service demand variations of its East of California (“EOC”) loads. Phase II ID at P 42, JA 643-44. In the ALJ’s view, El Paso “was very much aware of its growing East of California and Mexican markets and should have taken steps to increase its capacity accordingly, which it did not.” *Id.* (citation omitted).

On March 21, 2003, the Settling Parties moved to defer action on the initial decisions so they and other parties could formalize an agreement that would resolve the matters raised in the complaint proceeding. R. 3260; *see also* R. 3267. Then, on June 4, 2003, the Settling Parties filed the JSA for Commission approval, requesting that the Commission “dismiss the complaint with prejudice as provided for in the settlement, vacate [the Phase I and Phase II] Initial Decisions of the Chief Judge in this proceeding, and terminate this proceeding.” R. 3271 at Offer of Settlement p. 2, JA 1130; R. 3271 at JSA p. 16, JA 1160.

The JSA “is one element of [and a condition precedent to] a larger settlement [(Master Settlement Agreement (“MSA”) filed for approval in California State court)] that resolves all claims against [El Paso] relating to, *inter alia*, any alleged actions that, during the period September 1, 1996 through March 20, 2003, increased or could have increased natural gas prices, natural gas pipeline capacity prices, or electric power prices in California, including any claims that were raised in this proceeding.” *Id.* at Offer of Settlement p. 2, JA 1130; *see also id.* at 7, JA 1135. Under the proposed JSA and MSA, El Paso agreed, among other things:

- to make payments of approximately \$1.69 billion, R. 3271 at Offer of Settlement p. 7, JA 1135;
- to make 3290 MMcf/d of firm capacity primary capacity available to its California delivery points, R. 3271 at Offer of Settlement pp. 3, 8, JA 1131, 1136; R. 3271 at JSA pp. 7, 10-11, JA 1151, 1154-55;
- to provide 320 MMcf/d of new capacity on El Paso’s system by constructing its full Line 2000 Power-Up expansion project without any additional reservation charges until the effective date of its next rate case, R. 3271 at Offer of Settlement pp. 3-4, 10, JA 1131-32, 1138; R. 3271 at JSA pp. 8-9, JA 1152-53;
- to clarify its 1996 rate settlement Block II recall capacity rights, R. 3271 at Offer of Settlement pp. 4, 10-12, JA 1132, 1138-40; R. 3271 at JSA pp. 11-12, JA 1155-56; and
- that, during the term of the JSA (five years), FERC affiliates would not acquire additional firm capacity on FERC’s system, R. 3271 at Offer of Settlement pp. 4, 12, JA 1132, 1140; R. 3271 at JSA pp. 12-13, JA 1156-57.

In addition, the Settling Parties agreed to “an alternative dispute resolution process.” R. 3271 at JSA p. 18, JA 1162.

Under that process, compliance with certain of the terms of [the JSA] shall be enforced by a Special Master, as provided in a Stipulated Judgment that the Settling Parties will file with a federal district court in California. In part, the Stipulated Judgment will provide that, to the extent that the Settling Parties disagree in the future as to whether particular compliance issues are subject to the jurisdiction of the Commission, the parties agree that such disputes will be submitted to the Commission for resolution. The Stipulated Judgment will further state that in the event the Commission does not resolve such a dispute within 60 days, the dispute will be submitted to the Special Master for his/her immediate resolution, provided, however, that nothing in the Stipulated Judgment is intended to deprive the Commission of the ability to resolve any disputes or issues within its jurisdiction.

Id.

FERC Staff and other parties filed comments generally supporting approval of the settlement, while Petitioners and others filed comments opposing it. R. 3278-96. Petitioners urged rejection because, in their view, the JSA: (1) included Special Master provisions that “divest the Commission of matters within its exclusive statutory jurisdiction,” R. 3286 at 16, JA 1226; (2) allocated Power-Up Project capacity to California shippers, rather than to EOC shippers, contrary to FERC’s determination in the Capacity Allocation Proceeding, *id.* at 21, JA 1231; (3) required El Paso to establish unduly discriminatory dual primary delivery points rights for certain shippers, *id.* at 21-22, JA 1231-32; (4) modified Block II capacity recall rights, *id.* at 23-25, JA 1233-35; and (5) preempted resolution of

EOC shippers' request for clarification in the Capacity Allocation Proceeding that expired Block II capacity is free of the 1996 Settlement Block II capacity conditions, *id.* at 30-31, JA 1240-41.¹ Alternatively, Petitioners requested that, if the Commission approved the JSA, the Commission sever them from the settlement and issue a merits decision on contested settlement issues. *Id.* at 4, 33-39, JA 1214, 1243-49.

2. The Capacity Allocation Proceeding (Docket No. RP00-336)

Historically, El Paso provided two types of firm service,² contract demand ("CD") and full requirements ("FR"). July 9, 2003 Capacity Allocation Proceeding Order, 104 FERC at P 7. CD service, subscribed to mostly by California customers, provides transmission rights on El Paso's system up to the maximum quantity designated in each customer's service contract. *Id.* CD shippers' reservation charges are based on their contract entitlements. FR service, by contrast, subscribed to mostly by EOC customers, required customers to transport on El Paso, and for El Paso to transport, the customers' full natural gas requirements each day, with no quantity limitations. *Id.* at P 7. FR shippers'

¹ That assertion became moot when the Commission denied EOC Shippers' requested clarification in the Capacity Allocation Proceeding, *El Paso Natural Gas Co.*, 104 FERC ¶ 61,045 at PP 173-75 (2003) ("July 9, 2003 Capacity Allocation Proceeding Order"). Rehearing Order at P 43 and n.36, JA 1486-87.

² Firm service is service that is not subject to a prior claim by another customer. *El Paso Natural Gas Co.*, 99 FERC ¶ 61,244 at 62,013 (2002) ("May 2002 Capacity Allocation Proceeding Order") (citing 18 C.F.R. §284.7).

reservation charges were based on their billing determinants set in a 1996 Settlement.

In July 2001, complaints were filed against El Paso by both a group of its CD customers, and a group of its FR customers (including a number of Petitioners here), alleging that their firm contractual entitlements were not being met because El Paso was regularly prorating customer nominations. The Commission agreed with complainants that firm service on El Paso had deteriorated and was no longer reliable as “El Paso does not have sufficient firm capacity to meet growing demand for firm service on its system, and firm service has been curtailed through pro rata allocations of service nominations on a routine basis.” May 2002 Capacity Allocation Proceeding Order, 99 FERC at 62,001, 62,008.

Finding that the degradation in firm service was caused primarily by the significant and unrestricted growth in FR demand and that FR contracts are a disincentive to pipeline-to-pipeline competition and offer no incentive for El Paso to build necessary expansion because El Paso would receive no new revenues for the expanded capacity, the Commission concluded that the public interest required, among other things, conversion of the FR contracts to CD contracts. *Id.* at 62,000-04.

The Commission also rejected the ALJ’s Phase II ID finding that El Paso must operate its system at its MAOP. July 9, 2003 Capacity Allocation Proceeding

Order at PP 66-77. While MAOP “establishes the maximum pressure at which a pipeline or pipeline segment may operate,” *id.* at P 71 (citing 49 C.F.R. §192.3), pipelines are certificated not to operate at MAOP, but at expected service levels. *Id.* at P 74. El Paso’s tariff set its expected service levels (minimum and maximum receipt and delivery pressures) based on the *pro forma* contracts between shippers and El Paso. *Id.* at P 76. “These contract levels cannot exceed MAOP, but they can be established at any level between MAOP and the Minimum Design Operating Pressure. The Commission certifies the service levels that are reflected in the executed service agreements. Thus, El Paso fulfills its obligations when it delivers to its shippers within the pressure levels established by its contract.” *Id.*

Additionally, the Commission rejected the ALJ’s finding that El Paso cannot reserve capacity for managing transients, *i.e.*, to serve the hourly service demand variations of its EOC loads. *Id.* at PP 78-80.

[I]t is reasonable for El Paso to reserve capacity for managing transients, and not post that capacity as available firm capacity. . . . Because of the large swings in daily requirements, El Paso must reserve mainline capacity to support the hourly service demand variations of its EOC Customers. Without this additional flexibility, the hourly and daily variations in demand by the EOC Customers would deplete the line pack on El Paso Pipeline’s system. . . . The capacity reserved for managing transients is necessary to render firm services. . . . El Paso may not sell or contract for firm service capacity that is subject to a prior claim. Capacity that is needed to manage transients is subject to such a prior claim. Therefore, it is not appropriate to make an adjustment to available system capacity to

include capacity used to manage transients because that capacity is not available for firm sales.

Id. at PP 78-80.

Furthermore, the Commission rejected the ALJ's finding that El Paso should have increased its capacity to accommodate the growing EOC demand. *Id.* at P 75. El Paso's tariff did not require it expand its capacity to accommodate increasing EOC demand unless "in El Paso's judgment, such expansions [we]re economically feasible." *Id.*

On February 11, 2005, this Court denied Petitioners' appeal of the Capacity Allocation Proceeding Orders. *Arizona Corporation Commission v. FERC*, 397 F.3d 952 (D.C. Cir. 2005).

C. The Challenged Orders

The Commission accepted the JSA in settlement of the instant proceeding because "[t]he certainty and the outcome of the Settlement allow the parties and the Commission to move forward without the need to employ additional private and public resources in the pursuit of a complaint challenging contracts that expired more than two years ago," November 14, 2003 Order at P 56, JA 1367-68. But, in response to matters raised by Petitioners and other contesting parties, the Commission required modifications to make the JSA "consistent with Commission policy and other orders relating to El Paso Pipeline's capacity." November 14, 2003 Order at P 41, JA 1362.

As Petitioners had requested, the Commission rejected, as unduly discriminatory and contrary to policy, the JSA's dual firm delivery point provisions. November 14, 2003 Order at PP 41, 59, 74-82, 150, JA 1362, 1368, 1372-74, 1395. The Commission also rejected the JSA's proposed exclusive reservation of 3,290 MMcf/d of firm capacity for California shippers. *Id.* at PP 142-55, JA 1393-97; Rehearing Order at PP 15, 33, JA 1476-77, 1483-84. While El Paso "is obligated to maintain physical facilities sufficient to make 3,290 MMcf/d of capacity available to its California delivery points," El Paso's ability "to make a specified volume of physical capacity available does not mean that that amount of capacity is reserved for the exclusive use of the California markets." November 14, 2003 Order at P 147, JA 1394. Rather, "a pipeline's service obligation is defined by its contracts with its shippers." *Id.*

Regulation under the NGA is predicated on a system of private contracts between pipelines and their customers that the Commission is empowered to review. Absent such contracts, there is no Commission-enforceable certificate requirement that El Paso Pipeline serve particular customers or markets. If the Settling Parties intend to ensure that El Paso Pipeline reserves 3,290 MMcf/d of capacity for the California markets, then the Settling Parties or their agents must have contracts with El Paso Pipeline to reserve those volumes of firm mainline transmission and delivery point capacity.

November 14, 2003 Order at P 145 (citation omitted), JA 1393-94.

The other matters raised by contesting parties did not warrant modification of the JSA. For example, although Petitioners claimed the JSA allocated Power-

Up Project capacity to California shippers, rather than to EOC shippers, the Commission explained that the JSA did not alter the Capacity Allocation Proceeding ruling that all capacity on El Paso's system, including the Power-Up Project capacity, in excess of that needed to serve CD and FT-2 shippers, must be allocated to the EOC shippers. November 14, 2003 Order at PP 13, 142, 146, 148, JA 1354-55, 1393, 1394.

Furthermore, the JSA's Special Master proposal was found appropriate because "it provides the Settling Parties an avenue for resolving issues of performance under the Settlement, but it does not diminish the Commission's ultimate jurisdiction over El Paso Pipeline's transportation services or the jurisdiction of the United States Courts of Appeals to review Commission orders." November 14, 2003 Order at P 59, JA 1368; see also *id.* at PP 91-98, JA 1377-79; Rehearing Order at PP24-35, JA 1480-84.

The fact that the Settling Parties have agreed to employ the Special Master to aid them in reaching agreement on certain issues does not change the fact that all interested parties, including EOC shippers, will be afforded the right to notice and an opportunity to present countervailing arguments for the Commission's consideration and that the Commission will review all proposals *de novo*.

Rehearing Order at P 29, JA 1482.

The Block II recall clarifications were appropriate as well, as they did not modify the 1996 Settlement, but "merely resolve[d] uncertainties in the recall process established in the El Paso Pipeline 1996 Settlement and confirm[ed] El

Paso Pipeline's agreement to follow a more objective and transparent process in the recall of Block II capacity." November 14, 2003 Order at P 120, JA 1386; *see also id.* at PP 121-24, JA 1387-88; Rehearing Order at PP 41-43, JA 1486-87.

As modified, the Commission found the JSA to be just and reasonable and in the public interest because it:

resolves a lengthy and heavily contested proceeding in a manner that is consistent with the Commission's policies, as well as its orders in [the Capacity Allocation Proceeding]. The Commission's action here also provides finality, allows customers to receive financial relief, and preserves the rights of the EOC and California shippers. The certainty achieved by the Settlement also permits parties to make long-term plans regarding their capacity and natural gas needs.

Rehearing Order at PP 4, 12, JA 1473, 1475 (citation omitted).

Acceptance of the modified JSA did not prejudice Petitioners. Rehearing Order at PP 12, 20, JA 1475, 1478-79. The CPUC's complaint, which "alleged that El Paso Pipeline and its affiliates violated the Standards of Conduct and improperly withheld pipeline capacity to drive up the price of natural gas at the California border," did not seek any relief for EOC shippers. *Id.* at PP 13, 47, JA 1475, 1488. While "the Settlement here primarily provides relief to customers on whose behalf the complaint was filed," *id.*, it provides benefits to all El Paso customers:

It provides financial benefits to customers who were impacted by the alleged conduct of the El Paso Companies [and] other benefits to all of El Paso Pipeline's shippers, including EOC Shippers. These benefits include El Paso Pipeline's commitments to complete [the

Power-Up Project] . . . and to administer the Block II capacity recall provisions in a reasonable, objective, and more transparent manner Moreover, EOC Shippers also benefit from the Commission's rejection of the claim that El Paso Pipeline has a certificated obligation to reserve 3,290 MMcf/d of capacity for service to California.

Id. at P 20, JA 1478-79 (footnote omitted). Additionally, the JSA did not alter any EOC Shipper rights set in the Capacity Allocation Proceeding. *Id.*

Severance of the EOC Shippers for a merits decision was not justified because the instant orders and those in the Capacity Allocation Proceeding either rendered moot, or resolved, all contested issues. November 14, 2003 Order at P 7, JA 1351. "The Commission [found] no reason to sever the EOC Shippers from this proceeding to allow them to pursue issues that have been resolved elsewhere." Rehearing Order at P 48, JA 1488. "EOC Shippers participated in both this and the Capacity Allocation Proceeding to the extent they chose and had ample notice and opportunity to challenge the evidence in both proceedings. EOC Shippers have not been deprived of a forum and opportunity to present their claims." *Id.* at P 19, JA 1478; *see also id.* at P 14, JA 1476 ("EOC shippers have been represented and participated in both proceedings; therefore, they have been provided a forum and full opportunity to advance their arguments concerning their rights to El Paso Pipeline's capacity.").

In these circumstances, severance would have been inappropriate, as it "would have allowed [Petitioners] a second opportunity to pursue issues that were

resolved in the Capacity Allocation Proceeding.” Rehearing Order at P 14, JA 1476. “Certain issues of law and fact are identical in both proceedings,” and Petitioners’ minimal participation in the instant proceeding³ was intended to obtain relief they also pursued through their extensive participation in the Capacity Allocation Proceeding. Rehearing Order at PP 14, 19, JA 1476, 1478. Petitioners’ severance request sought affirmance of Phase II ID findings (faulting El Paso for the capacity problems on its system) that had been rejected in the Capacity Allocation Proceeding (*see* July 9, 2003 Capacity Allocation Proceeding Order at PP 66-80 (rejecting the bases for the Phase II ID’s fault finding); *and* May 2002 Capacity Allocation Proceeding Order at 62,000-04 (finding that the degradation in firm service was caused primarily by the significant and unrestricted growth in demand under the FR contracts)). Accordingly, Petitioners’ request constituted an improper collateral attack on the Commission’s Capacity Allocation Proceeding rulings. *Id.* at PP 47, 51, JA 1488, 1489.

³ Petitioners’ participation in Docket No. RP00-241 was limited to the following:

Both briefs filed by the EOC Shippers were responsive briefs. The EOC Shippers played a largely passive role in this case. They did not engage in any discovery, sponsor any testimony, tender any EOC witness for cross examination by [El Paso Pipeline], submit any evidence, or file any initial briefs that would have allowed [El Paso Pipeline] to respond directly to their claims.

Rehearing Order at n.13, JA 1476 (quoting R. 3313 at 3 n.6).

Finally, the Commission found, “EOC shippers [we]re not entitled to a merits ruling on the Phase II ID’s findings.” Rehearing Order at P 51, JA 1489. “[T]here is no requirement that the Commission must rule on the merits of a complaint before it approves a settlement resolving that complaint.” *Id.* at P 17, JA 1477.

The petition for review followed.

SUMMARY OF ARGUMENT

I.

This Court has held that a FERC determination to resolve an investigation of alleged past misconduct through settlement is presumed nonreviewable. None of the *Chaney* factors that would rebut the presumption of nonreviewability exists. The NGA does not limit FERC's enforcement discretion by setting substantive priorities or by otherwise circumscribing FERC's power to discriminate among issues or cases it will pursue. Nor did FERC refuse to take enforcement action based on the mistaken belief that it lacked jurisdiction. And, finally, FERC did not adopt a general policy that is so extreme as to amount to an abdication of its statutory responsibilities. Thus, the petition for review should be dismissed.

II

Assuming jurisdiction, the challenged orders should be upheld. The Commission appropriately addressed the merits of all contested settlement issues, and required that the JSA be modified to reflect those issues it found had merit.

Despite Petitioners' claim to the contrary, the merits of the Phase II ID withholding finding was not a contested settlement issue. The Commission is not required to rule on the merits of a complaint before it approves a settlement resolving that complaint.

In any event, the Capacity Allocation Proceeding Orders already addressed, and rejected on its merits, the Phase II ID's determination that El Paso violated the NGA by withholding capacity. Petitioners' repeated assertion that the Commission should have affirmed the Phase II ID's withholding finding constitutes an impermissible collateral attack on the rejection of that finding in the Capacity Allocation Proceeding. Accordingly, the Court lacks jurisdiction to address it.

FERC has not created an administrative shell game to insulate its actions from review, as Petitioners assert. Petitioners petitioned for, and obtained judicial review of, the Orders in the Capacity Allocation Proceeding which rejected the Phase II ID's finding.

The Commission properly denied Petitioners' request for severance to relitigate the Phase II ID withholding finding. Severance was unnecessary and inappropriate because it would have allowed Petitioners a second opportunity to pursue issues that were resolved in the Capacity Allocation Proceeding.

The Settlement benefits all El Paso customers, including Petitioners. Under the Settlement, El Paso committed to complete the Power-Up Project, to administer the Block II capacity recall provisions in a reasonable, objective, and more transparent manner. Moreover, Petitioners also benefit from the Commission's rejection of the claim that El Paso Pipeline has a certificated obligation to reserve 3,290 MMcf/d of capacity for service to California.

The Commission also appropriately accepted the Special Master Provisions, as they amount to nothing more than a contractual commitment by the Settling Parties to address certain issues to the Special Master prior to invoking the Commission's jurisdiction. As before, the Commission will decide all El Paso matters *de novo*. Moreover, the Special Master process does not deprive Petitioners of any rights they previously had. There is no situation in which anything resulting from the Special Master procedures could adversely affect Petitioners before they have an opportunity to comment or protest and the Commission acts *de novo*.

ARGUMENT

I. THE PETITION FOR REVIEW SHOULD BE DISMISSED AS THE CHALLENGED ORDERS, APPROVING SETTLEMENT OF A COMMISSION INVESTIGATION, ARE JUDICIALLY UNREVIEWABLE

A. FERC's Action Was Wholly Within Its Discretion

The instant proceeding involved a discrete set of circumstances in which FERC conducted an investigation into allegations that, during the period November 2000 through March 31, 2001, El Paso violated the NGA and its implementing regulations. *See, e.g.*, December 27, 2001 Order at 62,740, JA 180, and February 27, 2002 Order at P 21, JA 310 (invoking its NGA §§ 5 and 14 investigative authority); Br. at 7, 8, 28, 49 (noting that this case involved an investigation). After investigating the allegations, FERC chose to resolve the matter by accepting, with modifications, a proposed settlement. This determination, wholly within FERC's discretion, is unreviewable. *Chaney*, 470 U.S. at 828, 831-33; *BG&E*, 252 F.3d at 459-62.

Chaney holds that agency decisions not to exercise its prosecutory or enforcement authority are not judicially reviewable where such decisions are committed to the agency's absolute discretion. *Chaney*, 470 U.S. at 828, 831-33 (citing APA § 10, 5 U.S.C. § 701(a)(2) (judicial review is inapplicable "to the extent that . . . agency action is committed to agency discretion by law.")); *cf. Block v. SEC*, 50 F.3d 1078, 1081-82 (D.C. Cir. 1995) (under *Chaney*, an agency

decision not to determine whether a violation has occurred or not to proceed against a violation is unreviewable).

An agency's decision not to enforce is generally unsuitable for judicial review for several reasons. First,

an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to proceed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.

Chaney, 470 U.S. at 831-32; cf. *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1281 (D.C. Cir. 1999) (a decision not to prosecute is made for many reasons, including reasons unrelated to the merits of the charge); *Roosevelt v. E.I. Du Pont Nemours & Co.*, 958 F.2d 416, 423 (D.C. Cir. 1992) (under *Chaney*, courts generally lack authority to review an agency's enforcement agenda and resource-allocation decisions). Second, "when an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect." *Chaney*, 470 U.S. at 832. Finally, an agency's decision not to institute enforcement

proceedings is analogous to a prosecutor's decision not to indict, and should be accorded the same absolute deference. *Id.*⁴

Chaney's presumption of non-reviewability also applies to FERC's decision to accept a contested settlement in resolution of a matter under investigation. *BG&E*, 252 F.3d at 459-62 ("This Court has held that the *Chaney* presumption of nonreviewability extends not just to a decision whether to bring an enforcement action, but to a decision to settle."); *cf. New York State Dept. of Law v. FCC*, 984 F.2d 1209, 1213-16 (D.C. Cir. 1993); *Fort Sumter Tours, Inc. v. Babbitt*, 202 F.3d 349, 354 (D.C. Cir. 2000) (decision whether to settle a case is not reviewable under the APA); *Schering Corp. v. Heckler*, 779 F.2d 683, 686-87 (D.C. Cir. 1985) (holding agency decisions not to initiate enforcement action, to abandon unilaterally an enforcement action, and to settle an initiated enforcement action, all unreviewable).

In *BG&E*, after a four-year investigation into whether a natural gas company ("Columbia") had violated the NGA by abandoning service without first obtaining

⁴ The Court indicated that the presumption of non-reviewability might be rebutted under the following circumstances: if the substantive statute limits an agency's enforcement discretion by setting substantive priorities or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue; if the agency refused to take enforcement action based on the mistaken belief that it lacked jurisdiction; or if the agency has "'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." *Id.* at 832-33 and n.4. None of those circumstances applies here.

FERC approval, FERC approved a contested settlement that expressly declined to resolve whether Columbia had violated the NGA. *BG&E*, 252 F.3d at 457-58. FERC noted that settling this matter allowed it to devote its resources to current regulatory programs and initiatives rather than to an alleged past violation of the NGA. *Id.* at 458 (citing *Columbia Gas Transmission Corp.*, 89 FERC ¶ 61,365, 61,992 (1999)). When the contesting party, BG&E, petitioned for review of FERC’s determination, this Court dismissed the petition for lack of jurisdiction because “FERC’s decision to settle with Columbia, and its consequent decision not to see its enforcement action through to fruition, is a paradigmatic instance of an agency exercising its presumptively nonreviewable enforcement discretion.” *Id.* at 460; *see also id.* at 457, 462.

The Court found that the NGA does not provide guidelines for FERC to follow in exercising its enforcement discretion. *BG&E*, 252 F.3d at 460. Rather,

the NGA confirms that FERC’s decision how, or whether, to enforce that statute is entirely discretionary. Nowhere does the act place an affirmative obligation on FERC to initiate an enforcement action, nor does it impose limitations on FERC’s discretion to settle such an action. “Certainly the statute does not lay out any circumstances in which the agency is required to undertake or to continue an enforcement action.”

Id. (quoting *New York State*, 984 F.2d at 1215); *see also id.* at 461 (the NGA is “utterly silent on the manner in which the Commission is to proceed against a particular transgressor.”). While the “NGA’s lack of any standards by itself [was]

fatal to BG&E's claim," the Court noted that:

the Natural Gas Act goes even further, and expressly confirms the breadth of the Commission's enforcement discretion. The NGA states that FERC "*may in its discretion* bring an action" against a violator of the act. [NGA § 20(a), 15 U.S.C.] § 717s(a)(emphasis added [by Court]). It also provides that the Commission "*may investigate*" any possible violations. *Id.* [§ 14(a), 15 U.S.C.] § 717m(a) (emphasis added [by Court]). FERC's regulations contain equally discretionary language: the Commission "*may initiate administrative proceedings . . . or take other appropriate action.*" 18 C.F.R. § 1b.7 (emphasis added [by Court]). If Congress had intended to cabin FERC's enforcement discretion, it could have used obligatory terms such as "must," "shall," and "will," not the wholly precatory language it employed in the act.

Id.

The Court also found that "FERC's decision to settle with Columbia did not proceed from the Commission's mistaken belief that it 'lacked jurisdiction' to bring an enforcement action. [*Chaney*,] 470 U.S. at 833 n.4. On the contrary, FERC initiated an enforcement in 1993 and then decided not to pursue it further." *BG&E*, 252 F.3d at 461.

Additionally, the Court found that settlement was not "an 'extreme' policy that amounts to 'an abdication of FERC's statutory responsibilities.'" *Id.* (quoting *Chaney*, 470 U.S. at 833 n.4.). "Like other federal agencies, FERC routinely approves settlement agreements in enforcement proceedings." The Court noted that "the Commission decided to settle with Columbia for reasons the *Chaney* Court expressly held to be legitimate." *Id.* (*comparing Chaney*, 470 U.S. at 831

(recognizing agencies' need to determine whether a "particular enforcement action requested best fits the agency's overall policies, and indeed, whether the agency has enough resources to undertake the action at all"), *with Columbia Gas Transmission Corp.*, 85 FERC ¶ 61,437, 62,642-43 (1998), *and Columbia Gas Transmission Corp.*, 89 FERC ¶ 61,325, 61,922 (1999)(explaining that the Commission had decided to settle, and not award money damages, because it chose to devote its resources to current regulatory initiatives)).

The Commission's discretionary decision to approve a settlement is likewise immune from judicial review. *Chaney*, 470 U.S. at 828, 831-33; *BG&E*, 252 F.3d at 459-62. None of the *Chaney* factors that would rebut the presumption of non-reviewability exists. Neither the NGA nor the Commission's regulations limit FERC's enforcement discretion by setting substantive priorities or by otherwise circumscribing FERC's power to discriminate among issues or cases it will pursue. FERC did not refuse to take enforcement action based on the mistaken belief that it lacked jurisdiction. Nor did FERC adopt a general policy that is so extreme as to amount to an abdication of its statutory responsibilities. *See Chaney* at 832-33 and n.4; *Crowley Caribbean Transportation v. Pena*, 37 F.3d 671, 676 (D.C. Cir. 1994) (a single-shot decision to decline enforcement in the context of an individual case is not a general policy statement).

Rather, the Commission accepted the JSA, as modified, in settlement of the instant proceeding because “[t]he certainty and the outcome of the Settlement allow the parties and the Commission to move forward without the need to employ additional private and public resources in the pursuit of a complaint challenging contracts that expired more than two years ago,” November 14, 2003 Order at P 56, JA 1367-68, “a reason the *Chaney* Court expressly held to be legitimate,” *BG&E*, 252 F.3d at 461. The petition should, therefore, be dismissed.

II. THE COMMISSION APPROPRIATELY APPROVED SETTLEMENT OF THIS COMPLAINT PROCEEDING

A. Standard Of Review

Assuming jurisdiction, the Court reviews FERC orders under the APA's arbitrary and capricious standard. *E.g., Florida Municipal Power Agency v. FERC*, 315 F.3d 362, 365 (D.C. Cir. 2003). Under that standard, the Commission's decision must be reasoned and based upon substantial evidence in the record. For this purpose, the Commission's factual findings are conclusive if supported by substantial evidence. NGA §19(b). The substantial evidence standard “requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence.” *Florida Municipal*, 315 F.3d at 365 (quoting *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002)).

In addition, FERC's interpretation of its own regulations is given "controlling weight unless it is plainly erroneous or inconsistent with the

regulation." *Washington Water Power Co v. FERC*, 201 F.3d 497, 502 (D.C. Cir. 2000). The Commission's reasonable interpretation of its own orders will be upheld as well. *See Texaco Inc. v. FERC*, 148 F.3d 1091, 1099 (D.C. Cir. 1998); *Natural Gas Clearinghouse v. FERC*, 108 F.3d 397, 399 (D.C. Cir. 1997).

As explained below, the Commission's determinations were well-reasoned, supported by substantial evidence, and consistent with applicable law. Accordingly, the challenged orders must be upheld.

B. The Commission Appropriately Decided The Merits Of All Contested Settlement Issues

The Commission addressed the merits of all contested settlement issues, and required that the JSA be modified to delete provisions that were inconsistent with FERC policy and other FERC orders regarding El Paso's capacity, *i.e.*, the provisions regarding dual primary delivery points (November 14, 2003 Order at PP 41, 59, 74-82, 150, JA 1362, 1368, 1372-74, 1395) and the exclusive reservation of 3,290 MMcf/d of firm capacity for California (*id.* at PP 142-55, JA 1393-97; Rehearing Order at PP 15, 33, JA 1476-77, 1483-84).

1. The Merits Of The Phase II ID Withholding Finding Was Not A Contested Settlement Issue

Petitioners assert that the Commission also was required to make merits findings regarding the ALJ's Phase II ID determinations that: (1) El Paso "violated its NGA service obligations by failing to provide as much as 696 MMcf/d of

contracted-for firm capacity and that the existence of transient operational conditions on the pipeline did not serve to excuse this violation;” (2) El Paso “violated the Commission’s standard of conduct/affiliate abuse rules to provide an unlawful competitive advantage to [its affiliate];” and (3) El Paso “deliberately abused its monopoly market power by withholding pipeline capacity from the marketplace so as to economically benefit [its affiliate] at the expense of all other firm shippers on [its] system.” Br. at 35-36, 48.

FERC found no such obligation:

The Settling Parties have made it clear that they wish to end this proceeding without a determination on the merits [on the Phase II ID determinations], although they might have obtained different results or benefits from a decision on the merits. There is no requirement that the Commission must rule on the merits of a complaint before it approves a settlement resolving that complaint.⁵

Rehearing Order at P 17, JA 1477. While Petitioners may interpret Commission regulation 18 C.F.R. § 385.602(h)(1)(i) as requiring FERC to decide the merits of allegations underlying an enforcement proceeding, FERC’s interpretation, not Petitioners’ contrary interpretation, of FERC’s own regulation is due deference. *Washington Water Power*, 201 F.3d at 502.

⁵ Contrary to Petitioners’ claim, Br. at 49-51, the Commission’s determination that there is no requirement that it rule on the merits underlying a complaint before approving a settlement resolving the complaint applies both to NGA § 5 actions initiated by the Commission or a third-party.

Neither *Mobil Oil v. FPC*, 417 U.S. 283, 214 (1974), nor *Southern California Edison Co. v. FERC*, 162 F.3d 116, 119 (D.C. Cir. 1998), require the Commission to decide the merits of the allegations underlying the investigation here, as Petitioners posit. Br. at 36. Both *Mobil Oil* and *Southern California Edison* involved rate case settlements, and do not speak to what merits determinations the Commission must make in approving an enforcement investigation settlement. *See Laclede*, 997 F.2d at 944 (deciding the merits of contested issues in ratemaking settlements involves different inquiries from those in settlements of other types of cases); *Trailblazer Pipeline Co.*, 87 FERC ¶ 61,110 at 61,439 n. 24, 61,440 (1999) (Commission review of settlements can involve “different types of merits decisions”).

2. The Commission Already Had Rejected The Merits Of The Phase II ID Withholding Finding

In any event, as the Commission explained, the Capacity Allocation Proceeding Orders already addressed, and rejected on its merits, the Phase II ID’s determination that El Paso violated the NGA by withholding capacity. November 14, 2003 Order at P 7, JA 1351, Rehearing Order at PP 14, 19, 47, 51, JA 1476, 1478, 1488, 1489. While the ALJ believed El Paso’s capacity problems were caused by El Paso wrongfully withholding capacity, the Commission found, instead, that El Paso’s capacity problems were caused by the significant and unrestricted growth in FR demand in conjunction with El Paso tariff provisions

that did not require capacity expansion to accommodate increasing FR demand unless “in El Paso’s judgment, such expansions [we]re economically feasible.” May 2002 Capacity Allocation Proceeding Order at 62,000-04; July 9, 2003 Capacity Allocation Proceeding Order at P 75.

The Commission further found that the ALJ misunderstood the role MAOP and transients play in determining whether El Paso inappropriately withheld capacity. El Paso was not required to operate its system at its MAOP, as the ALJ believed. *Id.* at PP 66-77. Rather, under its tariff, “El Paso fulfills its obligations when it delivers to its shippers within pressure levels established by its contract[s].” *Id.* at P 76.

Similarly, the ALJ erred in finding that El Paso should not reserve capacity for transients. *Id.* at PP 78-80. The Commission explained that “it [was] reasonable for El Paso to reserve capacity for managing transients, and not post that capacity as available” because “El Paso may not sell or contract for firm service capacity that is subject to a prior claim. Capacity that is needed to manage transients is subject to a prior claim.” *Id.* at PP 78-80.

The Commission did not ignore the record or the Phase II ID determinations in making these findings, as Petitioners allege, Br. at 41 and n.63, 44-46, it simply reached different conclusions. Moreover, credibility of the witnesses, Br. at 45,

was irrelevant to the Commission's conclusion that the Phase II ID's withholding finding was incorrect.

Additionally, the Commission's determination on transients is consistent with the precedent cited by Petitioners as requiring pipelines to account for transient operational conditions in its pipeline design and level of marketable capacity, Br. at 45. The Commission did not employ transient factors as an "after-the-fact justification[]" for [El Paso's] failure to provide the firm service it previously sold and is now unable to provide." Br. at 45. Rather, the Commission found that El Paso could not provide the full service for which it had contracted because of the significant and unrestricted growth in FR demand. May 2002 Capacity Allocation Proceeding Order at 62,000-04; July 9, 2003 Capacity Allocation Proceeding Order at P 75.

Thus, Petitioners' contention that the Capacity Allocation Proceeding "did not resolve the contested capacity shortfall issues litigated in the [instant proceeding]," Br. at 38, 41, is erroneous. *See* July 9, 2003 Capacity Allocation Proceeding Order at PP 66-80 (examining and finding no merit to Petitioners' capacity shortfall claims). Petitioners also err in claiming that the Capacity Allocation Proceeding "contains no record" on the withholding issue. Br. at 38, 41. In reviewing the Phase II ID's withholding determination in the Capacity Allocation Proceeding, July 9, 2003 Capacity Allocation Proceeding Order at PP

66-80, the Commission appropriately considered publicly available evidence from the instant proceeding. *Wisconsin Power & Light v. FERC*, 363 F.3d 453, 463 (D.C. Cir 2004); *Union Electric Co. v. FERC*, 890 F.2d 1193, 1202-03 (D.C. Cir 1989). Petitioners were parties in both proceedings.

Petitioners' repeated assertion that the Commission should have affirmed the Phase II ID's withholding finding constitutes an impermissible collateral attack on the rejection of that finding in the Capacity Allocation Proceeding. Rehearing Order at PP 47, 51, JA 1488, 1489. Accordingly, the Court lacks jurisdiction to address it. *City of Nephi v. FERC*, 147 F.3d 929, 934 (D.C. Cir. 1998) (the court lacked jurisdiction to consider petitioner's contention because FERC already had rejected that contention in a prior order); *Georgia Industrial Group v. FERC*, 137 F.3d 1358, 1363 (D.C. Cir. 1998) (same); *Transwestern Pipeline Co. v. FERC*, 988 F.2d 169, 174 (D.C. Cir. 1993)(same).

Petitioners attempt to escape this result by arguing that the rejection of the Capacity Allocation Proceeding's rejection of the Phase II ID's withholding finding was merely "*obiter dicta*." Br. at 41, 42. FERC's characterization of the instant claim as a collateral attack on its rejection in the Capacity Allocation Proceeding of the Phase II ID's withholding finding, Rehearing Order at PP 47, 51, JA 1488, 1489, establishes that FERC does not consider its prior rejection finding to be dicta. FERC's interpretation of its own prior order, not Petitioners', is due

deference and, therefore, is controlling. *Texaco*, 148 F.3d at 1099; *Natural Gas Clearinghouse*, 108 F.3d at 399.

Petitioners also contend that “FERC’s Orders, both in the [Capacity] Allocation Proceeding and the [instant] Proceeding, fail to address the [Phase II ID]’s other key findings of [El Paso]’s deliberate use of its monopoly market power over transportation to withhold up to 345 MMcf/d of capacity to benefit its affiliate Merchant.” Br. at 45-46. As the Commission explained, there was no need to address that issue because:

although one provision of the Settlement address[ed] concerns about the relationships of El Paso and its affiliates, EOC Shippers did not oppose that provision or otherwise raise the Standards of Conduct issue in their comments opposing the Settlement. [Petitioners] cannot raise such issues for the first time on rehearing.

Rehearing Order at P 18, JA 1477-78 (footnote omitted).

While Petitioners contend they raised the Standards of Conduct/affiliate issue as a contested issue in their comments on the Settlement, Br. at 36 (citing R. 3286 at 35-38, JA 1245-48, Affidavit at 1-6, JA 1253-58), the facts show otherwise. Neither Petitioners’ comments, R. 3286 at 35-38, JA 1245-48, nor the affidavit attached to it, Affidavit at 1-6, JA 1253-58, to “identify, in compliance with Rule 602(f)(4) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.602(f)(4), disputed issues of material fact that would be addressed in

the course of a merits decision on [the Phase II ID],” *id.* at P 3, JA 1254, raised this issue.

FERC has not “created an administrative shell game” to “insulate its actions from review,” as Petitioners assert. Br. at 37 (capitalization in heading modified), 38, 43, 48. The instant case is wholly distinguishable from *Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1293 (D.C. Cir. 2000) (cited Br. at 43). There, the Court found that a prior order had not decided the issue raised by the petitioner because, when the petitioner sought review of that prior order, “the Commission moved – successfully – for dismissal of the petition for review on the ground that the [prior] order was non-final.” Here, by contrast, Petitioners petitioned for, and obtained judicial review of, the Orders in the Capacity Allocation Proceeding, including the July 9, 2003 Order, which rejected the Phase II ID’s finding. Review of those orders was not dismissed, but was denied after this Court reviewed the merits of Petitioners’ challenges. *Arizona*, 397 F.3d 952. Thus, FERC’s rejection of the Phase II ID’s findings in the July 9, 2003 Order was not “insulated” from judicial review by a “shell game,” but by Petitioners’ failure to challenge that rejection in the proceeding in which it occurred. *Georgia Industrial Group*, 137 F.3d at 1363 (the court lacked jurisdiction to consider petitioner's contention because FERC already had rejected that contention in a prior order); *Transwestern*, 988 F.2d at 174 (same).

Nor were Petitioners denied the right “to be heard ‘at a meaningful time and in a meaningful manner,’” on the issue, Br. at 42 and n.69 (quoting *Jifry v. FAA*, 370 F.3d 1174, 1183 (D.C. Cir. 2004)); *see also* Br. at 51. Rehearing Order at P 19, JA 1478. Petitioners participated extensively in the Capacity Allocation Proceeding. *Id.* In fact, it was in response to Petitioners’ claims in that proceeding that the Commission addressed the merits of, and rejected, the Phase II ID’s withholding finding. July 9, 2003 Capacity Allocation Proceeding Order at P 66 and n. 67. Petitioners had notice of, and an opportunity to challenge, that rejection in a petition for rehearing, NGA § 19(a), 15 U.S.C. § 717r(a), and then on appeal of the Capacity Allocation Proceeding Orders, NGA § 19(b), 15 U.S.C. § 717r(b), but chose not to do so.

Even if the judicial issue preclusion standards in *Yamaha Corporation of America v. U.S.*, 961 F.2d 245, 254 (D.C. Cir. 1992), Br. at 39-40, apply to the administrative determination here, they do not help Petitioners. Under *Yamaha*, three factors establish whether a prior judicial holding has preclusive effect:

First, the same issue now being raised must have been contested by the parties and submitted for judicial determination in the prior case. Second, the issue must have been actually and necessarily determined by a court of competent jurisdiction in that prior case. Third, preclusion in the second case must not work a basic unfairness to the party bound by the first determination. An example of such unfairness would be when the losing party clearly lacked any incentive to litigate the point in the first trial, but the stakes in the second trial are of a vastly greater magnitude.

Yamaha, 961 F.2d at 254 (citation and footnote omitted).

All three *Yamaha* factors establish that Petitioners' instant challenge to the Commission's rejection of the Phase II ID's finding is precluded. First, Petitioners previously raised in the Capacity Allocation Proceeding the same contention they now raise: that the Commission should adopt the Phase II ID's finding that El Paso wrongfully withheld capacity. July 9, 2003 Capacity Allocation Proceeding Order at P 66 and n.67 (Petitioners argued that El Paso's available capacity "should be increased to reflect the findings of the Chief ALJ in Docket No. RP00-241-006 that El Paso withheld capacity, including 210 MMcf/d to manage transients"). Second, the Commission actually and necessarily determined that contention. *Id.* at PP 67-80.

Third, precluding Petitioners from having a second opportunity to pursue the same claim is not unfair. While Petitioners assert they "would be prevented from showing FERC and persuading this Court that, based on the [instant] Proceeding, [El Paso] unlawfully exercised market power," Br. at 40, they already had that opportunity in the Capacity Allocation Proceeding. Moreover, although Petitioners contend they "would be prevented from using these findings in [El Paso]'s upcoming rate case to challenge the prudence of additional capacity installed by [El Paso] to cure a capacity shortfall caused, according to [the Phase II ID], by [El Paso]'s own actions," Br. at 40, Petitioners do not have a right to a merits

determination on the Phase II ID findings, Rehearing Order at P 17, JA 1477. In addition, the Commission confirmed Petitioners' right to challenge the prudence of additional capacity installed by El Paso: "parties may raise issues such as whether the facilities are used and useful or prudent in the rate case proceeding in which El Paso Pipeline seeks to roll in the project's costs." November 14, 2003 Order at n.82, JA 1396 (citing *El Paso Natural Gas Co.*, 103 FERC ¶ 61,280 at PP 40-45 (2003)).

Petitioners' attempt, Br. at 37, to liken the instant case to *Laclede*, 997 F.2d 936, fails as well. Unlike in *Laclede*, where the Commission "failed to conduct *any* meaningful review" of contested settlement issues, 997 F.2d at 947 (emphasis in original), the Commission meaningfully reviewed the merits of the contested issues, as evidenced by the required modification of the settlement to reflect those issues it found had merit.

C. The Commission Properly Denied Petitioners' Request For Severance To Relitigate The Phase II ID Withholding Finding

Petitioners concede that "there exist[] no 'hard and fast rules for determining whether severance of contesting parties is appropriate'" Br. at 46 (quoting *Alternative Dispute Resolution*, FERC Stats. & Regs., Regulations Preamble (January 1991-June 1996) ¶ 31,018 at 31,332 (1995)). Nonetheless, Petitioners argue that FERC "has developed a settled practice for refusing to sever contesting parties, summarized in *Trailblazer*, which is inapplicable in this instance." Br. at

46. In Petitioners view, under this “settled practice,” the only “rationales for refusal to sever include: (a) placing the contesting party in a ‘no lose’ situation; (b) risking recovery of the pipeline’s cost of service; and (c) where the contesting party was not a direct pipeline customer.” Br. at 46-47 (footnote omitted).⁶

As the Commission explained in *Trailblazer*, 87 FERC at 61,447, however, “[t]here are no bright line rules to determine whether severance is appropriate, and the Commission must analyze the nature of the objections and determine whether they can be resolved on the basis of policy, or substantial evidence in the record, or whether additional evidence is needed.” That is just what the Commission did here. After analyzing the nature of the Petitioners’ severance request -- that severance was necessary so the Commission could issue a merits determination on the Phase II ID’s withholding finding -- the Commission determined that severance was unnecessary and inappropriate because it “would have allowed [Petitioners] a second opportunity to pursue issues that were resolved in the Capacity Allocation Proceeding.” Rehearing Order at P 14, JA 1355. The Commission “emphasize[d] that the basis for its denial of severance is that [Petitioners] seek to use this

⁶ Petitioners’ convoluted attempt to apply these rationales to the instant enforcement proceeding, Br. at 47-48, establish that, even if *Trailblazer* did summarize a settled Commission practice for refusing to sever contesting parties, that practice would apply only to cases involving rate settlements, and are irrelevant to contested enforcement settlements. *See, e.g.*, Br. at 47 (“The ‘no lose’ and risk of cost of service rationales are not present because the proceeding below was not a rate proceeding”).

proceeding to revisit issues that the Commission has resolved elsewhere.”⁷
Rehearing Order at P 48, JA 1488.

In any event, Petitioners’ assertion that severance was appropriate because the Settlement caused them “substantial prejudice” by denying them a FERC ruling on the Phase II ID’s withholding finding and an opportunity to appeal such a ruling, Br. at 48, has a faulty premise. As previously explained, “[t]here is no requirement that the Commission must rule on the merits of a complaint before it approves a settlement resolving that complaint.” Rehearing Order at P 17, JA 1477. Moreover, FERC already had ruled on the Phase II ID’s withholding finding in the Capacity Allocation Proceeding, November 14, 2003 Order at P 7, JA 1351; Rehearing Order at PP 14, 19, 47, 51, JA 1476, 1478, 1488, 1489, and Petitioners petitioned for and obtained judicial review of the Orders issued in that proceeding. *Arizona*, 397 F.3d 952. Thus, it was not the Settlement, but Petitioners’ failure to challenge the Commission’s Phase II ID ruling in the proceeding in which it was made, that is the cause of the alleged prejudice. That failure meant that, even if severance had been granted, Petitioners could not pursue their impermissible collateral attack on the Capacity Allocation Proceeding Orders.

⁷ Petitioners’ challenges to statements in the November 14, 2003 Order regarding the basis for the Commission’s denial of Petitioners’ severance request, Br. at 47-48, are irrelevant. The Rehearing Order explained that Commission denied severance in order to prevent Petitioners’ attempted impermissible collateral attack on findings made in the Capacity Allocation Proceeding. Rehearing Order at PP 14, 47, 48, 51, JA 1476, 1488, 1489.

D. The Commission Appropriately Determined That All El Paso Customers, Including Petitioners, Benefit From Acceptance Of The Settlement

Petitioners erroneously contend that the Settlement benefits only El Paso's California customers. Br. at 49. The Commission found that the Settlement benefits all El Paso customers, including Petitioners:

It provides financial benefits to customers who were impacted by the alleged conduct of the El Paso Companies. It provides other benefits to all of El Paso Pipeline's shippers, including EOC Shippers [Petitioners here]. These benefits include El Paso Pipeline's commitments to complete a project [the Power-Up Project] that will expand the pipeline's capacity without imposition of additional reservation charges until the effective date of the pipeline's next rate case and to administer the Block II capacity recall provisions in a reasonable, objective, and more transparent manner that will allow all of El Paso Pipeline's shippers to monitor the acquisition and use of that capacity. Moreover, EOC Shippers also benefit from the Commission's rejection of the claim that El Paso Pipeline has a certificated obligation to reserve 3,290 MMcf/d of capacity for service to California. In doing so, the Commission has created more certainty with respect to the amount of capacity that will be available for potential acquisition by the EOC Shippers.

Rehearing Order at P 20, JA 1478-79 (footnote omitted).

E. The Commission Appropriately Accepted The Dispute Resolution (Special Master) Provisions

Petitioners argue that the Commission should have rejected the JSA's Special Master provisions because they purportedly: (1) "provide[] the California parties with a secret forum that will decide critical issues directly affecting the Petitioners' rights;" and (2) "provide[] the California Parties with superior

discovery rights, permitting them to obtain access to critical information regarding [El Paso]’s operations that will prove advantageous to them in [El Paso]’s upcoming rate case.” Br. at 52-56. Petitioners’ concerns are unfounded.

“The Commission’s jurisdiction and [Petitioners]’ rights to address matters proposed to the Commission will not be affected by [the Special Master] process,” Rehearing Order at P 24, JA 1480, as “the Special Master provisions amount to nothing more than a contractual commitment by the Settling Parties to address certain issues to the Special Master prior to invoking the Commission’s jurisdiction.” Rehearing Order at P 25, JA 1481. No critical matters will be resolved by the Special Master because FERC’s “jurisdiction under the NGA trumps any agreement on jurisdictional matters that may be reached by the Settling Parties with or without the aid of the Special Master.” *Id.*

As before, the Commission will decide all El Paso matters *de novo*:

No rulings by the Special Master will bind the Commission on any matters within its jurisdiction, and nothing the parties agree to in accordance with the Special Master procedures will or can be effective unless and until addressed by the Commission *de novo* under its normal administrative procedures. The Special Master’s duties involve aiding the Settling Parties in their compliance with certain contractual obligations, but do not infringe upon or diminish in any fashion the Commission’s exclusive jurisdiction and responsibilities as mandated by Congress and the Commission’s regulations.

Rehearing Order at P 28, JA 1481-82. In short, the “Special Master provisions do not prevent the Commission from acting or bind the Commission’s actions in any manner.” *Id.* at P 32, JA 1483.

Moreover, “the Special Master process does not deprive [Petitioners] of any rights they now have. . . . There is no situation in which anything resulting from the Special Master procedures could adversely affect [Petitioners] before [they] have an opportunity to comment or protest and the Commission acts *de novo*.”⁸ Rehearing Order at P 35, JA 1484; *see also id.* at P 29, JA 1482. Although the Settling Parties will have a limited ability under the Special Master procedures to “request data” from El Paso so they can “address compliance issues arising out of the implementation of the [JSA],” R. 3287 Stipulated Judgment at 6, JA 1267, *see Br.* at 54-55, when a matter reaches FERC for its *de novo* review, Petitioners will have the same discovery rights as all other parties. *See* 18 C.F.R. §§ 385.401-411 (Commission Regulations on Discovery Procedures).

Petitioners’ concern that the Special Master will “insure that [El Paso] make[s] 3,290 MMcf/d available to its California delivery points,” thereby “affect[ing] directly how much capacity is available to [Petitioners],” *Br.* at 53, *see*

⁸ This refutes Petitioners’ purported concerns that “[t]here is no guarantee that a dispute among [El Paso] and the California Parties would be submitted to FERC,” *Br.* at 54, and that the Special Master procedures can “resolve issues that directly impact all parties, while simultaneously excluding some parties from the process,” *Br.* at 55.

also Br. at 52, is baseless as well. The challenged orders “firmly reject[ed] the purported obligation of El Paso Pipeline to reserve 3,290 MMcf/d of firm capacity exclusively to California.” Rehearing Order at P 33, JA 1483.

Finally, Petitioners fret that, because of the Special Master procedures, “the California Parties and [El Paso] can reach a resolution of all key issues in the upcoming rate case prior to the time it is filed in June 2005, and this pre-filing consensus will be extremely difficult, if not impossible, for [Petitioners] to overcome in litigation at FERC.” Br. at 55-56. But such alliances to present a consensus position frequently occur in FERC proceedings:

Nothing prevents a group of parties from agreeing to a position of a course of action prior to seeking Commission approval of their agreement. Indeed, [Petitioners] have themselves collaborated on the positions they have taken in this proceeding. The fact that the Settling Parties have agreed to employ the Special Master to aid them in reaching agreement on certain issues does not change the fact that all interested parties, including [Petitioners], will be afforded the right to notice and an opportunity to present countervailing arguments for the Commission’s consideration and that the Commission will review all proposals *de novo*.

Rehearing Order at P 29, JA 1482.

CONCLUSION

For the foregoing reasons, the petition for review should be dismissed or, in the alternative, denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Circuit Rule 28(d)(1), I hereby certify that this brief contains 11,471 words, not including the tables of contents and authorities, the certificate of counsel, this certificate and the addendum.

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