ORAL ARGUMENT HAS NOT BEEN SCHEDULED

In the United States Court of Appeals for the District of Columbia Circuit

Nos. 08-1349, *et. al*.

FREEPORT-MCMORAN CORPORATION, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL ENERGY REGULATORY COMMISSION

FINAL BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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August 11, 2011

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

The parties before this Court are identified in the briefs of Petitioners.

B. Rulings Under Review

1. *El Paso Natural Gas Co.*, 112 FERC ¶ 61,150 (2005), JA 1;

2. *El Paso Natural Gas Co.*, 114 FERC ¶ 61,290 (2006), JA 42;

3. *El Paso Natural Gas Co.*, 116 FERC ¶ 61,016 (2006), JA 77;

4. *El Paso Natural Gas Co.*, 120 FERC ¶ 61,208 (2007), JA 94;

5. *El Paso Natural Gas Co.*, 124 FERC ¶ 61,227 (2008), JA 126;

6. *El Paso Natural Gas Co.*, 132 FERC ¶ 61,139 (2010), JA 182; and

7. *El Paso Natural Gas Co.*, 132 FERC ¶ 61,155 (2010), JA 220.

C. Related Cases

Related issues to those presented in this appeal have previously been before this Court in *Arizona Corp. Comm'n v. FERC*, 397 F.3d 952 (D.C. Cir. 2005); *Arizona Corp. Comm'n v. FERC*, No. 04-1123, 168 Fed. Appx. 447, 2005 U.S. App. LEXIS 22751 (D.C. Cir. Oct. 20, 2005); and *Arizona Corp. Comm'n v. FERC*, 2006 U.S. App. LEXIS 20166 (D.C. Cir. Aug. 3, 2006). There are no related cases currently pending before this Court or any other court.

/s/ Beth G. Pacella
Beth G. Pacella
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August 11, 2011

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2002 CAP Order	*El Paso Natural Gas Co.*, 99 FERC ¶ 61,244 (2002)
2003 CAP Order	*El Paso Natural Gas Co.*, 104 FERC ¶ 61,045 (2003)
2004 CAP Order	*El Paso Natural Gas Co.*, 106 FERC ¶ 61,233 (2004)
Arizona I	*Arizona Corp. Comm'n v. FERC*, 397 F.3d 952 (D.C. Cir. 2005)
Arizona II	*Arizona Corp. Comm'n v. FERC*, No. 04-1123, 168 Fed. Appx. 447, 2005 U.S. App. LEXIS 22751 (D.C. Cir. October 20, 2005)
August 2007 Order	*El Paso Natural Gas Co.*, 120 FERC ¶ 61,208 (2007), JA 94
August 17, 2010 Order	*El Paso Natural Gas Co.*, 132 FERC ¶ 61,139 (2010), JA 182
August 24, 2010 Order	*El Paso Natural Gas Co.*, 132 FERC ¶ 61,155 (2010), JA 220
Capacity Allocation Orders	*El Paso Natural Gas Co.*, 99 FERC ¶ 61,244, *order adopting capacity allocation methodology*, 100 FERC ¶ 61,285 (2002), *order on reh'g*, 104 FERC ¶ 61,045 (2003), *order on reh'g*, 106 FERC ¶ 61,233 (2004), *aff'd sub nom. Arizona Corp. Comm'n v. FERC*, 397 F.3d 952 (D.C. Cir. 2005)
Commission or FERC	The Federal Energy Regulatory Commission
El Paso	Petitioner El Paso Natural Gas Company

Freeport-McMoRan	Petitioner Freeport-McMoRan Corp.
July 2006 Order	*El Paso Natural Gas Co.*, 116 FERC ¶ 61,016 (2006), JA 77
July 2005 Order	*El Paso Natural Gas Co.*, 112 FERC ¶ 61,150 (2005), JA 1
March 2006 Order	*El Paso Natural Gas Co.*, 114 FERC ¶ 61,290 (2006), JA 42
MMcf/d	million cubic feet per day
PIP	pipeline integrity program
September 2008 Order	*El Paso Natural Gas Co.*, 124 FERC ¶ 61,227 (2008), JA 126

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

Nos. 08-1349, *et al.*

FREEPORT-MCMORAN CORPORATION, *ET AL.*,
PETITIONERS,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission ("FERC" or "Commission") reasonably interpreted and applied settlements and tariffs it previously approved, as well as its own orders and regulations, in reviewing El Paso Natural Gas Company's ("El Paso") rate filing and settlement.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutory and regulatory provisions are contained in the Addendum.

INTRODUCTION

This proceeding involves El Paso's 2005 general, system-wide rate filing and the 2006 Settlement of that filing, which was supported by all parties except petitioner Freeport-McMoRan Corporation ("Freeport-McMoRan"). In a series of orders, FERC resolved the numerous issues raised by interpreting and applying settlement and tariff provisions, as well as its own orders and regulations. *El Paso Natural Gas Co.*, 112 FERC ¶ 61,150 (2005) ("July 2005 Order"), 114 FERC ¶ 61,290 (2006) ("March 2006 Order"), 116 FERC ¶ 61,016 (2006) ("July 2006 Order"), 120 FERC ¶ 61,208 (2007) ("August 2007 Order"), 124 FERC ¶ 61,227 (2008) ("September 2008 Order"), 132 FERC ¶ 61,139 (2010) ("August 17, 2010 Order"), 132 FERC ¶ 61,155 (2010) ("August 24, 2010 Order"), 133 FERC ¶ 61,116 (2010), 133 FERC ¶ 61,117 (2010).

Only a few of the issues raised at FERC are raised on appeal. The issues primarily concern the proper interpretation and application of Article 11.2 of a 1996 settlement after FERC modified other provisions of that settlement in orders affirmed by this Court in *Arizona Corp. Comm'n v. FERC*, 397 F.3d 952 (D.C. Cir. 2005) ("*Arizona I*"). El Paso contends that FERC should have determined that Article 11.2 no longer applies, or that its application is more limited than FERC found. Conversely, Freeport-McMoRan contends that FERC should have determined that Article 11.2 applies more broadly than it did. In addition,

Freeport-McMoRan contends that FERC erred in approving the 2006 Settlement. As the record shows, FERC's determinations in this case were reasonable, deserve deference, and should be upheld.

STATEMENT OF FACTS

I. Events Leading To The Challenged Orders

A. Full Requirements And Contract Demand Service

Historically, El Paso provided both full requirements and contract demand service. August 17, 2010 Order P 3, JA 183. Contract demand service provided transmission rights on El Paso's system up to the maximum quantity designated in a customer's service contract. *Id.* Full requirements service, by contrast, required El Paso to transport a customer's full natural gas requirements each day, with no limit on the amount of gas a shipper could require El Paso to transport other than the capacity of its delivery point(s). *Id.*

B. The 1990 Settlement

In 1990, El Paso entered into a settlement which converted its bundled sales contracts into unbundled transportation service contracts. *El Paso Natural Gas Co.*, 54 FERC ¶ 61,316, *on reh'g*, 56 FERC ¶ 62,290 at 62,148-49 (1991); August 17, 2010 Order P 3, JA 182. In addition, the 1990 Settlement provided that: (1) full requirements service on El Paso would continue; (2) "El Paso shall not be required to construct any facilities that are not economically justifiable" (§ 3.6);

and (3) capacity would be allocated *pro rata* if El Paso had insufficient capacity to serve all transportation requests. August 17, 2010 Order P 4, JA 183.

C. The 1996 Settlement

Following the unbundling of sales and transportation services, El Paso's local distribution company customers turned back their capacity rights, leaving about 35 percent of El Paso's capacity unsubscribed. *Arizona I*, 397 F.3d at 954; August 24, 2010 Order PP 3-4, JA 220-21. To address the resulting revenue shortfall without dramatically increasing remaining customers' rates, El Paso and its customers entered into the 1996 Settlement. September 2008 Order P 5, JA 127; *see also El Paso Natural Gas Co.*, 79 FERC ¶ 61,028, *on reh'g*, 80 FERC ¶ 61,084 (1997) (approving 1996 Settlement).

Under the 1996 Settlement, El Paso and its shippers agreed to share both the fixed costs of, and the revenues from any sales of, the turned-back capacity. Specifically, for the first eight years of the 1996 Settlement, El Paso's shippers would bear 35 percent of the fixed costs of the unsubscribed capacity (i.e., El Paso's shippers paid El Paso $254.8 million), and El Paso would credit back to the shippers 35 percent of any remarketing revenues. *El Paso*, 79 FERC at 61,126; *see also* September 2008 Order PP 5, 28, JA 127, 135; August 24, 2010 Order P 4, JA 221; *El Paso Natural Gas Co.*, 99 FERC ¶ 61,244 at 62,008 & n.63 (2002) ("2002 CAP Order").

In addition, Article 11.2(a) of the 1996 Settlement[1] caps rates for capacity then under contract by eligible shippers until the contracts terminate. August 17, 2010 Order P 6, JA 183; August 24, 2010 Order P 5, JA 221. Under Article 11.2(b), the rates of a shipper with an Article 11.2(a) rate-capped contract exclude costs attributable to capacity on El Paso's system on December 31, 1995 that becomes unsubscribed or is subscribed at less than the maximum tariff rate. August 17, 2010 Order P 6, JA 183; August 24, 2010 Order P 5, JA 221.

D. The Capacity Allocation Proceeding

After the 1996 Settlement was approved, circumstances on El Paso changed dramatically, and capacity became constrained. *E.g.*, August 17, 2010 Order P 7, JA 184. Several factors contributed to this including, primarily, that full requirements load grew substantially to amounts far greater than the levels used to set the 1996 Settlement billing determinants upon which their demand charges were based. *Id.*; *see also Arizona I*, 397 F.3d at 954; 2002 CAP Order at 61,998. There was no longer sufficient capacity to meet the demands of all firm service[2] shippers, "making service unreliable and triggering *pro rata* cutbacks" in

[1] Pertinent provisions of the 1996 and 1990 Settlements are set out in the Addendum to this brief.

[2] Firm service is "service that is not subject to a prior claim by another customer or another class of service and receives the same priority as any other class of firm service." 18 C.F.R. § 284.7(a)(3).

accordance with § 4.2 of El Paso's tariff and the 1990 Settlement. *Arizona I*, 397 F.3d at 954; *see also*, *e.g.*, August 17, 2010 Order P 7, JA 184-85; August 24, 2010 Order PP 9-10, JA 223.

In response to the routine cuts in service, shippers filed several complaints asserting that El Paso's capacity allocation procedures were unjust and unreasonable and asking FERC to remedy the problem. August 17, 2010 Order P 7, JA 185.

In the Capacity Allocation Orders,[3] FERC agreed with the complainants that the quality of firm service on El Paso had deteriorated, and would continue to deteriorate, without Commission action. Among other things, FERC found that the degradation in firm service was caused, in large part, by the significant and unrestricted growth in full requirements service. *E.g.*, August 24, 2010 Order P 13, JA 225. To restore reliable firm service, therefore, FERC directed that service under full requirements contracts (i.e., service with no transportation demand limit) be converted to contract demand service (i.e., service with specific transportation demand limits). *E.g.*, July 2006 Order P 11, JA 81 (citing 2002 CAP Order). All system capacity not under contract by existing contract demand shippers, including

[3] *El Paso Natural Gas Co.*, 99 FERC ¶ 61,244 ("2002 CAP Order"), *order adopting capacity allocation methodology*, 100 FERC ¶ 61,285 (2002), *order on reh'g*, 104 FERC ¶ 61,045 (2003) ("2003 CAP Order"), *order on reh'g*, 106 FERC ¶ 61,233 (2004) ("2004 CAP Order") (collectively, "Capacity Allocation Orders"), *aff'd sub nom. Arizona I*, 397 F.3d 952.

the capacity from El Paso's Line 2000 and Power-Up expansion projects, was allocated to the former full requirements shippers at their then-existing demand charges. August 17, 2010 Order P 9 & n.8, JA 185-86; July 2006 Order PP 11-12, JA 81-82; August 24, 2010 Order P 16, JA 226.

The Capacity Allocation Orders modified the 1996 Settlement only to the extent necessary to restore reliable firm service, and stated that "the remainder of the Settlement will remain in place." 2002 CAP Order at 62,018; August 17, 2010 Order P 10, JA 186; September 2008 Order 11-12, JA 129; August 24, 2010 Order PP 15, 19, JA 225, 227 (citing 2002 CAP Order at 62,018; 2003 CAP Order PP 93, 173); 2004 CAP Order P 14.

A group of former full requirements shippers petitioned for review of the Capacity Allocation Orders, challenging both the evidence supporting the need for conversion and the conversion remedy. *Arizona I*, 397 F.3d at 954-56. This Court rejected petitioners' arguments, affirming the Capacity Allocation Orders in all respects.

E. El Paso's 2005 Rate Filing

In accordance with the 1996 Settlement, El Paso filed a general system-wide Natural Gas Act ("NGA") § 4 rate case on June 30, 2005. R.1, JA 266; *see also* July 2006 Order P 2, JA 78. El Paso proposed a rate increase for existing services, a number of new services, and changes in certain terms and conditions of service

including its penalty structure. July 2006 Order P 2, JA 78; August 17, 2010 Order P 16, JA 188-89. El Paso also proposed to eliminate the Article 11.2 rate cap, contending that it no longer applied in light of FERC's action in the Capacity Allocation Proceeding. July 2005 Order PP 25-26, JA 11; August 2007 Order P 2 and n.3, JA 95.

Freeport-McMoRan, among others, protested El Paso's rate filing. R.57, JA 432. As pertinent here, Freeport-McMoRan contended that Article 11.2 still applied (*id.* 8-11, JA 439-42), and that FERC should reject El Paso's proposal to roll-in the costs of its expansion capacity because El Paso allegedly withheld capacity in 2000-2001 (*id.* 6-7, JA 437-38). *See also* August 17, 2010 Order PP 17, 19, JA 189, 190 (same).

FERC accepted El Paso's filing subject to the outcome of a hearing and a technical conference on various issues including the continued applicability of the Article 11.2 rate cap. July 2005 Order PP 31, 88-92, JA 13, 31-33.

Technical conferences were held on September 20-21 and October 19-20, 2005. September 2008 Order P 14, JA 130. Afterwards, briefs were filed regarding whether Article 11 continues to apply after the Capacity Allocation Proceeding. March 2006 Order PP 5-8, JA 44.

Also, after numerous settlement conferences El Paso filed a settlement proposal on December 6, 2006 ("2006 Settlement"). R.530 at 3, JA 870; August

2007 Order P 7, JA 97. The 2006 Settlement resolved all issues set for hearing or technical conference except for certain Article 11.2 issues and issues related to maximum delivery obligations, and was supported by FERC's Trial Staff and every class of customer on El Paso's system, including California shippers, former full requirements shippers, Article 11.2 shippers, non-Article 11.2 shippers, local distribution companies, electric utilities, state commissions, natural gas producers, marketers, electric generators and end-users. R.561 (Joint Reply Comments In Support of Settlement) at 10-11, JA 1084-85. *See also* August 2007 Order P 55, JA 115 (noting widespread support); *id.* PP 11-12, JA 98 (listing numerous parties supporting or not opposing the settlement). Only Freeport-McMoRan opposed the settlement. August 17, 2010 Order P 27, JA 192.[4]

II. The Challenged Orders

In the challenged orders, FERC carefully considered the record and the issues raised and, as pertinent here, determined that: (1) the Capacity Allocation Orders did not abrogate Article 11.2 of the 1996 Settlement (March 2006 Order PP 2, 25-32, JA 42, 50-54; September 2008 Order PP 11-12, 30-37, JA 129,

[4] Freeport-McMoRan attempts to show that its interests are different from those of parties supporting the Settlement by arguing that "Article 11.2 contract rights are uniquely important" to it because, as an end-user, it cannot pass through its transportation costs. Br. 5, 17. Freeport-McMoRan was not unique in this respect, as other end-users supported approval of the settlement. *See, e.g.*, R.559 (Reply Comments In Support of Electric Generator Coalition) at 5, JA 1027.

136-39; August 24, 2010 Order PP 24, 62-86, 110, JA 229, 240-49, 258); (2) Article 11.2 applies to the amended, former full requirements contracts (March 2006 Order PP 39-41, JA 57; September 2008 Order P 45 & n.37, JA 142; August 24, 2010 Order PP 110-14, JA 258-60); (3) Article 11.2 applies to turned-back but not expansion capacity allocated to former full requirements shippers (March 2006 Order PP 68-69, 81-86, JA 65-67, 71-73; September 2008 Order PP 53-60, 72-77, 84, 86, 88, JA 146-49, 154-60; August 17, 2010 Order PP 96-97, JA 215-16; August 24, 2010 Order PP 101-16, JA 254-60); (4) the rate for turned-back capacity is the rate applicable to the new shipper's receipt points, not the rate the former shipper paid (September 2008 Order P 62, JA 150; August 24, 2010 Order P 116, JA 260); and (5) the first 4,000 million cubic feet per day ("MMcf/d") of firm maximum rate subscribed El Paso capacity would be presumed to be 1995 capacity for Article 11.2(b) purposes (March 2006 Order P 60, JA 64; September 2008 Order PP 96-98, JA 163-64; August 17, 2010 Order P 24 & n.35, JA 191).

In addition, FERC approved a settlement of El Paso's rate filing alternatively under the first two approaches for approving contested settlements set forth in its precedent, *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345 (1998), *order on reh'g*, 87 FERC ¶ 61,110, *order on reh'g*, 88 FERC ¶ 61,168 (1999). August 2007

Order PP 18-30, 47-62, JA 101-07, 112-17; August 17, 2010 Order PP 36-102, JA 195-217; August 24, 2010 PP 126-30, JA 263-64.

Furthermore, FERC fully considered, but found meritless, as well as irrelevant to the matters at issue in this 2005 rate filing proceeding, Freeport-McMoRan's claims that El Paso allegedly withheld capacity in 2000-2001. July 2006 Order PP 22-37, JA 85-92; March 2006 Order PP 68-69, 81-86, JA 65-68, 71-73; August 2007 Order PP 22, 23 & n.28, JA 103, 104; September 2008 Order PP 72-77, 84, 86, 88, JA 154-60; August 17, 2010 Order PP 50-51, 54-59, 95-98, JA 199, 200-04, 214-16.

SUMMARY OF ARGUMENT

In the Capacity Allocation Orders, as affirmed by this Court in *Arizona I*, 397 F.3d 952, the Commission modified a 1996 settlement of El Paso's rates to the extent necessary to restore reliable firm service on El Paso's system, which had become unreliable, among other causes, due to the growth in demand of El Paso's full requirements customers. This case in large measure concerns the scope and extent of the Commission's modification of the 1996 Settlement in the Capacity Allocation Orders. In reviewing the issues raised in this case, FERC reasonably interpreted and applied settlement and tariff provisions it previously approved, as well as its own orders and regulations. FERC's determinations were reasonable, deserve deference, and should be affirmed.

El Paso's primary claim on appeal is that FERC's partial modification of the 1996 Settlement eliminated the central benefits of that settlement to El Paso, and, as a result, rendered Article 11.2 of the Settlement (which was not addressed in the Capacity Allocation Proceeding) unenforceable. As FERC found, this claim is untimely. El Paso should have raised this claim in the Capacity Allocation Proceeding, where FERC and the parties addressed which portions of the 1996 Settlement should be modified.

Even if El Paso's claim were timely, it lacks merit as the Capacity Allocation Orders did not deprive El Paso of the benefits of the 1996 Settlement.

Because El Paso's ability to remarket turned-back capacity was always qualified by its obligation to provide firm full requirements service, the Capacity Allocation Orders' requirement that El Paso allocate all available existing capacity simply enforced El Paso's pre-existing obligation. Indeed, as FERC found, El Paso already had enjoyed, and continued to enjoy, many of the benefits of the 1996 Settlement.

FERC also reasonably determined that the Capacity Allocation Orders did not abrogate, but simply amended, the full requirements contracts. Contrary to El Paso's contention, Article 11.2 does not require the mutual agreement of El Paso and the shipper for a full requirements contract to be amended.

Moreover, consistent with its determination in the Capacity Allocation Orders that El Paso was required to use its available existing capacity to transport full requirements shippers' needs, FERC reasonably concluded that turned-back capacity allocated to full requirements shippers in the Capacity Allocation Proceeding, like other El Paso capacity in existence at the time of the 1996 Settlement, is subject to the Article 11.2(a) rate cap. Likewise, FERC reasonably found that Line 2000 and Power-Up expansion capacity, which did not exist at the time of the 1996 Settlement, was not subject to the Article 11.2(a) rate cap.

FERC's determination to set the Article 11.2(b) compliance presumption at 4,000 MMcf/d was reasonable as well. It would not have been appropriate to

increase the presumption to include capacity set aside for transients, as Freeport-McMoRan urged. The Capacity Allocation Orders explained that FERC's regulations require El Paso, like all pipelines, to reserve capacity to manage transients, and that such capacity is not part of a pipeline's available capacity.

Freeport-McMoRan also challenges FERC's approval of the contested 2006 Settlement. In accordance with FERC's precedent, FERC determined under Trailblazer Approach II that the overall result of the settlement was just and reasonable and that Freeport-McMoRan, the only party contesting the settlement, would be in no worse position under the settlement than if the case were litigated. Alternatively, under Trailblazer Approach I, FERC found there was no merit to Freeport-McMoRan's challenges to the settlement. As part of this analysis, FERC considered but rejected Freeport-McMoRan's claims that El Paso allegedly withheld capacity in 2000-2001, finding those claims both without merit and irrelevant in this 2005 rate proceeding.

ARGUMENT

I. Standard Of Review

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard and upholds FERC's factual findings if supported by substantial evidence. *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 528 (D.C. Cir. 2010).

FERC's orders will be affirmed "so long as FERC examine[d] the relevant data and articulate[d] a . . . rational connection between the facts found and the choice made. In matters of ratemaking, [the Court's] review is highly deferential, as [i]ssues of rate design are fairly technical and, insofar as they are not technical, involve policy judgments that lie at the core of the regulatory mission." *Id.* (quoting *Alcoa Inc. v. FERC*, 564 F.3d 1342, 1347 (D.C. Cir. 2009) (alterations and omission by Court)); *see also Blumenthal v. FERC*, 552 F.3d 875, 881 (D.C. Cir. 2009) ("the statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition, and we afford great deference to the Commission in its rate decisions") (quoting *Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008)).

In addition, the Court gives substantial deference to FERC's interpretation of its own orders (*Sacramento*, 616 F.3d at 528) and regulations (*Alcoa Power Generating Inc. v. FERC*, No. 10-1066, 2011 U.S. App. LEXIS 9041, at *24 (D.C.

Cir. May 3, 2011)), as well as to FERC's interpretation of settlement agreements (*Transcontinental Gas Pipe Line Corp. v. FERC*, 485 F.3d 1172, 1178 (D.C. Cir. 2007)), and tariffs (*Old Dominion Elec. Coop., Inc. v. FERC*, 518 F.3d 43, 48 (D.C. Cir. 2008)).

II. FERC Reasonably Determined That Its Actions In the Capacity Allocation Proceeding Did Not Abrogate Article 11.2.

El Paso contends that, because the Capacity Allocation Orders required it to allocate all of its available existing capacity to converting full requirements shippers, those orders prevented El Paso from continuing to remarket turned-back capacity, thereby eliminating the central benefit of the 1996 Settlement and, consequently, El Paso's need to comply with Article 11.2. Br. 6-7, 9-21. El Paso's contention is both untimely and meritless.

A. El Paso's Claim That The Capacity Allocation Proceeding Abrogated Article 11.2 Is Untimely.

In the Capacity Allocation Proceeding, as affirmed by this Court, the Commission rejected arguments that it should abrogate the entire 1996 Settlement, and instead modified the Settlement only to the extent necessary to restore firm service. March 2006 Order PP 25, 27, JA 50, 51. El Paso supported FERC's surgical modification of the 1996 Settlement and, while it could have, El Paso never argued that Article 11.2 or any other settlement provision should be abrogated. September 2008 Order P 30, JA 136; March 2006 Order PP 27, 32, JA

51, 54. Thus, when El Paso argued in the instant proceeding that Article 11.2 should be abrogated in light of actions in the Capacity Allocation Proceeding, FERC "repeatedly rejected that argument as untimely." August 24, 2010 Order P 85, JA 248 (citing March 2006 Order P 32, JA 54; September 2008 Order P 30, JA 136); *see also Pacific Gas & Elec. Co. v. FERC*, 533 F.3d 820, 822, 824-25 (D.C. Cir. 2008) (claim "cloaked in the guise of a challenge to the orders below" was "an impermissible collateral attack on a series of orders that FERC issued" in an earlier proceeding).

El Paso contends the continued applicability of Article 11.2 was not at issue in the Capacity Allocation Proceeding. Br. 21. To the contrary, "the *entire* 1996 Settlement, including Article 11.2, was under Commission review in the Capacity Allocation Proceeding." August 24, 2010 Order P 86, JA 249. While "[t]he Commission ultimately decided to modify only those portions of the 1996 Settlement necessary to restore reliable firm service, . . . this was not a foregone conclusion." *Id.* "El Paso could have raised its arguments in the Capacity Allocation Proceeding where the Commission addressed the question of what portions of the Settlement required modification, but did not." March 2006 Order P 32, JA 54. "The bottom line is that El Paso failed to seek rehearing of the decision in the Capacity Allocation Proceeding to modify only certain portions of the 1996 Settlement, and El Paso cannot use this proceeding to revitalize rights it

waived and contest its obligations under Article 11.2." August 24, 2010 Order P 86, JA 249; *see also* March 2006 Order PP 27, 32, JA 51, 54 (same); September 2008 Order P 30, JA 136 (same).

FERC also found no merit to El Paso's claim (Br. 21), that "in the [Capacity Allocation Proceeding], no party could have known whether or how Article 11.2 would affect [El Paso]'s rates in a yet-to-be-filed rate case." August 24, 2010 Order P 85, JA 248-49. "By its terms, Article 11.2 continues past the term of the 1996 Settlement. Thus, El Paso should have known or realized the Commission's decision to modify the 1996 Settlement in a limited manner and to keep the remaining provisions, including Article 11.2, would impact El Paso in future rate proceedings." *Id.*, JA 249.

El Paso's attempt to resurrect its time-barred Article 11.2 claim by pointing to *El Paso Natural Gas Co.*, 109 FERC ¶ 61,359 (2004) ("Primary Point Redesignation Order"), Br. 21, fails. That compliance order "address[ed] El Paso's proposed procedures for redesignating primary point rights." *El Paso*, 109 FERC ¶ 61,359 at P 1. Several parties filed a motion for "clarification concerning the rate impact of redesignating primary point rights," asserting that the Article 11.2 rate cap would continue to apply for the duration of their contracts. *Id.* PP 1, 14-16. Other parties substantively and procedurally opposed the motion. *Id.* PP 17-22. For example, one party countered that this "motion was not the proper procedural

vehicle to request a Commission ruling interpreting the rate cap," and that "El Paso is months away from filing its next rate case and should be given the opportunity to describe its proposal." *Id.* P 19. In the context of that compliance proceeding on the redesignation of primary point rights, FERC reasonably found that "a ruling on how the rate cap would apply in El Paso's next general rate case is premature at this time and beyond the scope of this proceeding." *Id.* P 23.

By contrast, in the Capacity Allocation Proceeding FERC reviewed "the *entire* 1996 Settlement," and specifically addressed which provisions should be modified. August 24, 2010 Order P 86, JA 249. Thus, FERC's statement in the Primary Point Redesignation Order, which was made after the Capacity Allocation Orders issued and only a few months before El Paso would file the instant rate proceeding, does not help El Paso.

B. El Paso's Claim That FERC's Actions In The Capacity Allocation Proceeding Abrogated Article 11.2 Lacks Merit.

1. Requiring El Paso To Allocate All Available Existing Capacity Simply Enforced El Paso's Pre-Existing Obligation.

El Paso contends that the Capacity Allocation Orders' requirement that it allocate all available turned-back capacity to full requirements shippers undermined its ability to remarket that capacity and, thereby, frustrated a central purpose of the 1996 Settlement. FERC reasonably found otherwise. August 24, 2010 Order PP 42, 65, 68 (citing 2002 CAP Order at 62,012; 2003 CAP Order P

161), 70 (citing 2003 CAP Order P 161), 74, 75 (citing 2002 CAP Order at 62,012; 2003 CAP Order P 112), 76, JA 233, 241-44; September 2008 Order PP 32-35, 37 JA 136-39.

As FERC determined in the Capacity Allocation Proceeding (2003 CAP Order PP 48, 80, 96, 97, 112, 143, 161; 2002 CAP Order at 62,001, 62,011-13), El Paso's ability to remarket turned-back capacity was never unqualified, but was "always subject to [El Paso's] contractual obligation under the [full requirements contracts] to use its existing capacity to serve their needs, as well as the obligations under section 16.3 of the 1996 Settlement and [FERC regulation] 284.7(a)(3) to operate its pipeline in a manner that provides reliable firm service to its existing customers." August 24, 2010 Order P 42, JA 233. *See also* September 2008 Order PP 31-32, 34, 37, JA 136-39 (same); *id.* P 33, JA 137 ("El Paso's contracts with its [full requirements] customers required it to use all its existing capacity, including [turned-back capacity], to serve any increased demand of the [full requirements] customers."). "Thus, when the Commission required El Paso, in the Capacity Allocation Proceeding, to use [turned-back capacity] to serve the [full requirements] shippers," it "did not abrogate the central purpose of the 1996 Settlement," but, rather, "held El Paso to its obligation to administer its pipeline consistent with section 16.3 of the 1996 Settlement and the Commission's

regulations and use its existing capacity to satisfy its contractual obligations under the existing firm customers' [contracts]." August 24, 2010 Order P 42, JA 233.

As the Capacity Allocation Orders explained, firm service is defined in FERC's regulations, 18 C.F.R. § 284.7(a)(3), as "service that is not subject to a prior claim by another customer." 2002 CAP Order at 62,013; 2003 CAP Order PP 48, 80. Moreover, El Paso is obligated under 1996 Settlement Article 16.3 "to reasonably ensure the quality of firm service and that its actions do not degrade the quality of that service." 2003 CAP Order P 96 (citing 2002 CAP Order at 62,012); *see also* 2003 CAP Order PP 97, 112. Thus, "in accordance with the provisions of the 1996 Settlement and the Commission's regulations," FERC determined, El Paso "may not enter into new firm service contracts unless it can demonstrate that it has available capacity to provide the service." 2002 CAP Order at 62,012.

The Capacity Allocation Orders further found that El Paso "was and is obligated to provide service to the [full requirements] shippers up to their full requirements," i.e., the amount they nominate for shipment. 2003 CAP Order P 182; *see also* 2002 CAP Order at 61,998 ("[Full requirements] contracts provide that El Paso must deliver and the customer must take from El Paso, the customer's full natural gas requirements each day."). And, as *Arizona I* found:

> the reservation charges of the [contract demand] shippers were based on the capacity they reserved, while the [full requirements] shippers' were based on 1996 "billing determinants." Nonetheless, the [full requirements] shippers remained free, as the name "full requirements" suggests, to insist that El Paso meet their full requirements.

397 F.3d at 954; *see also* 2002 CAP Order at 61,998 ("Full requirements customers are not limited to a specific contract demand quantity."). Accordingly, El Paso's claim that full requirements shippers could not "simply 'grow into' [El Paso]'s existing capacity for free" (Br. 17-18; Pet.-Int. Br. 11), is an impermissible collateral attack on the Capacity Allocation Orders and *Arizona I*. *See Pacific Gas*, 533 F.3d at 822, 824-25. El Paso's obligation to expand (*see* Br. 17), is different from its obligation to serve shippers with existing capacity.

The record in the Capacity Allocation Proceeding established that El Paso's existing capacity was insufficient to meet the needs of its current firm customers. *E.g.*, 2002 CAP Order at 61,999 n.14, 62,000; 2003 CAP Order P 111 & n. 109, n.142, P 133. To restore firm service on El Paso, therefore, FERC directed, among other things, that El Paso allocate all of its available existing capacity (i.e., all existing capacity not under contract to contract demand shippers or needed to serve FT-2 shippers (small full requirements shippers with limited receipt rights)) to converting full requirements shippers. 2002 CAP Order at 62,009, 62,017; *El Paso*, 100 FERC ¶ 61,285 PP 21, 32; 2003 CAP Order PP 52, 83, 88 & n.87, 133, 135.

2. El Paso's Arguments To The Contrary Are Unavailing.

Ignoring the portions of the Capacity Allocation Orders discussed above, as well as FERC's reliance on them in the instant orders, El Paso contends FERC's determination that El Paso's ability to remarket turned-back capacity was always qualified conflicts with the Capacity Allocation Orders. Br. 15-17. In El Paso's view, if the Capacity Allocation Orders had found El Paso's ability to remarket turned-back capacity was always qualified, FERC would not have had to "change[] the risk sharing provisions and terminate[] [full requirements] service in the [Capacity Allocation Proceeding]." *Id*. 16-17. El Paso further notes that the Capacity Allocation Orders declined to find El Paso at fault for remarketing turned-back capacity or for implementing *pro rata* curtailments. *Id*. 15-16.

As FERC explained, however, these "argument[s] oversimplif[y] the situation." August 24, 2010 Order P 71, JA 242. "Throughout the Capacity Allocation Proceeding, as well as in the September [2008] Order, the Commission emphasized that when capacity became constrained on the El Paso system, El Paso's tariffs, contracts, and settlements operated to create conflicting rights and obligations, making it almost impossible for El Paso to fulfill them all." *Id.* (citing 2003 CAP Order P 112; September 2008 Order P 34, JA 138). *See also, e.g.*, 2003 CAP Order P 61; 2002 CAP Order at 62,001, 62,012-13, 62,019; August 24, 2010 Order P 71, JA 242 (setting out conflicting obligations). "Because of these

conflicting agreements, the Commission chose not to fault any party for the capacity shortfall on the El Paso system, and instead focused on restoring firm service and making parties' rights and obligations clear for the future. However, this does not mean that, during that time, El Paso was successfully fulfilling all of its obligations, including its obligation to serve the needs of its existing shippers." August 24, 2010 Order P 74, JA 243.

Moreover, as already discussed, the Capacity Allocation Orders did not change the 1996 Settlement's risk-sharing provisions. Rather, those orders enforced El Paso's already-existing obligation to remarket turned-back capacity only if it was not needed to serve existing firm customer demand. *See supra* at 19-22.

Furthermore, FERC could not allow full requirements service to continue even after it ensured that El Paso would only remarket turned-back capacity that was not needed to serve existing firm customers. The significant and unrestricted growth in full requirements demand was largely responsible for the degradation in firm service on El Paso. 2002 CAP Order at 62,000, 62,002-03, 62,008 & n.64; August 24, 2010 Order P 13, JA 225. El Paso already lacked sufficient capacity to meet the demands of its firm customers; allowing full requirements service to continue, with its unlimited and ever-growing demand, would necessarily further

degrade firm service. 2002 CAP Order at 62,003, 62,008; August 24, 2010 Order PP 72-73, JA 243. *See also Arizona I*, 397 F.3d at 955 (same).

El Paso next challenges FERC's reliance on 1996 Settlement section 16.3, claiming that provision is concerned only with "facilities," and does not indicate that El Paso must allocate turned-back capacity to full requirements shippers without additional payment. Br. 19. "The Commission disagree[d] with El Paso's narrow reading of that section." August 24, 2010 Order P 75, JA 244.

> Section 16.3, which is titled "Service Obligations," requires El Paso to "maintain and operate facilities sufficient to satisfy and perform the service obligations with respect to both quality and quantity of service imposed on it" by the 1996 Settlement. The requirement that El Paso operate its facilities in a manner sufficient to satisfy and perform its service obligations under the 1996 Settlement certainly includes the requirement that El Paso use its existing facilities to meet the needs of its existing customers. This is why the Commission relied on section 16.3 in the Capacity Allocation Proceeding orders to find that El Paso could not enter into new service contracts unless it could demonstrate that it has available capacity to provide the service.[5]

Id. FERC's reasonable interpretation of section 16.3, not El Paso's contrary interpretation, is due deference and should be upheld. *Transcontinental Gas*, 485 F.3d at 1178.

[5] The Commission further stated that *Arizona I* "affirmed this decision, including the Commission's reliance on section 16.3 in making this finding, and it is improper for El Paso to raise the issue of section 16.3 again here." August 24, 2010 Order P 75 & n.66, JA 244 (citing 2003 CAP Order P 112; 2002 CAP Order at 62,012).

El Paso also claims that FERC improperly relied on section 284.7(a)(3) of its regulations because, purportedly, El Paso offered a lesser form of firm service than that offered on other systems in light of unique provisions in El Paso's agreements. Br. 17, 19-20 (referring to *pro rata*, full requirements, and economically-justified expansion provisions). That claim was rejected in the Capacity Allocation Proceeding. As FERC determined there, after interpreting its own regulations and pertinent provisions in FERC-approved tariffs and settlement agreements, "the Commission's regulations that define firm service apply to firm service on all pipelines. Firm service has the same attributes and must meet the same requirements on all pipelines. The Commission has not approved a different type of firm service on El Paso that is less firm or less reliable than firm service on other pipelines." 2002 CAP Order at 62,001; *see also id.* at 62,013 (same); *Alcoa*, 2011 U.S. App. LEXIS 9041, at *24 (substantial deference due to Commission's interpretation of its own regulations); *Transcontinental Gas*, 485 F.3d at 1178 (substantial deference due to Commission's interpretation of settlement agreements); *Old Dominion*, 518 F.3d at 48 (substantial deference due to Commission's interpretation of tariffs).

FERC added that, as it "already explained in the Capacity Allocation Proceeding orders," the "routine *pro rata* curtailments on El Paso were unjust and unreasonable and not permitted under section 284.7(a)(3) of the Commission's

regulations." August 24, 2010 Order P 77, JA 244 (citing 2002 CAP Order at 62,001). "The Commission was not persuaded that the [full requirements] shippers agreed to submit to unjust and unreasonable impairment of their firm services arising from excess use of *pro rata* curtailments. Thus, El Paso's argument that the Commission approved *pro rata* curtailments that could be applied on a routine basis without limitation is inconsistent with the Commission's findings in the Capacity Allocation Proceeding." *Id.*, JA 245.[6]

3. In Any Event, El Paso Already Had Enjoyed, And Continued To Enjoy, Many Of The Benefits Of The 1996 Settlement.

El Paso contends that requiring it to allocate all available existing capacity to converting full requirements shippers deprived it of the benefit for which it bargained in the 1996 Settlement. Br. 10-11, 14, 31. *See also* Pet.-Int. Br. 12 (same). While El Paso focuses on only one of the benefits it obtained under the 1996 Settlement -- the ability to remarket turned-back capacity -- FERC appropriately considered all the benefits El Paso obtained, and found that El Paso already had enjoyed, and continued to enjoy, many of the benefits of the 1996 Settlement. August 24, 2010 Order PP 81-83, 108, JA 247-48, 257 (citing 2002 CAP Order at 62,008).

[6] The Commission again noted that, "[b]ecause [it] already addressed this issue in the Capacity Allocation Proceeding, El Paso may not raise it again here." August 24, 2010 Order P 77, JA 244.

For example, at the outset, El Paso received almost $255 million in risk-sharing payments from shippers to cover 35 percent of the costs of the unsubscribed capacity. August 24, 2010 Order P 81, JA 247; September 2008 Order P 28, JA 135. In addition, El Paso would continue to collect revenues well into the future from the numerous turned-back capacity sales it made before the Capacity Allocation Proceeding. August 24, 2010 Order PP 81, 108, JA 247, 257. Moreover, El Paso retained its ability to resell turned-back capacity as long as doing so would not degrade service to existing firm customers. *Id.* (citing 2003 CAP Order P 161).

Furthermore, El Paso obtained benefits from the Capacity Allocation Orders. Specifically, the end of full requirements service released El Paso from its obligation to meet the unlimited full requirements shippers' demands. August 24, 2010 Order PP 81, 108, JA 247, 257. Additionally, all parties would benefit from the restoration of reliable firm service, as well as the creation of proper market incentives for infrastructure expansion, on El Paso's system. *Id.* PP 81, 108, JA 247, 257.

FERC also pointed out that "the Capacity Allocation Proceeding did not change the bargain for El Paso any more than [it did] for any other party." August 24, 2010 Order P 82, JA 248. *See also id.* P 83 (same); March 2006 Order P 28, JA 52 ("contrary to El Paso's assertion, it was not only El Paso whose expectations

under the Settlement were altered.") The "expectations of the [full requirements] shippers were changed when their service was converted to [contract demand] service" and they "lost their entitlement to unlimited service." March 2006 Order P 28, JA 52; August 24, 2010 Order P 82, JA 248.

4. Accepting El Paso's Offer To Forego Cost Recovery (Until Its Next Rate Case) For Its Line 2000 And Power-Up Project Expansions Did Not Abrogate Article 11.2.

El Paso also complains, without any supporting argument or citation, that "FERC modified the Settlement in other significant ways, including by allocating expansion capacity to the [full requirements] shippers at no charge." Br. 20; *see also* Pet.-Int. Br. 11-12.

In the Capacity Allocation Proceeding, El Paso explained that its Line 2000 and Power-Up expansion projects would provide sufficient additional capacity so that *pro rata* allocations would no longer occur except in cases of *force majeure*. March 2006 Order P 26, JA 51. "Further, El Paso stated that it was willing to forgo cost recovery for the projects until its next rate case, and the Commission accepted this commitment." *Id.* (citing 2002 CAP Order at 62,024; 2003 CAP Order P 109; *El Paso*, 103 FERC ¶ 61,280 (2003) (Power-Up Project Certificate Order)). Since "El Paso's commitment was not in any way related to modification of Article 11," FERC reasonably found that accepting El Paso's offer to forego

cost recovery for these projects until its next rate case "provide[d] no basis for finding that Article 11 no longer exists." *Id.*

5. El Paso's Claim That Article 11.2 No Longer Applies Because The 1996 Settlement Was A Non-Severable Package Deal Fails As Well.

El Paso also claims that Article 11.2 no longer applies because the 1996 Settlement included a non-severability clause (Article 17) which provided that, if the Settlement was approved with modifications, El Paso "will have the right, in its discretion, . . . to withdraw this Stipulation and Agreement." Br. 14 (omission by El Paso). FERC found no merit to this claim. March 2006 Order P 29, JA 52. "The fact that the Settlement contains in Article 17 a fairly standard provision that would have allowed El Paso to withdraw the Settlement prior to its implementation if the Commission's approval modified the Settlement in a significant way, does not mean that El Paso or any other party can withdraw from the Settlement bargains after the Settlement was implemented." *Id.* While El Paso argues that this permits the "absurd result that FERC could approve a settlement without change on Day One and then make wholesale changes on Day Two" (Br. 14), this ignores that changes would occur only where changed circumstances rendered previously-approved rates unjust and unreasonable.

III. FERC Reasonably Determined That The Converted Contracts Were Amended Contracts Within The Meaning Of Article 11.2.

Article 11.2 "applies to any firm Shipper with a [contract] that was in effect on December 31, 1995, and that remains in effect, in its present form **or as amended**, on January 1, 2006, but only for the period that such Shipper has not terminated such [contract]." August 24, 2010 Order P 111, JA 258 (emphasis by FERC). Interpreting settlement provisions it had approved as well as its own orders, FERC reasonably found that the Capacity Allocation Orders amended the full requirements contracts and, therefore, Article 11.2 continued to apply to the former full requirements shippers' contract demand service. March 2006 Order PP 39-41, JA 57; September 2008 Order PP 42, 45, JA 141, 142; August 24, 2010 Order PP 110-14, JA 258-60.

El Paso contends an amendment requires mutual agreement between El Paso and the shipper. Br. 22, 23. *See also* Pet.-Int. Br. 8. To the contrary, FERC may amend a contract in the exercise of its statutory obligation to assure just and reasonable rates. *See, e.g.*, *Boston Edison Co. v. FERC*, 856 F.2d 361, 372-73 (1st Cir. 1988) ("FERC is, of course, empowered to order a contract term amended *prospectively* if that term is found to produce unjust or unreasonable results.") And, as FERC found, "[t]here is no requirement in Article 11.2 that El Paso and its shippers must agree to amend the [full requirements] contracts into [contract demand] contracts in order for the Article 11.2 rate cap to continue to apply to the

contract 'as amended.'" August 24, 2010 Order P 112, JA 259. FERC's reasonable interpretation of the settlement provision deserves deference and should be affirmed. *Transcontinental Gas.*, 485 F.3d at 1178.

El Paso further asserts that the conversion to contract demand did not "amend" the contracts but, rather, "resulted in a fundamentally new contractual relationship" because the shipper would no longer be required to take its full requirements from El Paso. Br. 23-24 & n.56 (citing 2003 CAP Order P 90); Pet.-Int. Br. 5. FERC found, however, that "Article 9.2 of the 1996 Settlement itself [gave] the [full requirements] shippers the option of converting to [contract demand] service, so there was nothing that assured El Paso that the [full requirements] shippers would remain [full requirements] shippers through the term of the Settlement."[7] March 2006 Order n.24, JA 52; *see also id.* P 40, JA 57 (same); September 2008 Order P 45 and n.37, JA 142 (same); August 24, 2010 Order P 112 and nn.108-109, JA 259 (same). Furthermore, contrary to El Paso's assertion (Br. 26), FERC found that conversion from full requirements service to contract demand service under Article 9.2 would not eliminate a shipper's Article

[7] El Paso argues, for the first time on appeal, that Article 9.2's conversion right applied to only some full requirements shippers. Br. 25-26. As El Paso did not raise this to FERC on rehearing (R.320, JA 637; R.664, JA 1168), it cannot raise it on appeal. NGA § 19(b), 15 U.S.C. § 717r(b); *Williams Gas Processing-Gulf Coast Co., L.P. v. FERC*, 331 F.3d 1011, 1016 (D.C. Cir. 2003); *Intermountain Mun. Gas Agency v. FERC*, 326 F.3d 1281, 1285 (D.C. Cir. 2003).

11.2 protection. March 2006 Order P 40, JA 57; September 2008 Order P 45 & n.37, JA 142; August 24, 2010 Order P 112 & n.109, JA 259. In fact, El Paso acknowledged below that Article 9 does not address the applicability of the Article 11.2 rate caps. R. 664 (Rehearing Request) at 40, JA 1207.

El Paso also argues more than an amendment occurred because FERC set contract demand levels that exceed the level of service provided to full requirements shippers when the 1996 Settlement was negotiated. Br. 24. As this Court recognized in *Arizona I*, 397 F.3d at 954, however, full requirements contracts were not limited to the level of service used in 1996. September 2008 Order PP 54, 58, JA 146, 148 (citing 2003 CAP Order PP 27, 30, 32, 61, 115; 2002 CAP Order at 62,000, 62,003, 62,016). Thus, the Capacity Allocation Orders appropriately amended the full requirements contracts to provide contract demand service at then-current usage levels (i.e., use of the system over the 12 month period from September 1, 2001 through August 31, 2002). 2002 CAP Order at 62,007.

Allowing converting contract demand levels to be "sculpted," i.e., vary by month (Br. 24 (citing 2002 CAP Order at 62,009)), did not exceed the scope of contract amendment either. "Because of the limited availability of system capacity to meet El Paso's firm shippers' needs, it was necessary to allocate capacity to the former [full requirements] shippers on a varying monthly basis. Without sculpting,

El Paso would not have had sufficient capacity to meet the needs of all its firm shippers." August 24, 2010 Order P 113, JA 259; *see also* 2002 CAP Order at 62,009 ("Seasonal entitlement allocations will allow shippers to obtain capacity for the season or months that they need it, thus freeing capacity the rest of the year for use by other shippers with different seasonal needs.").

El Paso further claims, for the first time on appeal, that "the central purpose of the reference to 'amended' contracts" was to ensure Article 11.2 would apply to contracts whose terms were required to be extended under 1996 Settlement Article 9.2. Br. 23 and n.55. El Paso did not raise this claim on rehearing before FERC (R.320, JA 637; R.664, JA 1168) and, therefore, forfeited its right to raise it on appeal. "Section 19(b) of the NGA, 15 U.S.C. § 717r(b), bars the court from considering on review any objection that was not raised on rehearing, without good cause shown." *Williams Gas Processing*, 331 F.3d at 1016. *See also Intermountain Mun. Gas Agency*, 326 F.3d at 1285 (NGA § 19(b) "requires that an objection must be specifically urged, so as to put the Commission on notice of the ground on which rehearing was being sought") (internal quotation and citation omitted). It is highly unlikely, in any event, that this claim would have changed the Commission's determination. If the parties intended to limit amendments to time extensions required under Article 9.2, they could have said so, rather than include the broad "or as amended" language in Article 11.2. *Cf.* September 2008

Order P 56, JA 147 (noting that if the parties intended a provision to have a particular, limited meaning, "they could have drafted the 1996 Settlement to provide as much").

El Paso asserts that the Capacity Allocation Orders "repeatedly characterized these new arrangements in the [Capacity Allocation Proceeding] as '*new* CD contracts.'" Br. 25. El Paso also did not raise this to FERC on rehearing (R.320, JA 147; R.664, JA 1168) and, therefore, cannot raise it on appeal. NGA § 19(b); *Williams Gas Processing*, 331 F.3d at 1016; *Intermountain Mun. Gas Agency*, 326 F.3d at 1285. In any event, the Capacity Allocation Orders repeatedly stated that they were "modifying" the full requirements contracts (*e.g.*, 2002 CAP Order at 62,005-06, 2003 CAP Order PP 1, 42, 43, 98, 105), and "converting" full requirements "service" to contract demand "service" (*e.g.*, 2002 CAP Order at 62,024; 2003 CAP Order PP 27, 138; 2004 CAP Order PP 9, 12, 14, 25). FERC's reasonable interpretation of its own orders as modifying the full requirements contracts deserves deference and should be upheld. *Sacramento*, 616 F.3d at 528.

IV. FERC Reasonably Determined Article 11.2 Applies To Turned-Back Capacity.

El Paso argues that turned-back capacity allocated to former full requirements shippers in the Capacity Allocation Proceeding is not subject to Article 11.2. Br. 27-31. In El Paso's view, full requirements shippers did not have

a right to have their full requirements met with available existing capacity. Br. 28-30.

As already explained, however, FERC determined in the Capacity Allocation Proceeding that El Paso was required to transport full requirements service shippers' full requirements each day, and was required to use its available existing capacity, including turned-back capacity, to do so. September 2008 Order PP 54, 57, 84, JA 146-48, 159 (citing 2002 CAP Order at 62,000, 62,003, 62,016; 2003 CAP Order at PP 27, 30, 32, 61, 115); August 24, 2010 Order PP 103-09, JA 254-58 (citing 2003 CAP Order at P 171). Thus, FERC reasonably concluded that turned-back capacity allocated to full requirements shippers in the Capacity Allocation Proceeding, like other El Paso capacity in existence at the time of the 1996 Settlement, is subject to the Article 11.2(a) rate cap. September 2008 Order PP 53-60, JA 146-49; August 24, 2010 Order PP 101-09, JA 254-58.

For the first time on appeal, El Paso challenges FERC's finding (September 2008 Order P 56, JA 147) that "there is no language in Article 11.2(a) limiting its application to non-[turned-back capacity]," and "if the parties intended the rate cap to apply only to non-[turned-back capacity], they could have drafted the 1996 Settlement to provide as much." Br. 30 & n.73. Even if this challenge were properly before the Court, it would not stand. FERC reasonably concluded that, because "Article 11.2 distinguishes between capacity in existence on December 31,

1995 and new capacity built afterwards, but Article 11.2 does not indicate that a portion of the pre-December 31, 1995 capacity should be treated differently than the rest," there "is no basis in the language of Article 11.2 to hold that the rate cap does not apply to [turned-back capacity]." September 2008 Order P 56, JA 147.

Next, El Paso asserts (without having raised this claim on rehearing) that the Capacity Allocation Proceeding finding that Article 11.2 applies to turned-back capacity will "blur[] incentives that have been clarified in the [Capacity Allocation Proceeding]." Br. 30. El Paso does not explain its assertion, but cites to testimony that, if Article 11.2(a) applies to allocated turned-back capacity it will undercut the demand growth price signal. R.12 at 78, JA 366. El Paso is mistaken.

The Capacity Allocation Orders explained that, "[b]ecause the former [full requirements] shippers did not have to purchase additional capacity to serve increased demands, but could increase their demands under their existing contracts, there was no economic incentive for El Paso or any other pipeline to construct additional capacity to meet these needs." 2004 CAP Order P 19. After conversion, however, these "shippers will have to purchase additional capacity to serve their growing needs, and this demand for additional capacity will provide pipelines with the incentive for expansion." *Id.*; *see also* 2003 CAP Order P 31 ("This requirement to separately contract for additional service provides an incentive for the pipeline to incur the costs necessary to expand its system to meet future growth

needs. Therefore, the conversion of the [full requirements] contracts to [contract demand] contracts will provide the proper incentives to expand."); 2002 CAP Order at 62,000, 62,004, 62,016 (same); August 24, 2010 Order P 78, JA 245 (same). FERC's determination that Article 11.2 applies to allocated turned-back capacity does not impact the converted full requirements shippers' need to purchase additional capacity to serve their growing needs (at non-capped prices) and, thus, does not undercut the demand growth price signal established in the Capacity Allocation Proceeding.

V. FERC Reasonably Determined That The Turned-Back Capacity Rate Is The Rate Applicable To The New Shipper's Receipt Point.

Finally, El Paso argues that, if any rate cap applies to the turned-back capacity, it should be the higher California rate cap since almost all the capacity was turned back by California shippers. Br. 31-32. El Paso is mistaken.

The location of the prior users of turned-back capacity is irrelevant to the rate applicable to the current users of that capacity. September 2008 Order P 62, JA 150 (citing 2003 CAP Order P 141); August 24, 2010 Order P 116, JA 260 (citing 2003 CAP Order P 141); *see also* 2003 CAP Order P 158. "As the Commission explained in the Capacity Allocation Proceeding, when a contract for firm service expires and the shipper does not exercise a right of first refusal, that capacity is available to other shippers." September 2008 Order P 62, JA 150 (citing 2003 CAP Order P 141). The rate for that turned-back capacity "will be the

rate applicable to the new shipper's receipt points, not the rate the former shipper paid." *Id.*; *see also* August 24, 2010 Order P 116, JA 260 (same).

El Paso professes concern that FERC's finding will "curtail [its] ability to recover its costs from Article 11.2 contracts." Br. 32. FERC appropriately determined, however, that "issues raised here related to El Paso's ability to recover its cost of service through its rates are properly addressed in the current rate case proceeding in Docket No. RP08-426," regarding El Paso's rate proposal filed in accordance with the 2006 Settlement. August 24, 2010 Order P 116, JA 260; *see also Algonquin Gas Transmission Co. v. FERC*, 948 F.2d 1305, 1315 (D.C. Cir. 1991) ("the Commission was merely exercising its well-established discretion to order [its] own proceedings and control [its] own docket") (internal quotation omitted); *Domtar Me. Corp., Inc. v. FERC*, 347 F.3d 304, 314 (D.C. Cir. 2003) (same).

VI. FERC Reasonably Determined Article 11.2(a) Does Not Apply To Expansion Capacity

In contrast to turned-back capacity, capacity added by the Line 2000 and Power-Up expansion projects did not exist at the time of the 1996 Settlement. FERC found, therefore, consistent with the language of the 1996 Settlement as well as its purpose and regulatory context, that the Article 11.2(a) rate cap does not apply to the expansion capacity allocated to former full requirements shippers in the Capacity Allocation Proceeding. March 2006 Order PP 68-69, 81-86, JA 66,

71-73; September 2008 Order PP 72-77, 84, 86, 88, JA 154-56, 159-60; August 17, 2010 Order PP 96-97, JA 215-16; August 24, 2010 Order P 105, JA 255.

Freeport-McMoRan contends, however, that Line 2000 was intended only to replace existing capacity[8] and to improve system reliability. Br. 39-43. In Freeport-McMoRan's view, since Line 2000 was intended to serve existing shipper requirements, it should be subject to the Article 11.2(a) rate cap. *Id*. 40-41, 42.

As the Capacity Allocation Orders explained, however, under § 3.6 of the 1990 Settlement (which continued in effect after the 1996 Settlement) El Paso was not obligated to construct new capacity at its own expense to serve the increased needs of its full requirements shippers. March 2006 Order PP 68, 81-82, JA 66, 71 (citing 2003 CAP Order PP 97, 103-04); September 2008 Order PP 73-74, JA 154-55. "Because El Paso was not obligated to fund new capacity to meet the growing [full requirements] demands, the growth that could occur under those [full requirements] contracts was limited to the capacity of the system at the time the contracts were executed." September 2008 Order P 74, JA 155. "In other words, it

[8] Contrary to Freeport-McMoRan's contention, El Paso's application and the order granting the certificate repeatedly state that Line 2000 would "add to," "increase," and "expand" El Paso's capacity. *E.g.*, Freeport-McMoRan Supp. App. H-1, 3-5, 9-10, 12; *El Paso Natural Gas Co.*, 95 FERC ¶ 61,176 at 61,569-71, 61,573-74 (2001). While an earlier El Paso filing intended only to replace capacity (*El Paso*, 95 FERC at 61,569-70, 61,571), the Line 2000 filing approved by the Commission was intended to, and did, expand El Paso's capacity by 230 MMcf/d.

was not part of El Paso's service obligation, or part of the [full requirements] shippers' rights under the 1995 contracts, to receive service for their increased demands with expansion capacity at no additional cost." *Id.*; *see also id.* P 88, JA 160.

Freeport-McMoRan also contends the 230 MMcf/d of Line 2000 expansion capacity is subject to Article 11.2(a) because it was intended to replace the 210 MMcf/d of transient capacity the Capacity Allocation Orders determined was appropriately set aside to serve transients. Br. 43. This contention fundamentally misunderstands the nature of transient capacity.

In accordance with 18 C.F.R. § 284.7(a)(3), capacity must be set aside to serve transients and, because that capacity is not available for firm sales, it is not part of a system's available capacity. August 2007 Order P 24 n.28, JA 104-05, and August 17, 2010 Order P 55, JA 201 (both citing CAP 2003 Order PP 62-80). Because El Paso appropriately set aside 210 MMcf/d for transients, that capacity was never part of its available capacity and did not need to be replaced.

Next, Freeport-McMoRan attempts to undercut FERC's determination by arguing that, unlike the Power-Up Project, Line 2000 was proposed before FERC began to consider El Paso's service reliability problems. Br. 41. In fact, however, El Paso reliability issues were raised beginning in 1999, and in 2000 FERC directed El Paso to file a system-wide capacity allocation proposal to resolve those

issues. 2002 CAP Order at 61,998-99 (explaining genesis of Capacity Allocation Proceeding). Thus, when the Line 2000 expansion was proposed on March 15, 2001, FERC was already addressing El Paso's service reliability problems.

Freeport-McMoRan complains FERC mistakenly stated that El Paso offered, at a conference during the Capacity Allocation Proceeding, to build not only the Power-Up expansion, but also the Line 2000 expansion. Br. 41 (citing September 2008 Order P 75, JA 155). This complaint is incorrect. *See* September 2008 Order P 65, JA 151 (citing 2002 CAP Order at 62,009, 62,011-12). Even if this complaint were correct it would be of no import, as it does not diminish FERC's fundamental holding that the Article 11.2(a) rate cap does not apply to the Line 2000 (and Power-Up) capacity because that capacity did not exist at the time of the 1996 Settlement. *E.g.*, September 2008 Order PP 74, 88, JA 155, 160.

VII. FERC Reasonably Adopted The Presumption That The First 4,000 MMcf/d Of Firm Maximum Rate Subscribed Capacity Is 1995 Capacity For Article 11.2(b) Purposes.

Under Article 11.2(b), costs related to capacity on El Paso's system on December 31, 1995 that becomes unsubscribed or is sold at a discounted rate are not to be included in the rates of a shipper with a contract in effect on December 31, 1995 that remains in effect. March 2006 Order PP 19, 56-63, JA 49, 62-65; September 2008 Order PP 96-98, 115, 118, JA 163-64, 169, 170.

Since 1996, El Paso added substantial capacity to its system through the Line 2000, Power Up, Line 1903, Hobbs, East Valley Lateral, and Picacho Compressor expansion projects. September 2008 Order P 97, JA 163. In addition, El Paso's system is integrated, with all facilities serving all shippers. *Id.* PP 97, 98, JA 163-64. Thus, "when El Paso markets capacity today, it is marketing undifferentiated capacity which cannot be physically attributed to pre-1995 or post-1995 capacity." *Id.* P 98, JA 164.

Nonetheless, because Article 11.2(b) applies only to capacity that was part of El Paso's pre-December 31, 1995 system, and the parties had agreed at the time of the 1996 Settlement that El Paso's system capacity was "slightly more than 4,000 MMcf/d," FERC adopted a presumption, for Article 11.2(b) purposes, that the first 4,000 MMcf/d of firm maximum rate subscribed capacity on El Paso's system is pre-December 31, 1995 capacity. March 2006 Order P 60, JA 64 (quoting 1996 Offer of Settlement, Freeport-McMoRan Supp.-App. J-5, J-7); September 2008 Order PP 96, 98, JA 163-64; August 17, 2010 Order P 24 & n.35, JA 191.

While agreeing that setting a presumption was reasonable (Br. 44), Freeport-McMoRan asserts that setting the presumption at 4,000 MMcf/d was not. Br. 44-46. In support, Freeport-McMoRan states that its rehearing request "urg[ed] that this entire matter be set for hearing," and that it "offered additional evidence

demonstrating that the [presumption] should be set substantially higher, at least at 4,234 MMcf/d." Br. 45 (citing R.544 (Lander Aff.) PP 24-26, JA 1012-14).[9]

Freeport-McMoRan's rehearing petition did not "urg[e] that this entire matter be set for hearing;" rather, it "request[ed] that the Commission set for a *de novo* hearing the appropriate method for determining what vintages of capacity qualify for Article 11.2(b) protection." R.321 at 24-25, JA 703-04. In Freeport-McMoRan's view, "El Paso's computers can readily be programmed to track the various vintages of capacity for contracting purposes." *Id.* at 24, JA 703. But, as just explained, El Paso's system is integrated, and the capacity it markets today "cannot be physically attributed to pre-1995 or post-1995 capacity." September 2008 Order PP 97, 98, JA 163-64. Thus, there was no need for a hearing to determine the vintages of El Paso's capacity.

Freeport-McMoRan's rehearing petition further urged that the presumption level should be increased by 210 MMcf/d (the amount set aside for transient capacity) to 4,210 MMcf/d because FERC purportedly found in *El Paso Natural Gas Co.*, 114 FERC ¶ 61,305 PP 51-52 (2006), "that such system capacity is no longer needed to manage transients." R.321 at 24 n.20, 25-28, JA 703-07. In fact, that order states only that "the Commission, in the Capacity Allocation Proceeding,

[9] Freeport-McMoRan also asserts, for the first time, that evidence it never presented to the Commission shows El Paso's capacity in February 1996 was 4,380 MMcf/d. Br. 45. This assertion and evidence are not properly before the Court.

provided deference to El Paso as system operator to maintain sufficient operational capacity to provide reliable firm service to its customers," and "[t]he Commission again here lends deference to El Paso, as the operator, to maintain operational capacity necessary to provide service." 114 FERC ¶ 61,305 P 51.

The cited order did not undercut FERC's determinations in the Capacity Allocation Orders that, in accordance with 18 C.F.R. § 284.7(a)(3), "El Paso, like all pipelines, must reserve capacity to manage transients, such as daily and hourly load swings, to provide reliable firm service to its firm shippers," that "El Paso may not sell or contract for firm service capacity . . . that is needed to manage transients," and, therefore, that "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." 2003 CAP Order PP 78-80; *see also* R.359 at 4-6, JA 713-15 ("the Commission did not state that El Paso has an additional 210 MMcf/d available for sale" and "El Paso can only sell capacity that it can provide on a sustainable firm basis."); R.560 at 11 & n.12, JA 1046 ("the 210 MMcf/d is not 'back on the market.' El Paso still can only sell firm capacity when it can make that capacity available on a sustainable, firm basis, taking into account the impact of transient conditions. This is true even though, as [Freeport-McMoRan] notes, FERC permitted El Paso to remove from its tariff a provision that specifically repeated this requirement. What [Freeport-McMoRan] fails to

understand is that such requirement still exists in the Commission's regulations, 18 C.F.R. § 284.7(a)(3), which continues to apply to El Paso regardless of whether El Paso continues to have a specific tariff provision that repeats this fundamental Commission requirement.").

Although not raised on rehearing (R.118, JA 453; R.321, JA 680; R.612, JA 1141) and, therefore, not properly before the Court (NGA § 19(b); *Williams Gas Processing*, 331 F.3d at 1016; *Intermountain Mun. Gas Agency*, 326 F.3d at 1285), Freeport-McMoRan argues on appeal that the presumption should be increased by 24 MMcf/d because its evidence purportedly showed that El Paso allocated 4,024 MMcf/d of preexisting west-flow capacity in the Capacity Allocation Proceeding. Br. 45 (citing R. 544, Lander Aff. PP 24-26, JA 1012-14). When it set the presumption level at 4,000 MMcf/d, FERC knew that El Paso's capacity at the time of the 1996 Settlement "was slightly more than 4000 MMcf/d." March 2006 Order P 60, JA 64 (internal quotation omitted). FERC's decision to round down the presumption level by a *de minimis* amount[10] is a rate determination that deserves the Court's deference and should be affirmed.

[10] Even Freeport-McMoRan's witness did not assert that the difference between 4,000 and 4,024 MMcf/d was substantial. R. 544, Lander Aff. P 25, JA 1013 (arguing only that the difference between 4,000 and 4,234 MMcf/d was "not insubstantial").

VIII. FERC Appropriately Approved The 2006 Settlement.

A. FERC's Regulations And *Trailblazer*

Freeport-McMoRan also asserts that the Commission's approval of the contested 2006 Settlement failed to satisfy FERC's standards for evaluating a contested settlement. Br. 26-39. These claims likewise lack merit.

It is well-settled that the Commission has the authority, and in fact the obligation, to consider contested settlements. *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 312-13 (1974); *Pensylvania Gas & Water Co. v. FPC*, 463 F.2d 1242, 1249-50 (D.C. Cir. 1972) (citing *Michigan Consol. Gas Co. v. FPC*, 283 F.2d 204, 224 (D.C. Cir. 1960)). This Court has affirmed the Commission's significant discretion under its regulations to determine how it will evaluate the justness and reasonableness of contested settlements. *Arctic Slope Regional Corp. v. FERC*, 832 F.2d 158, 164 (D.C. Cir. 1987) (concluding that "[t]he breadth of discretion trumpeted by Rule 602(h)(1)(ii)(B) is manifest"); *United Mun. Distribs. Group v. FERC*, 732 F.2d 202, 208 (D.C. Cir. 1984) (observing the Commission's broad authority under its regulations to "take other action" that it deems appropriate when addressing contested settlements, and rejecting arguments that would limit FERC's options under its regulations).

Under its regulations, FERC "may decide the merits of contested settlement issues, if the record contains substantial evidence upon which to base a reasoned

decision or the Commission determines there is no genuine issue of material fact." 18 C.F.R. § 385.602(h)(1)(i). *Trailblazer*, 87 FERC at 61,439, "explained the four approaches for approving contested settlements that are consistent with these standards," the first two of which are relevant here.

Under the first approach (Trailblazer Approach I), FERC can approve the settlement if it finds that there is an adequate record to address the contested issues on the merits and that those issues lack merit. *Trailblazer*, 85 FERC at 62,342; August 2007 Order P 49, JA 113.

Under the second approach (Trailblazer Approach II), "the Commission can approve a settlement as a package where the overall result is just and reasonable, even if some of the aspects of the settlement are problematic and might not warrant approval outside the context of the settlement." *Trailblazer*, 87 FERC at 61,439; August 2007 Order P 50, JA 113. This approach, which "focuses on the end result of the overall settlement," "involves a balancing of the benefits of the settlement against the costs and potential effect of continued litigation," and "includes a finding that the contesting party would be in no worse position under the terms of the settlement than if the case were litigated." *Trailblazer*, 87 FERC at 61,439; August 2007 Order P 50, JA 113. Determining whether the result under the settlement is worse for the contesting party than the likely result of continued

litigation "may involve some analysis of the specific issues raised by the settlement . . . ." *Trailblazer*, 87 FERC at 61,439.

Here, FERC determined that the 2006 Settlement could be approved under both the Trailblazer I and Trailblazer II Approaches. August 2007 Order P 54, JA 115; August 17, 2010 Order P 31, JA 193. Thus, the Trailblazer I and Trailblazer II Approaches provide independent, alternative bases for approving the 2006 Settlement, either of which, standing alone, is sufficient support for the Commission's orders. *See, e.g., Consolidated Hydro, Inc. v. FERC*, 968 F.2d 1258, 1261 (D.C. Cir. 1992) (affirming FERC orders on one of two alternative findings, without addressing the second alternative finding); *County of Del. v. DOT*, 554 F.3d 143, 149 (D.C. Cir. 2009) (affirming FAA finding on one of two alternative grounds presented by the agency).

B. FERC Reasonably Approved The 2006 Settlement Under Trailblazer Approach II.

Consistent with Trailblazer Approach II, FERC determined that the "overall result of the Settlement is just and reasonable, and that [Freeport-McMoRan] would be in no worse position under the Settlement than if the case were litigated." August 2007 Order P 60, JA 116; *see also, e.g.*, *id.* PP 60-61, JA 116-17; August 17, 2010 Order PP 87-102, JA 212-18.

FERC found that "[t]he 2006 Settlement provides substantial benefits to all El Paso shippers." August 17, 2010 Order P 89, JA 213; *see also* August 2007

Order P 61, JA 116 (same). Specifically: "the rates in the 2006 Settlement are substantially lower than El Paso's filed rates;" the "Settlement provides shippers with rate stability for the term of the settlement," as it "precludes two rate increase filings El Paso expected to make in 2006 and 2007;" the "Settlement provides shippers with broader penalty tolerance levels and more favorable point allocation/aggregation features than those accepted by the Commission in the [March 2006 Order];" "the revenue crediting provisions provide some assurance that even if El Paso's revenues exceed expectations, any excess will be shared with shippers;" the "Settlement also establishes working groups to address additional areas of concern, including tariff simplification, rate design, cost allocation, and fuel recovery;" and the "Settlement's resolution of these issues as an integrated package avoids protracted and expensive litigation that would likely result absent settlement." August 17, 2010 Order P 89, JA 213; *see also* August 2007 Order PP 30, 61, JA 107, 116 (same).

For the first time on appeal, Freeport-McMoRan challenges FERC's reliance on some of these benefits. Br. 38. Since Freeport-McMoRan did not raise these challenges to FERC on rehearing, it forfeited its ability to do so on appeal. NGA § 19(b); *Williams Gas*, 331 F.3d at 1016; *Intermountain*, 326 F.3d at 1285.

In any case, these challenges have no merit. Freeport-McMoRan points to nothing to support its mistaken assertion that "FERC's analysis place[d] undue

weight on the fact that the Settlement allowed parties to avoid protracted litigation." Br. 38. FERC simply included that benefit among the many benefits of the settlement. In any event, this Court has affirmed FERC's consideration of the benefits of avoiding protracted litigation. *See, e.g.*, *Laclede Gas Co. v. FERC*, 997 F.2d 936, 947 (D.C. Cir. 1993) (Commission may take prospect of further litigation into account in deciding whether to accept settlement); *Wisconsin Pub. Power Inc. v. FERC*, 493 F.3d 239, 276 (D.C. Cir. 2007) (FERC is not required to quantify the length and nature of proceedings to be avoided through settlement).

Moreover, although Freeport-McMoRan questions whether it would benefit from greater penalty tolerances and customer working groups (Br. 38), FERC's determination that all shippers would benefit from these settlement provisions is the type of ratemaking and policy judgment that lies at the core of FERC's regulatory mission and deserves deference. *See Sacramento*, 616 F.3d at 528. Freeport-McMoRan also complains that FERC "set[] the benefits bar unreasonably low" by "ascrib[ing] benefit to the fact that the Settlement rates are lower than the pipeline's originally filed rates." Br. 38. But, FERC actually found that the 2006 Settlement rates were not just lower, but were **substantially** lower, than the filed rates. August 17, 2010 Order P 89, JA 213.

Next, Freeport-McMoRan claims FERC improperly failed to consider issues set for hearing in the March 2006 Order. Br. 36-37. Freeport-McMoRan is mistaken. August 17, 2010 Order PP 77-86, JA 209-12.

FERC determined that, "whether costs not recoverable by [El Paso] under Article 11.2 were entitled to recovery as a discount adjustment to its rates" (Br. 36 n.73), was not an issue here because settlement rates would apply. August 17, 2010 Order P 79, JA 210. *See also* August 24, 2010 Order PP 126-30, JA 263-64. If El Paso proposed a discount adjustment in its next rate case, the issue would be addressed there. August 24, 2010 Order PP 126-30, JA 263-64. *See also* August 17, 2010 Order P 79, JA 210 ("there is no requirement that a settlement resolve all issues for future rate cases in order to be approved by the Commission").

Contrary to Freeport-McMoRan's claim (Br. 38, *see also* Br. 46), FERC also addressed the Article 11.2(b) issue. FERC acknowledged that, because the non-Article 11.2(a) 2006 Settlement rates are black-box rates, it is impossible to determine whether those rates comply with Article 11.2(b). August 17, 2010 Order PP 80-83, JA 210-11. Noting, however, that the "2006 Settlement establishes a temporary compromise regarding the Article 11.2 issues" for the three year settlement term, FERC found that, "[i]n this case, any divergence from exact incorporation of Article 11.2 of the 1996 Settlement is but one element for the

Commission to consider in the whole of this assessment." *Id*. PP 78, 83, 89, JA 209, 211, 213. "[T]he entire settlement package . . . provides just and reasonable rates and substantial benefits to El Paso shippers, including [Freeport-McMoRan]." *Id.* P 83, JA 211; *see also id.* P 85, JA 212 ("Because the 2006 Settlement was negotiated as a whole, no one issue . . . should be looked at in isolation"); *Trailblazer*, 87 FERC at 61,439 (*Trailblazer* approach II "focuses on the end result of the overall settlement").

Freeport-McMoRan also erroneously claims that "black-box rate settlements previously have been approved by FERC only under the fair and reasonable standard reserved for uncontested settlements." Br. 35. In fact, the Commission also has accepted contested black-box settlements under both *Trailblazer* approaches I and II. *E.g.*, *Duke Energy Trading and Mktg., L.L.C.*, 125 FERC ¶ 61,345 PP 14, 18, 25, 29-33, 38 (2008), *reh'g order*, 126 FERC ¶ 61,234 PP 8, 10, 19-21 and n.32, 30, 40-41 (2009); *Southwestern Pub. Serv. Co.*, 124 FERC ¶ 61,232 PP 10, 19, 23, 25-26, 29 (2008).

As already discussed, FERC also rejected Freeport-McMoRan's claim (Br. 39) that El Paso did not need to set aside capacity to serve transients. 18 C.F.R. § 284.7(a)(3) requires that capacity be set aside to serve transients, and because such capacity is not available for firm sales, it is not part of a system's available capacity. August 2007 Order P 24 n.28, JA 104-05, and August 17, 2010 Order P

55, JA 201 (both citing 2003 CAP Order at PP 62-80). Nothing in *El Paso*, 114 FERC ¶ 61,305, changed this.

In addition, Freeport-McMoRan contends FERC did not consider in its cost-benefit analysis the impact of a pipeline integrity program ("PIP") surcharge and a half-cent usage-charge adder. Br. 39. In fact, however, FERC found these add-ons to be "*de minimis*" and "outweighed by the other benefits of the Settlement . . . ." August 2007 Order P 30, JA 107. *See also* August 17, 2010 Order P 85, JA 212 (same); *id.* ("As the Commission discusses below (detailed *infra* section 3(b) [regarding *Trailblazer* approach II]), the 2006 Settlement provides parties with a series of valuable features, and the inclusion of the PIP Surcharge and the half-cent usage adder do not undermine these benefits.").

FERC appropriately approved the settlement under Trailblazer Approach II, as it determined the overall result of the settlement, as a package, was just and reasonable, even if some aspect of the settlement was problematic and might not warrant approval outside the context of the settlement. *Trailblazer*, 87 FERC at 61,439; August 2007 Order P 50, JA 113. FERC properly focused on the end result of the overall settlement, balanced its benefits against the costs and potential effect of continued litigation, and reasonably found that Freeport-McMoRan would be in no worse position under the terms of the settlement than if the case were litigated. *Trailblazer*, 87 FERC at 61,439; August 2007 Order P 50, JA 113.

C. FERC's Alternative Approval Of The 2006 Settlement Under Trailblazer Approach I Was Reasonable.

FERC's alternative approval of the settlement under Trailblazer Approach I, was reasonable as well, as FERC found no merit to Freeport-McMoRan's settlement challenges. August 2007 Order PP 18-30, 57-59, JA 101-07, 115-16; August 17, 2010 Order PP 36-86, JA 195-212.

Again, Freeport-McMoRan contends FERC did not address Article 11.2(b) compliance and El Paso's need to set aside capacity to serve transients. Br. 32-33. As just discussed, however, FERC addressed the merits of both of those issues. August 17, 2010 Order PP 78, 80-83, JA 209-11; August 2007 Order P 24 n.28, JA 104-05, and August 17, 2010 Order P 55, JA 201 (both citing CAP 2003 Order PP 62-80). Likewise, contrary to Freeport-McMoRan's claim (Br. 32), FERC ruled on the merits of the add-on charges, finding them *de minimis.* August 2007 Order P 30, JA 107; August 17, 2010 Order P 85, JA 212.

Finally, Freeport-McMoRan argues FERC failed to address its claims that, because El Paso allegedly withheld capacity in 2000-2001: (1) expansion capacity should be subject to the Article 11.2(a) rate cap (Br. 30 (citing R.544 (Settlement Comments) at 14 and Lander Aff. P 22, JA 982, 1011)); and (2) the Article 11.2(b) compliance presumption should be set at 4,234 (Br. 31 (citing R.544 (Settlement Comments) at 14 and Lander Aff. PP 24-26, JA 982, 1012-14)). *See also* Br. 26-

31. As the record shows, however, FERC addressed Freeport-McMoRan's withholding claims.

First, in its protest of El Paso's rate filing, Freeport-McMoRan argued that expansion costs should not be rolled-in because El Paso withheld capacity in 2000-2001 and, therefore, it was not prudent for El Paso to later expand its capacity. R.57 at 6-7, JA 437-38; *see also* R.118 (Freeport-McMoRan Rehearing Request of July 2005 Order) at 14-16, JA 466-68 (same); R.183 (Freeport-McMoRan Supplemental Rehearing Request of July 2005 Order) at 4, JA 494 (requesting that FERC find that parties "are free to address, as part of the rate hearing's prudence inquiry, the issue of El Paso's culpability for the 2000-01 capacity shortfall.").

"The Commission carefully considered [Freeport-McMoRan]'s allegations and found that the issue of whether El Paso withheld capacity during the five-month period from November 2000-March 2001 [was] irrelevant to whether it was prudent for El Paso to construct expansion projects in 2003 or whether the costs of expansion projects should be afforded rolled-in treatment in this proceeding." August 2007 Order P 22, JA 103 (citing July 2006 Order PP 22-37, JA 85-92); *see also* August 17, 2010 Order PP 50-51, JA 199. Among other things, FERC explained that, "even if [Freeport-McMoRan] were to show that El Paso had withheld capacity during the limited period of time at issue, this would not change

the fact that El Paso lacked sufficient capacity to meet the firm needs of its shippers in 2002, and that the [expansion projects were] necessary to meet those firm needs." August 2007 Order P 22, JA 103 (footnote omitted); *see also* July 2006 Order P 37, JA 92 (same). "Accordingly, [Freeport-McMoRan]'s withholding allegations [were] irrelevant to the prudence inquiry in this case." July 2006 Order P 37, JA 92.

When Freeport-McMoRan later raised additional withholding claims in its 2006 Settlement protest -- i.e., that the Article 11.2(a) rate cap should apply to expansion capacity (raised R.544 at 14 and Lander Aff. P 22, JA 982, 1011), and that the Article 11.2(b) compliance presumption should be increased to include 210 MMcf/d capacity set aside for transients (raised R.544 at 14 and Lander Aff. PP 24-26, JA 982, 1012-14) -- the Commission considered and rejected those claims as well.

While the affidavit submitted as part of Freeport-McMoRan's settlement protest contended that Article 11.2(a)'s rate cap applied to expansion because El Paso withheld capacity in 2000-2001, FERC found otherwise. August 17, 2010 Order PP 95-98, JA 214-16. Whether El Paso withheld capacity in 2000-01 would not change the fact that the expansion capacity, which was not part of El Paso's system in 1995, was needed to meet firm demand on the system after the alleged withholding ended, and that El Paso was not obligated to provide, and full

requirements shippers did not have a right to receive, expansion capacity at no additional cost to those shippers. *Id.*; *see also* March 2006 Order PP 68-69, 81-86, JA 65-67, 71-73; September 2008 Order PP 72-77, 84, 86, 88, JA 154-57, 159-60. Thus, Freeport-McMoRan's withholding claim would not change the finding that the Article 11.2(a) rate cap does not apply to the expansion capacity. August 17, 2010 Order PP 96-98, JA 215-16.

Likewise, as already discussed *supra* at 41, the Commission considered and rejected Freeport-McMoRan's claim (Br. 31, citing R.544 at 14 and Lander Aff. PP 24-26, JA 982, 1012-14) that El Paso improperly withheld 210 MMcf/d to serve transients. August 2007 Order P 24 n.28, JA 104-05, and August 17, 2010 Order P 55, JA 201 (both citing 2003 CAP Order PP 62-80).

As previously noted, Freeport-McMoRan waived its ability to argue that the presumption should be increased by 24 MMcf/d because it failed to raise that argument on rehearing. Even if it were properly before the Court, however, that argument has no merit. FERC's decision to set the presumption at a slightly-rounded level, March 2006 Order P 60, JA 64 (El Paso's capacity at the time of the 1996 Settlement "was slightly more than 4000 MMcf/d") (internal quotation omitted), is a rate determination that deserves deference and should be affirmed.

Thus, having addressed and found no merit to the contested settlement issues, FERC's alternative approval of the 1996 Settlement under Trailblazer

Approach I was reasonable as well. *Trailblazer*, 85 FERC at 62,342; August 2007 Order P 49, JA 112-13.

Last, it appears Freeport-McMoRan also might be arguing (Br. 27-28) that FERC failed to comply with the Court's directive in *Arizona Corp. Comm'n v. FERC*, No. 04-1123, 168 Fed. Appx. 447, 2005 U.S. App. LEXIS 22751 (D.C. Cir. October 20, 2005) ("*Arizona II*") that Freeport-McMoRan have "the ability . . . to argue in [the instant FERC proceeding] that neither the Commission's orders in the Capacity Allocation Proceeding, nor the decision of this court in [*Arizona I*], precludes the argument that El Paso caused the capacity shortfall in 2000-2001 by exercising market power to withhold capacity." 168 Fed. Appx. at 448, 2005 U.S. App. LEXIS 22751 at *1 (citations omitted). Freeport-McMoRan does not point to any particular withholding argument it was not permitted to raise, and the record establishes that Freeport-McMoRan was permitted to raise, and that the Commission fully considered, its withholding arguments.

CONCLUSION

For the foregoing reasons, the petitions for review should be denied.

Respectfully submitted,

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Nos. 08-1349, *et al*.

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C) and this Court's order of February 22, 2011, holding that the Brief of Respondent FERC should not exceed 15,000 words, I hereby certify that this brief contains 13,810 words, not including the tables of contents and authorities, the glossary, the certificate of counsel and this certificate.

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August 11, 2011

ADDENDUM

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proceedings shall be conducted in such manner as the Commission shall by regulations prescribe. The Board shall be appointed by the Commission from persons nominated by the State commission of each State affected, or by the Governor of such State if there is no State commission. Each State affected shall be entitled to the same number of representatives on the board unless the nominating power of such State waives such right. The Commission shall have discretion to reject the nominee from any State, but shall thereupon invite a new nomination from that State. The members of a board shall receive such allowances for expenses as the Commission shall provide. The Commission may, when in its discretion sufficient reason exists therefor, revoke any reference to such a board.

(b) Conference with State commissions regarding rate structure, costs, etc.

The Commission may confer with any State commission regarding rate structures, costs, accounts, charges, practices, classifications, and regulations of natural-gas companies; and the Commission is authorized, under such rules and regulations as it shall prescribe, to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this chapter to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.

(c) Information and reports available to State commissions

The Commission shall make available to the several State commissions such information and reports as may be of assistance in State regulation of natural-gas companies. Whenever the Commission can do so without prejudice to the efficient and proper conduct of its affairs, it may, upon request from a State commission, make available to such State commission as witnesses any of its trained rate, valuation, or other experts, subject to reimbursement of the compensation and traveling expenses of such witnesses. All sums collected hereunder shall be credited to the appropriation from which the amounts were expended in carrying out the provisions of this subsection.

(June 21, 1938, ch. 556, § 17, 52 Stat. 830.)

§ 717q. Appointment of officers and employees

The Commission is authorized to appoint and fix the compensation of such officers, attorneys, examiners, and experts as may be necessary for carrying out its functions under this chapter; and the Commission may, subject to civil-service laws, appoint such other officers and employees as are necessary for carrying out such functions and fix their salaries in accordance with chapter 51 and subchapter III of chapter 53 of title 5.

(June 21, 1938, ch. 556, § 18, 52 Stat. 831; Oct. 28, 1949, ch. 782, title XI, § 1106(a), 63 Stat. 972.)

REFERENCES IN TEXT

The civil-service laws, referred to in text, are set forth in Title 5, Government Organization and Employees. See, particularly, section 3301 et seq. of Title 5.

CODIFICATION

Provisions that authorized the Commission to appoint and fix the compensation of such officers, attorneys, examiners, and experts as may be necessary for carrying out its functions under this chapter ''without regard to the provisions of other laws applicable to the employment and compensation of officers and employees of the United States'' are omitted as obsolete and superseded.

As to the compensation of such personnel, sections 1202 and 1204 of the Classification Act of 1949, 63 Stat. 972, 973, repealed the Classification Act of 1923 and all other laws or parts of laws inconsistent with the 1949 Act. The Classification Act of 1949 was repealed by Pub. L. 89–554, Sept. 6, 1966, § 8(a), 80 Stat. 632, and reenacted as chapter 51 and subchapter III of chapter 53 of Title 5, Government Organization and Employees. Section 5102 of Title 5 contains the applicability provisions of the 1949 Act, and section 5103 of Title 5 authorizes the Office of Personnel Management to determine the applicability to specific positions and employees.

Such appointments are now subject to the civil service laws unless specifically excepted by those laws or by laws enacted subsequent to Executive Order 8743, Apr. 23, 1941, issued by the President pursuant to the Act of Nov. 26, 1940, ch. 919, title I, § 1, 54 Stat. 1211, which covered most excepted positions into the classified (competitive) civil service. The Order is set out as a note under section 3301 of Title 5.

''Chapter 51 and subchapter III of chapter 53 of title 5'' substituted in text for ''the Classification Act of 1949, as amended'' on authority of Pub. L. 89–554, § 7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5.

AMENDMENTS

1949—Act Oct. 28, 1949, substituted ''Classification Act of 1949'' for ''Classification Act of 1923''.

REPEALS

Act Oct. 28, 1949, ch. 782, cited as a credit to this section, was repealed (subject to a savings clause) by Pub. L. 89–554, Sept. 6, 1966, § 8, 80 Stat. 632, 655.

§ 717r. Rehearing and review

(a) Application for rehearing; time

Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Review of Commission order

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission

in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which is supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission order

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(d) Judicial review

(1) In general

The United States Court of Appeals for the circuit in which a facility subject to section 717b of this title or section 717f of this title is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval (hereinafter collectively referred to as ''permit'') required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).

(2) Agency delay

The United States Court of Appeals for the District of Columbia shall have original and exclusive jurisdiction over any civil action for the review of an alleged failure to act by a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.), for a facility subject to section 717b of this title or section 717f of this title. The failure of an agency to take action on a permit required under Federal law, other than the Coastal Zone Management Act of 1972, in accordance with the Commission schedule established pursuant to section 717n(c) of this title shall be considered inconsistent with Federal law for the purposes of paragraph (3).

(3) Court action

If the Court finds that such order or action is inconsistent with the Federal law governing such permit and would prevent the construction, expansion, or operation of the facility subject to section 717b of this title or section 717f of this title, the Court shall remand the proceeding to the agency to take appropriate action consistent with the order of the Court. If the Court remands the order or action to the Federal or State agency, the Court shall set a reasonable schedule and deadline for the agency to act on remand.

(4) Commission action

For any action described in this subsection, the Commission shall file with the Court the consolidated record of such order or action to which the appeal hereunder relates.

(5) Expedited review

The Court shall set any action brought under this subsection for expedited consideration.

(June 21, 1938, ch. 556, § 19, 52 Stat. 831; June 25, 1948, ch. 646, § 32(a), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 85–791, § 19, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109–58, title III, § 313(b), Aug. 8, 2005, 119 Stat. 689.)

REFERENCES IN TEXT

The Coastal Zone Management Act of 1972, referred to in subsec. (d)(1), (2), is title III of Pub. L. 89–454, as added by Pub. L. 92–583, Oct. 27, 1972, 86 Stat. 1280, as amended, which is classified generally to chapter 33 (§ 1451 et seq.) of Title 16, Conservation. For complete classification of this Act to the Code, see Short Title note set out under section 1451 of Title 16 and Tables.

CODIFICATION

In subsec. (b), ''section 1254 of title 28'' substituted for ''sections 239 and 240 of the Judicial Code, as amended [28 U.S.C. 346, 347]'' on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

transportation authorized by section 311(a) of the NGPA.

[44 FR 52184, Sept. 7, 1979, as amended by Order 581, 60 FR 53072, Oct. 11, 1995]

§ 284.4 Reporting.

(a) *Reports in MMBtu.* All reports filed pursuant to this part must indicate quantities of natural gas in MMBtu's. An MMBtu means a million British thermal units. A British thermal unit or Btu means the quantity of heat required to raise the temperature of one pound avoirdupois of pure water from 58.5 degrees to 59.5 degrees Fahrenheit, determined in accordance with paragraphs (b) and (c) of this section.

(b) *Measurement.* The Btu content of one cubic foot of natural gas under the standard conditions specified in paragraph (c) of this section is the number of Btu's produced by the complete combustion of such cubic foot of gas, at constant pressure with air of the same temperature and pressure as the gas, when the products of combustion are cooled to the initial temperature of the gas and air and when the water formed by such combustion is condensed to a liquid state.

(c) *Standard conditions.* The standard conditions for purposes of paragraph (b) of this section are as follows: The gas is saturated with water vapor at 60 degrees Fahrenheit under a pressure equivalent to that of 30.00 inches of mercury at 32 degrees Fahrenheit, under standard gravitational force (980.665 centimeters per second squared).

[Order 581, 60 FR 53072, Oct. 11, 1995]

§ 284.5 Further terms and conditions.

The Commission may prospectively, by rule or order, impose such further terms and conditions as it deems appropriate on transactions authorized by this part.

§ 284.6 Rate interpretations.

(a) *Procedure.* A pipeline may obtain an interpretation pursuant to subpart L of part 385 of this chapter concerning whether particular rates and charges comply with the requirements of this part.

(b) *Address.* Requests for interpretations should be addressed to: FERC Part 284 Interpretations, Office of General Counsel, Federal Energy Regulatory Commission, Washington, DC 20426.

[44 FR 66791, Nov. 21, 1979; 44 FR 75383, Dec. 20, 1979, as amended by Order 225, 47 FR 19058, May 3, 1982; Order 581, 60 FR 53072, Oct. 11, 1995]

§ 284.7 Firm transportation service.

(a) *Firm transportation availability.* (1) An interstate pipeline that provides transportation service under subpart B or G or this part must offer such transportation service on a firm basis and separately from any sales service.

(2) An intrastate pipeline that provides transportation service under Subpart C may offer such transportation service on a firm basis.

(3) *Service on a firm basis* means that the service is not subject to a prior claim by another customer or another class of service and receives the same priority as any other class of firm service.

(4) An interstate pipeline that provided a firm sales service on May 18, 1992, and that offers transportation service on a firm basis under subpart B or G of this part, must offer a firm transportation service under which firm shippers may receive delivery up to their firm entitlements on a daily basis without penalty.

(b) *Non-discriminatory access.* (1) An interstate pipeline or intrastate pipeline that offers transportation service on a firm basis under subpart B, C or G must provide such service without undue discrimination, or preference, including undue discrimination or preference in the quality of service provided, the duration of service, the categories, prices, or volumes of natural gas to be transported, customer classification, or undue discrimination or preference of any kind.

(2) An interstate pipeline that offers transportation service on a firm basis under subpart B or G of this part must provide each service on a basis that is equal in quality for all gas supplies transported under that service, whether purchased from the pipeline or another seller.

(3) An interstate pipeline that offers transportation service on a firm basis under subpart B or G of this part may

the hearing session, the presiding officer may, with due regard for the convenience of the participants, direct advance distribution of the exhibits by a prescribed date. The presiding officer may also direct the preparation and distribution of any briefs and other documents which the presiding officer determines will substantially expedite the proceeding.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 578, 60 FR 19505, Apr. 19, 1995]

§ 385.602 Submission of settlement offers (Rule 602).

(a) *Applicability*. This section applies to written offers of settlement filed in any proceeding pending before the Commission or set for hearing under subpart E. For purposes of this section, the term ''offer of settlement'' includes any written proposal to modify an offer of settlement.

(b) *Submission of offer*. (1) Any participant in a proceeding may submit an offer of settlement at any time.

(2) An offer of settlement must be filed with the Secretary. The Secretary will transmit the offer to:

(i) The presiding officer, if the offer is filed after a hearing has been ordered under subpart E of this part and before the presiding officer certifies the record to the Commission; or

(ii) The Commission.

(3) If an offer of settlement pertains to multiple proceedings that are in part pending before the Commission and in part set for hearing, any participant may by motion request the Commission to consolidate the multiple proceedings and to provide any other appropriate procedural relief for purposes of disposition of the settlement.

(c) *Contents of offer*. (1) An offer of settlement must include:

(i) The settlement offer;

(ii) A separate explanatory statement;

(iii) Copies of, or references to, any document, testimony, or exhibit, including record citations if there is a record, and any other matters that the offerer considers relevant to the offer of settlement; and

(2) If an offer of settlement pertains to a tariff or rate filing, the offer must include any proposed change in a form suitable for inclusion in the filed rate schedules or tariffs, and a number of copies sufficient to satisfy the filing requirements applicable to tariff or rate filings of the type at issue in the proceeding.

(d) *Service*. (1) A participant offering settlement under this section must serve a copy of the offer of settlement:

(i) On every participant in accordance with Rule 2010;

(ii) On any person required by the Commission's rules to be served with the pleading or tariff or rate schedule filing, with respect to which the proceeding was initiated.

(2) The participant serving the offer of settlement must notify any person or participant served under paragraph (d)(1) of this section of the date on which comments on the settlement are due under paragraph (f) of this section.

(e) *Use of non-approved offers of settlement as evidence*. (1) An offer of settlement that is not approved by the Commission, and any comment on that offer, is not admissible in evidence against any participant who objects to its admission.

(2) Any discussion of the parties with respect to an offer of settlement that is not approved by the Commission is not subject to discovery or admissible in evidence.

(f) *Comments*. (1) A comment on an offer of settlement must be filed with the Secretary who will transmit the comment to the Commission, if the offer of settlement was transmitted to the Commission, or to the presiding officer in any other case.

(2) A comment on an offer of settlement may be filed not later than 20 days after the filing of the offer of settlement and reply comments may be filed not later than 30 days after the filing of the offer, unless otherwise provided by the Commission or the presiding officer.

(3) Any failure to file a comment constitutes a waiver of all objections to the offer of settlement.

(4) Any comment that contests an offer of settlement by alleging a dispute as to a genuine issue of material fact must include an affidavit detailing any genuine issue of material fact by specific reference to documents, testimony, or other items included in the

offer of settlement, or items not included in the settlement, that are relevant to support the claim. Reply comments may include responding affidavits.

(g) *Uncontested offers of settlement.* (1) If comments on an offer are transmitted to the presiding officer and the presiding officer finds that the offer is not contested by any participant, the presiding officer will certify to the Commission the offer of settlement, a statement that the offer of settlement is uncontested, and any hearing record or pleadings which relate to the offer of settlement.

(2) If comments on an offer of settlement are transmitted to the Commission, the Commission will determine whether the offer is uncontested.

(3) An uncontested offer of settlement may be approved by the Commission upon a finding that the settlement appears to be fair and reasonable and in the public interest.

(h) *Contested offers of settlement.* (1)(i) If the Commission determines that any offer of settlement is contested in whole or in part, by any party, the Commission may decide the merits of the contested settlement issues, if the record contains substantial evidence upon which to base a reasoned decision or the Commission determines there is no genuine issue of material fact.

(ii) If the Commission finds that the record lacks substantial evidence or that the contesting parties or contested issues can not be severed from the offer of settlement, the Commission will:

(A) Establish procedures for the purpose of receiving additional evidence before a presiding officer upon which a decision on the contested issues may reasonably be based; or

(B) Take other action which the Commission determines to be appropriate.

(iii) If contesting parties or contested issues are severable, the contesting parties or uncontested portions may be severed. The uncontested portions will be decided in accordance with paragraph (g) of this section.

(2)(i) If any comment on an offer of settlement is transmitted to the presiding officer and the presiding officer determines that the offer is contested, whole or in part, by any participant, the presiding officer may certify all or part of the offer to the Commission. If any offer or part of an offer is contested by a party, the offer may be certified to the Commission only if paragraph (h)(2)(ii) or (iii) of this section applies.

(ii) Any offer of settlement or part of any offer may be certified to the Commission if the presiding officer determines that there is no genuine issue of material fact. Any certification by the presiding officer must contain the determination that there is no genuine issue of material fact and any hearing record or pleadings which relate to the offer or part of the offer being certified.

(iii) Any offer of settlement or part of any offer may be certified to the Commission, if:

(A) The parties concur on a motion for omission of the initial decision as provided in Rule 710, or, if all parties do not concur in the motion, the presiding officer determines that omission of the initial decision is appropriate under Rule 710(d), and

(B) The presiding officer determines that the record contains substantial evidence from which the Commission may reach a reasoned decision on the merits of the contested issues.

(iv) If any contesting parties or contested issues are severable, the uncontested portions of the settlement may be certified immediately by the presiding officer to the Commission for decision, as provided in paragraph (g) of this section.

(i) *Reservation of rights.* Any procedural right that a participant has in the absence of an offer of settlement is not affected by Commission disapproval, or approval subject to condition, of the uncontested portion of the offer of settlement.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 541, 57 FR 21734, May 22, 1992; Order 578, 60 FR 19505, Apr. 19, 1995]

§ 385.603 Settlement of negotiations before a settlement judge (Rule 603).

(a) *Applicability.* This section applies to any proceeding set for hearing under subpart E of this part and to any other proceeding in which the Commission

1990 SETTLEMENT PROVISIONS

Section 3.6:

El Paso shall not be required to construct any facilities that are not economically justifiable. The provisions of this section 3.6 shall survive the term of this Stipulation and Agreement.

1996 SETTLEMENT PROVISIONS

Article 9.2:

A number of full-requirements Shippers in El Paso's east-of-California ("EOC") market area have TSAs with El Paso that are subject to termination, at the Shipper's option, during the term of this Stipulation and Agreement. Many of such TSAs also confer an option on the Shipper to convert all or part of the full requirements service provided for therein to CD service at a contract quantity. In consideration for the various provisions of this Stipulation and Agreement, any such Shipper having a right to terminate its TSA during the term of this Stipulation and Agreement shall not be entitled to exercise any such termination right to be effective before January 1, 2002. Further, any such Shipper having a right to terminate its TSA during the term of this Stipulation and Agreement shall not be entitled to exercise any right to convert full requirements service to CD service to be effective before January 1, 2002. The requirements of this paragraph 9.2 shall be satisfied by each Shipper to which this paragraph applies by delivering to El Paso an executed amendment to its TSA providing that, notwithstanding any other provision in such TSA, the TSA may not be terminated or converted by such Shipper prior to January 1, 2002, and providing further that the Shipper shall be required to give El Paso the same amount of advance notice of such termination as would be required by the TSA for termination as authorized therein. Except as amended to satisfy this paragraph 9.2, the rights as provided in the TSA of the Shippers to which this paragraph applies shall not be affected or modified by this Stipulation and Agreement unless the Shipper and El Paso mutually agree otherwise.

Article 11.2:

Firm TSAs [transportation service agreements] In Effect on December 31, 1995, That Remain in Effect Beyond January 1, 2006. This paragraph 11.2 applies to any firm Shipper with a TSA that was in effect on December 31, 1995, and that remains in effect, in its present form or as amended, on January 1, 2006, but only for the period that such Shipper has not terminated such TSA. El Paso agrees with respect to such Shippers that, in all rate proceedings following the term of this Stipulation and Agreement:

(a) Base Settlement Rates Escalated. El Paso will not propose to charge a rate applicable to service under such TSA during the remainder of the term thereof that exceeds the base settlement rate established under paragraph 3.2(a) applicable to such Shipper, as adjusted pursuant to paragraphs 3.2(b) and 3.5 through the term of this Stipulation and Agreement, as escalated annually thereafter through the remainder of the term of such TSA using the procedure specified by paragraph 3.2(b) unless and until such TSA is terminated by the Shipper.

(b) Unsubscribed Capacity Costs. El Paso agrees that the firm rates applicable to service to any Shipper to which this paragraph 11.2 applies will exclude any cost, charge, surcharge, component, or add-on in any way related to the capacity of its system on December 31, 1995, to deliver gas on a forward haul basis to the Shippers listed on Pro Forma Tariff Sheet Nos. 33-35, that becomes unsubscribed or is subscribed at less than the maximum applicable tariff rate as escalated pursuant to paragraph 3.2(b). El Paso assumes full cost responsibility for any and all existing and future step-downs or terminations and the associated CD/billing determinants related to the capacity described in this subparagraph (b).

(c) Following the term of this Stipulation and Agreement, any Shipper to which this paragraph 11.2

applies may, at the end of the primary or rollover term of its TSA, reduce its billing determinants or CD without losing the protection of this paragraph 11.2. At the request of any Shipper, El Paso will amend the Shipper's TSA to include the provisions of this paragraph 11.2.

(d) Termination by El Paso of the TSA of a Shipper subject to this paragraph 11.2 shall not terminate such Shipper's rights to the protections afforded by this paragraph 11.2.

Article 16.3:

Service Obligations. El Paso agrees and confirms that, during the effectiveness of this Stipulation and Agreement, it will maintain and operate facilities sufficient to satisfy and perform the service obligations with respect to both quality and quantity of service imposed upon it by, and subject to the conditions applicable to, the provisions of this Stipulation and Agreement and its firm TSAs [transportation service agreements] in effect on December 31, 1995.

Article 17:

17.1 Non-Severability and Conditions Precedent. It is stipulated and agreed that the various provisions of the instant Stipulation and Agreement are not severable and that neither this Stipulation and Agreement, nor any of the provisions hereof, shall become effective unless and until each of the following has occurred:

(a) the Commission shall have entered an order no longer subject to rehearing approving the instant Stipulation and Agreement, without condition or modification to any provision; and

(b) such Commission order approving the instant Stipulation and Agreement shall have waived compliance by El Paso with the requirements of the Commission's Rules and Regulations, including, but not limited to, Part 154, as

necessary to carry out the provisions of this Stipulation and Agreement.

The first day of the month following the month in which conditions (a) and (b) are satisfied, or the date on which El Paso implements this Stipulation and Agreement pursuant to paragraph 17.2, whichever should apply, shall constitute the effective date of this Stipulation and Agreement.

17.2 Implementation of Stipulation and Agreement. If the Commission approves the instant Stipulation and Agreement with modifications or conditions, then El Paso will have the right, in its discretion, to implement the Stipulation and Agreement as modified, to seek judicial review, or to withdraw this Stipulation and Agreement. In the event El Paso elects to implement the Stipulation and Agreement as modified, El Paso shall exercise such option by serving written notice upon the Commission, El Paso's Shippers, all parties to the instant proceedings, and interested state commissions. In the event such modifications or conditions are unacceptable to any consenting or non-opposing party, such party shall be entitled to withdraw its consent or lack of opposition to this Stipulation and Agreement and become a contesting party with full rights to litigate. Further, nothing contained herein shall be construed as abrogating the right of any party to seek rehearing or to seek judicial review in accordance with Section 19 of the NGA of any changes or modifications of this Stipulation and Agreement by the Commission.

17.3 Severance of Contesting Parties. The provisions of this Stipulation and Agreement shall not apply to any party that elects to become a contesting party. A contesting party shall be any party which, on or before the date on which initial comments regarding this Stipulation and Agreement are due to be filed with the Commission, files with the Commission and serves on the parties to this proceeding a written notice stating that such party elects to become a contesting party. Any party which does not explicitly make an election but which comments opposing any part of this Stipulation and Agreement or requests modifications to the Stipulation and Agreement which are not acceptable to El Paso shall be considered a contesting party. Any party which does not explicitly identify itself as a contesting party and does not file comments opposing or requesting modifications to this

Stipulation and Agreement shall be deemed a consenting party. A contesting party shall be entitled to have its rates separately established by the Commission using procedures as specified by the Commission. Pending a final determination of just and reasonable rates by the Commission, the as-filed rates in Docket No. RP95-363-000 or in any subsequent Section 4 rate proceedings shall apply to contesting parties in lieu of the settlement rates provided for in this Stipulation and Agreement. Accordingly, the proceeding at Docket No. RP95-363-000 shall not be terminated as to any contesting party.

17.4 Filing and Effectiveness of Tariff Sheets. Not later than fifteen (15) days following the effective date of this Stipulation and Agreement, El Paso shall file the tariff sheets required to implement this Stipulation and Agreement with proposed effective dates as provided herein.

Freeport-McMoran Corp., et al. v. FERC **Docket No. RP05-422*, et al.***
D.C. Cir. Nos. 08-1349*, et al.*

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 11th day of August 2011, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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