20031114-0380 Issued by FERC OSEC 11/14/2003 in Docket#: RP00-241-000

105 FERC ¶ 61,201
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Public Utilities Commission of the State of California

v.

El Paso Natural Gas Company, El Paso Merchant Energy-Gas, L.P., and El Paso Merchant Energy Company

Docket Nos. RP00-241-000
RP00-241-006
RP00-241-008

ORDER ON CONTESTED SETTLEMENT

(Issued November 14, 2003)

I. INTRODUCTION

1. In this order, the Commission accepts, as modified, a contested settlement in a complaint proceeding addressing market power issues concerning the operations of El Paso Natural Gas Company (El Paso Pipeline) and jointly, El Paso Merchant Energy-Gas, L.P. and El Paso Merchant Energy Company[1] (El Paso Merchant).[2] The Public Utilities Commission of the State of California (CPUC) filed the complaint on April 4, 2000, alleging that El Paso Pipeline and El Paso Merchant, acting individually or in concert, manipulated California energy markets by withholding pipeline transportation capacity to drive up natural gas prices in the periods immediately before and during the California energy crisis of 2000-2001. In addition, the complaint alleged that the award of three

[1]Effective January 1, 2001, El Paso Merchant Energy Company changed its name to El Paso Merchant Energy, L.P.

[2]Both El Paso Pipeline and El Paso Merchant are subsidiaries of El Paso Corporation, as is Mojave Pipeline Company (Mojave). El Paso Corporation and/or its subsidiaries are sometimes referred to collectively in this order as the El Paso Companies.

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transportation contracts (El Paso Contracts) by El Paso Pipeline to its marketing affiliate, El Paso Merchant, was unduly preferential as the result of an intra-corporate sharing of information, in violation of the Commission's Standards of Conduct for Pipelines With Marketing Affiliates (Standards of Conduct or Affiliate Standards).[3]

2. On June 4, 2003, El Paso Pipeline, El Paso Merchant, CPUC, Pacific Gas and Electric Company (PG&E), Southern California Edison Company (Edison), and the City of Los Angeles, California (LA City) (collectively, the Settling Parties) filed for Commission approval an Offer of Settlement and Request for Approval of Joint Settlement Agreement (JSA). Attached as an exhibit to the JSA is a Pro Forma Stipulation of Judgment, which contains, inter alia, provisions further describing certain aspects of the JSA. On June 27, 2003, the Settling Parties filed a related document, the Master Settlement Agreement (MSA).[4] Attached to the MSA are, inter alia, a form of Proposed Stipulated Judgment, Proposed Order of Reference Under Federal Rule of Civil Procedure 53, and Stipulation and Proposed Order. These three documents, which are referred to collectively as the Stipulated Judgment, supersede the Pro Forma Stipulation of Judgment filed with the JSA.

3. The parties that filed comments in response to the Settlement include the Arizona Corporation Commission (ACC) (jointly with the East of California Shippers (EOC Shippers)),[5] Automated Power Exchange, Inc. (APX), Duke Energy Trading and Marketing, L.L.C. (Duke), Indicated Shippers,[6] Southwest Gas Corporation (Southwest Gas), Southern California Gas Company (SoCalGas), Transwestern Pipeline Company

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[3] 18 C.F.R. Part 161 (2003).

[4] In this order, all of the documents filed by the Settling Parties, including the JSA, the Stipulated Judgment, and the MSA, are sometimes referred to collectively as the Settlement.

[5] ACC and the EOC Shippers are referred to in this order as ACC. The EOC Shippers include Apache Nitrogen Products, Inc., Arizona Gas Division of Citizens Communications Company, El Paso Electric Company, El Paso Municipal Customer Group, Phelps Dodge Corporation, Public Service Company of New Mexico, Salt River Project, and Texas Gas Service Company, a division of ONEOK, Inc.

[6] Indicated Shippers include Aera Energy LLC, BP America Production Company and BP Energy Company, Burlington Resources Oil & Gas Company, and ConocoPhillips Inc.

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(Transwestern), and the Commission's Staff (Staff).[7] SoCalGas, Transwestern, and Staff generally support the Settlement with some clarifications, while the other non-settling parties generally oppose all or significant portions of the Settlement.

4. As discussed below, the Commission accepts the Settlement, as modified, in resolution of the proceedings in Docket Nos. RP00-241-000, RP00-241-006, and RP00-241-008. The Commission's decision here is limited solely to those proceedings, and because it is a settlement, neither the Settling Parties nor the contesting parties may rely on the Commission's rulings in this order or in any subsequent Commission order on the Settlement as precedent in any other proceeding before the Commission or in any other forum. Further, the Commission's action here is limited to acceptance of the JSA, as modified. The Commission also has reviewed the Stipulated Judgment and the MSA, but finds nothing in those documents that would cause it to reject the JSA.

5. This order is in the public interest because it resolves a lengthy and heavily contested proceeding in a manner that is consistent with the Commission's policies, as well as its orders in Docket No. RP00-336-006, et al. (Capacity Allocation Proceeding). The July 9, 2003 Order in the Capacity Allocation Proceeding completed the resolution of longstanding issues arising from the allocation and use of El Paso Pipeline's capacity.[8] In resolving the complaint proceeding in Docket Nos. RP00-241-000, RP00-241-006, and RP00-241-008, the Commission's action here provides finality, allows customers to receive financial relief, and at the same time preserves the rights of the EOC and California customers. The certainty achieved by the Settlement also permits parties to make long-term plans regarding their capacity and natural gas needs.

6. In addition, the Settling Parties have demonstrated that settlement of the complaint proceeding in Docket No. RP00-241-000, et al., is a significant aspect of the resolution of litigation and investigations in California and other western states. The comprehensive settlement of these proceedings requires in part that El Paso Pipeline and El Paso Corporation pay approximately $1.69 billion through a variety of mechanisms.[9]

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[7] In this proceeding, the term Staff includes the Office of Administrative Litigation, which served as trial staff in Phase I of the hearing, and the Office of Market Oversight and Investigations, which served as trial staff in Phase II of the hearing.

[8] El Paso Natural Gas Co., 104 FERC & 61,045 (2003).

[9] Offer of Settlement and Request for Approval of Joint Settlement Agreement at 7 (June 4, 2003).

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7. In accepting the Settlement, as modified, the Commission denies the requests that certain non-settling parties be severed as parties for the purpose of pursuing a merits order on the second initial decision issued by the Chief Administrative Law Judge (Chief ALJ) in this proceeding.[10] Likewise, the Commission denies requests that certain issues be severed for a decision on the merits. The Commission's orders in the Capacity Allocation Proceeding and the modifications of the Settlement discussed below have rendered those requests moot or resolved them with respect to all parties, and the Commission finds that there is no remaining issue of material fact. Accordingly, the Commission finds that the Settlement, as modified, is fair and reasonable and in the public interest, and the Commission approves it.

II. BACKGROUND

8. El Paso Pipeline owns and operates an extensive pipeline system traversing several southwestern states and terminating at the boundary between Arizona and California.[11] El Paso Pipeline's capacity into California has been the subject of various proceedings before this Commission for more than a decade. As applicable to the current Settlement, certain of those proceedings are summarized below.

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[10] See infra Part III.

[11] El Paso Pipeline's system consists of two major legs: the Northern Mainline and the Southern Mainline. El Paso Pipeline's Northern and Southern Mainline systems are physically connected by three crossovers. The total system includes more than 10,200 miles of pipeline facilities, 1.2 million horsepower of compression, more than 200 delivery points, 145 receipt points, and 42 mainline interconnects extending from various natural gas production areas in the southwestern United States through the States of Texas, Oklahoma, New Mexico, and Colorado, and terminating at the boundary between Arizona and California near Ehrenberg and Topock, Arizona. The Southern Mainline system provides transportation service from gas production areas in the Permian and Anadarko Basins to the Ehrenberg delivery point. The Northern Mainline system provides transportation service from the San Juan Basin through El Paso Pipeline's San Juan Triangle facilities to the Topock delivery points. At its Topock delivery points, El Paso Pipeline's system interconnects with Mojave's interstate pipeline system and with the intrastate transmission systems of SoCalGas, PG&E, and Southwest Gas. El Paso Pipeline's other connection with the SoCalGas system is at the Ehrenberg delivery point. Additionally, El Paso Pipeline's interstate system makes deliveries to other on-system delivery points and to markets located east of California (EOC Markets), including the EOC Shippers.

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A. El Paso Pipeline 1996 Settlement[12]

9. The early 1990s witnessed the development of substantial excess interstate pipeline capacity to the California markets. As a result of this excess capacity, and with the approval of the CPUC, local distribution companies, including SoCalGas and PG&E permanently relinquished a large amount of capacity on El Paso Pipeline's system.[13] El Paso Pipeline filed a Section 4 rate proceeding, seeking in part to impose an exit fee on customers turning back capacity. Although the Commission rejected the exit fee, the remainder of the proceeding was resolved by the El Paso Pipeline 1996 Settlement, which will expire December 31, 2005. In part, the El Paso Pipeline 1996 Settlement divided the turned-back capacity into three blocks, which were the subject of the El Paso Contracts at issue in this proceeding.

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[12]The history of the El Paso Pipeline 1996 Settlement is fully described in orders relating to that proceeding. El Paso Natural Gas Co., 79 FERC & 61,028, order on reh'g, 80 FERC & 61,084 (1997), remanded, Southern California Edison Co. v. FERC, 162 F.3d 116 (D.C. Cir. 1998), order on remand, 89 FERC & 61,164 (1999), order on reh'g, 90 FERC & 61,354 (2000). The El Paso Pipeline 1996 Settlement was preceded by an earlier settlement also addressing El Paso Pipeline's capacity. El Paso Natural Gas Co., 54 FERC & 61,316; order on reh'g, El Paso Natural Gas Co., 56 FERC & 61,290 (1991).

[13]CPUC initiated this process with orders issued in Re: Natural Gas Procurement and Reliability Issues; Re: Gas Utility Procurement Practices and Refinements to the Regulatory Framework for Gas Utilities, 41 CPUC 2d 668, 127 PUR 4th 417 (1991); Order Instituting Rulemaking into Natural Gas Procurement and Reliability Issues, 47 CPUC 2d 51, 138 PUR 4th 569 (1992). See also Section 5 Complaint at 14-15 (Docket No. RP00-241-000, filed April 4, 2000).

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B. El Paso Pipeline's Contracts for the Three Blocks of Capacity[14]

10. El Paso Pipeline entered into three two-year, negotiated rate contracts with Dynegy Marketing and Trade (Dynegy) covering the three blocks of capacity with primary rights to the California delivery points.[15] The Commission approved those contracts. Following expiration of the Dynegy contracts, El Paso Pipeline posted the capacity and entered into three one-year, negotiated rate contracts with Enron North America Corp. covering the three blocks of capacity. After the Commission issued an order approving the contracts, but requiring the parties to modify them to be consistent with the El Paso Pipeline 1996 Settlement, the parties terminated the contracts, which again made the three blocks of capacity available.[16] El Paso Pipeline posted the three blocks of capacity in February 2000 and entered into the El Paso Contracts, which expired May 31, 2001, and which were the subject of the complaint in this proceeding. El Paso Pipeline did not file the El Paso Contracts for Commission approval on grounds that they did not differ from the pro forma agreement in the pipeline's tariff.

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[14] Block I, which consists of 500 MMcf/d of capacity with alternate receipt point access to all system receipt points unless the capacity is sold for maximum tariff rates, in which case there are primary receipt point access rights to the Permian and Anadarko Basins, but not to the San Juan Basin; Block II, which consists of 614 MMcf/d of capacity designated for primary point deliveries to Topock for PG&E or shipper(s) serving a market in PG&E's service territory (collectively "Block II Shippers") and having primary access to all system receipt points, including the San Juan Basin. If El Paso Pipeline markets Block II capacity to shippers that are not serving northern California, the Block II Shippers have recall rights; and Block III, which consists of 500 MMcf/d of capacity having primary access rights to all system receipt points.

[15] The Dynegy contracts are discussed in El Paso Natural Gas Co., 83 FERC & 61,286 (1998), order on reh'g, 88 FERC & 61,139, order on reh'g, 89 FERC & 61,073 (1999), petitions for review dismissed as moot, Public Utilities Commission of the State of California v. FERC, 236 F.3d 708 (D.C. Cir. 2001).

[16] El Paso Natural Gas Co., 90 FERC & 61,050 (2000).

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C. Capacity Allocation Proceeding

11. In the Capacity Allocation Proceeding, the Commission found El Paso Pipeline's then-current capacity allocation methodology to be unjust and unreasonable. The Commission found that application of the capacity allocation methodology had adversely affected the public interest because firm shippers were not receiving the firm service for which they paid. The Commission emphasized that, where it is operationally feasible, a pipeline should assign customers specific capacity rights at receipt and delivery points. However, the Commission stated that most of El Paso Pipeline's contracts with its firm transportation shippers provided for system-wide access to receipt and delivery points, with the shippers having no specified rights to pipeline capacity. Thus, when shippers' nominations exceeded the physical capacity of a specific receipt or delivery point, El Paso Pipeline's tariff required pro rata allocations based on the nominated amounts.

12. The Commission's orders in the Capacity Allocation Proceeding resolved many of these problems.[17] In its July 9, 2003 Order in that proceeding, the Commission acknowledged that a variety of factors had contributed to problems on the system, including, inter alia, growth under the full requirements (FR) contracts, aspects of the El Paso Pipeline 1996 Settlement, and the shippers' preference for nominating out of the lower-cost San Juan Basin.[18]

13. Certain aspects of the July 9, 2003 Order in the Capacity Allocation Proceeding are of particular relevance to the Commission's review of the Settlement in Docket Nos. RP00-241-000, et al. In the July 9, 2003 Order, the Commission affirmed that, effective September 1, 2003, FR contracts on the El Paso Pipeline system must be converted to contract demand (CD) contracts containing specified quantity limitations. After

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[17] El Paso Natural Gas Co., 99 FERC & 61,244, order on clarification and adopting capacity allocation methodology, 100 FERC & 61,285 (2002), order on reh'g, 104 FERC & 61,045 (2003), reh'g pending.

[18] El Paso Natural Gas Co., 104 FERC & 61,045 (2003). On July 9, 2003, the Commission also issued an order accepting El Paso Pipeline's allocation report and compliance filing. El Paso Natural Gas Co., 104 FERC ¶ 61,044 (2003). In a further order issued August 29, 2003, the Commission accepted and suspended El Paso Pipeline's compliance filing, subject to conditions, and established a technical conference. El Paso Natural Gas Co., 104 FERC ¶ 61,232 (2003). The technical conference was held September 24, 2003.

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reserving the amount of capacity necessary to meet the needs of the CD and FT-2 shippers, the Commission allocated all of the remaining available capacity and the planned expansion capacity on the pipeline system, including new capacity from El Paso Pipeline's Line 2000 Project[19] and the capacity to be added by the Power-Up Project,[20] but the Commission provided that no additional reservation charges would be imposed until El Paso Pipeline's next rate case.[21] Further, in addressing the disposition of capacity from expiring contracts, the Commission held that there is no certificated obligation to serve California.

14. The Commission affirmed that El Paso Pipeline must include Block I and Block II capacity in the initial allocation to the converting FR shippers because it is firm service capacity and is scheduled as such. The Commission also clarified that the block designations and associated restrictions will extend until the El Paso Pipeline 1996 Settlement expires at the end of 2005, rather than through the term of existing contracts for that capacity.

15. To end the pro rata allocations that had made firm service on El Paso Pipeline's system unreliable, the Commission directed that firm customers be assigned specific receipt point rights. With firm service now more reliable, the Commission prohibited El Paso Pipeline from allocating or curtailing firm service except in the event of force majeure or maintenance situations.

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[19]The Commission authorized El Paso Pipeline to acquire and convert to natural gas use approximately 785 miles of a crude oil pipeline between Ehrenberg, Arizona, and McCamey, Texas. El Paso Natural Gas Co., 95 FERC ¶ 61,176 (2001). El Paso Pipeline placed its Line 2000 into service on November 13, 2002, thereby increasing its system capacity by 230 MMcf/d.

[20]See El Paso Natural Gas Co., 103 FERC ¶ 61,280 (2003). Contemporaneously with the issuance of this order, the Commission is issuing an order denying rehearing and granting clarification of that order.

[21]Although the Commission had given converting FR customers the opportunity to purchase capacity relinquished by CD customers, the Commission pointed out that only one shipper bid in either of the turnback opportunities.

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III. HISTORY OF THIS PROCEEDING

16. The lengthy procedural history of this complaint proceeding is summarized in Appendix A to this order. The Chief ALJ presided over three hearings and issued two Initial Decisions, the Phase I ID[22] and the Phase II ID.[23]

17. In the Phase I ID, the Chief ALJ found that, while El Paso Pipeline and El Paso Merchant had the ability to exercise market power during the term of the El Paso Contracts, the record was not clear that they had done so. The Chief ALJ also found that El Paso Corporation, El Paso Pipeline, El Paso Merchant, and Mojave had violated the Standards of Conduct in the process leading to the award of the three blocks of capacity.

18. On the basis of comments filed by the Market Oversight and Enforcement Section of the Commission's Office of the General Counsel (MOE) following issuance of the Phase I ID, the Commission remanded the proceeding to the Chief ALJ for the purpose of reopening the record to conduct a limited supplemental hearing on the issue raised by MOE: whether El Paso Pipeline violated Section 284.9 of the Commission's regulations[24] by failing to make interruptible transportation (IT) service available during the period from November 1, 2000, through March 31, 2001.[25]

19. In the Phase II ID, the Chief ALJ affirmed his previous findings of violations of the Standards of Conduct, and he also found that complainants had failed to show that El Paso Merchant had exercised market power. However, the Chief ALJ found that, during the limited period at issue in the Phase II hearing, El Paso Pipeline had failed to schedule all of the capacity that it posted and also had failed to post all of the capacity that it had available.

20. While the Commission was reviewing the IDs, the Settling Parties asked the Commission to defer action pending the outcome of settlement discussions, which

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[22] Public Utilities Commission of the State of California v. El Paso Natural Gas Co., 97 FERC & 63,004 (2001).

[23] Public Utilities Commission of the State of California v. El Paso Natural Gas Co., 100 FERC & 63,041 (2002).

[24] 18 C.F.R. ' 284.9 (2003).

[25] Public Utilities Commission of the State of California v. El Paso Natural Gas Co., 97 FERC & 61,380 (2001).

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culminated with the Settlement now before the Commission. Thus, the Commission has not issued an order on exceptions to the two IDs.

IV. LATE-FILED MOTION TO INTERVENE

21. On June 24, 2003, APX filed a motion to intervene out of time, asserting that the precise scope of the proceedings intended to be resolved by the Settlement is unclear, and thus the Settlement may impact it in other proceedings, particularly in Docket No. EL00-95-45, et al., which addresses responsibility for refunds. APX states that it previously acted as a scheduling coordinator for El Paso Merchant in the California markets, although El Paso Merchant made all decisions with respect to the quantity, source and sink, price, and timing of such sales. APX maintains that it did not intervene in this proceeding at an earlier time because, prior to the filing of the Settlement, it did not appear that this proceeding would affect it. However, APX emphasizes that its intervention is solely for the purpose of seeking clarification of the scope of the Settlement, and thus its intervention will not disrupt the proceeding or prejudice any other party.

22. The Commission grants the motion of APX to intervene out of time, which, because it seeks only clarification of the scope of the Settlement, will not delay or disrupt this proceeding or adversely impact existing parties to the proceeding.[26] Further, as stated above, the Commission's acceptance of the Settlement, as modified, terminates only the proceedings in Docket Nos. RP00-241-000, RP00-241-006, and RP00-241-008. Therefore, the Commission also grants APX's request for clarification and clarifies that the Commission's determinations in this order or any subsequent order addressing the Settlement may not be cited as precedent by the Settling Parties or the contesting parties in any other proceedings before the Commission or in any other forum.

[26]On March 25, 2003, California Dairies, Inc., F&A Dairy of California, Inc., Hilmat Cheese Company, Humboldt Creamery Association, Leprino Foods Company, De Francesco & Sons, Inc., and Associated Feed & Supply Co., Inc. also filed a petition to intervene for the limited purpose of seeking expeditious release of the protected documents filed in this proceeding. However, the Commission's May 9, 2003 Order Directing the Release of Information in Docket No. RP00-241-000 moots this petition for intervention. Public Utilities Commission of the State of California v. El Paso Natural Gas Co., 103 FERC & 61,154 (2003). Accordingly, the petition is denied.

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V. SUMMARY OF THE JSA[27]

23. Article 1 - Definitions In part, this article defines the MSA as the agreement to be filed with the California Superior Court for the County of San Diego in June 2003 in Case No. J.C.C.P. Nos. 4221, 4224, 4226, and 4228. The Stipulated Judgment is defined as the Stipulation to Entry of Judgment to be filed no later than June 30, 2003, with the United States District Court for the Central District of California. The pro forma copies of the Stipulated Judgment attached to the JSA and the MSA provide, inter alia, for the appointment and duties of the Special Master, which are discussed below.

24. Article 3 - Scope of Settlement This article states that the JSA, in further implementation of the MSA and also as reflected in Article 11 of the JSA, constitutes a full and complete resolution of (1) all claims and issues raised by the California Settling Parties[28] in Docket No. RP00-241-000 and all subdockets, and (2) all related claims and issues that were raised by the California Settling Parties in the Capacity Allocation Proceeding and any other Commission proceedings, including but not limited to allegations that El Paso Pipeline violated its certificates and/or the El Paso Pipeline 1996 Settlement, and that El Paso Pipeline and/or El Paso Merchant violated the Natural Gas Act (NGA), the Natural Gas Policy Act and/or the Commission's regulations or orders.

25. Article 5 - Capacity Available to El Paso Pipeline's California Delivery Points El Paso Pipeline agrees to make 3,290 MMcf/d of firm primary capacity available to its California delivery points, provided that each of the following conditions occurs:

A. El Paso Pipeline is able to place into service its 320 MMcf/d Power-Up Project as proposed in Docket No. CP03-1-000;

B. El Paso Pipeline obtains tariff authority to provide shippers who contract for a total of no more than 623 MMcf/d of unsubscribed or turnback capacity to a primary non-California delivery point(s) with dual primary delivery point rights permitting the shippers to ship gas either to a primary

[27]The Commission's summaries of the provisions of the JSA, the Stipulated Judgment, and the MSA are not intended as Commission interpretation of the meaning of those documents.

[28]In this order, CPUC, PG&E, Edison, and LA City may be referred to as California Settling Parties. Likewise, El Paso Pipeline and El Paso Merchant may be referred to as El Paso Settling Parties.

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non-California delivery point(s), to a primary California delivery point, or to both; and

C. El Paso Pipeline obtains tariff authority to revise the Block II capacity recall provisions established in the El Paso Pipeline 1996 Settlement.

26. In addition, Article 5 provides that El Paso Pipeline will not be deemed to have violated its obligations under this article if it is unable to make available or schedule to its California delivery points 3,290 MMcf/d of firm primary capacity due to such factors as: (a) force majeure events; (b) delays in securing necessary regulatory approvals; (c) superseding regulatory or court rulings; (d) shipper choices relocating their primary delivery points from California points to non-California points, thereby reducing the contractual amount of capacity with California primary delivery point rights below 3,290 MMcf/d; and (e) shipper choices to use dual primary delivery point capacity to deliver gas to non-California delivery points instead of to California delivery points. However, this article also clarifies that the JSA does not alter El Paso Pipeline's obligation to maintain physical facilities sufficient to deliver 3,290 MMcf/d to its California delivery points. Further, Article 5 prohibits El Paso Pipeline from adding new firm incremental load to its system that would prevent it from making available or scheduling the 3,290 MMcf/d of firm primary capacity to its California delivery points.

27. Article 6 - Line 2000 Power-Up If El Paso Pipeline is granted authority in Docket No. CP03-1-000 to install additional compression to increase system capacity by 320 MMcf/d, El Paso Pipeline will construct the Power-Up Project on a phased schedule, as proposed in its certificate application. The article states that, upon completion of the project, El Paso Pipeline will have the physical capacity to deliver up to an aggregate of 3,840 MMcf/d to the California delivery points as follows: (a) 540 MMcf/d to SoCalGas-Topock; (b) 400 MMcf/d to Mojave-Topock; (c) 1,140 MMcf/d to PG&E-Topock; and (d) 1,760 MMcf/d to SoCalGas-Ehrenberg. Further, the article provides that no California Settling Party will object to the recovery through rates established in El Paso Pipeline's next section 4 rate case of the costs reasonably incurred by El Paso Pipeline in connection with this project.

28. Article 7 - Dual Primary Delivery Points This article would provide El Paso Pipeline tariff authority to give certain shippers the ability to ship gas either to a primary non-California delivery point or to a primary California delivery point, subject to the requirement that such shippers contract for no more than 623 MMcf/d of the unsubscribed or turnback capacity as part of the FR/CD conversion. The article also provides that the California Settling Parties will have the right to argue to the Commission in the future that non-California shippers should not be permitted to acquire part of the 3,290 MMcf/d and change the primary delivery points to non-California

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points. Upon agreeing to a shipper's request to move its primary delivery point from a California point to a non-California point, El Paso Pipeline must provide notice to the California Settling Parties.

29. Article 7 also provides that, absent agreement to the contrary, El Paso Pipeline is not obligated to provide capacity under firm contracts with primary rights to California delivery points, either on a single or dual basis, in excess of the following: (1) SoCalGas-Topock, 540 MMcf/d, (2) PG&E-Topock, 1,140 MMcf/d, (3) Mojave-Topock, 400 MMcf/d, and (4) SoCalGas-Ehrenberg, 1,210 MMcf/d. Except as limited by Block II recall rights, shippers holding contracts with dual primary rights will have the sole discretion to determine the amounts of their daily nominations and the delivery points.

30. Article 8 - Block II Recall Rights During the remaining term of the El Paso Pipeline 1996 Settlement (through December 31, 2005), Block II capacity will remain subject to recall by PG&E or shippers serving a market in PG&E's service territory. However, the parties agree that, upon Commission approval of the JSA, El Paso Pipeline's tariff provisions regarding the Block II recall process will be clarified as stated in the General Terms and Conditions (GT&C) of the pro forma tariff sheets attached to the JSA at Tab 2. The proposed clarifications to the Block II recall process are discussed in greater detail below in this order.

31. Article 9 – Affiliate Issues None of El Paso Pipeline's affiliates will enter into new contracts for capacity on the El Paso Pipeline system for the term of the JSA except (1) as may be necessary for the affiliate to fulfill its obligations existing under the terms of the MSA, or (2) to replace existing capacity to serve existing contractual obligations. The article also quantifies the amount of El Paso Pipeline capacity held by El Paso Merchant as of the date of the JSA.

32. Article 9 further states that, to the extent that, on any day, El Paso Merchant does not use any of its mainline capacity on El Paso Pipeline to fulfill its Settlement obligations or to serve other obligations existing at the time of the JSA, it must not unreasonably delay posting such unused capacity for release in accordance with the pipeline's tariff and upon terms and conditions comparable to capacity release transactions occurring contemporaneously among non-affiliated shippers on El Paso Pipeline's system. Further, the Settling Parties agree that, in its order approving the JSA, the Commission must waive the applicability of Section 28.9(d) of the GT&C of El Paso Pipeline's Volume No. 1-A Tariff (which prohibits the re-release of capacity acquired on a volumetric reservation charge basis) to the extent necessary to enable El Paso Merchant to meet this obligation.

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33. Article 10 - Effective Date Neither the JSA nor any of its provisions will become effective unless: (1) the Commission issues an order approving the JSA without condition or modification; (2) the Commission's order waives compliance by the El Paso Settling Parties with the requirements of the Commission's Rules and Regulations as necessary to carry out the provisions of the JSA; (3) the Stipulated Judgment referenced in Article 12 has become fully effective pursuant to its terms; and (4) the MSA has become fully effective pursuant to its terms. The article also establishes the rights and obligations of the parties in the event the Commission or a reviewing court modifies the Settlement. If the parties are unable to agree to accept the modifications, they will present their arguments to the Special Master, whose resolution will be taken to the Commission for review as necessary.

34. Article 11 - Termination of Other Proceedings, Mutual Release, and Waiver The Settling Parties agree that, in approving the JSA, the Commission must terminate the proceeding and dismiss with prejudice the complaint in Docket No. RP00-241-000, as well as vacate the Phase I and Phase II IDs. The California Settling Parties agree that the issues and claims settled are deemed withdrawn with prejudice as to the Settling Parties in all other Commission proceedings, including but not limited to the Capacity Allocation Proceeding and the proceedings in Docket No. RP01-484-000.

35. This article also states that nothing in the JSA replaces or supplants any remedy that the Commission makes available to all shippers in the Capacity Allocation Proceeding. However, the parties agree that the California Settling Parties shall not be entitled to any relief against the El Paso Settling Parties in the Capacity Allocation Proceeding, or in any other proceeding, which is covered by the scope of the release set forth at Paragraph 5.2 of the MSA.

36. Article 12 - Dispute Resolution The Settling Parties have agreed to an alternative dispute resolution process, which provides that compliance with certain terms of the JSA will be enforced by the Special Master. If the parties disagree with respect to the Commission's jurisdiction, they will submit any such dispute to the Commission for resolution. However, they also provide that, in the event the Commission does not resolve such a dispute within 60 days, the dispute will be submitted to the Special Master for his or her immediate resolution, although the parties state that the process is not intended to deprive the Commission of its ability to resolve matters within its jurisdiction.

37. The JSA does not contain details concerning the appointment and the responsibilities of the Special Master. Those details are provided in section 2 (Order of Reference Under Federal Rule of Civil Procedure 53) of the Stipulated Judgment and are summarized in Appendix B to this order.

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38. Article 13 - Term The term of the JSA will be five years from the Effective Date.

39. Article 14 - General Provisions Article 14 provides, inter alia, that nothing in the JSA is deemed to supersede, modify, or replace the provisions of the El Paso Pipeline 1996 Settlement except with respect to the clarifications relating to the recall of Block II capacity.

VI. DISCUSSION

40. As discussed below, the Commission accepts the Settlement, as modified, and terminates the proceedings in Docket Nos. RP00-241-000, RP00-241-006, and RP00-241-008. The Commission has reviewed the JSA, the Stipulated Judgment, and the MSA; however, the Commission's action here is limited to the provisions of the JSA. The Commission finds nothing in the Stipulated Judgment or the MSA that would cause it to reject the JSA. The Commission also denies the requests that certain contesting parties or issues be severed.

41. The Commission is requiring that the Settlement be modified to ensure that it is consistent with Commission policy and other orders relating to El Paso Pipeline's capacity. As discussed below, the Commission rejects the dual primary firm delivery point proposal because it is unduly discriminatory. Additionally, the Commission is requiring the Settling Parties to modify Section 5.2 of the JSA to delete a proposed condition relating to the dual delivery point provisions. Other issues relating to the allocation of capacity on El Paso Pipeline's system have been resolved in the Capacity Allocation Proceeding. However, the remaining issues raised by the contesting parties are considered below and resolved on the merits. Further, the Commission finds that the interests of the Settling Parties and the contesting parties are so interrelated as to make severance of parties or issues inappropriate in this case. Thus, there remains no genuine issue of material fact, and the Commission finds that the Settlement, as modified, achieves a resolution of the complaint proceedings in Docket No. RP00-241-000, et al., that is fair and reasonable and in the public interest.

A. Standard of Review for a Contested Settlement

42. The Commission has broad authority under Section 385.602(h) of its regulations[29] to address contested settlements. The Commission may decide the merits of

[29] 18 C.F.R. ' 385.602(h) (2003).

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the contested issues if the record contains substantial evidence on which to base a reasoned decision or if the Commission determines that there is no genuine issue of material fact. If the Commission finds that the record lacks substantial evidence or that the contesting parties or issues cannot be severed, the Commission may establish hearing procedures to supplement the record, or it may take other appropriate action.

43. In Trailblazer Pipeline Co. (Trailblazer),[30] the Commission explained at length the standards and procedures it employs in ruling on settlements. The Commission stated that, in reviewing a settlement, it must first determine whether the settlement presents an acceptable outcome for the case that is consistent with the public interests represented by the Commission. The Commission acknowledged the value of settlements, but stated that some cases may involve an overriding public interest that outweighs the interest in achieving a settlement. In such instances, the Commission has modified those settlements to be consistent with Commission policy.[31]

44. If the Commission concludes that a contested settlement provides an acceptable outcome for a case, it must next determine the approach it will employ to address the contested issues. If there is an adequate record, the Commission can address the contested issues on the merits, approving the settlement if the Commission finds that each of the contentions lacks merit. However, even if some individual aspects of a settlement may be problematic, the Commission still may approve a contested settlement as a package if the overall result of the settlement is acceptable. Alternatively, the Commission may approve the settlement on the basis that the benefits of the settlement outweigh the nature of the objections, and the contesting parties' interests are too attenuated. The last alternative usually has included a finding that the contesting party would have another forum in which to raise its contentions.[32]

45. The Commission also emphasized that its broad discretion in determining whether to sever contesting parties or contested issues has been affirmed by the courts.[33] However, the Commission is obligated to give sufficient consideration to the interests of the contesting parties, even if the settlement has wide support and only one or very few

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[30] 85 FERC & 61,345 (1998), order on reh'g, 87 FERC & 61,110 (1999).

[31] Trailblazer Pipeline Co., 85 FERC & 61,345, at 62,341 (1998).

[32] Id. at 62,342-43.

[33] Id. at 62,340.

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contesting parties oppose the settlement.[34] In a decision involving the El Paso Pipeline 1996 Settlement, the court held that the Commission can satisfy that obligation in one of three ways: (1) deciding on the merits the issues raised by the contesting parties, (2) if possible, executing a severance that fully protects the contesting parties, or (3) at a minimum, addressing the question of whether the contesting parties' interests are sufficiently likely to be congruent with those of the settling parties so that the Commission can determine that the settling parties' agreement is dispositive of the contesting parties' interests.[35]

46. The Commission explained in Trailblazer that it views severance as the option of last resort. However, in considering severance, the Commission determines whether (1) the settlement can be approved on the merits as to both consenting and contesting parties, or (2) the contesting parties have raised a valid concern such that the settlement should be modified for all parties including the consenting parties, in which case severance is inappropriate, and the Commission should issue a merits order applicable to all parties.[36] Moreover, the Commission will try to honor a request by the settling parties to approve the settlement as a package.[37]

47. On rehearing in the Trailblazer proceeding, the Commission addressed again its second and third approaches to approving a contested settlement. The Commission stated that the second approach "involves a balancing of the benefits of the settlement against the costs and potential effect of continued litigation." The Commission explained that "[u]nder this approach, the Commission's approval of the contested settlement as just and reasonable 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."[38] Under the third approach, the Commission will approve the settlement if the benefits outweigh the nature of the objection and the interest of the contesting party is sufficiently attenuated that the settlement can be approved under the fair and equitable standard applicable to uncontested settlements. However, the interests of the parties contesting the Settlement

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[34] Id.

[35] Id. at 62,341, citing Southern California Edison Co. v. FERC, 162 F.3d 116 (D.C. Cir. 1998).

[36] Id. at 62,344-45.

[37] Id. at 62,347.

[38] Trailblazer Pipeline Co., 87 FERC & 61,110, at 61,439 (1999).

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in this proceeding are too closely related to those of the Settling Parties to permit application of the third approach.

48. In the instant complaint proceeding, the record is lengthy and complex. Nothing could be gained by delaying action on this Settlement to allow the parties to present additional evidence relating to the contested issues, which are resolved below on the merits or have been resolved in other proceedings, such as the Capacity Allocation Proceeding. Thus, the Commission's decision on the merits of the issues discussed below and its acceptance of the Settlement, as modified, represents an overall outcome that is consistent with the public interest.

B. Severance of Parties or Issues

1. Positions of the Parties

49. ACC urges the Commission to reject the Settlement or to sever it and the EOC Shippers as parties. ACC contends that the Settlement would transfer much of the control of a jurisdictional pipeline from the Commission to a Special Master to be appointed by a federal district court in California, would give California shippers rights to firm transportation service that would be superior to the rights of EOC Shippers, and would preempt the Commission's resolution of the Capacity Allocation Proceeding. Further, states ACC, the Settlement has adverse rate implications and imposes obligations on the EOC Shippers to which they have not agreed, takes away capacity those shippers have been allocated in other proceedings (including Block II capacity), unlawfully modifies the El Paso Pipeline 1996 Settlement, and is inconsistent with the Commission's June 4, 2003 Order in Docket No. CP03-1-000.

50. ACC also asserts that the Commission should render a merits decision on the Phase II ID, in which the Chief ALJ made numerous findings of fact -- challenged on exceptions by El Paso Pipeline and El Paso Merchant -- based in part on the credibility of the witnesses who testified in the Phase II hearing. ACC submits that there is substantial evidence in the record on which to decide those issues.

51. Southwest Gas argues that the contested issues, such as the dual delivery points and Block II provisions, are so inherently interconnected and establish rights for all El Paso Pipeline shippers as to make severance, either on an issue or party basis, infeasible. However, Southwest Gas also contends that the Commission must apply the stricter standard enunciated in Trailblazer, and unless the Settlement is modified, it fails to meet this standard because it favors California shippers in violation of Section 16.3 of the El Paso Pipeline 1996 Settlement. Therefore, Southwest Gas asks the Commission to (1) either affirm the Phase II ID finding that El Paso Pipeline violated Section 16.3 of the El

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Paso Pipeline 1996 Settlement by failing to ensure the required level of service quality and quantity or carve this issue out of the Settlement for contesting parties to allow a separate decision based upon the Phase II ID, and (2) incorporate the Phase II ID and the record from Docket No. RP00-241-006, et al., into the Docket No. RP00-336-000, et al., proceeding. Although Indicated Shippers seek clarification of several aspects of the Settlement, they seek modification, rejection, or severance of only one substantive provision -- the dual primary firm delivery point provision.

52. In response, Settling Parties oppose severance of any parties or issues. They disagree that the contesting parties would be in a worse position under the Settlement than if litigation of the case continued. Additionally, continue Settling Parties, in the context of a complaint proceeding, the objecting party must show that approval of the settlement would not be a reasonable exercise of the Commission's broad remedial discretion.[39]

53. Settling Parties next argue that there are valid reasons for vacating the two IDs. First, state Settling Parties, courts have vacated lower court orders which, if allowed to stand, would eliminate the possibility of settlement because of the chance that the orders could later be used against one of the settling parties in subsequent litigation.[40] Settling Parties maintain that such circumstances exist here because El Paso Pipeline and El Paso Merchant face additional civil litigation that either has relied on or potentially will rely on the IDs, but that such litigation is not resolved by the MSA. Thus, continue Settling Parties, absent a Commission ruling vacating the IDs, El Paso Pipeline and El Paso Merchant would be prejudiced in these and other judicial actions. Settling Parties further contend that vacatur is supported as a condition of the Settlement by all the Settling Parties, and the joint nature of the request distinguishes it from cases where the courts have denied a single party's unilateral attempt to vacate a lower court's decision in a post hoc attempt to improve the party's position after a settlement has become effective.[41]

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[39]Settling Parties cite Laclede Gas Co. v. FERC, 997 F.2d 936, 944 (D.C. Cir. 1993).

[40]Settling Parties cite Motta v. INS, 61 F.3d 117 (1st Cir. 1995 (per curiam)); Major League Baseball Props. Inc. v. Pacific Trading Cards, Inc., 150 F.3d 149 (2d Cir. 1998); Novell, Inc. v. Network Trade Ctr. Inc., 187 F.R.D. 657, 660-61 (D. Utah 1999) (vacating order where a party could not settle without adversely affecting collateral litigation).

[41]Settling Parties cite U.S. Bancorp Mortgage Co. v. Bonner Mall Partnerships, 513 U.S. 18, 26 (1994).

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Finally, Settling Parties state that, in the context of a contested settlement of a Section 5 complaint proceeding, the Commission need only establish that its decision constitutes a reasonable accommodation of the relevant factors and that the remedy provided is equitable in the circumstances.[42]

2. Commission Analysis

54. The Commission has reviewed this contested Settlement in accordance with Rule 602(h) and the principles outlined in Trailblazer. As stated above, the record in Docket No. RP00-241-000, et al., is lengthy and complex. The Commission also finds that the contested issues in this proceeding can be resolved on the merits or have been resolved by application of Commission policy and its rulings in other orders involving El Paso Pipeline's system. For those reasons, the Commission will not establish additional hearing procedures to address the contested issues.

55. In accordance with Trailblazer, the Commission's review of the Settlement leads to a conclusion that the Settlement, as modified, presents an acceptable outcome for the complaint proceeding in Docket No. RP00-241-000, et al., that is consistent with the public interests represented by the Commission. The complaint proceeding has involved three hearing phases with competing experts and multiple pleadings at every stage. It has consumed enormous resources of the parties, as well as of the Commission. Moreover, the Settlement before the Commission is an integral part of a more comprehensive settlement involving proceedings in other forums, which in part requires El Paso Corporation and El Paso Pipeline to pay a large sum of money. Additionally, the Settlement limits the amount of El Paso Pipeline capacity that may be held by the pipeline’s affiliates, which was the basis of CPUC's original complaint.

56. Taken together, the Commission concludes that the benefits to all parties to be obtained from the Settlement, as well as the resolution of capacity issues in the Capacity Allocation Proceeding, leaves the contesting parties in a position no worse than if litigation of the complaint proceeding continued before the Commission and through likely judicial challenges. The certainty and the outcome of the Settlement allow the parties and the Commission to move forward without the need to employ additional

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[42]Settling Parties cite Laclede Gas Co. v. FERC, 997 F.2d 936, 944 (D.C. Cir. 1993). Cf. Baltimore Gas & Elec. Co. v. FERC, 252 F.3d 456, 460 (D.C. Cir. 2001) ("FERC's decision to settle with [a pipeline], and its consequent decision not to see its enforcement action through to fruition, is a paradigmatic instance of an agency exercising its presumptively nonreviewable enforcement discretion.").

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private and public resources in the pursuit of a complaint challenging contracts that expired more than two years ago.

57. The Commission emphasizes, however, that it has reviewed in detail the issues raised by the contesting parties. Where appropriate, the Commission has modified the Settlement to be consistent with Commission policy. The Commission also has relied on its decisions in related proceedings where certain of the issues have been resolved. As a result of its review, the Commission is satisfied that it has given thorough consideration to the interests of the contesting parties. Because the Settlement implicates the interrelated service rights of the contesting parties and the Settling Parties, the Commission will deny the requests to sever issues or sever the contesting parties.

58. The primary issues raised by the contesting parties are (1) the dual primary delivery point provisions, (2) use of a Special Master to resolve issues arising from performance under the Settlement, (3) the proposed clarifications of the Block II recall process, and (4) the amount of capacity allocated to EOC customers.

59. The first three of these issues are addressed on the merits in this order. As discussed below, the Commission is rejecting the dual primary delivery point proposal (and a related condition in Article 5) because it is unduly discriminatory. The Commission is accepting the Special Master proposal because the Commission finds that it provides the Settling Parties an avenue for resolving issues of performance under the Settlement, but it does not diminish the Commission's ultimate jurisdiction over El Paso Pipeline's transportation services or the jurisdiction of the United States Courts of Appeals to review Commission orders. The Commission also is accepting the proposed clarifications to the Block II recall process that was established in the El Paso Pipeline 1996 Settlement because the Commission finds that the proposed clarifications, which will be effective only through December 31, 2005, result in greater certainty in the recall process and thereby protect the interests of all parties affected by the recall provisions. Finally, as discussed below, the fourth issue has been resolved in the Capacity Allocation Proceeding and the June 4, 2003 order in Docket No. CP03-1-000, in which the Commission's rulings are based on extensive evidence, little of which is in the record in this complaint proceeding.

60. The Commission's action here in accepting the Settlement, as modified, also includes vacating the Phase I ID and the Phase II IDs. The Commission emphasizes that the Chief ALJ's findings and conclusions stated in those IDs may not be cited as precedent either before the Commission or in other proceedings.

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C. Contested Provisions of the JSA

1. Dual Primary Firm Delivery Points

61. Article 7 of the JSA would permit modification of El Paso Pipeline's tariff to allow certain shippers to ship gas either to a non-California primary delivery point or to a California primary delivery point if the shippers contract for no more than 623 MMcf/d of the 3,290 MMcf/d capacity to California by obtaining unsubscribed or turnback capacity in the FR conversion process. The article also provides that the California Settling Parties may argue to the Commission in the future that non-California shippers may not acquire part of the 3,290 MMcf/d and change the primary delivery points to non-California points. Upon agreeing to a shipper's request to move its primary delivery point from a California point to a non-California point, El Paso Pipeline must provide notice to the California Settling Parties.

62. Article 7 also provides that, absent agreement to the contrary, El Paso Pipeline is not obligated to provide firm primary capacity rights to California delivery points, either on a single or dual basis, in excess of the following: (1) SoCalGas-Topock, 540 MMcf/d, (2) PG&E-Topock, 1,140 MMcf/d, (3) Mojave-Topock, 400 MMcf/d, and (4) SoCalGas-Ehrenberg, 1,210 MMcf/d. Except as limited by Block II recall rights, shippers holding contracts with the dual rights will have sole discretion to determine the amounts of their daily nominations and the delivery points.

a. Positions of the Parties

63. Many commenters characterize this proposal as unjust, unreasonable, and unduly discriminatory, in violation of NGA Sections 4 and 5, as well as the Commission's regulations.[43]

64. Indicated Shippers contend that shipper contracts containing dual rights will have a negotiated term and condition of service that is not available to all firm shippers, thereby violating the Commission's requirements concerning non-conforming contract provisions.[44] Indicated Shippers also assert that shippers with dual rights would receive an unduly discriminatory benefit in the capacity release market because they would pay

[43]Indicated Shippers cite 15 U.S.C. ' ' 717c and 717d (1994); 18 C.F.R. ' ' 284.7 and 284.9 (2003).

[44]Indicated Shippers cite ANR Pipeline Co., 97 FERC & 61,224, at 62,024 (2001).

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only the effective unit rate for the capacity, but would be permitted to release the capacity at rates up to the maximum tariff rates.

65. Indicated Shippers further argue that dual primary firm delivery point rights would be operationally infeasible. First, state Indicated Shippers, because El Paso Pipeline's system is not "pathed" from receipt point to delivery point, the transfer of deliveries of gas from one primary delivery point to another may cause mainline constraints and curtailment of other shippers' firm transportation. For example, continue Indicated Shippers, if receipts are out of the San Juan Basin, El Paso Pipeline may not be able to guarantee the use of primary delivery point rights to the non-California delivery points if it is experiencing constraints on its north-south crossovers. Further, Indicated Shippers assert that dual primary delivery point rights would interfere with pathing on El Paso Pipeline's system because they would allow the shipper to nominate a delivery point outside of its path and potentially flow gas in two directions. Finally, Indicated Shippers claim that this proposal would tie up valuable primary delivery point capacity that El Paso Pipeline otherwise would be permitted or obligated to sell. Indicated Shippers contend that this "withholding" of capacity is inefficient and inconsistent with the Commission's policies.

66. Several commenters seek an explanation of how the 623 MMcf/d limit was calculated and how other underlying assumptions were developed. Southwest Gas claims that the proposed 623 MMcf/d of capacity will be available only if the Commission (1) determines that this dual point capacity, once designated as firm and primary to EOC points, cannot be redesignated for use solely to California, and (2) directs El Paso Pipeline to quantify how much of this 623 MMcf/d capacity will be available in light of the limitation relating to Block II recall rights.

67. The commenters raise other issues as well. Duke argues that the dual primary firm delivery point rights would be unique on the pipeline grid and arguably at odds with Order No. 637. Transwestern anticipates potential adverse impacts on needed infrastructure construction that could result from the dual primary delivery point rights provision. Transwestern contends that, during the five year term of the Settlement, there would be great uncertainty as to whether and where additional capacity should be built.

68. SoCalGas and Staff generally support the proposal, arguing that it is intended to strike a reasonable balance between the California and EOC Markets that would support FR conversion, as well as empowering shippers to direct gas to the market that values it most. SoCalGas contends that this would help address pipeline capacity constraints such as those experienced in the winter of 2000-2001.

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69. In response, Settling Parties contend that the dual primary delivery point provisions would achieve a reasonable balance between the competing demands of the California and EOC Markets and would allow gas to flow to the market that values it the most, subject to applicable Block II recall rights.[45] Settling Parties state that the Settlement requires El Paso Pipeline to make available 3,290 MMcf/d of firm primary capacity to the California border during the next five years, subject to certain conditions. However, Settling Parties admit that there is less than 3,290 MMcf/d under contract to California at the current time. Settling Parties also acknowledge that the Commission has determined in the Capacity Allocation Proceeding that the allocation of unsubscribed capacity to the converting FR shippers is necessary as one means of serving their needs, which have increased significantly since the El Paso Pipeline 1996 Settlement. While the creation of dual delivery point rights would give EOC customers the opportunity to deliver gas to California on a primary firm basis, Settling Parties argue that the rights would not create a competitive benefit if the Commission is correct that EOC customers need the capacity to serve their own needs. On the other hand, continue Settling Parties, if EOC customers do not need this capacity, they could use it to serve California, thus potentially enhancing competition to serve California and ensuring that the capacity will not sit idle.

70. Settling Parties dismiss the concern of Transwestern that dual rights would create uncertainty regarding the commitment of capacity to specific markets, thereby preventing the building of needed pipeline infrastructure. Settling Parties assert that market signals, including pipeline load factors and gas prices, would indicate clearly where and when new capacity is needed to serve western markets.

71. Moreover, state Settling Parties, when Order No. 637 is implemented on the El Paso Pipeline system, any claimed advantage or disadvantage of dual primary delivery points will be eliminated because, assuming full pathing is implemented, all shippers will be able to segment their capacity and deliver to points within their paths on a primary firm basis. In the meantime, contend Settling Parties, that is essentially what EOC customers would be able to do with the dual rights proposed here.

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[45]Settling Parties state that, in this manner, dual primary delivery points strongly promote the Commission's pro-competitive, efficiency-based policy that favors the allocation of scarce capacity rights to the shippers who value the capacity the most. See, e.g., Order No. 636-A, FERC Stats. & Regs. [Regulations Preambles 1991-1996] & 30,950, at 30,555, 30,559 (1992).

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72. According to Settling Parties, El Paso Pipeline would not award the dual rights when there would be inadequate north-to-south capacity to serve the dual points, and El Paso Pipeline also will comply with the requirement of paragraph 10.2 of the El Paso Pipeline 1996 Settlement, which, they argue, precludes the pipeline from selling any additional north-to-south capacity until it increases that capacity. However, Settling Parties point out that, even without the dual delivery point authority, EOC customers would be subject to existing system limitations on primary rights to unsubscribed capacity. Thus, continue Settling Parties, if there is inadequate north-to-south capacity to relocate primary firm capacity from the Topock delivery points to EOC Markets upstream from Topock on the Southern Mainline system, dual delivery rights would not change that fact.

73. Finally, Settling Parties explain that the 623 MMcf/d is not a volumetric requirement, but merely a limit on the amount of capacity that can be awarded dual rights. Settling Parties also confirm that the dual delivery point rights would be available only through the five-year term of the instant Settlement.

b. Commission Analysis

74. The Commission will reject the proposal for dual primary delivery points because it is unduly discriminatory and contrary to Commission policy. Under Part 284 of the Commission's regulations, pipelines are required to provide service on a non-discriminatory basis. The regulations also provide that firm service is that which is not subject to a prior claim by another customer and receives the same priority of service as any other class of firm service.[46] Dual primary delivery points are inconsistent with both requirements.

75. First, dual primary delivery points, as proposed, would be superior service rights that would be available only to certain of El Paso Pipeline's customers.[47] El Paso Pipeline's pro forma transportation service agreements provide in Article 1.1 that a

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[46] 18 C.F.R. § 284.7(a)(3) (2003). See also El Paso Natural Gas Co., 104 FERC ¶ 61,045, at P 80 (2003).

[47] See, e.g., ANR Pipeline Co., 103 FERC ¶ 61,223 (2003). The Commission found that a special provision permitting shippers to change a primary point without following the regular tariff procedures could adversely affect other shippers seeking primary point capacity. Shippers with the special provision would have priority for obtaining the primary point capacity, contrary to Commission policy.

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shipper's contract demand is the sum of the delivery point maximum daily quantities (MDQs). Thus, the shippers with dual primary delivery points would in essence have double the primary rights they otherwise would have for this capacity, and the sum of their delivery point MDQs would exceed their contract demands. In addition, dual primary point rights would permit certain shippers to receive preferential rate treatment. Shippers with dual point rights would be required to pay the California zone rate only when using the Topock delivery point, while other shippers would be required to pay the California zone rate if they held California primary point rights, even on days when they did not use those California primary point rights.

76. Moreover, granting additional primary rights to one set of customers could decrease the primary point rights available for other firm customers. To the extent that EOC customers (who received in the Capacity Allocation Proceeding capacity not otherwise subject to contracts) opted to change their primary delivery points to non-California points, El Paso Pipeline would be precluded from selling the California primary point rights to other shippers, thus inhibiting competition on the pipeline's system.

77. Additionally, the dual primary point rights proposal is broadly worded and might convey primary point rights for this capacity to any of the California delivery points, which would be contrary to the Commission's ruling in Amoco Energy Trading Corp. v. El Paso Natural Gas Co.[48] In that case, the Commission required El Paso Pipeline to allocate delivery point rights so that the aggregate primary delivery point rights at each delivery point would not exceed the capacity of that point.

78. The Commission also is concerned about the operational feasibility of dual primary delivery points. El Paso Pipeline's Topock delivery points are on the pipeline's Northern Mainline system. In contrast, EOC customers, who were allocated most of the capacity not otherwise subject to contracts, have delivery points primarily on the Southern Mainline system. Receipt points for the Topock delivery point capacities currently are apportioned among the three supply basins: San Juan (on the Northern Mainline system) and Permian and Anadarko (both on the Southern Mainline system). However, serving Southern Mainline system delivery points from Northern Mainline system receipt points (San Juan) requires some portion of the gas to flow through the constrained north-south crossovers. El Paso Pipeline has maintained that no additional north-south crossover capacity is available for Southern Mainline system delivery points from San Juan receipt points. In fact, it has indicated in the Capacity Allocation

[48] 93 FERC ¶ 61,060 (2000).

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Proceeding that it can accommodate a reallocation of primary delivery point capacity to Southern Mainline system delivery points only if the new points are served from Permian or Anadarko receipt points, thus avoiding the constrained north-south crossovers.[49]

79. Further, application of the dual primary point proposal would be severely limited. The Settling Parties state that El Paso Pipeline would not award the dual rights when there would be inadequate north-south capacity. The Settling Parties also state that El Paso Pipeline will comply with Article 10.2 of the El Paso Pipeline 1996 Settlement, which prohibits El Paso Pipeline from selling new service on its constrained north-south crossovers. Thus, because the mainline capacity currently is fully subscribed, El Paso Pipeline would be able to offer dual primary delivery points only if EOC customers sourced at least some portion of the gas from the Permian or Anadarko Basins.

80. The Commission points out that its capacity release policies and El Paso Pipeline's tariff allow shippers to release unused capacity to shippers that may need it, including California customers that do not wish to hold firm service contracts. Transportation services obtained through these procedures may be accomplished on a primary point basis to the extent capacity is available and the releasing shipper agrees to a change in primary points. Otherwise, such transportation may be accomplished on a firm secondary point basis.

81. Finally, the contesting parties have questioned the origin of the 623 MMcf/d identified as available for the dual delivery point option. However, the quantity claimed to be available for this purpose is unimportant because, in the Capacity Allocation Proceeding, the Commission already has allocated to EOC customers all of the available capacity.

82. Accordingly, because the dual primary firm delivery point proposal is unduly discriminatory, as well as for other reasons discussed in this order, the Commission will require the JSA to be modified to remove this proposal.

2. Special Master

83. Article 12 of the JSA explains that the Settling Parties have agreed to an alternative dispute resolution process, which is further described in the Stipulated Judgment. The process, which is summarized in Appendix B to this order, provides for a

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[49] Initial Comments of El Paso Natural Gas Company in September 24 Technical Proceeding at 12-13 (October 14, 2003).

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Special Master, who will be empowered to enforce specified contractual obligations of the parties. Settling Parties state that the Special Master will be proposed by the parties under the JSA, approved by the court, and paid for by El Paso Pipeline. However, Settling Parties emphasize that disputed matters within the Commission=s jurisdiction will be submitted first to the Commission for resolution.

a. Positions of the Parties

84. ACC and Indicated Shippers contend that the proposed Special Master provisions would cause a pipeline that is subject to the Commission's NGA jurisdiction to become subject to control in many critical respects by the Special Master. While ACC observes that the Stipulated Judgment appears to allow the Commission to determine whether it has jurisdiction, ACC maintains that those provisions apply only when El Paso Pipeline or the California Settling Parties contest the jurisdiction of the Special Master.

85. ACC argues that the Special Master proposal violates the separation of powers established by the United States Constitution by transferring to the judicial branch exclusive jurisdiction vested by statute in an executive branch agency. Further, continues ACC, Congress provided in the NGA that an aggrieved party may seek judicial review of a Commission order only after it has exhausted all remedies before the Commission.[50]

86. ACC also asserts that the Commission cannot waive its exclusive jurisdiction or share its authority.[51] For example, states ACC, the Commission has rejected contractual efforts to bifurcate its exclusive statutory jurisdiction[52] and also has stated that "[c]ases involving matters of contract interpretation ... may be decided by a state or federal court or the state utility commission, as appropriate, if they do not involve matters within our exclusive jurisdiction."[53]

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[50]ACC cites 15 U.S.C. 717r(b) (2003). See also Whitney Natn'l Bank in Jefferson Parish v. Bank of New Orleans and Trust Co., 379 U.S. 411, 420-22 (1965); Consolidated Gas Supply Corp. v. FERC, 611 F.2d 951 (4th Cir. 1979); Alexander v. FERC, 609 F.2d 543 (D.C. Cir. 1979).

[51]ACC cites Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 580 (1981).

[52]ACC cites PacifiCorp v. Reliant Energy Services, Inc., 99 FERC & 61,381, at 62,614 (2002) (PacifiCorp).

[53]ACC cites Pike County Citizens for Justice v. Ashland Exploration, Inc.,

(continued…)

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87. ACC next contends that the Special Master provisions would undermine the protections afforded by the Administrative Procedure Act (APA)[54] and the Government in the Sunshine Act (Sunshine Act).[55] ACC emphasizes that the APA contemplates that matters within an agency's jurisdiction and expertise will be adjudicated first at the agency level. Moreover, claims ACC, the JSA threatens the rights of parties and the public to open meetings concerning disputes under the JSA. ACC states that it appears that only the signatory parties to the Settlement have any rights to seek relief from the Special Master.

88. In contrast, Staff argues that the Special Master process is an important aspect of the Settlement, and while it clearly is intended to promote expeditious resolution of disputes arising under the Settlement, it does not appear to impact the Commission's authority to resolve disputes within its jurisdiction.

89. Settling Parties respond that the Special Master process does not diminish the jurisdiction of the Commission or the Court of Appeals, but rather is intended to ensure that the Settling Parties' contractual commitments are carried out expeditiously. Settling Parties distinguish the Commission's decision in PacifiCorp,[56] asserting that PacifiCorp's contract sought to give the court exclusive jurisdiction over contracts setting specific short-term rates -- a matter that is committed to the Commission's exclusive jurisdiction. By contrast, explain Settling Parties, the Settlement provides a timeline for resolving jurisdictional questions, directing the Special Master to conduct a proceeding if jurisdiction has not been assumed by the Commission within 60 days. However, Settling Parties emphasize that decisions or actions of the Special Master are subject to any subsequent decision by the Commission on matters within the Commission's jurisdiction. Settling Parties submit that this alternative dispute resolution process recognizes the separation of powers between the executive and judicial branches of government, pointing out that the Commission has endorsed similar mechanisms "to simplify and expedite" proceedings.[57]

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59 FERC & 61,057, at 61,237 (1992).

[54]ACC cites 5 U.S.C. ' 551 et seq. (2003).

[55]ACC cites 5 U.S.C. ' 552b (2003).

[56]PacifiCorp v. Reliant Energy Services, Inc., 99 FERC & 61,381 (2002).

[57]Settling Parties cite Order No. 578, FERC Stats. & Regs. [Regulations Preambles 1991-1996] & 31,018, at 31,319 (1995); see also 18 C.F.R. ' ' 385.604-605 (2003).

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90. Settling Parties also state that, because the Commission retains authority over jurisdictional issues, the Special Master process does not conflict with the APA. Moreover, continue Settling Parties, the Special Master proceedings are not administrative meetings and, therefore, are not subject to the Sunshine Act. While Settling Parties acknowledge that only the signatory parties to the Settlement have the right to appear before the Special Master to seek special relief, Settling Parties also observe that only the signatories are legally bound by the contractual obligations. According to Settling Parties, non-parties to the Settlement continue to have all applicable legal and regulatory rights.

b. Commission Analysis

91. The Commission is accepting the Special Master proposal because it does not diminish or override the Commission's jurisdiction to review and modify any decision of the Special Master. The Commission has examined the Special Master provisions in the Stipulated Judgment and is satisfied that the parties acknowledge the Commission's authority to act on matters within its exclusive jurisdiction. In fact, the parties to the Settlement have clearly and repeatedly stated in the JSA and the Stipulated Judgment their intent that jurisdictional matters remain within the Commission's purview. The Settling Parties merely have agreed to employ an outside neutral who will assist them in resolving contractual disputes among themselves. The Special Master provisions do not and cannot bind other parties, such as those who have challenged them.

92. An examination of the Special Master provisions in the Stipulated Judgment supports the Commission's determination on this issue. For example, section D.1 states in part that the Special Master's authority to monitor and enforce the specified commitments under the JSA is "subject to the acknowledged principle that the Special Master shall have no jurisdiction over matters within FERC's jurisdiction…" Footnote number 2 of the Stipulated Judgment further states that, "[t]o the extent that there is any ambiguity and/or inconsistency between the provisions … [of the Stipulated Judgment] and the actual language of the Joint Settlement Agreement, the language of the Joint Settlement Agreement shall control." Article 12 of the JSA also states in part that "nothing in the Stipulated Judgment is intended to deprive the Commission of the ability to resolve any disputes or issues within its jurisdiction."

93. Moreover, the provisions in section D of the Stipulated Judgment that voluntarily limit the rights of the Settling Parties with respect to El Paso Pipeline's next rate proceeding do not limit in any fashion the Commission's statutory authority to ensure that El Paso Pipeline's rates are just and reasonable. Likewise, these voluntary limitations do not in any respect limit the rights of those who are not parties to the Settlement to challenge all aspects of El Paso Pipeline's next rate case.

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94. Section E.5 of the Stipulated Judgment provides in part as follows:

> the sole remedy the Special Master shall be authorized to impose for breaches of the Settling Parties' commitments … shall be specific performance, and other reasonable injunctive remedies to ensure compliance with such commitments. In addition, the Special Master shall be the exclusive vehicle for resolution of the commitments set forth above of the Settling Parties, without prejudice to other claims or remedies that the Settling Parties in other forums may have other than any claim or remedy for a breach or breaches of the Stipulated Judgment.

95. Section E.6 of the Stipulated Judgment addresses the process for resolving disputes concerning the Commission's jurisdiction. Although the section states that Special Master proceedings resume if the Commission has not resolved the issue within 60 days, the Commission is satisfied that it, as well as the Courts of Appeals, retain their separate powers with respect to the ultimate resolution of issues within the Commission's jurisdiction. Finally, section F of the Stipulated Judgment provides that findings, recommendations, or decisions of the Special Master may be submitted as evidence in Commission proceedings, but that provision also specifically states that such findings "will not have any preclusive effect or constitute binding precedent in such proceedings."

96. As stated above, the Commission is satisfied that the Special Master provisions do not diminish the Commission's jurisdiction. Because El Paso Pipeline is a natural gas company subject to the Commission's jurisdiction, there will be jurisdictional ramifications to many of the issues that are presented to the Special Master. Nonetheless, the Special Master cannot require El Paso Pipeline to engage in any activity requiring Commission approval, nor can the Special Master require El Paso Pipeline to perform any action contrary to the statutes or contrary to Commission regulations, policies, or directives. Moreover, the Commission emphasizes that nothing in the Settlement can relieve El Paso Pipeline of its certificate obligation to provide open access transportation on a not-unduly discriminatory or preferential basis pursuant to the terms of its tariff and contracts. If the parties contesting the Settlement believe that El Paso Pipeline has violated any of its statutory or regulatory obligations, those contesting parties retain all applicable rights to challenge El Paso Pipeline's conduct before the Commission.

97. In the Commission's view, the Special Master process does not implicate the APA or the Sunshine Act. It is akin to other types of alternative dispute resolution processes in which parties rely on neutrals in an effort to resolve disputes without the need to litigate those issues, either before the Commission or in the courts. Indeed, the

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Commission's own regulations establish such a process.[58] In this case, the Settling Parties' voluntary agreement to employ a neutral does not limit the rights of the contesting parties, nor does it diminish the jurisdiction of the Commission or the Courts of Appeal. Accordingly, the Commission accepts Article 12 of the JSA, as that article is further explained by the provisions of the Stipulated Judgment.

98. ACC urges the Commission to prohibit El Paso Pipeline from seeking recovery in its next rate case of the costs relating to the Special Master. ACC asks the Commission to ensure that the pipeline's shareholders must bear those costs. The Settling Parties respond that Federal Rule of Civil Procedure 53(a) expressly provides that "compensation to be allowed to a master shall be filed by the court, and shall be charged upon such of the parties ... as the court may direct." In reaching the Settlement here, the Settling Parties agreed that El Paso Pipeline would bear the costs of the Special Master -- an agreement that is permissible under the Federal Rules of Civil Procedure. However, the Commission will not rule on the issue of recovery of costs at this juncture. If El Paso Pipeline seeks to recover in its next rate case any costs attributable to the Special Master process, other parties may challenge those costs in the rate case proceeding.

3. Block II Recall Provisions

99. Article 8 of the JSA provides that, during the remaining term of the El Paso Pipeline 1996 Settlement (through December 31, 2005), Block II capacity will remain subject to recall by PG&E or shippers serving a market in PG&E's service territory. However, the parties agree that, upon Commission approval of the JSA, El Paso Pipeline's tariff provisions regarding the Block II recall process will be clarified as stated in the GT&C of the pro forma tariff sheets attached to the JSA at Tab 2.

100. Pro forma Fourth Revised Sheet No. 218, Third Revised Sheet No. 219, and Original Sheet Nos. 219F, 219G, 219H, and 219I contain the proposed clarifications relating to Block II capacity recall. Under the proposed clarifications, a shipper requesting recall of Block II capacity must first enter into a new Transportation Service Agreement with El Paso Pipeline for unsubscribed Block II capacity. The shipper will specify the term of the recall. On the day the recall is effective, the shipper requesting the recall must attempt to nominate all Block II capacity that it had under contract prior to the effective date of the recall. Further, the proposed tariff sheets establish enhanced posting requirements for El Paso Pipeline, as well as the types of notice required for recall of the Block II capacity. In addition, the proposed tariff sheets establish the

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[58] 18 C.F.R. § 385.604, et seq. (2003).

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sequence of Block II capacity subject to recall. In part, this section provides that unsubscribed capacity will be used to serve the recalling shipper's need to the extent possible, with recourse next to capacity that has been marketed to a non-PG&E-Topock delivery point unless it is being used to serve markets in PG&E's service territory. The sequence of capacity recall also includes a provision that the recall request will be filled on a pro rata basis from all shippers. The price to be paid for recalled Block II capacity will be based on the term of the recall. Finally, the proposed clarifications establish the time limits within which El Paso Pipeline will respond to the recall requests, procedures for extension of a recall, and re-recall rights.

101. Settling Parties submit that the proposed clarifications resolve uncertainties in the recall process that have arisen since the time of the El Paso Pipeline 1996 Settlement. Specifically, explain Settling Parties, the proposed clarifications: (1) define more precisely the conditions a recalling shipper must meet before it can attempt to recall the capacity and the rate that recalling shippers will pay; (2) require El Paso Pipeline to post a variety of Block II capacity information on its web-site, thereby enabling shippers to make informed choices in deciding whether to recall; (3) delineate the sequence in which the capacity will be recalled, with capacity that is being used to deliver gas to a non-PG&E-Topock delivery point (including EOC, SoCalGas, and Mojave delivery points) being recalled only after all other eligible Block II capacity (including unused capacity) is recalled; (4) specify the terms under which the capacity can be "re-recalled;" and (5) provide deadlines by which El Paso Pipeline must process recall requests.

a. Positions of the Parties

102. ACC argues that Block II conditions are an integral part of the El Paso Pipeline 1996 Settlement and thus cannot be modified by a few parties in violation of the Mobile-Sierra doctrine.[59] They point out that Section 12.1 of the El Paso Pipeline 1996 Settlement provides:

> In consideration of the provisions of this Stipulation and Agreement, except as otherwise expressly provided in this Stipulation and Agreement, El Paso [Pipeline] agrees to waive its right to file for or request approval of any change in its settlement rates or of any tariff change reflected on the tariff

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[59] ACC cites United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956); FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956). See also, Arkansas Power and Light Co., 52 FERC & 61,029, at 61,159 (1990).

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> sheets attached hereto or any other term or condition of this Stipulation and Agreement to be effective prior to such date [January 1, 2006].

103. Additionally, ACC cites Section 16.6 of the El Paso Pipeline 1996 Settlement, which provides:

> In consideration for the provisions of this Stipulation and Agreement, the [California] parties to the instant proceeding waive any right they might otherwise have during the term of this Stipulation and Agreement to challenge the level of settlement rates provided for herein or any other provision of this Stipulation and Agreement as being unjust, unreasonable, or unduly discriminatory within the meaning of Section 5 of the NGA ....

104. ACC submits that the El Paso Pipeline 1996 Settlement also binds the Commission in the absence of demonstrated public interest requiring a change.[60] According to ACC, the proposed Block II recall provisions have not been addressed on the record in the complaint proceeding. Further, continues ACC, modification of Block II provisions is inconsistent with the Commission's rulings in the Capacity Allocation Proceeding that El Paso Pipeline must provide all unsubscribed, expired, and turnback capacity to EOC customers[61] and would afford El Paso Pipeline almost unlimited discretion to refuse to allocate such capacity to those customers.

105. Southwest Gas argues that the proposed revisions remove capacity that is necessary to support the conversion of FR to CD service. According to Southwest Gas, the 443,912 Mcf/d of expiring contract capacity that the Commission directed El Paso Pipeline to allocate to converting FR customers will be available to support new CDs only if it is firm, reliable, primary point capacity. Southwest Gas asks the Commission to reserve this issue for resolution in the Capacity Allocation Proceeding, where it has been raised.

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[60] ACC cites Texaco, Inc. v. FERC, 148 F.3d 1091, 1097 (D.C. Cir. 1998); Kentucky West Virginia Gas Co. v. FERC, 780 F.2d 1231, 1237 (5th Cir. 1986); Texas Gas Transmission Corp. v. FPC, 414 F.2d 1392, 1394 (6th Cir. 1971); Mobil Oil Corp. v. FPC, 570 F.2d 1021, 1026 (D.C. Cir 1978); El Paso Natural Gas Co., 50 FERC & 61,202, at 61,653 (1990).

[61] ACC cites Mid Louisiana Gas Co., 21 FERC & 61,072, at 61,251 (1982). See also Pennsylvania Gas and Water Co. v. FPC, 463 F.2d 1242, 1247 (D. C. Cir. 1972).

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106. Claiming that there is no discussion of this key provision in the JSA, Indicated Shippers and ACC challenge proposed Original Sheet No. 219H, which states in part:

> (f) Rate to be paid for recalled capacity. For recall periods of one month or less, the recalling Block II shipper must pay the maximum reservation tariff rate for deliveries to California. For recall periods of longer than one month, the rate shall equal the rate paid by the shipper whose capacity is being recalled. Where the capacity being recalled is held by a converting full requirements shipper, the rate to be paid by the recalling shipper shall be the effective unit rate for capacity for the converted full requirements shippers. The effective unit rate is defined as determined by dividing the annual cost responsibility of each converted full requirements shipper by the aggregate annual contract demand, both as determined in the Docket No. RP00-336 proceeding. If the recall is extended, then the rate for the extension will be the same as the rate paid during the initial recall period.

107. According to Indicated Shippers, this revision would create a perverse incentive to recall capacity for longer-term deals because the rate to be paid for those deals is equal to the rate paid by the shipper whose capacity is being recalled. Indicated Shippers further state that, in the case of former FR shippers who have purchased Block II capacity, the recall rate would be the effective unit rate and thus very cheap. Therefore, reason Indicated Shippers, the Commission should require that recalled capacity will be fully utilized to serve the PG&E service territory to prevent a shipper from recalling the capacity for one year, paying the minimal effective unit rate, serving a customer in the PG&E service territory for one month, and then serving any other market (not in the PG&E service territory) for the remaining 11 months. Specifically, state Indicated Shippers, the recall right should be conditioned such that if on any given day, the recalled capacity is not being utilized to serve PG&E markets, then it should be offered back to the shipper from whom the capacity was obtained.

108. Southwest Gas and ACC raise similar concerns about the rates and length of terms of recalls. Southwest Gas asks the Commission to modify the Settlement to require that Block II recalls be priced at the maximum tariff rate for deliveries to the California zone. SoCalGas supports modification of the provision to eliminate any possibility of gaming. ACC also contends that the proposal virtually guarantees that all Block II capacity will be recalled for deliveries to California, leaving little if any Block II capacity for the EOC customers, even on an interruptible basis, at peak times when they require the capacity to serve human needs loads.

109. ACC states that El Paso Pipeline's December 2, 2002 compliance filing in the Capacity Allocation Proceeding indicates that 28.6 percent of the total forward haul firm capacity available to the FR shippers is Block II capacity. However, continues ACC, the

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discount established by the JSA takes away nearly one-third of that amount. Further, argues ACC, the recall sequencing provisions also harm the EOC Shippers because they serve temperature-sensitive markets and have no storage. For example, ACC states that the recall provisions would permit the California customers to recall capacity that was not "scheduled" during a temporary dip in demand.

110. Indicated Shippers point out that Article 13 of the JSA establishes a term of five years from the effective date -- until 2008. Indicated Shippers argue that the Commission should clarify the Settlement to terminate the revised Block II recall provisions when the term of the El Paso Pipeline 1996 Settlement ends on December 31, 2005.

111. In contrast, Staff supports the proposed revisions, arguing that the Settlement will clarify the recall rights of Block II capacity holders in a manner that will permit increased deliveries to the southern California gas market. According to Staff, these revisions will be effective only through the remainder of the term of the El Paso Pipeline 1996 Settlement. Staff emphasizes the two conditions that a recalling shipper must meet: (1) the shipper requesting a recall must enter into a new firm Transportation Service Agreement with El Paso Pipeline for unsubscribed Block II capacity; and (2) on the day the recall becomes effective, the shipper requesting the recall must attempt to nominate all Block II capacity it had under contract prior to the effective date of the recall. According to Staff, these provisions help assure that Block II capacity will not be recalled if unsubscribed Block II capacity exists and that a shipper may not "hoard" Block II capacity by recalling such capacity without first nominating its existing Block II capacity. Staff also maintains that the clarifications enhance posting requirements, requiring El Paso Pipeline to post information including Block II contract holders, their rates, and the volume of gas that each has scheduled to a non-PG&E-Topock delivery point during that cycle.

112. SoCalGas agrees that the limitations on the recall provisions will provide greater certainty concerning the circumstances in which recall rights may be exercised, thereby increasing the value of the Block II capacity to EOC customers and supporting the implementation of the conversion of the FR contracts and allocation of El Paso Pipeline's capacity. SoCalGas also maintains that the revised Block II recall rights do not provide any additional rights out of the San Juan Basin or affect the north-to-south capacity constraints under the El Paso Pipeline 1996 Settlement.

113. In their responsive comments, Settling Parties argue that the recall provisions are consistent with the El Paso Pipeline 1996 Settlement and that they do not seek to modify that settlement. Thus, contend Settling Parties, the Mobile-Sierra doctrine does

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not apply, and the Commission may issue an order approving the Settlement's provisions clarifying the recall process.[62]

114. In reality, state Settling Parties, ACC is proposing to modify the El Paso Pipeline 1996 Settlement by insisting that a rate higher than the rate paid by EOC customers should be charged to the northern California shippers when they recall Block II capacity for more than one month.[63] Settling Parties cite El Paso Natural Gas Co.,[64] in which the Commission addressed Block II capacity recalled by northern California shippers for more than one month:

> The purpose of the language is to assure that the capacity is not recalled at a rate that is less than that El Paso has obtained for the transportation of the gas to a destination other than northern California, and under the provisions of the 1996 settlement El Paso may not withhold the capacity to obtain a

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[62]Settling Parties cite Union Pacific Fuels, Inc. v. FERC, 129 F.3d 157, 161 (D.C. Cir. 1997). Settling Parties contend that, if the Commission believes that clarifying the sequence and matching rates for recalling capacity is a modification to El Paso Pipeline's practices, the Commission should exercise its NGA Section 5 authority to adopt such a modification. Moreover, Settling Parties disagree with ACC's claim that that there is not record evidence concerning this issue in Docket No. RP00-241-000, et al. See Ex. PUC-1 at 30-31; Ex. PUC-35.

[63]Settling Parties state that the only question they had to answer to adhere to the El Paso Pipeline 1996 Settlement was to determine the EOC customers' rates under their contracts with El Paso Pipeline for Block II capacity. According to Settling Parties, the converting FR shippers were allocated unsubscribed Block II capacity by the Commission at no extra cost as part of their conversion to CD service. Although the converting FR shippers could argue that they will be paying nothing for that Block II capacity and that it should be recallable at that same zero reservation rate, the Settling Parties reasonably concluded that those shippers will be paying "effective unit rates" attributable to the total volume of capacity rights they will hold after their conversion to CD service. Therefore, conclude Settling Parties, Sheet No. 219H logically referred to the Effective Unit Rate(s) for the FR shippers as stated in Section 9 of Rate Schedule FT-1. Finally, Settling Parties state that the Effective Unit Rate is a good proxy because there has been no rate established by the Commission.

[64]88 FERC & 61,139 (1999).

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higher rate as long as the rate at least matches the price for which the capacity was sold.[65]

115. Settling Parties also contend that, assuming arguendo, there would be an incentive to recall capacity based on price, that incentive already exists. However, emphasize Settling Parties, the types of recalls feared by Indicated Shippers have not occurred. Thus, reason Settling Parties, if it is economic to serve northern California with the recalled capacity, the shipper holding the capacity itself would have the ability and incentive to do so. Moreover, add Settling Parties, to the extent recalled capacity is temporarily not used, it would not be "held idle" but would become available to the market as IT.[66]

116. Settling Parties submit that there is no basis for concerns that the revisions would give El Paso Pipeline almost unlimited discretion to refuse to allocate capacity to EOC customers if it would adversely affect the recall rights associated with Block II capacity. Moreover, continue Settling Parties, the Settlement does not deprive EOC customers of firm capacity. According to Settling Parties, ACC failed in the Capacity Allocation Proceeding to modify the El Paso Pipeline 1996 Settlement by eliminating the Block II limitations on 614 MMcf/d of El Paso Pipeline capacity.[67] Thus, contend Settling Parties, ACC's argument here is a collateral attack on the Commission's prior orders.

117. Settling Parties further emphasize that the EOC Shippers have had the right to sign up for turnback capacity, some of which has no Block I or Block II limitations, but the EOC Shippers twice have declined to do so. Settling Parties also observe that EOC customers will continue to have the right to sign up for turnback capacity at least once a

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[65]Id. at 61,421.

[66]Settling Parties challenge Indicated Shippers' argument that the clarification to the Block II recall rights may enable parties to "manipulate" the market if a recalling shipper obtains capacity to serve northern California for a certain recall period, but then begins to serve any other market with the recalled capacity. Settling Parties assert that, if a shipper uses Block II capacity to serve markets other than northern California, no matter how the shipper obtained it, the Block II capacity can be recalled under the El Paso Pipeline 1996 Settlement. The Settlement here does not change that principle.

[67]Settling Parties cite El Paso Natural Gas Co., 100 FERC & 61,285, at 62,251-52 (2002).

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year.[68] In addition, contend Settling Parties, EOC customers can acquire permanent or long-term capacity releases either for year round use or on a seasonal basis.

118. Settling Parties argue that the proposed sequencing provisions do not rewrite the El Paso Pipeline 1996 Settlement, which was silent on that issue and left the matter to El Paso Pipeline's discretion. Rather, state Settling Parties, the sequencing provisions attempt to minimize disruptions to EOC customers using the Block II capacity. Settling Parties cite the conditions precedent that must be satisfied before a northern California shipper can attempt to recall another shipper's Block II capacity (i.e., the shipper must first use unsubscribed Block II capacity, and on the day of the recall, the shipper must first attempt to nominate all of its own Block II capacity). Settling Parties also observe that unused capacity will be recalled first, which will be less disruptive than recalling capacity that is being used.

119. Additionally, Settling Parties state that the Settlement does not extend the term of the Block II recall process beyond the term of the El Paso Pipeline 1996 Settlement. Specifically, Settling Parties point to Section 8.2 of the JSA, which provides that "during the remaining term of the 1996 Settlement, Block II capacity will remain subject to recall by PG&E or shippers serving a market in PG&E's service territory." Finally, Settling Parties observe that section 4.5(b)(ii) of the proposed tariff revisions provides that "[b]eginning with the effective date of the Western Energy Settlement in Docket No. RP00-241, et al., through December 31, 2005, the Block II recall provisions detailed in Section 4.10 of the General Terms and Conditions of this Tariff shall apply."

b. Commission Analysis

120. The Commission will accept the Block II recall clarifications proposed by the Settling Parties. The clarifications proposed here merely resolve uncertainties in the recall process established in the El Paso Pipeline 1996 Settlement and confirm El Paso Pipeline's agreement to follow a more objective and transparent process in the recall of Block II capacity. For this reason, the Commission is satisfied that the Mobile Sierra doctrine is not implicated and does not prohibit the proposed clarifications. The Mobile Sierra doctrine applies only when parties attempt to modify a contract, and no such modification is proposed in this Settlement.

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[68] Settling Parties cite El Paso Natural Gas Co., 99 FERC & 61,244, at 62,018 (2002).

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121. The Commission finds that the proposed Block II recall clarifications are not inconsistent with the El Paso Pipeline 1996 Settlement with respect to the rate to be paid. That settlement, as clarified by the Commission,[69] ensures that, for recalls longer than one month, recalling shippers must pay a rate no less than that paid by the party whose capacity is being recalled. The proposed Block II recall clarifications do not change those rate provisions. What has changed is that EOC customers now hold a portion of the Block II capacity, a situation that was not addressed in the El Paso Pipeline 1996 Settlement. Thus, the proposed clarifications establish that the rate paid by an EOC customer holding the capacity must be that shipper's effective unit rate applied to the recall, and the existing recall provisions require the same result. Conversely, requiring a recalling shipper to pay the maximum rate for recalls longer than one month, as proposed by ACC, would be a modification to the El Paso Pipeline 1996 Settlement.

122. Similarly, the revised sequencing provisions do not violate the El Paso Pipeline 1996 Settlement. That settlement also is silent with respect to sequencing of a recall and affords El Paso Pipeline considerable discretion in scheduling the recall. The proposed clarifications establish a process that limits El Paso Pipeline's discretion. The proposed recall sequence appropriately provides that unused capacity will be recalled before any recall of capacity that is being used to serve California Markets. The Commission finds these sequencing clarifications to be reasonable, in that they provide additional certainty for the process and minimize any disruption to the EOC customers' use of Block II capacity.

123. Further, the Commission finds that the proposed Block II recall clarifications are consistent with the Commission's rulings in the Capacity Allocation Proceeding. ACC and Southwest Gas argue that the Block II recall clarifications proposed in the Settlement would permit El Paso Pipeline to refuse to allocate capacity to EOC customers in that proceeding. However, that argument has no merit. The Commission directed El Paso Pipeline to reallocate capacity, including Block II capacity, to the EOC customers effective as of September 1, 2003, and El Paso Pipeline has complied with that order.

124. The Commission has confirmed that the Block II restrictions, including the recall provisions, remain effective for the EOC customers holding that capacity. Moreover, clarifying the Block II recall provisions here will not remove capacity needed to support conversion of FR service, as Southwest Gas fears. Any outstanding issues regarding allocation of capacity will be addressed in future orders in the Capacity Allocation Proceeding, where they have been raised. The Settlement provisions that

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[69] El Paso Natural Gas Co., 88 FERC ¶ 61,139, at 61,421 (1999).

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would clarify the currently-effective recall process will not impact in any way the Commission's actions in the Capacity Allocation Proceeding. Accordingly, the Commission accepts the proposed clarifications to the Block II capacity recall process.

4. The Master Settlement Agreement

125. The MSA addresses the scope of the comprehensive Settlement, as well as issues in the complaint proceeding in Docket No. RP00-241-000, et al., and other proceedings. The Commission has reviewed the MSA to analyze its effect on the JSA. The portions of the MSA cited and challenged by the contesting parties relate to, inter alia, distribution of the Settlement Fund (Section 3.1), the consideration given by the El Paso Companies (Section 4.1), various releases (Sections 5.1 through 5.6), and parties' obligations to seek dismissal of various proceedings (Section 6.7).

a. Positions of the Parties

126. ACC and Duke contend that the MSA trumps the JSA in many ways. In particular, they cite sections of the JSA that incorporate by reference the release and other portions of the MSA. In ACC's view, the Settling Parties crafted the MSA as part of their effort to divest the Commission of its statutory jurisdiction.[70] Moreover, continue ACC and Duke, if the Commission approves the JSA, and by extension, the MSA provisions incorporated into the JSA, the Commission will be required to uphold the terms of the MSA, particularly with respect to these incorporated provisions. According to ACC, this would prevent the Commission from undertaking or even considering a Section 5 action or a complaint brought by its own Staff or by any El Paso Pipeline customer that is not a party to the MSA.

127. Duke adds that the JSA is but one part of a much larger settlement that implicates the pending California electricity refund proceeding and the Commission's investigations of California and Western natural gas and electricity markets. Duke contends that the MSA does not specify how the large settlement fund will be distributed and that the Allocation Agreement referenced in the MSA has not been furnished to the Commission. Because Duke fears that the MSA may duplicate the remedy in the California electricity refund proceeding, Duke states that it will file in Docket No. EL00-95, et al., a Motion to Lodge the MSA and associated Settlement documents as new evidence in that proceeding. Duke contends that the Commission should reserve any

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[70] Southwest Gas generally supports the comments filed by ACC relating to the proposed Special Master provisions.

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decisions bearing on the California electricity refund proceeding until parties to that proceeding have an opportunity to comment on the MSA and the related Allocation Agreement. Further, states Duke, to the extent that Commission approval of the JSA implies approval of the releases, such approval should be expressly qualified so as not to apply to Duke as a non-settling party in this proceeding. Finally, Duke asks the Commission to ensure that its actions do not adversely affect non-settling parties in the California electricity refund proceeding.

128. In response, Settling Parties assert that the contesting parties do not raise issues that require the Commission to modify or reject the JSA. According to Settling Parties, it is not surprising that a comprehensive settlement involving multiple parties and affecting multiple proceedings in multiple forums would contain cross references, and Settling Parties contend that referring to a non-jurisdictional document in a jurisdictional settlement agreement does not transform the MSA into a different document. Further, state Settling Parties, ACC fails to explain how and why it believes the cross references are objectionable or harmful. Settling Parties also argue that ACC confuses contractual rights and obligations undertaken in settlement of Commission proceedings with the Commission's jurisdiction. Settling Parties emphasize that no party can undertake acts subject to the Commission's jurisdiction without Commission approval. Finally, Settling Parties point out that, by its plain terms, Section 5.2 of the MSA bars only the Settling Parties from bringing claims against the El Paso Companies.

b. Commission Analysis

129. The Commission has reviewed the interrelated provisions of the JSA and the MSA. The Commission finds that the MSA does not divest the Commission of jurisdiction in any respect, nor does it have any negative effect on any jurisdictional issue. The entire Settlement package is complex because it is intended to resolve proceedings in a number of forums, but it does not deprive contesting parties of any rights they have under the NGA or the Commission's regulations to challenge actions by El Paso Pipeline before the Commission.

130. The Commission made it clear above that it is approving only the JSA. The Commission also made it clear that its determinations in this order relate only to resolution of the complaint proceeding in Docket Nos. RP00-241-000, RP00-241-006, and RP00-241-008. Nothing in this order is intended to affect or limit in any manner any potential relief the Commission may grant in the California electricity refund proceeding in Docket No. EL00-95-45, et al., or in any other proceeding.

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5. Capacity Reservation – JSA Articles 5 and 6

131. Article 5 of the JSA obligates El Paso Pipeline to make 3,290 MMcf/d of firm primary capacity available to its California delivery points during the five-year term of the Settlement, subject to the following conditions: (1) El Paso Pipeline is able to place its 320 MMcf/d Power-Up Project into service, (2) El Paso Pipeline obtains tariff authority to grant dual primary delivery point rights,[71] and (3) El Paso Pipeline obtains tariff authority to revise the Block II recall procedures.[72] The JSA further provides that El Paso Pipeline will not be deemed to have violated this obligation if it is prevented from making the capacity available due to (1) force majeure events, (2) regulatory or judicial delays or rulings, or (3) shipper choices relocating their primary delivery points from California points to non-California points or using dual primary delivery point capacity to deliver to non-California points. However, the article also provides that nothing alters El Paso Pipeline's obligation to maintain physical facilities sufficient to deliver 3,290 MMcf/d to its California delivery points. Additionally, the article states that El Paso Pipeline will not add new firm incremental load to its system that would prevent it from making available or scheduling the 3,290 MMcf/d to its California delivery points.

132. Section 6.2 of the JSA provides that, if El Paso Pipeline receives necessary approvals, it will construct the Power-Up Project on a phased schedule as proposed in its certificate application in Docket No. CP03-1-000. As stated above, the Commission granted El Paso Pipeline's application in an order issued June 4, 2003, in that docket.[73]

133. Section 6.3 provides that, upon completion of the Power-Up Project, El Paso Pipeline will have the physical capacity to deliver up to 3,840 MMcf/d in the aggregate to its California delivery points as follows:

SoCalGas-Topock	540 MMcf/d
Mojave-Topock	400 MMcf/d
PG&E-Topock	1,140 MMcf/d
SoCalGas-Ehrenberg	1,760 MMcf/d

[71] As discussed above, the Commission rejects this aspect of the Settlement.

[72] As discussed above, the Commission accepts this aspect of the Settlement.

[73] El Paso Natural Gas Co., 103 FERC & 61,280 (2003).

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134. Section 6.4 of the JSA provides that no California Settling Party will object to recovery in El Paso Pipeline's future rates of the costs reasonably incurred to increase physical capacity to the California delivery points to 3,840 MMcf/d. That section also provides that the California Settling Parties may object to the allocation of such costs in El Paso Pipeline's next rate case.

a. Positions of the Parties

135. ACC contends that the JSA reduces the capacity granted EOC customers in the Capacity Allocation Proceeding, in particular, the 230 MMcf/d attributable to the Line 2000 project, as well as the 320 MMcf/d attributable to the Power-Up Project. ACC submits that the JSA also is inconsistent with the Capacity Allocation Proceeding in allowing the California Settling Parties to argue that non-California shippers should not be permitted to acquire part of the 3,290 MMcf/d and change the primary delivery points to non-California points.

136. Indicated Shippers express similar concerns. Additionally, Indicated Shippers warn that the Settlement may require El Paso Pipeline to withhold unsubscribed capacity from the market to meet its 3,290 MMcf/d obligation. Moreover, continue Indicated Shippers, it is not clear what would qualify as "new firm incremental load." Indicated Shippers question, for example, whether that term would include shipper choices relocating primary delivery points from California to non-California points, shipper choices to use dual primary delivery points when one of the points is new, and California backhaul service.

137. Southwest Gas maintains that El Paso Pipeline argued in the Capacity Allocation Proceeding that total available westward flow capacity should be decided in this Docket No. RP00-241-000, et al. Therefore, Southwest Gas asserts that the Commission should affirm the Phase II ID on the issue of westward flow capacity, clarifying that El Paso Pipeline's total current westward flow capacity is 4,740 MMcf/d in the winter and 4,500 MMcf/d in the summer.

138. ACC observes that El Paso Pipeline will file a new rate case to be effective January 1, 2006. ACC asks the Commission to ensure that El Paso Pipeline will not propose in that filing that all capacity with dual primary delivery points is effectively "California" capacity, with applicable California-zone reservation charges. ACC and Southwest Gas also challenge the requirement that El Paso Pipeline employ a miles-of-haul cost allocation methodology in its next rate case.

139. ACC maintains that the June 4, 2003 Order in Docket No. CP03-1-000 determined that the costs of the Power-Up Project (and by inference, the costs of the Line

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2000 Project) should be rolled into system-wide rates. However, Indicated Shippers and SoCalGas assert that the Settlement should be clarified to ensure that no party is prevented from opposing those costs in El Paso Pipeline's next rate case. Finally, SoCalGas and Indicated Shippers contend that the Commission should clarify the inconsistency between the June 4, 2003 Order and the provisions of the JSA concerning reassessment of the need for Phase III of the Line 2000 Power-Up Project following completion of the first two phases of the project.

140. Settling Parties respond that Section 6.3 of the JSA does not rob EOC customers of any capacity allocated to them in the Capacity Allocation Proceeding. According to Settling Parties, that section merely recites the limits of El Paso Pipeline's physical capacity to its California delivery points following completion of the Power-Up Project, but that El Paso Pipeline's obligation to make firm capacity available to California is conditioned on shippers executing contracts for that amount of capacity. Settling Parties further emphasize that El Paso Pipeline has committed to construct the Power-Up Project without additional reservation charges until its next rate case. However, Settling Parties also contend that the El Paso Pipeline 1996 Settlement does not tie the hands of El Paso Pipeline or any other party concerning the pipeline's rates after December 31, 2005. Moreover, with respect to the provision that permits California parties to contest EOC customers' efforts to acquire part of the 3,290 MMcf/d and change the primary delivery points from a California point to a non-California point, Settling Parties emphasize that California parties already have the right to try to persuade the Commission to adopt their position.

141. Finally, state Settling Parties, the Settlement is fully compatible with the order in the Power-Up Project proceeding. Settling Parties maintain that, if the Commission does not approve the Settlement as submitted, El Paso Pipeline will have no contractual obligation to build the Power-Up Project, but if the Commission approves the Settlement as submitted, then El Paso Pipeline will build the Power-Up Project, including Phase III. Settling Parties contend that the Commission authorized construction of that project because it found that the project is necessary to restore reliable firm service to all customers on El Paso Pipeline's system.[74] Although they assert that the June 4, 2003 Order in that proceeding gave El Paso Pipeline the option to file a certificate amendment to modify, reduce, or eliminate the Phase III capacity,[75] Settling Parties argue that it did not require El Paso Pipeline to seek additional authority prior to building Phase III.

[74] Settling Parties cite El Paso Natural Gas Co., 103 FERC ¶ 61,280, at PP 23-24 (2003).

[75] Id. at P 40.

b. Commission Analysis

142. The Commission has addressed most of the contesting parties' claims in the Capacity Allocation Proceeding, in which the record fully supports the Commission's determinations. In contrast, the record in the complaint proceeding in Docket No. RP00-241-000, et al., is focused on El Paso Pipeline's use of its capacity. The Commission will not permit this Settlement to alter its rulings in the Capacity Allocation Proceeding, but instead will examine Articles 5 and 6 of the JSA in light of those rulings.

143. The foundation of the Commission's firm transportation policy is that interstate open access pipelines may not sell or contract for firm service capacity that is subject to a prior claim by any other customer or class of service.[76] Likewise, a pipeline may not sell capacity that is necessary to manage transients on its system.

144. The Commission made it clear in the Capacity Allocation Proceeding that it is committed to ensuring that El Paso Pipeline manages its capacity so as not to compromise its obligations to its firm shippers. Indeed, the Commission's determination above rejecting the dual primary firm delivery point proposal is based in part on its commitment to ensuring reliable firm service on El Paso Pipeline's system. In the July 9, 2003 Order in the Capacity Allocation Proceeding, the Commission thoroughly reviewed aspects of El Paso Pipeline's service that might affect the pipeline's obligations to those shippers. In particular, the Commission stated that El Paso Pipeline has no certificated obligation to serve California other than through its self-implementing contracts. The pipeline's certificate obligation to that market is a function of its contracts with various shippers, as those contracts change from time-to-time.

145. Regulation under the NGA is predicated on a system of private contracts between pipelines and their customers that the Commission is empowered to review.[77] Absent such contracts, there is no Commission-enforceable certificate requirement that El Paso Pipeline serve particular customers or markets. If the Settling Parties intend to ensure that El Paso Pipeline reserves 3,290 MMcf/d of capacity for the California

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[76] 18 C.F.R. § 284.7(a)(3) (2003). See also El Paso Natural Gas Co., 104 FERC ¶ 61,045, at P 80 (2003).

[77] See, e.g., United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332, 340-43 (1955); Pennzoil v. FERC, 671 F.2d 119 at n.6 (5th Cir. 1982); Pennzoil v. FERC, 645 F.2d 360 at 373-74 (5th Cir. 1981), cert. denied, 454 U.S. 1142 (1982); H.S. Phillips v. FERC, 586 F.2d 465, 469 (5th Cir. 1978).

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markets, then the Settling Parties or their agents must have contracts with El Paso Pipeline to reserve and schedule those volumes of firm mainline transmission and delivery point capacity. Any Rate Schedule FT-1 contract must specify the capacity reserved,[78] the rates to be paid for the reserved capacity, and the receipt and delivery points to which the shipper is entitled. The Commission's approval of this Settlement, as modified, does not change those requirements or waive any tariff provision or Commission regulation, except for the tariff's capacity release provision discussed below. Reserving capacity through specific contracts is consistent with the Commission's policy that service should go to those who value it most.

146. Viewed in light of the Commission's rulings in the Capacity Allocation Proceeding and in the June 4, 2003 Order relating to the Power-Up Project, the contesting parties' comments with respect to Articles 5 and 6 of the JSA generally lack merit.

147. The Commission agrees that El Paso Pipeline is obligated to maintain physical facilities sufficient to make 3,290 MMcf/d of capacity available to its California delivery points. However, the ability of El Paso Pipeline to make a specified volume of physical capacity available does not mean that that amount of capacity is reserved for the exclusive use of the California markets. As the Commission stated above, it held in the July 9, 2003 Order in the Capacity Allocation Proceeding that a pipeline's service obligation is defined by its contracts with its shippers. As the contracts are amended or expire, the service obligation changes accordingly, and the capacity subject to an expiring contract becomes available for sale to any of El Paso Pipeline's customers unless a shipper with an expiring contract exercises a right of first refusal.[79]

148. The Commission also made it clear in the July 9, 2003 Order in the Capacity Allocation Proceeding that the amount of capacity to be used as the starting point in the initial allocation is 5,400 MMcf/d, including the capacity to be added by the Power-Up Project, which the Commission authorized in the June 4, 2003 Order in Docket No. CP03-1-000. The Commission also stated in the July 9, 2003 Order in the Capacity Allocation Proceeding that certain issues had been resolved in the Power-Up Project

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[78]As the likely capacity reservation will be the difference between the sum of other firm contracts to California and 3,290 MMcf/d, and the sum can change with the addition or deletion of contracts or the changing of primary delivery points under existing contracts, Part 284 provides El Paso Pipeline and the Settling Parties with the certificate and pre-granted abandonment authority to reflect these changes.

[79]El Paso Natural Gas Co., 104 FERC ¶ 61,045, at PP 132, 133, 141, 149 (2003).

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order, specifically, the need for the project and its consistency with the Commission's Pricing Policy Statement, including issues of subsidization, alternatives, and cost recovery.[80] Moreover, the Commission affirmed that El Paso Pipeline's claim of 4,300 MMcf/d of west-flow capacity is consistent with the evidence in the Capacity Allocation Proceeding.[81] For these reasons, the Commission accepts the condition stated in section 5.1.1 of the JSA that El Paso Pipeline must be able to place into service the Power-Up Project.

149. ACC challenges the provision in the JSA that would allow Settling Parties to oppose allowing non-California shippers to acquire any of the 3,290 MMcf/d of capacity. However, this too has been resolved in the Capacity Allocation Proceeding, and the Commission does not intend its acceptance of this provision in the JSA to alter its resolution of capacity allocation and delivery point issues in the Capacity Allocation Proceeding.

150. Consistent with the discussion above rejecting the dual firm primary delivery point proposal, the Commission rejects the condition set out in Section 5.1.2. of the JSA that El Paso Pipeline must be granted authority to implement dual primary firm delivery point rights. Similarly, the Commission rejects the condition set out in Section 5.2 that would excuse El Paso Pipeline from making 3,290 MMcf/d of capacity available to California if shippers utilize dual primary delivery points to deliver to non-California delivery points. The JSA must be modified accordingly.

151. As also discussed above, the Commission is accepting the proposed clarifications to the Block II recall provisions; therefore, the Commission accepts the condition stated in Section 5.1.3 of the JSA relating to those provisions.

152. Indicated Shippers question the intent of the statement in Section 5.3 that El Paso Pipeline may not add "new firm incremental load" to its system that would prevent it from making available or scheduling to its California delivery points 3,290 MMcf/d of firm primary capacity. This language must be interpreted in the context of the regulatory framework in which it operates. As the Commission pointed out above, a pipeline's firm service obligation is established in Section 284.7(a)(3) of the Commission's regulations. Section 5.3 of the JSA cannot be interpreted to be inconsistent with that obligation. El

[80] Id. at P 147, citing 103 FERC ¶ 61,280, at PP 20-26, 34-36, 41-45.

[81] Id. at P 145 n.138.

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Paso Pipeline must not commit to any additional new firm service unless it has available capacity that is not subject to existing firm contracts or other firm obligations.

153. Section 5.4 provides that the Settlement is not intended to preclude, restrict, or inhibit shipper choices in any manner; rather it is intended to broaden shipper choices by, inter alia, eliminating contractual restraints on the delivery of gas to the California border. The Commission finds no fault with this expression of the Settling Parties' intent, but emphasizes that it cannot be applied to alter Commission action in the Capacity Allocation Proceeding or other proceedings involving El Paso Pipeline.

154. Section 6.4 provides that the California Settling Parties will not object to the recovery in El Paso Pipeline's rates in its next rate case of the costs reasonably incurred by the pipeline in connection with the increase of its physical capacity to California, but it acknowledges that this capacity will be available to serve both California and EOC Markets. The Commission accepts this provision, as it leaves the California Settling Parties free to challenge the reasonableness, as well as the allocation, of the costs, and in any event, it purports to bind only the California Settling Parties.[82] Additionally, the Commission will not prohibit El Paso Pipeline from proposing a different rate design allocation methodology in its next rate case, nor will the Commission require the pipeline to file alternative rate sheets if it does propose a new methodology. At the time El Paso Pipeline files its next rate case, all parties will have the opportunity to raise their objections in light of circumstances existing at that time.

155. In the June 4, 2003 Order issuing the certificate for the Power-Up Project, the Commission addressed timing of the phases of the construction. Phase I is scheduled to be completed by February 2004, Phase II is to be completed by April 2004, and Phase III is to be completed by April 1, 2005. On October 28, 2003, El Paso Pipeline filed in Docket No. CP03-1-000 a notification that it will proceed with the construction of Phase

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[82]In the June 4, 2003 order granting El Paso Pipeline certificate authority to construct the project, the Commission found that roll-in of the costs of the project is justified, absent changed circumstances, although the Commission emphasized that, as with any rate determination in a certificate proceeding, parties may raise issues such as whether the facilities are used and useful or prudent in the rate case proceeding in which El Paso Pipeline seeks to roll in the project's costs. The Commission also stated that, because the costs will be rolled into El Paso Pipeline's rates, all customers will pay for the capacity. El Paso Natural Gas Co., 103 FERC ¶ 61,280, at PP 40-45 (2003).

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III. El Paso Pipeline acknowledged the existence of market demand to support the project. Accordingly, the Commission finds that Section 6.2 of the JSA is acceptable.[83]

6. Proceedings Resolved by the Settlement and Parties Bound by the Settlement

156. APX states that, in Docket No. EL00-95-45, et al., the Commission is determining refunds owed as a result of the flawed California spot electricity market. APX fears that El Paso Merchant may assert that the "claims and issues" in the proposed Settlement in Docket Nos. RP00-241-000, et al., are "related to" the California refund proceeding in EL00-95-45, et al.

157. APX asks that the Settling Parties specify each Commission or other proceeding they intend to resolve by the Settlement, and particularly, whether the Settlement is intended to release El Paso Merchant from claims in Docket No. EL00-95-45, et al. In the alternative, APX asks the Commission to clarify that, because APX is not a party to the Settlement, neither the Settlement nor any Commission order on the Settlement will limit the right of APX to recover any refund amounts it may be owed by El Paso Merchant.

158. Duke also has expressed concern that the Settlement, in particular the MSA, may duplicate a remedy in the California electricity refund proceeding. Duke states that it intends to file in Docket No. EL00-95-45, et al., a motion to lodge the MSA and associated documents so that parties can comment on the implementation of the compensatory mechanism in the MSA as it may affect that proceeding.

159. As the Commission has stated repeatedly throughout this order, its approval of the JSA, as modified, resolves only the complaint proceeding in Docket Nos. RP00-241-000, RP00-241-006, and RP00-241-008. Neither the Commission's actions here nor the agreements among the Settling Parties reviewed along with the JSA can be deemed to resolve any issue pending in any other proceeding before the Commission, in particular the proceedings in Docket No. EL00-95-45, et al. Likewise, the Commission's actions in approving the JSA, as modified, cannot be used to foreclose in any manner the rights of non-settling parties to assert their positions in Docket No. EL00-95-45, et al., or other proceedings.

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[83] See Order Denying Rehearing and Granting Clarification, Docket No. CP03-1-001, issued contemporaneously with the issuance of this order.

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7. Waiver of Section 28.9(d) of El Paso Pipeline's Tariff

160. Article 9 of the JSA states that, to the extent that El Paso Merchant does not use any of its mainline capacity on El Paso Pipeline on a given day to fulfill its Settlement obligations or other obligations existing at the time of the JSA, it must not unreasonably delay posting such unused capacity for release. The Settling Parties request, in Article 9 of the JSA, that the Commission waive Section 28.9(d) of El Paso Pipeline's tariff to the extent necessary to enable El Paso Merchant to release any capacity it has acquired in the secondary market. Section 28.9(d) of the tariff prohibits the re-release of capacity acquired on a volumetric reservation charge basis.

161. The initial complaint in this proceeding alleged the withholding of capacity by El Paso Pipeline and its marketing affiliate. In an effort to resolve the parties' concerns about efficient utilization of unused capacity held by the affiliate, Settling Parties have agreed to provide for the release of capacity held by El Paso Pipeline's affiliates, whether on a monthly demand basis or a volumetric basis. Settling Parties contend this will ensure complete openness and accountability by the affiliate. None of the comments in response to the Settlement challenged this request. Because of the nature of the original complaint and the long evidentiary process necessary to determine withholding by an affiliate, the Commission will allow waiver of Section 28.9(d) of El Paso Pipeline's tariff for the five-year term of the Settlement to facilitate the release of El Paso Merchant's capacity when it is not needed, which will alleviate any concern relating to capacity withholding by El Paso Pipeline or its affiliates.

The Commission orders:

(A) The Commission accepts the JSA, as modified in accordance with the discussion in the body of this order.

(B) The Commission dismisses the complaint and terminates the proceedings in Docket Nos. RP00-241-000, RP00-241-006, and RP00-241-008, and the Commission also vacates the Phase I ID and the Phase II ID.

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(C) The Commission grants waiver of Section 28.9(d) of El Paso Pipeline's tariff to permit re-release of El Paso Merchant's capacity acquired on a volumetric reservation charge basis during the term of the Settlement, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

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APPENDIX A

SUMMARY OF PROCEDURAL HISTORY

On April 4, 2000, CPUC filed its complaint pursuant to NGA Section 5.[84] The complaint asserted, inter alia, that the El Paso Contracts for approximately 1,220 MMcf/d of firm capacity to California raised issues of possible affiliate abuse, of anti-competitive impact on the delivered price of gas and the wholesale electric market in California, and of the effect of restrictions on the Block II recall rights established in the El Paso Pipeline 1996 Settlement. In part, CPUC asserted that marketers seeking portions of the capacity were unsuccessful because El Paso Merchant significantly outbid the other parties, offering $38.5 million for all of the capacity. CPUC also asked the Commission to terminate the El Paso Contracts or to require El Paso Merchant to release on a short-term basis any unused firm transportation rights under those contracts to replacement shippers offering a higher rate than El Paso Merchant was obligated to pay El Paso Pipeline.

On June 28, 2000, the Commission issued an Order on Complaint Requiring Response to Data Requests (June 28, 2000 order).[85] In that order, the Commission granted in part CPUC's discovery requests and also required El Paso Pipeline and El Paso Merchant to provide additional information to the Commission and CPUC. On July 28, 2000, El Paso Merchant filed a request for rehearing of the June 28, 2000 order.

On August 31, 2000, CPUC filed a motion for summary disposition urging the Commission to abrogate the El Paso Contracts. Additionally, CPUC asked the Commission to prohibit El Paso Pipeline from tying together Block I, Block II, and Block III capacity in a "total package" arrangement in subsequent open seasons or prearranged agreements and to prohibit El Paso Merchant or any other El Paso Pipeline affiliate from bidding for or subscribing to the Block I, Block II, or Block III capacity.

On August 31, 2000, CPUC also filed a motion for a protective order, asserting that other parties should be given access to the information provided to CPUC pursuant to the June 28, 2000 Order. On September 15, 2000, the Commission issued the requested

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[84] 15 U.S.C. ' 717d (1994).

[85] Public Utilities Commission of the State of California v. El Paso Natural Gas Co., 91 FERC & 61,312 (2000).

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protective order (September 15, 2000 Protective Order).[86] On September 22, 2000, El Paso Merchant filed a request for rehearing of the September 15, 2000 Protective Order.

On December 7, 2000, Edison filed a motion for expedited consideration and for immediate relief. Edison asked the Commission to grant immediately CPUC's motion for summary disposition or, in the alternative, to require El Paso Merchant to comply with the September 15, 2000 Protective Order.

In an order issued January 10, 2001, the Commission denied the requests for rehearing of the June 28, 2000 Order and the September 15, 2000 Protective Order and required El Paso Merchant to provide Protected Materials to parties that executed the Protective Order and appropriate Non-Disclosure Certificates (January 10, 2001 Order).[87] The January 10, 2001 Order also permitted parties receiving the protected materials to file additional comments based on their examination of the protected materials.

On March 28, 2001, the Commission issued the Order Denying Motion for Summary Disposition, Dismissing Complaint in Part, and Setting It for Hearing in Part (March 28, 2001 Order).[88] In that order, the Commission found, inter alia, that El Paso Pipeline and El Paso Merchant did not violate the Commission's Affiliate Standards in negotiating and entering into the El Paso Contracts. The Commission also concluded that El Paso Pipeline's open season process was not skewed to favor a bid by El Paso Merchant and that El Paso Merchant did not possess information regarding a discount that was unavailable to other bidders. However, the Commission set for hearing the question of whether El Paso Pipeline and/or El Paso Merchant had market power, and if so, exercised it to drive up the price of natural gas at the California border.

CPUC, El Paso Pipeline, El Paso Merchant, and PG&E (jointly with Edison) filed requests for rehearing of the March 28, 2001 Order. In addition, on May 31, 2001, the Chief ALJ issued a report to the Commission seeking guidance with respect to the scope of the hearing on the market power issue. The Chief ALJ also asked the Commission to clarify whether its finding in the March 28, 2001 Order that El Paso Pipeline and El Paso

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[86]Public Utilities Commission of the State of California v. El Paso Natural Gas Co., 92 FERC & 61,225 (2000).

[87]Public Utilities Commission of the State of California v. El Paso Natural Gas Co., 94 FERC & 61,021 (2001).

[88]Public Utilities Commission of the State of California v. El Paso Natural Gas Co., 94 FERC & 61,338 (2001).

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Merchant had not violated the Affiliate Standards was based solely on the record before the Commission at the time of the March 28, 2001 Order or whether the Commission intended that he compile a more complete record on the question of possible violations of the Affiliate Standards and make findings as to whether any such violation, if it existed, contributed to the alleged exercise of market power by El Paso Pipeline and El Paso Merchant.

In the Order on Rehearing issued June 11, 2001, the Commission granted in part and denied in part the requests for rehearing of the March 28, 2001 Order filed by CPUC, PG&E, and Edison and set for hearing the allegations of affiliate abuse and violations of the Affiliate Standards, pointing out that the Commission now believed that the allegations raised factual issues that would be resolved best in an evidentiary hearing. The Commission also denied the request for rehearing of the March 28, 2001 Order filed by El Paso Pipeline and El Paso Merchant (June 11, 2001 Order).[89]

El Paso Pipeline and El Paso Merchant sought rehearing of the June 11, 2001 Order. On August 10, 2001, the Commission issued a Notice of Denial of Rehearing.

The Phase I hearing in this proceeding commenced April 3, 2001, and concluded August 6, 2001. On October 9, 2001, the Chief ALJ issued the Phase I ID, finding that El Paso Corporation, El Paso Pipeline, El Paso Merchant, and their affiliate, Mojave, violated Standards of Conduct F and G. The Chief ALJ also found that, while El Paso Pipeline and El Paso Merchant had the ability to exercise market power during the term of the El Paso Contracts, the record was not clear that they had done so.[90]

On October 30, 2001, MOE filed comments asserting that its examination of the public portion of the record in this proceeding caused it to question whether El Paso Pipeline might have violated Section 284.9 of the Commission's regulations[91] by failing to make IT service available during the period from November 2000 through March 2001.

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[89]Public Utilities Commission of the State of California v. El Paso Natural Gas Co., 95 FERC & 61,368 (2001).

[90]Public Utilities Commission of the State of California v. El Paso Natural Gas Co., 97 FERC & 63,004 (2001).

[91]18 C.F.R. ' 284.9 (2003).

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On November 1, 2001, El Paso Pipeline and El Paso Merchant filed a motion to strike MOE's comments, arguing that the filing constituted an abuse of process and violated the due process rights of El Paso Pipeline and El Paso Merchant. PG&E and Edison opposed the motion to strike, urging the Commission to provide for additional investigation into the question of whether El Paso Pipeline made all of its capacity available during the period identified by MOE.

On December 27, 2001, the Commission issued the Order Denying Motion to Strike and Remanding Proceeding for Limited Supplemental Hearing (December 27, 2001 Order).[92] The Commission remanded the proceeding to the Chief ALJ for the purpose of reopening the record to conduct a further hearing on the limited issue of whether, during the period from November 1, 2000, through March 31, 2001, El Paso Pipeline made all of its capacity available at its California delivery points.

On January 28, 2002, El Paso Pipeline and El Paso Merchant filed a request for rehearing of the December 27, 2001 Order. They argued that the Commission acted arbitrarily and capriciously, abused its discretion, and acted contrary to its own rules and the evidence by denying the motion to strike MOE's comments and by remanding the proceeding to the Chief ALJ for the purpose of reopening the record for the limited purpose described above. On February 27, 2002, the Commission issued an Order Denying Rehearing (February 27, 2002 Order).[93]

On March 29, 2002, CPUC, PG&E, and Edison filed in Docket No. RP00-241-008 a joint motion for reconsideration or rehearing of the February 27, 2002 Order. They asked the Commission to reconsider whether the El Paso Contracts should have been filed for Commission approval under NGA Section 4. They argued that the issue is important because it affects the scope of remedies available to the Commission, as well as the burden of proof. However, the joint movants suggested that the Commission defer action on their request for reconsideration or rehearing until it issued an order on review of the Phase I and Phase II IDs. El Paso Pipeline and El Paso Merchant filed an answer asking the Commission to reject the request for reconsideration or rehearing, contending that it was an impermissible request for rehearing of an order denying rehearing and that no new evidence presented at the hearing warranted reopening the record on this issue.

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[92]Public Utilities Commission of the State of California v. El Paso Natural Gas Co., 97 FERC & 61,380 (2001).

[93]Public Utilities Commission of the State of California v. El Paso Natural Gas Co., 98 FERC & 61,210 (2002).

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CPUC, PG&E, and Edison filed a response, contending that the Commission has the ability to correct prior legal error and that recent Commission precedent has clarified what constitutes a "material deviation" that would obligate a pipeline to file contracts under Section 4.

The limited Phase II hearing commenced March 21, 2002, and concluded April 10, 2002. The Chief ALJ issued the Phase II ID on September 23, 2002. In that decision, the Chief ALJ affirmed his previous findings of violations of the Affiliate Standards and stated that no evidence had been presented in the Phase II hearing that would cause him to change his ruling in the Phase I ID that El Paso Merchant had not been shown to have exercised market power. However, the Chief ALJ found that, during the period at issue in the Phase II hearing (November 1, 2000, through March 31, 2001), El Paso Pipeline failed to schedule all of the capacity that it posted and also failed to post all of the capacity that it had available. In addition, the Chief ALJ recommended that the Commission institute penalty procedures, both for violations of the Affiliate Standards and for the unlawful exercise of market power by El Paso Pipeline.

Following issuance of both IDs, the parties filed motions seeking oral argument before the Commission. The Commission granted the motions, and on December 2, 2002, the Commission heard oral argument in this matter.

Prior to the Commission's consideration of an order on the IDs, the Settling Parties filed a motion asking the Commission to defer action so that they could file a settlement to resolve the proceeding. The Settlement addressed in the body of this order is the culmination of their negotiations.

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APPENDIX B

SUMMARY OF APPLICABLE PROVISIONS OF STIPULATED JUDGMENT

The Settling Parties ask the court to approve a Special Master under Federal Rule of Civil Procedure 53 for a term of five years commencing upon the effective date of the Stipulated Judgment.

If the Settling Parties cannot agree upon a mutually acceptable Special Master, they will submit for the court's consideration a list of qualified, experienced, neutral individuals with no conflicts of interest. The Stipulated Judgment establishes the nomination and selection process to be followed, removal of the Special Master, and replacement of the Special Master if necessary. The Stipulated Judgment also allows the Special Master to hire additional qualified advisors to assist him or her. El Paso Pipeline will pay the expenses and fees of the Special Master, but each Settling Party will bear the expense of its participation in any proceedings before the Special Master.

The Settling Parties intend for the Special Master to have the authority to monitor and enforce specified commitments under the JSA, subject to the acknowledged principle that the Special Master will have no jurisdiction over matters within the Commission's jurisdiction.[1] The specified commitments are as follows:

A. El Paso Pipeline's commitment under Section 5.1 of the JSA (and subject to the conditions set forth in Sections 5.1.1, 5.1.2, and 5.1.3) to make 3,290 MMcf/d of firm primary capacity available to its California delivery points, and its commitment under Section 5.3 not to add new incremental load to its system that would prevent it from making that amount available. However, El Paso Pipeline will not be deemed to have violated its obligations in JSA Article 5 if it is unable to make available or schedule that amount due to factors beyond its control, including the factors listed in Section 5.2.

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[1] Footnote 3 of the Stipulated Judgment provides in part as follows:

To the extent that there is any amgiguity and/or inconsistency between the provisions summarized ... [in this section] and the actual language of the Joint Settlement Agreement, the Settling Parties hereby agree that the language of the Joint Settlement Agreement shall control.

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B. El Paso Pipeline's commitments under Section 6.2 of the JSA to construct the Power-Up Project with in-service dates proposed in its certificate application in Docket No. CP03-1-000, assuming El Paso Pipeline receives necessary approvals, and to use all commercially reasonable efforts to obtain such approvals on a timely basis.

C. El Paso Pipeline's commitments under Sections 7.1 and 8.2 of the JSA to obtain the tariff authority outlined therein.

D. El Paso Pipeline's commitment under Section 7.1 of the JSA to notify the California Parties promptly upon agreeing to a shipper's request to move its primary delivery point from a California point to a non-California point.

E. El Paso Pipeline's commitments under Article 9 of the JSA prohibiting affiliates from entering into new contracts to hold capacity on El Paso Pipeline's system except in specified circumstances, El Paso Merchant's obligation not to delay unreasonably post unused capacity. The existing capacity held by El Paso Merchant as of the date of the JSA is (1) approximately 37 MMcf/d of firm capacity, which it acquired directly from El Paso Pipeline, and which has primarily California delivery rights, (2) approximately 156 MMc/d of primary firm capacity to Ehrenberg which it acquired from SoCalGas under a temporary release, and (3) approximately 92 MMcf/d of capacity on the Willcox lateral that does not include any mainline rights.

F. California Parties' commitment in Section 6.4 of the JSA not to object to recovery in El Paso Pipeline's rates in its next rate case of the costs reasonably incurred by El Paso Pipeline to increase the physical California delivery capacity from 3,290 MMcf/d to 3,840 MMcf/d.

G. El Paso Pipeline's agreement that, in its next Section 4 rate case, its proposed rates will be based on a miles-of-haul approach for all costs, including Line 2000 Conversion and Power-Up Project costs, consistent with the position advocated by Edison in Docket No. RP95-363-002. The California Parties are not prohibited from objecting to the allocation of costs reasonable incurred in the construction of the Power-Up Project and the Line 2000 Conversion Project, although they may not propose a cost allocation, rate design,

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or other methodology that would preclude El Paso Pipeline from recovering its costs reasonably incurred in those projects.

H. Requests by a majority of California Parties for data addressing compliance under the JSA, although they may not request such data more than four times per year.

The Stipulated Judgment describes in detail the procedures to be followed in seeking Special Master proceedings.

A. Any report of the Special Master is subject to review by the court. If objections are not filed, the Special Master's report becomes effective.

B. Settling Parties agree that the Special Master is to be the exclusive vehicle for resolution of the commitments described above, without prejudice to other claims or remedies that the Settling Parties may have in other forums other than any claim or remedy for a breach or breaches of the Stipulated Judgment.

C. To the extent there is a dispute as to whether any matter submitted to the Special Master is subject to the Commission's jurisdiction, the jurisdictional issue is to be submitted to the Commission for resolution. The motion before the Special Master giving rise to the jurisdictional dispute is to be held in abeyance for 60 days pending Commission resolution of the matter. Any Settling Party may appeal the Commission's determination of a jurisdictional dispute concerning the Special Master to the Court of Appeals for the District of Columbia Circuit (Court of Appeals).

(1) Should the Commission and the Court of Appeals determine within 60 days that the Commission does not have jurisdiction, proceedings before the Special Master will resume.

(2) Should the Commission determine within 60 days that it does not have jurisdiction, but no appeal is taken, proceedings before the Special Master will resume.

(3) If the Commission determines that it does not have jurisdiction within the 60-day period, but the Court of Appeals has not had the opportunity to review the Commission's determination, the

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proceedings before the Special Master will resume, subject to the outcome of the Court of Appeals' review of the jurisdictional issue.

(4) If the Commission does not resolve the jurisdiction within 60 days, proceedings before the Special Master will resume, although resumption of the Special Master proceedings will not act to divest the Commission or the Court of Appeals of the authority to decide the jurisdictional dispute, and the Special Master's proceeding will be subject to the determination of the Commission or the Court of Appeals.

(5) El Paso Pipeline must comply with orders issued by the Special Master after proceedings resume before him/her, although the Special Master's orders are subject to the outcome of any Commission or Court of Appeals proceedings.

D. Any findings, recommendations, or decisions by the Special Master may be submitted or admitted in any subsequent proceeding before the Special Master. The parties also may use the Special Master's determinations or those of the Court of Appeals as evidence in Commission proceedings, but they also agree that any such determinations to not have any preclusive effect or constitute binding precedent in such proceedings.