

132 FERC ¶ 61,139  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
John R. Norris, and Cheryl A. LaFleur.

El Paso Natural Gas Company

Docket No. RP05-422-023

ORDER ON REHEARING

(Issued August 17, 2010)

1. On October 1, 2007, Phelps Dodge Corporation (Phelps Dodge)<sup>1</sup> filed a request for rehearing and clarification of the Commission's August 31, 2007 order, which approved an Offer of Settlement filed by El Paso Natural Gas Company (El Paso) on December 6, 2006.<sup>2</sup> As discussed below, the Commission denies Phelps Dodge's request for rehearing.

**I. Background**

2. Phelps Dodge's rehearing request raises issues that relate to events on El Paso's system dating back almost twenty years. Below the Commission provides a summary of these major events, which include two settlements entered into by El Paso and its shippers, two complaint proceedings filed by El Paso shippers to remedy capacity shortfall problems on the system in 2000-2001, and appellate review of the Commission's actions in these proceedings. A summary of these prior proceedings and settlements will be helpful in addressing Phelps Dodge's request for rehearing.

**A. 1990 Settlement**

3. In 1990, El Paso entered into a settlement (1990 Settlement) with its customers that, among other things, implemented contract conversions from bundled sales service to

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<sup>1</sup> Phelps Dodge is a major producer of copper, with mines and smelters located in Arizona and New Mexico and a refinery located in Texas. In order to satisfy the natural gas requirements of its facilities, Phelps Dodge receives firm transportation service under El Paso's Rate Schedule FT-1.

<sup>2</sup> *El Paso Natural Gas Co.*, 120 FERC ¶ 61,208 (2007) (August 31 Order).

transportation service. During this time period, El Paso served its firm customers under two types of contracts, full requirements contracts and contract demand contracts. Contract demand contracts provided specific delivery rights up to a specified quantity limitation at delivery points designated in the contracts. Full requirements contracts provided that El Paso must deliver the customer's full gas requirements each day. There was *no limit* on the amount of gas the full requirements shippers could require El Paso to transport, other than the capacity of their delivery points. The contract demand contracts on El Paso were held mainly by California customers, while the full requirements contracts were held mainly by customers located east of California.

4. The 1990 Settlement specifically provided for the continuation of full requirements service on the El Paso system. The 1990 Settlement also provided for *pro rata* allocations of capacity among firm shippers. In addition, section 3.6 of the 1990 Settlement, which survived the term of the settlement, stated that "El Paso shall not be required to construct any facilities that are not economically justifiable."

#### **B. 1996 Settlement**

5. In 1996, El Paso entered into another settlement that set the rates and terms and conditions of service for a ten-year period (1996 Settlement). At the time the Commission approved the 1996 Settlement,<sup>3</sup> there was substantial excess capacity on El Paso's system. Following the restructuring and unbundling of the natural gas industry in the 1990's, the California local distribution company (LDC) customers turned back their rights to capacity on El Paso at the request of the Public Utilities Commission of the State of California (CPUC). As a result, approximately 35 percent of the capacity on the El Paso system became unsubscribed. This excess capacity threatened to increase the rates of the remaining El Paso customers. The 1996 Settlement resolved this issue through an agreed-upon sharing of both the risk of the unsubscribed capacity and the revenues when El Paso resold the turnback capacity.

6. The 1996 Settlement also provided rate certainty for certain shippers in the form of a rate cap. Specifically, Article 11.2(a) of the 1996 Settlement provided that rates for capacity then under contract by eligible shippers would be capped, subject to inflation, and that the rate cap would continue to apply until the termination of shippers' transportation service agreements (TSA).<sup>4</sup> Article 11.2(b) provided that even if eligible

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<sup>3</sup> *El Paso Natural Gas Co.*, 79 FERC ¶ 61,028 (1997), *reh'g denied*, 80 FERC ¶ 61,084 (1997).

<sup>4</sup> Sections (a) and (b) of Article 11.2 provide:

11.2 Firm TSAs In Effect on December 31, 1995, That Remain in Effect Beyond January 1, 2006. This paragraph

(continued...)

shippers entered into new TSAs in the future, their rates would never include costs attributable to capacity, up to the level in existence on the El Paso system at the time of the 1996 Settlement, that becomes unsubscribed or is subscribed at less than the maximum applicable tariff rate.

**C. Capacity Allocation Proceeding**

7. During the 1996 Settlement period, circumstances on the El Paso system changed dramatically. Available capacity on El Paso went from an excess to a constrained

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11.2 applies to any firm Shipper with a TSA that was in effect on December 31, 1995, and that remains in effect, in its present form or as amended, on January 1, 2006, but only for the period that such Shipper has not terminated such TSA. El Paso agrees with respect to such Shippers that, in all rate proceedings following the term of this Stipulation and Agreement:

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

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

condition. Several factors contributed to this turn of events, including that the full requirements shippers' load grew substantially to amounts far in excess of shippers' billing determinants. As a result, in 2000 and 2001, El Paso experienced significant capacity allocation problems. Firm service on the system became unreliable because El Paso routinely reduced nominations for firm service through *pro rata* allocations, as set forth in its tariff and the 1990 Settlement. Consequently, shippers filed complaints against El Paso in two separate cases – the Capacity Allocation Proceeding and the CPUC Complaint Case – arguing that capacity allocation procedures on El Paso were unjust and unreasonable and asking the Commission to provide a remedy for these problems.

8. On May 31, 2002, the Commission issued an order agreeing with the complainants that the quality of firm service on the El Paso system had deteriorated and would continue to deteriorate without Commission action.<sup>5</sup> The Commission found that the current allocation methodology on El Paso, with *pro rata* allocations of firm service when El Paso had insufficient capacity to serve all of its firm customers, was not just and reasonable or in the public interest. Accordingly, the Commission established a framework for resolving the complicated capacity allocation problems that disrupted and degraded firm service on El Paso. Specifically, the Commission directed El Paso to convert its full requirements contracts to contract demand contracts with specific demand limits up to El Paso's available capacity, so that service to one firm shipper would not adversely affect firm service to others.<sup>6</sup>

9. On September 20, 2002, the Commission issued an order setting forth the method for converting the full requirements contracts.<sup>7</sup> After reserving the amount of capacity necessary to meet the needs of the existing contract demand shippers, the Commission allocated to the former full requirements shippers, as part of their new contract demands, all of the remaining available capacity. The Commission also allocated to the former full

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<sup>5</sup> *El Paso Natural Gas Co.*, 99 FERC ¶ 61,244 (2002) (May 31, 2002 Order), *reh'g*, 100 FERC ¶ 61,285 (2002) (September 20, 2002 Order), *reh'g*, 104 FERC ¶ 61,045 (2003) (July 9, 2003 Order), *reh'g*, 106 FERC ¶ 61,233 (2004) (March 8, 2004 Order), *aff'd*, *Arizona Corporation Commission v. FERC*, 397 F.3d 952 (D.C. Cir. 2005) (collectively the Capacity Allocation Proceeding).

<sup>6</sup> Phelps Dodge is one of the shippers whose contract was converted from full requirements to contract demand in the Capacity Allocation Proceeding.

<sup>7</sup> September 20, 2002 Order at P 21-34.

requirements shippers capacity related to the Line 2000 and Power-Up expansion projects on the El Paso system (Expansion Capacity).<sup>8</sup>

10. The Commission found that to convert full requirements service to contract demand service, it was necessary and in the public interest to modify portions of the 1996 Settlement. However, the Commission also found that the 1996 Settlement should only be modified to the extent necessary to restore reliable firm service on El Paso, and that the remainder of the 1996 Settlement should remain in effect until its expiration.<sup>9</sup> The Commission did not specifically address Article 11.2 of the 1996 Settlement.

11. In the Capacity Allocation Proceeding, Phelps Dodge and others claimed that El Paso withheld capacity in 2000-2001, thereby contributing to the capacity problems on the system at that time.<sup>10</sup> The Commission rejected various iterations of this argument in several different orders throughout the Capacity Allocation Proceeding.<sup>11</sup>

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<sup>8</sup> In the Capacity Allocation Proceeding, several complaining shippers, including Phelps Dodge, asked the Commission to order El Paso to expand its system and to use that expanded capacity to satisfy its existing contractual obligations. The Commission explained that it does not have authority to order El Paso to expand its system to address the capacity shortfall problem. The Commission stated that the decision whether to build additional facilities is a business decision left to the pipeline in the first instance under the Natural Gas Act. The Commission further stated that under the 1990 Settlement, El Paso was only obligated to construct facilities if it was “economically justifiable.” The Commission stated that the construction of additional capacity to serve the full requirements customers at no additional demand charge was not economically justifiable for El Paso. *See* May 31, 2002 Order, 99 FERC at 62,003 n.36, 62,011-12; July 9, 2003 Order at P 99-106. However, the Commission stated that El Paso had recently expanded capacity on its system with the Line 2000 Project, and had made a commitment to further expand its system with the Power-Up Project. The Commission found that the additional capacity related to these projects was necessary for El Paso to meet the needs of its existing customers and directed El Paso to include the Expansion Capacity in its initial allocation of capacity to the newly-converted full requirements shippers. *See* July 9, 2003 Order at P 145, 149.

<sup>9</sup> *Id.* at 62,018.

<sup>10</sup> Throughout the order, the Commission will refer to this argument by Phelps Dodge as “the capacity withholding issue” or “the capacity withholding claims.”

<sup>11</sup> May 31, 2002 Order, 99 FERC at 62,003-04; September 20, 2002 Order, 100 FERC ¶ 61,285 at P 14; July 9, 2003 Order, 104 FERC ¶ 61,045 at P 54 n.4, 61,

(continued...)

12. On February 11, 2005, the United States Court of Appeals for the District of Columbia Circuit (Court) affirmed the Commission's decision in the Capacity Allocation Proceeding in *ACC v. FERC I*.<sup>12</sup> In doing so, the Court addressed Phelps Dodge's capacity withholding claims. The Court stated:

Nor do petitioners persuade us that El Paso improperly withheld capacity. FERC observed, and petitioners did not disprove, that El Paso operated its "dynamic" pipelines at reasonable levels of capacity.<sup>13</sup>

**D. CPUC Complaint Case**

13. After the issuance of the July 9, 2003 Order in the Capacity Allocation Proceeding, the Commission approved a joint settlement agreement in Docket No. RP00-241-000 ending the CPUC Complaint Case (CPUC Settlement).<sup>14</sup> In approving the CPUC Settlement, the Commission rejected the request of Phelps Dodge and other former full requirements shippers to sever them from the CPUC Settlement so they could litigate, among other things, the issue of whether El Paso's actions and inactions caused the excessive curtailments on the system in 2000-2001.<sup>15</sup> The Commission denied their request, explaining on rehearing that it constituted an impermissible attempt to re-litigate the same capacity withholding claims that Phelps Dodge and the other former full requirements shippers had previously advanced, and that the Commission had rejected on

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66-80, 99-108, 110-112, 126-27, 141, 158; March 8, 2004 Order, 106 FERC ¶ 61,233 at P 61-64.

<sup>12</sup> *Arizona Corp. Comm'n v. FERC*, 397 F.3d 952 (D.C. Cir. 2005) (*ACC v. FERC I*).

<sup>13</sup> *Id.* at 955 (citation omitted).

<sup>14</sup> *Pub. Util. Com'n of the State of Cal. v. El Paso Natural Gas Co.*, 105 FERC ¶ 61,201 (2003), *order on reh'g*, 106 FERC ¶ 61,315 (2004). At the time the Commission approved the CPUC Settlement, the Administrative Law Judge (ALJ) had issued initial decisions in each of the two phases of the CPUC Complaint Case. *See Pub. Util. Com'n of the State of Cal. v. El Paso Natural Gas Co.*, 97 FERC ¶ 63,004 (2001); *Pub. Util. Com'n of the State of Cal. v. El Paso Natural Gas Co.*, 100 FERC ¶ 63,041 (2002). However, the Commission had not issued orders on exceptions to these initial decisions.

<sup>15</sup> *Pub. Util. Com'n of Cal. v. El Paso Natural Gas Co.*, 105 FERC ¶ 61,201, at P 7, 54-60 (2003), *order on reh'g*, 106 FERC ¶ 61,315, at P 47-48 (2004).

the merits in the Capacity Allocation Proceeding.<sup>16</sup> The Commission stated that Phelps Dodge and other former full requirements shippers, dissatisfied with the rulings in the Capacity Allocation Proceeding, were trying to convince the Commission to alter in the CPUC Complaint Case its ruling on issues that had been addressed and resolved in the Capacity Allocation Proceeding.<sup>17</sup>

14. Phelps Dodge and other former full requirements customers filed a petition for review with the Court challenging the Commission's orders approving the CPUC Settlement. On October 20, 2005, the Court issued a judgment dismissing the petition for review in *ACC v. FERC II*. In doing so, the Court stated:

[T]hat the petition for review be dismissed without prejudice to the ability of the petitioners to argue in El Paso Natural Gas Company's pending rate proceedings, FERC Docket No. RP05-422-000, that neither the Commission's order in the Capacity Allocation Proceeding... nor the decision of this court in [*ACC v. FERC I*]... precludes the argument that El Paso caused the capacity shortfall in 2000-2001 by exercising market power to withhold capacity.<sup>18</sup>

15. The Court explained that petitioners' chief concern in bringing the case was that if they did not prevail with respect to their non-preclusion argument, then they may be estopped from arguing in the subsequent rate proceeding that El Paso acted to withhold capacity on its pipeline. The Court stated that as a matter of prudence, the issue should not be resolved by the Court unless it arises and is of consequence in the subsequent rate proceeding.<sup>19</sup>

## **II. The Instant Proceeding**

### **A. 2005 Rate Case Filing**

16. On June 30, 2005, El Paso filed a general system-wide rate case (Rate Case Filing) in the instant docket, as required by Article 12 of the 1996 Settlement. The Rate Case

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<sup>16</sup> *Pub. Util. Com'n of Cal. v. El Paso Natural Gas Co., order on reh'g*, 106 FERC ¶ 61,315, at P 14, 47-48 (2004).

<sup>17</sup> *Id.* P 48.

<sup>18</sup> *Arizona Corp. Comm'n v. FERC*, Docket No. 04-1123, at 1 (D.C. Cir. Oct. 20, 2005) (unpublished order) (*ACC v. FERC II*).

<sup>19</sup> *Id.*

Filing proposed a rate increase for existing services, a number of new hourly and daily services, and changes in certain terms and conditions of service, including its penalty structure. The primary tariff sheets filed by El Paso did not include any adjustments to account for Article 11.2 because El Paso argued its obligations under Article 11.2 were fully discharged as a result of the Commission's modification of the 1996 Settlement in the Capacity Allocation Proceeding.<sup>20</sup>

17. Several parties, including Phelps Dodge, filed protests to the Rate Case Filing. Phelps Dodge argued, among other things, that Article 11.2 should continue to apply despite the modifications to the 1996 Settlement in the Capacity Allocation Proceeding.<sup>21</sup> Phelps Dodge further asserted that the Rate Case Filing improperly sought to roll-in to El Paso's rates the cost of building the Expansion Capacity in 2000-2001. Phelps Dodge argued that El Paso, and not its customers, should bear the cost of these facilities because El Paso and its marketing affiliates largely caused the capacity shortfall that necessitated the Expansion Capacity. Phelps Dodge stated it intended to litigate in this proceeding the issue of El Paso's fault with respect to the capacity curtailments in 2000-2001.<sup>22</sup>

#### **B. Suspension Order**

18. On July 29, 2005, the Commission accepted and suspended the primary tariff sheets submitted in the Rate Case Filing, subject to conditions and the outcome of a hearing and technical conference (Suspension Order).<sup>23</sup> Among the issues the Commission set for technical conference was the issue of the continued applicability of Article 11.2 of the 1996 Settlement. In establishing the hearing, the Commission explained that the issues to be litigated are limited to those issues raised by El Paso's filing.<sup>24</sup> The Commission stated that the matter raised by Phelps Dodge in its protest regarding the capacity shortfall on the El Paso system in 2000-2001 is not at issue in this proceeding and should not be addressed at the hearing.<sup>25</sup>

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<sup>20</sup> El Paso's June 30, 2005 Transmittal Letter at 4.

<sup>21</sup> Phelps Dodge's July 12, 2005 Protest and Motion for Leave to Intervene at 8-11.

<sup>22</sup> *Id.* at 6-7.

<sup>23</sup> *El Paso Natural Gas Co.*, 112 FERC ¶ 61,150 (2005) (Suspension Order).

<sup>24</sup> *Id.* P 31.

<sup>25</sup> *Id.* P 31 n.26.

19. Phelps Dodge sought rehearing of the Suspension Order's ruling on the capacity shortfall issue. Phelps Dodge argued that because El Paso sought in its Rate Case Filing to roll-in the costs of the Line 2000 and Power-Up projects, which were undertaken to address the capacity shortfall in 2000-2001, any determination regarding the roll-in of these costs must consider whether El Paso was culpable for the shortfall. Phelps Dodge asserted that the testimony submitted by El Paso in support of the Rate Case Filing relied on a claim that both the Commission and the Court had found that El Paso was not culpable for the 2000-2001 capacity shortfalls. Phelps Dodge argued this assertion by El Paso witness Adams was misplaced because certain decisions on this issue were still on appeal before the Court in *ACC v. FERC II*. Phelps Dodge requested that the Commission reverse on rehearing its decision that culpability regarding the capacity shortfall was not at issue in this proceeding. In the alternative, Phelps Dodge requested that the Commission make its decision regarding the capacity shortfall issue subject to the outcome of *ACC v. FERC II* and provisionally strike the testimony of El Paso witness Adams on the issue.

20. As explained above, the Court issued its decision in *ACC v. FERC II* on October 20, 2005. In response to the issuance of *ACC v. FERC II*, Phelps Dodge filed a motion to supplement its pending request for rehearing of the Suspension Order. Phelps Dodge requested that the Commission reverse the Suspension Order, arguing that in light of *ACC v. FERC II*, evidence on the capacity shortfall issue was improperly excluded from the hearing on the Rate Case Filing. Phelps Dodge argued that the decision in *ACC v. FERC II* rejected the Commission's position that Phelps Dodge was precluded from raising the capacity shortfall issue in this rate proceeding.

21. On July 7, 2006, the Commission denied Phelps Dodge's request for rehearing of the Suspension Order and granted Phelps Dodge's request to strike the testimony of El Paso witness Adams.<sup>26</sup> The Commission fully considered Phelps Dodge's capacity withholding allegations on the merits and found that the issue of whether El Paso withheld capacity during the five-month period from November 2000-March 2001 was irrelevant to whether it was prudent for El Paso to construct the Expansion Capacity or whether the costs of those projects should be afforded rolled-in rate treatment.<sup>27</sup>

### **C. Technical Conference Orders**

22. The Commission held technical conferences on El Paso's Rate Case Filing on September 20-21, 2005 and October 19-20, 2005. At the technical conferences the Commission established procedures granting parties an opportunity to brief the issues

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<sup>26</sup> *El Paso Natural Gas Co.*, 116 FERC ¶ 61,016 (2006) (July 7, 2006 Order).

<sup>27</sup> *Id.* P 35-37.

related to the continued applicability of Article 11.2 of the 1996 Settlement. After the conclusion of the technical conferences, the Commission issued two orders (collectively, Technical Conference Orders). The March 23, 2006 order addressed issues related to the implementation of new services,<sup>28</sup> while the March 20, 2006 order dealt with post-1996 Settlement issues, including Article 11.2.<sup>29</sup>

23. In the March 20, 2006 Order, the Commission determined, among other things, that its actions in the Capacity Allocation Proceeding did not abrogate Article 11.2.<sup>30</sup> The Commission also stated that because Article 11.2(a) applies only to TSAs in effect on December 31, 1995, the rate cap does not apply to newly executed contracts.<sup>31</sup> In addition, the Commission found that the Article 11.2(a) rate cap does not apply to the Expansion Capacity, which the Commission allocated to the former full requirements shippers as part of their new contract demand levels in the Capacity Allocation Proceeding.<sup>32</sup> The Commission explained that with respect to historical contract demand shippers, the rate cap applies to the contract demands under their 1995 TSAs, and, for the former full requirements shippers, the rate cap applies to their current contract demands minus the portion of those contract demands made possible by the Expansion Capacity.<sup>33</sup>

24. With regard to Article 11.2(b), the March 20, 2006 Order affirmed that the rates charged to eligible shippers for any service may not include any costs related to (1) unsubscribed capacity that was part of the El Paso system on December 31, 1995 (1995 Capacity); or (2) any such capacity sold at a rate less than the rate cap.<sup>34</sup> The Commission stated that in determining whether specific capacity was part of El Paso's 1995 system, the Commission will presume the first 4,000 MMcf/d of firm subscribed capacity on El Paso's system is 1995 Capacity.<sup>35</sup>

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<sup>28</sup> *El Paso Natural Gas Co.*, 114 FERC ¶ 61,305 (2006) (March 23, 2006 Order).

<sup>29</sup> *El Paso Natural Gas Co.*, 114 FERC ¶ 61,290 (2006) (March 20, 2006 Order).

<sup>30</sup> *Id.* at P 24-32.

<sup>31</sup> *Id.* P 52.

<sup>32</sup> *Id.* P 68.

<sup>33</sup> *Id.* P 74-86.

<sup>34</sup> *Id.* P 56-63.

<sup>35</sup> The Commission stated that "at the time of the 1996 Settlement, parties agreed that the capacity of the El Paso system was 'slightly more than 4,000 MMcf/d.' Therefore, in determining whether specific capacity was a part of El Paso's 1995 system, (continued...)

25. In the March 20, 2006 Order, the Commission stated that it was establishing general guidelines for the application of Article 11.2, and that it would leave certain details of implementation for the parties to address at the hearing. The Commission stated that within this general framework, parties may address at the hearing issues concerning whether any costs associated with El Paso's 1995 Capacity have been improperly included in the rates of eligible shippers, whether El Paso is entitled to a discount adjustment for any discounted rates, and how to calculate the rates for each shipper applying the guidelines set forth in the March 20, 2006 Order.<sup>36</sup>

26. Several parties, including Phelps Dodge, requested rehearing of the Technical Conference Orders. In its rehearing request, Phelps Dodge argued the Commission should reverse its finding that the Article 11.2(a) rate cap does not apply to Expansion Capacity.<sup>37</sup> In the alternative, Phelps Dodge requested that the Commission modify its decision that the Expansion Capacity should be allocated to the former full requirements shippers. Phelps Dodge also argued the Commission erred in establishing the presumption that the first 4,000 MMcf/d of capacity on the El Paso system is 1995 Capacity.

#### **D. 2006 Settlement**

27. On December 6, 2006, while requests for rehearing of the Technical Conference Orders were pending, El Paso filed a settlement (2006 Settlement) that resolved all issues in the Rate Case Filing set for hearing or technical conference, with limited exceptions. The 2006 Settlement was agreed to by all parties except Phelps Dodge.

28. The 2006 Settlement established "black box" rates for the settling parties for a three-year term, ending December 31, 2008. In addition, the 2006 Settlement, among other things, (1) established the contracts to be capped subject to Article 11.2(a) of the 1996 Settlement; (2) provided that usage rates will increase by \$0.005 effective May 1,

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the Commission will presume the first 4,000 MMcf/d of firm subscribed capacity on the El Paso system is 1995 capacity. Therefore, if El Paso has 4,000 MMcf/d of firm capacity subscribed at the rate cap level or above, there will be a presumption that there is no 1995 stranded or discounted capacity." *Id.* P 60.

<sup>36</sup> *Id.* P 43.

<sup>37</sup> Phelps Dodge's April 19, 2006 Request for Clarification and Rehearing.

2007; and (3) provided that El Paso may make limited NGA section 4 filings to recover certain Pipeline Integrity Program costs (PIP surcharge) during the settlement term.<sup>38</sup>

29. The issues the 2006 Settlement left unresolved were those related to shippers' maximum delivery obligations (MDO) and certain Article 11.2 issues. Although the Technical Conference Orders addressed both issues, the requests for rehearing of the Technical Conference Orders were pending before the Commission when the 2006 Settlement was filed. Plus, the March 20, 2006 Order set certain Article 11.2 implementation issues for hearing. As such, the 2006 Settlement provided that any outstanding issues related to Article 11.2 and MDOs would be resolved by the Commission when it addressed the requests for rehearing of the Technical Conference Orders and that the Commission's resolution of those rehearing requests would not take effect until the end of the three-year settlement period.

30. In its comments in opposition, Phelps Dodge objected to the 2006 Settlement's disposition of Article 11.2 issues and requested that the Commission reject the 2006 Settlement. Phelps Dodge argued that severing Phelps Dodge for a separate hearing would not be appropriate because the Article 11.2 issues to which it objected implicate the interrelated service rights of a number of settling parties.

31. In the August 31 Order, the Commission approved the Rate Case Settlement for all parties, including Phelps Dodge, with a modification to the standard of review.<sup>39</sup> In approving the 2006 Settlement, the Commission addressed and rejected the concerns raised by Phelps Dodge. The Commission found that none of the objections raised by Phelps Dodge presented genuine issues of material fact and that the 2006 Settlement could be approved under the first and second approaches for approving contested settlements set forth in the *Trailblazer* case.<sup>40</sup>

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<sup>38</sup> Specifically, Article 2.2 stated that El Paso may recover, through a volumetric surcharge, the cost of service of certain capital and related Operation and Maintenance (O&M) expenses associated with the Pipeline Integrity Program, subject to annual cost caps and true-up adjustments.

<sup>39</sup> August 31 Order, 120 FERC ¶ 61,208 (2007).

<sup>40</sup> *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345 (1998), *reh'g*, 87 FERC ¶ 61,110 (1999), *reh'g*, 88 FERC ¶ 61,168 (1999) (*Trailblazer*).

### **E. Post-2006 Settlement Orders**

32. On December 20, 2007, the Commission issued an order resolving on the merits the remaining MDO issues and dismissing as moot the pending rehearing requests and compliance filing protests of the March 23, 2006 Order.<sup>41</sup>

33. On September 5, 2008, the Commission issued an order addressing the requests for rehearing of the March 20, 2006 Order. The Commission affirmed all of its determinations, including the finding that the Commission's actions in the Capacity Allocation Proceeding did not abrogate Article 11.2 of the 1996 Settlement. The Commission also affirmed its decision that the Article 11.2(a) rate cap does not apply to the Expansion Capacity and the presumption that the first 4,000 MMcf/d of firm subscribed capacity is 1995 Capacity for the purposes of Article 11.2(b).<sup>42</sup> Parties filed requests for rehearing of the September 5, 2008 Order. These requests are currently pending before the Commission.

### **III. Request for Rehearing**

34. On October 1, 2007, Phelps Dodge filed a request for rehearing and clarification of the August 31 Order. Phelps Dodge raises three main arguments on rehearing. First, Phelps Dodge objects to the Commission's determination that the record in this proceeding was sufficient to resolve all contested issues of material fact related to the 2006 Settlement. Phelps Dodge argues that evidence regarding El Paso's capacity withholding in 2000-2001 is relevant to the determination of whether the 2006 Settlement rates are just and reasonable. Phelps Dodge argues the Commission's exclusion of such evidence on the basis of *res judicata* was improper, contradicts the decision in *ACC v. FERC II*, and prevents the Commission from resolving all issues of material fact related to the 2006 Settlement. Second, Phelps Dodge contends that the Commission improperly approved the 2006 Settlement under the first and second *Trailblazer* approaches for reviewing contested settlements. Finally, Phelps Dodge requests clarification that the Commission has not made a ruling on the merits regarding Article 13.4 of the 2006 Settlement.

### **IV. Discussion**

35. As discussed in detail below, the Commission denies Phelps Dodge's requests for rehearing.

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<sup>41</sup> *El Paso Natural Gas Co.*, 121 FERC ¶ 61,266 (2007).

<sup>42</sup> *El Paso Natural Gas Co.*, 124 FERC ¶ 61,227 (2008) (September 5, 2008 Order).

**A. The Evidentiary Record and Issues of Material Fact**

**1. August 31 Order**

36. In the August 31 Order, the Commission approved the 2006 Settlement and found that it was appropriate to address on the merits the contested issues raised by Phelps Dodge because the evidentiary record was complete and Phelps Dodge raised no genuine issues of material fact. While Phelps Dodge argued the record was incomplete because it did not contain evidence concerning the issue of El Paso's alleged capacity withholding in 2000-2001, the Commission found this argument unpersuasive.

37. The Commission explained that the record in this proceeding contained no evidence on the capacity withholding issue because the Commission had already addressed and rejected on the merits Phelps Dodge's assertion that the issue of El Paso's capacity withholding in 2000-2001 was relevant in this proceeding.<sup>43</sup> In addressing Phelps Dodge's concerns, the Commission reiterated the reasons it provided in the July 7, 2006 Order for finding that this evidence was irrelevant and not properly includable in the record.<sup>44</sup> The Commission explained, as it had in the July 7, 2006 Order, that in the Capacity Allocation Proceeding, the Commission determined that the capacity shortfall on El Paso was caused primarily by growth in the full requirements contracts, and that the Expansion Capacity was necessary to increase El Paso's total capacity to enable El Paso to meet the needs of its firm customers.<sup>45</sup> The Commission stated that whether or not El Paso withheld a portion of its capacity in a prior period would not change this determination. The Commission found that even if Phelps Dodge were to show in this proceeding that El Paso had withheld capacity during the relevant time period, that would not change the fact that El Paso lacked sufficient capacity to meet the firm needs of its shippers, and that the Expansion Capacity was necessary to meet those firm needs. As a result, the Commission concluded that Phelps Dodge's allegations were irrelevant to this proceeding.

38. The Commission stated that it has thoroughly analyzed Phelps Dodge's withholding arguments and has found that they lack merit, and further, has concluded that even if the allegations could be proven, they are irrelevant. The Commission stated Phelps Dodge's real objection is not to the 2006 Settlement, but to the Commission's prior decisions finding that evidence of El Paso's capacity withholding is not relevant

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<sup>43</sup> August 31 Order at P 21, 24 n.28, 26.

<sup>44</sup> *Id.* P 22-25.

<sup>45</sup> May 31, 2002 Order, 99 FERC at 62,001-02; July 9, 2003 Order at P 32, 54.

here. The Commission further asserted that those decisions are now final and not subject to collateral attack.

## **2. Phelps Dodge's Request for Rehearing**

39. Phelps Dodge asserts that the Commission's approval of the 2006 Settlement cannot be upheld under the standards for approving contested settlements. Specifically, Phelps Dodge argues that the evidentiary record in this case is incomplete because it does not contain evidence concerning El Paso's capacity withholding in 2000-2001. Phelps Dodge further contends the Commission's determination in the August 31 Order that there were no genuine issues of material fact was flawed because it was predicated on the erroneous finding that evidence regarding El Paso's capacity withholding should be excluded on the grounds of *res judicata*. Phelps Dodge argues this finding improperly ignores the decision in *ACC v. FERC II*, which, Phelps Dodge argues, permits the admission of capacity withholding evidence in this proceeding.

40. Moreover, Phelps Dodge argues that there are issues of material fact that remain unresolved by the 2006 Settlement. Specifically, Phelps Dodge contends the 2006 Settlement fails to resolve all Article 11.2 implementation issues set for hearing by the March 20, 2006 Order. Phelps Dodge also asserts the 2006 Settlement fails to demonstrate how the settlement rates comply with Article 11.2(b). In addition, Phelps Dodge argues the Commission failed to explain how certain rate features of the 2006 Settlement are consistent with Article 11.2(a). As a result, Phelps Dodge requests that the Commission reverse its decision in the August 31 Order and reject the 2006 Settlement.

## **3. Commission Determination**

41. As discussed below, the Commission denies Phelps Dodge's request for rehearing on this issue.

### **a. The Evidentiary Record**

42. The Commission has broad authority to address contested settlements under section 385.602(h) of its regulations.<sup>46</sup> In reviewing contested settlements, the Commission may decide the merits of the contested issues if the record contains substantial evidence on which to base a reasoned decision.<sup>47</sup> Here, the Commission finds that the record in this case is sufficient for Commission approval of the 2006 Settlement.

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<sup>46</sup> 18 C.F.R. § 385.602(h) (2010).

<sup>47</sup> 18 C.F.R. § 385.602(h)(1)(i) (2010).

As discussed below, the Commission finds that the August 31 Order is consistent with *ACC v. FERC II* and that evidence regarding El Paso's alleged capacity withholding was properly excluded from the record on the grounds of irrelevancy and *res judicata*.

i. **The August 31 Order is Consistent with ACC v. FERC II**

43. On rehearing, Phelps Dodge contends the Commission's decision to exclude the evidence of El Paso's alleged capacity withholding improperly ignores the holding in *ACC v. FERC II*, which, Phelps Dodge argues, permits the admission of such evidence in this proceeding. The Commission disagrees with Phelps Dodge's interpretation of *ACC v. FERC II*.

44. In *ACC v. FERC II*, the Court stated that parties must be permitted "to argue" in this proceeding that the decisions in the Capacity Allocation Proceeding and *ACC v. FERC I* do not preclude the argument that El Paso caused the capacity shortfall in 2000-2001.<sup>48</sup> Consistent with the holding in *ACC v. FERC II*, the Commission permitted Phelps Dodge to present such an argument in this proceeding.

45. A review of the procedural history of the instant case will illustrate this point. Phelps Dodge first raised the issue of El Paso's alleged capacity withholding in its protest to the Rate Case Filing. The Commission responded to Phelps Dodge's argument in the Suspension Order by explaining that El Paso's capacity withholding is not at issue in this proceeding and may not be addressed at the hearing on the Rate Case Filing.<sup>49</sup> Several months later, the Court issued its decision in *ACC v. FERC II*, stating that parties should be permitted to argue that prior decisions do not preclude parties from raising the capacity withholding issue in this proceeding.

46. Consistent with the directive in *ACC v. FERC II*, the Commission considered the merits of Phelps Dodge's capacity withholding arguments, which it raised on rehearing of the Suspension Order, in the July 7, 2006 Order.<sup>50</sup> While the July 7, 2006 Order ultimately determined that Phelps Dodge's position was unpersuasive, Phelps Dodge did have a full opportunity to argue the relevance and admissibility of evidence related to El Paso's capacity withholding in 2000-2001.

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<sup>48</sup> *ACC v. FERC II*, Docket No. 04-1123, at 1 (D.C. Cir. Oct. 20, 2005) (unpublished order).

<sup>49</sup> Suspension Order at P 31 n.26.

<sup>50</sup> July 7, 2006 Order at P 26-37.

47. The July 7, 2006 Order was a final Commission order on this issue. However, Phelps Dodge reasserted the capacity withholding issue as part of its objection to the 2006 Settlement. As a result, the Commission addressed Phelps Dodge's capacity withholding arguments again in the August 31 Order. In doing so, the Commission reiterated in detail the reasons it provided in the July 7, 2006 Order for finding that capacity withholding is irrelevant to this proceeding.<sup>51</sup> The Commission's determination in the August 31 Order that the record was complete was consistent with its prior (and final) decision in the July 7, 2006 Order that such evidence was not needed.

48. Contrary to Phelps Dodge's claim, nothing in the Court's judgment required the Commission to conduct evidentiary hearings in this rate case regarding whether El Paso withheld capacity or was otherwise at fault for any capacity shortfall on its pipeline system in 2000-2001. Instead, the Court's judgment recognized (based on the statements of Phelps Dodge and the other petitioners) that their only interest in the capacity shortfall claim was to show in *this* rate case that El Paso's construction of the Expansion Capacity was imprudent. As a result, the Court concluded the appeal was not ripe. While the Court stated that Phelps Dodge should be permitted "to argue" in this case that the capacity withholding evidence is admissible, it did not prohibit the Commission from rejecting Phelps Dodge's argument. For these reasons, the Commission concludes that the decision in the July 7, 2006 Order to exclude the capacity withholding evidence complies with *ACC v. FERC II*, which required the Commission to consider Phelps Dodge's position, but did not require the Commission to adopt it. The August 31 Order, which found that the record in this case was sufficient to approve the 2006 Settlement, was consistent with both the July 7, 2006 Order and *ACC v. FERC II*. Therefore, the Commission denies Phelps Dodge's request for rehearing on this issue.

ii. **The Capacity Withholding Evidence is Properly Excluded on Irrelevancy Grounds**

49. On rehearing, Phelps Dodge asserts the record is insufficient to approve the 2006 Settlement because it does not contain evidence concerning El Paso's alleged capacity withholding in 2000-2001. Phelps Dodge's general argument is that evidence of El Paso's alleged capacity withholding in 2000-2001 should be admitted in this proceeding because such evidence is relevant to determining whether the settlement rates are just and reasonable. Phelps Dodge contends that the capacity withholding evidence would demonstrate that El Paso's construction of the Expansion Capacity was imprudent<sup>52</sup> and that the cost of these projects should not be rolled-into El Paso's rates.

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<sup>51</sup> August 31 Order at P 22-25.

<sup>52</sup> The Commission notes that in the Capacity Allocation Proceeding, Phelps Dodge was one of the many shippers who argued that the Expansion Capacity was  
(continued...)

50. As explained above, the July 7, 2006 Order rejected Phelps Dodge's argument and determined that evidence regarding El Paso's alleged capacity withholding was irrelevant to the outcome of this proceeding.<sup>53</sup> In reaching this conclusion, the July 7, 2006 Order assessed the firm service capability of the El Paso system at the time of the alleged capacity withholding. The Commission explained that in the Capacity Allocation Proceeding, which occurred shortly after El Paso's alleged capacity withholding, the Commission recognized that there were multiple causes of firm service unreliability on the El Paso system.<sup>54</sup> However, the exponential growth in demand of the full requirements shippers was by far the central and most significant cause of the capacity shortfall problem. The Commission found that not only had demand under El Paso's full requirements contracts increased significantly,<sup>55</sup> but that it would continue to increase into the future, and that El Paso did not have sufficient capacity to meet these growing demands.<sup>56</sup> Given all of these factors, the Commission ultimately determined that the Expansion Capacity was necessary to increase the system's total capacity so that El Paso could provide reliable firm service to its customers.<sup>57</sup>

51. Considering the situation on the El Paso system as described in the Capacity Allocation Proceeding, the July 7, 2006 Order found that whether or not El Paso withheld capacity in 2000-2001 was irrelevant to whether it was prudent for El Paso to construct the Expansion Capacity.<sup>58</sup> The July 7, 2006 Order explained that because the capacity

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critically necessary to solve the capacity shortfall problem on the El Paso system. *See* May 31, 2002 Order, 99 FERC at 62,011. Yet, here, Phelps Dodge changes its position and argues it was imprudent for El Paso to construct the Expansion Capacity.

<sup>53</sup> July 7, 2006 Order at P 22, 37.

<sup>54</sup> *Id.* P 27.

<sup>55</sup> *Id.* (citing May 31, 2002 Order, 99 FERC at 62,001-03). The Commission calculated in the Capacity Allocation Proceeding that the growth in demand under the full requirements contracts was 72 percent for the period 1994-1995 to 2000.

<sup>56</sup> *Id.* P 28. The Commission found that plans for new gas-fired power plants indicated that future full requirements growth would be substantial and that the full requirements shippers had projected their need in the aggregate would total over 3 Bcf over the next few years.

<sup>57</sup> *Id.* P 33 (citing May 31, 2002 Order 99 FERC at 62,001-02; July 9, 2003 Order at P 32, 54).

<sup>58</sup> *Id.* P 35-37.

shortfall problems on the El Paso system were so extensive at that time, the Expansion Capacity was essential to serve the needs of the El Paso shippers, regardless of whether any withholding of capacity occurred during the relevant period. Thus, even if Phelps Dodge were able to show in this proceeding that El Paso had withheld some capacity, this would not change the determination that the expansion projects were prudent because a substantial capacity expansion was needed for the system. Because the Expansion Capacity contributed to the overall health of the system and benefitted all shippers, it was reasonable for the Commission to determine these projects were eligible for rolled-in rate treatment. Therefore, the July 7, 2006 Order concluded that Phelps Dodge's evidence on the capacity withholding issue was irrelevant to this matter, and need not have been admitted as evidence.<sup>59</sup>

52. The rationale the July 7, 2006 Order provided for excluding the capacity withholding evidence was well-reasoned. As the Commission found, there is no need to undertake additional procedures to gather evidence on an issue that will not impact the outcome of this case. Moreover, the July 7, 2006 Order was a final Commission order on this issue. Therefore, it was appropriate for the Commission to rely on these findings when determining that the record was sufficient to approve the 2006 Settlement in the August 31 Order. For these reasons, the Commission affirms the holding in the August 31 Order that the record in this case contains substantial evidence upon which to base a reasoned decision.

**iii. The Capacity Withholding Evidence is Properly Excluded on the Grounds of *Res Judicata***

53. In the August 31 Order, the Commission stated that Phelps Dodge's capacity withholding allegations have been thoroughly analyzed and rejected by the Commission in prior orders, and that Phelps Dodge's real objection was not to the 2006 Settlement, but to those prior orders.<sup>60</sup> On rehearing, Phelps Dodge argues that this finding in the August 31 Order improperly excluded evidence on the capacity withholding issue on the grounds of *res judicata*. We disagree.

54. Phelps Dodge has litigated, or sought to litigate, its capacity withholding claims in three separate cases before the Commission – the Capacity Allocation Proceeding, the CPUC Complaint Case, and the instant rate proceeding. Although Phelps Dodge's arguments on this issue have been something of a moving target, Phelps Dodge has generally advanced five theories to support its claim that El Paso was to blame for the capacity shortfall in 2000-2001. The Commission will explain how it has already

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.* P 26.

addressed each of these theories and why raising them again here constitutes an impermissible collateral attack on prior Commission orders.

55. First, Phelps Dodge has asserted that El Paso withheld 210 MMcf/day by not operating its system continuously, or on average, at Maximum Allowable Operating Pressure (MAOP). While the ALJ in the CPUC Complaint Case agreed with this assertion, the Commission in the Capacity Allocation Proceeding specifically rejected the basis for the ALJ's conclusion.<sup>61</sup> In the July 9, 2003 Order, the Commission found that El Paso has no obligation to operate at MAOP and acted reasonably in relying on a portion of its capacity to manage the dynamic, transient conditions that prevented constant operation at MAOP.<sup>62</sup> The Court affirmed this conclusion in *ACC v. FERC I*, stating that:

Nor do petitioners persuade us that El Paso improperly withheld capacity. FERC observed, and petitioners did not disprove, that El Paso operated its "dynamic" pipelines at reasonable levels of capacity.<sup>63</sup>

56. Second, Phelps Dodge has argued that El Paso breached an obligation to expand its system, thereby causing the capacity shortfall in 2000-2001. The ALJ in the CPUC Complaint Case agreed with this claim as well, although the ALJ failed to address section 3.6 of the 1990 Settlement,<sup>64</sup> which specifically refutes the claim. Here again, in the Capacity Allocation Proceeding, the Commission rejected the basis for the ALJ's conclusion by holding that El Paso did not have an unqualified obligation to expand its pipeline system at its own expense to meet the needs of the full requirements shippers.<sup>65</sup> In both the May 31, 2002 Order and the July 9, 2003 Order, the Commission stated that

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<sup>61</sup> July 9, 2003 Order at P 66-80 (2003).

<sup>62</sup> *Id.*

<sup>63</sup> *ACC v. FERC I*, 397 F.3d 952, 955 (D.C. Cir. 2005).

<sup>64</sup> Section 3.6 of the 1990 Settlement provides that "El Paso shall not be required to construct any facilities that are not economically justifiable. The provision of this section 3.6 shall survive the term of this Stipulation and Agreement."

<sup>65</sup> *See* May 31, 2002 Order, 99 FERC at 62,003-04 n.36; July 9, 2003 Order at P 61, 99-108.

to find otherwise would contradict the plain language of the 1990 Settlement.<sup>66</sup> The Court affirmed this ruling as well.<sup>67</sup>

57. Third, Phelps Dodge has asserted that El Paso oversold its system by remarketing a large portion of its turnback capacity.<sup>68</sup> The Commission also addressed this claim in the Capacity Allocation Proceeding.<sup>69</sup> In the July 9, 2003 Order, the Commission acknowledged that although El Paso had an obligation to administer its pipeline system in a manner that provided reliable firm service to its customers under section 16.3 of the 1996 Settlement,<sup>70</sup> El Paso remarketed the turnback capacity when it could not meet all of its firm service obligations. However, the Commission also recognized that the remarketing of turnback capacity was authorized under the 1996 Settlement and that shippers benefitted from such remarketing through the payment of revenue credits.<sup>71</sup> Moreover, the Commission noted that sales of the turnback capacity were approved by the Commission.<sup>72</sup> Considering all of this, the Commission concluded that El Paso's obligations under its tariff, contracts, and settlements conflicted with one another and were no longer just and reasonable.<sup>73</sup> The Commission stated that in such a situation, it was more appropriate for the Commission to provide a remedy going forward, than to

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<sup>66</sup> In the Capacity Allocation Proceeding, the Commission stated that construction of additional capacity to serve the full requirements customers at no additional demand charge was not "economically justifiable" for El Paso because it would not be able to recover its costs of the expansion plus a reasonable return on its investment. Thus, the Commission concluded that El Paso did not have an unqualified obligation to construct capacity at its own expense to serve the demand of the full requirements customers. *Id.*

<sup>67</sup> *ACC v. FERC I*, 397 F.3d 952, 956-7 (D.C. Cir. 2005).

<sup>68</sup> Turnback capacity is the capacity the California LDC shippers turned-back to El Paso as a result of the restructuring of the natural gas industry in the 1990s and that resulted in a large portion of El Paso's capacity being unsubscribed.

<sup>69</sup> July 9, 2003 Order at P 54 n.4, 110-112, 127.

<sup>70</sup> Section 16.3 of the 1996 Settlement states that El Paso must "maintain and operate its facilities sufficient to satisfy and perform the service obligations with respect to both quality and quantity of service imposed on it by...the provisions of this Stipulation and Agreement and its firm TSAs in effect on December 31, 1995."

<sup>71</sup> July 9, 2003 Order at P 127.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* P 112.

penalize El Paso for attempting to follow its tariff and settlements.<sup>74</sup> Moreover, the Commission found that the primary cause of the capacity shortfall on the El Paso system was the growth in demand under the full requirements contracts, and not El Paso's remarketing of the turnback capacity.<sup>75</sup>

58. Fourth, Phelps Dodge has argued that El Paso withheld 696 MMcf/day from California. This argument was based on the flawed premise that El Paso had a certificate obligation to ship its full California design capacity of 3,290 MMcf/day to California every day of the year, and that the 696 MMcf/day difference between El Paso's 3,290 MMcf/day design capacity and its actual average deliveries to California (2,594 MMcf/day) during a five-month period in 2000-2001 must necessarily have been withheld from California shippers. However, in the Capacity Allocation Proceeding, the Commission rejected the premise that El Paso had an obligation to ship 3,290 MMcf/day to its California delivery points. The Commission explained that when the capacity turned back by the California shippers was later subscribed by East-of-California (EOC) shippers, El Paso's obligation to provide firm service to California was reduced below 3,290 MMcf/day.<sup>76</sup> Moreover, as an EOC shipper, Phelps Dodge lacks standing to complain about capacity withheld from California, especially considering the capacity not used for California benefitted the EOC shippers by increasing their share of capacity.

59. Lastly, Phelps Dodge has claimed that El Paso was at fault for curtailing its shippers on a *pro rata* basis during 2000-2001.<sup>77</sup> This claim, which is essentially derivative of the prior claims discussed above, was also rejected by the Commission in the Capacity Allocation Proceeding. In the September 20, 2002 Order, the Commission stated that the *pro rata* curtailments were "no-fault" events.<sup>78</sup> Similarly, in the July 9, 2003 Order, the Commission stated it did not find that El Paso engaged in wrongdoing in implementing the *pro rata* allocations.<sup>79</sup> Instead, the Commission found that the

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<sup>74</sup> *Id.* P 98.

<sup>75</sup> *Id.* at P 32, 36, 54.

<sup>76</sup> March 8, 2004 Order at P 61-64; July 9, 2003 Order at P 141, 158.

<sup>77</sup> The *pro rata* allocations of capacity made by El Paso during the capacity shortfall in 2000-2001 resulted in cuts to the amount nominated by firm customers and the failure to schedule service for the full nominated volumes. *See* May 31, 2002 Order at n. 15.

<sup>78</sup> September 20, 2002 Order at P 14.

<sup>79</sup> July 9, 2003 Order at P 126.

principal cause of the curtailments was the significant and unlimited growth in demand by full requirements customers.<sup>80</sup> The Commission ultimately determined that the routine *pro rata* curtailments on the El Paso system must not continue and created a new framework for capacity allocation on the El Paso system.<sup>81</sup> However, in doing so, the Commission found no single party at fault for the problems on the El Paso system and noted that *pro rata* curtailments were permitted by the 1990 Settlement, which was agreed to by all of El Paso's shippers.<sup>82</sup>

60. It is therefore apparent that the Commission has fully addressed in the Capacity Allocation Proceeding each of Phelps Dodge's arguments regarding El Paso's alleged capacity withholding.<sup>83</sup> Phelps Dodge's attempt to again raise these claims constitutes an impermissible collateral attack on the orders in that proceeding. As previously explained, the situation on the El Paso system at the time of the Capacity Allocation Proceeding was critical, and the various factors contributing to the capacity shortfall were complicated and required Commission intervention for resolution. The remedy fashioned by the Commission in the Capacity Allocation Proceeding required compromises by all parties, but was ultimately a just and reasonable solution that was affirmed by the Court. By repeatedly attempting to litigate the issue of El Paso's alleged fault during that time, when the Commission has already determined that no one party was at fault, Phelps Dodge is hindering parties from achieving finality on the issues in the Capacity Allocation Proceeding.

61. For these reasons, the Commission finds that the issue of El Paso's alleged capacity withholding in 2000-2001 was properly excluded from the record in this proceeding on the grounds of *res judicata*. Accordingly, the Commission affirms the decision in the August 31 Order that the record in this case contains substantial evidence upon which to base a reasoned decision regarding the 2006 Settlement, and denies rehearing on this issue.

**b. Phelps Dodge Raises No Genuine Issues of Material Fact**

62. Phelps Dodge argues that the Commission should have rejected the 2006 Settlement because it leaves unresolved certain issues of material fact related to

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<sup>80</sup> May 31, 2002 Order, 99 FERC at 62,002; July 9, 2003 Order at P 32, 36, 54.

<sup>81</sup> May 31, 2002 Order, 99 FERC at 61,199-62,001.

<sup>82</sup> July 9, 2003 Order at P 126.

<sup>83</sup> In doing so, the Commission effectively rejected the ALJ's determinations on these issues in the Initial Decision CPUC Complaint Case in Docket No. RP00-241.

Article 11.2 of the 1996 Settlement. However, the alleged unresolved issues of material fact raised by Phelps Dodge are the same issues Phelps Dodge argues the Commission failed to properly address on the merits under the first Trailblazer approach. Therefore, the Commission will address each of these issues on the merits in its discussion of the first *Trailblazer* standard below.

**B. Approval of the 2006 Settlement Under Trailblazer Approaches I and II**

63. In the *Trailblazer* case, the Commission set forth four approaches for approving contested settlements despite the objections of a contesting party.<sup>84</sup>

64. Under the first approach, if there is an adequate record, the Commission can address each of the contesting party's issues on the merits, approving the settlement if the Commission finds that each of the contesting party's contentions lacks merit. Under the second approach, 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 just and reasonable. Under the third approach, if the settlement is not found to satisfy the just and reasonable standard, the Commission still may approve the settlement where the benefits of the settlement outweigh the elements of the objection, and the contesting party's interest is too attenuated such that the settlement may be approved under the "fair and reasonable" standard applicable to uncontested settlements. As a last resort, the fourth alternative is severance of the contesting party, permitting that party to obtain a litigated result, and approving the settlement as to the consenting parties.

**1. August 31 Order**

65. In the August 31 Order, the Commission found that the 2006 Settlement should be approved for all parties, including Phelps Dodge, consistent with both the first and second *Trailblazer* approaches. Under the first *Trailblazer* approach, the Commission determined that it sufficiently analyzed Phelps Dodge's objections to the 2006 Settlement and found that the protests lack merit and do not provide a basis for rejecting the 2006 Settlement. The Commission stated that Phelps Dodge's central objection to the 2006 Settlement is that its rates do not take into consideration whether El Paso withheld capacity in 2000-2001. The Commission explained that these objections are without merit because the Commission has previously ruled that Phelps Dodge's capacity withholding allegations were irrelevant and that the issue need not be litigated at the hearing.<sup>85</sup>

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<sup>84</sup> *Trailblazer*, 85 FERC ¶ 61,345 at 62,342-45 (1998).

<sup>85</sup> August 31 Order at P 57-59.

66. Under the second *Trailblazer* approach, the Commission found that the overall result of the 2006 Settlement is just and reasonable, and that Phelps Dodge would be in no worse position under the 2006 Settlement than if the case were litigated. The Commission concluded that Phelps Dodge would be in no worse position under the 2006 Settlement because, consistent with the Commission's prior orders on this issue, the capacity withholding issue could not be raised at the hearing. Moreover, the Commission explained that the 2006 Settlement provides substantial benefits to all of El Paso's shippers in the form of lower rates, rate stability, broader penalty tolerance levels, more favorable point allocation/aggregation features, and the establishment of a forum for resolving additional areas of concern. The Commission found that these benefits will place Phelps Dodge in a better position than if the case were litigated.<sup>86</sup>

## 2. Phelps Dodge's Request for Rehearing

67. Phelps Dodge argues that the Commission improperly approved the 2006 Settlement under the first *Trailblazer* approach. Phelps Dodge disagrees with the Commission's finding that Phelps Dodge's allegation that El Paso withheld capacity in 2000-2001 is not relevant to the proceeding. Phelps Dodge also asserts that evidence related to El Paso's capacity withholding is relevant to the issue of whether the 2006 Settlement rates comply with Article 11.2 of the 1996 Settlement.

68. In addition, Phelps Dodge asserts the 2006 Settlement fails to resolve all Article 11.2 implementation issues set for hearing by the March 20, 2006 Order, such as whether certain Article 11.2 costs may be treated by El Paso as a discount adjustment in its next rate case. Phelps Dodge also argues the Commission failed to explain how certain rate features of the 2006 Settlement, such as the PIP Surcharge and the half-cent usage adder, are consistent with Article 11.2(a). Finally, Phelps Dodge argues it is unclear whether the 2006 Settlement rates were calculated in accordance with Article 11.2(b).

69. Phelps Dodge contends the Commission's approval of the 2006 Settlement under the second *Trailblazer* approach is similarly flawed. Phelps Dodge argues the 2006 Settlement cannot be approved under the second *Trailblazer* approach because the record lacks sufficient evidence to permit the Commission to find that the overall package is within the zone of reasonableness. Phelps Dodge explains that as a part of the determination under the second *Trailblazer* approach, the Commission must find that the contesting party would be in no worse position under the settlement than if the case were litigated.<sup>87</sup> Phelps Dodge argues that in this case, the absence of evidence in the record

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<sup>86</sup> *Id.* P 60-61.

<sup>87</sup> *Citing Maritimes & Northeast Pipeline, L.L.C.*, 115 FERC ¶ 61,176, at P 69 (2006).

regarding how the 2006 Settlement rates comply with Article 11.2(b) of the 1996 Settlement impairs the Commission's finding that the 2006 Settlement places Phelps Dodge in no worse a position than if Phelps Dodge and El Paso were to litigate the issues in this case. Phelps Dodge asserts that evidence of El Paso's withholding capacity in 2000-2001, if considered, would result in Article 11.2(a) rate treatment for almost all of its firm capacity, including most of the capacity currently designated for rate purposes as Expansion Capacity. Phelps Dodge states that this change would support a reduction in Phelps Dodge's cost responsibility for Expansion Capacity from one-third to just over three percent. Phelps Dodge therefore argues that the possibility of such a reduction precludes a finding that Phelps Dodge would be in no worse a position under the 2006 Settlement than if the case were litigated.

### 3. Commission Determination

70. The Commission finds that the August 31 Order properly approved the 2006 Settlement pursuant to the first and second *Trailblazer* approaches.

#### a. First Trailblazer Approach

71. Under the first *Trailblazer* approach, if there is an adequate record, the Commission can address the contesting party's issues on the merits, approving the settlement if the Commission finds that the contesting party's contentions lack merit.<sup>88</sup> This order's prior discussion of the existing evidentiary record in this proceeding explained why the Commission considers it adequate for a merits decision (detailed *supra*). Therefore, the subsequent discussion focuses on whether the August 31 Order properly applied *Trailblazer* in rejecting Phelps Dodge's objections to the 2006 Settlement, beginning with the first *Trailblazer* approach, which requires the Commission to address non-settling parties' objections on the merits.

72. In the August 31 Order, the Commission found that under the first *Trailblazer* approach, Phelps Dodge's contentions lacked merit because they centered around the evidence of El Paso's alleged capacity withholding, which the Commission previously found was not relevant to this proceeding.<sup>89</sup> Here, Phelps Dodge's primary objections to the 2006 Settlement are that (1) the settlement rates fail to take into consideration evidence of El Paso's alleged capacity withholding in 2000-2001; and (2) it is unclear for various reasons, including exclusion of such evidence, whether the 2006 Settlement rates comport with Article 11.2 of the 1996 Settlement. The Commission reaffirms that the

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<sup>88</sup> *Trailblazer*, 85 FERC ¶ 61,345, at 62,342 (1998).

<sup>89</sup> August 31 Order at P 57-59.

August 31 Order properly addressed and rejected Phelps Dodge's arguments on the merits.

73. With respect to the first objection, the Commission has fully considered and addressed Phelps Dodge's arguments regarding El Paso's alleged capacity withholding in prior Commission orders and in the previous section of this order. As the Commission stated in the July 7, 2006 Order, the August 31 Order, and above, Phelps Dodge's allegations regarding El Paso's alleged capacity withholding in 2000-2001, and any related evidence, was excluded as irrelevant to this proceeding. The Expansion Capacity would have been necessary to address the capacity problems on El Paso's system regardless of any alleged capacity withholding. Thus, admission of such evidence would not impact a prudence determination regarding the construction of the Expansion Capacity. Moreover, as explained above, Phelps Dodge's allegations regarding El Paso's fault with respect to the capacity shortfall on the system have been addressed and rejected by the orders in the Capacity Allocation Proceeding. Thus, the August 31 Order properly held that the record was adequate and that Phelps Dodge's objections to the 2006 Settlement, which centered on the capacity withholding issue, lack merit.

74. Phelps Dodge's second objection is that the 2006 Settlement fails to adhere to Article 11.2. The Commission finds this argument is equally without merit. As explained in the background section of this order, Article 11.2 is a provision in the 1996 Settlement that places certain limitations on the rates that El Paso can charge shippers who were parties to the 1996 Settlement. In the Capacity Allocation Proceeding, the Commission modified certain portions of the 1996 Settlement to remedy the capacity shortfall problems on the El Paso system.<sup>90</sup> However, in doing so, the Commission stated that the 1996 Settlement should only be modified to the extent necessary to restore reliable firm service on El Paso, and that the remainder of the 1996 Settlement would remain in effect until its expiration.<sup>91</sup> The Commission did not specifically address Article 11.2 of the 1996 Settlement, which by its express language, continues beyond the term of the 1996 Settlement.

75. A few years later, when El Paso submitted its Rate Case Filing in this proceeding, parties raised the issue of whether Article 11.2 of the 1996 Settlement continued to apply despite the Commission's modification of certain portions of the 1996 Settlement in the Capacity Allocation Proceeding. In the March 20, 2006 Order, the Commission

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<sup>90</sup> May 31, 2002 Order, 99 FERC at 62,000-62,009.

<sup>91</sup> *Id.* at 62,018.

determined that its actions in the Capacity Allocation Proceeding did not abrogate Article 11.2 of the 1996 Settlement.<sup>92</sup>

76. The Commission also stated in the March 20, 2006 Order that it was providing general guidelines concerning the appropriate application of Article 11.2 and that the details of the implementation of these guidelines should be addressed at the hearing. The Commission stated that at the hearing, parties may address whether El Paso is entitled to a discount adjustment for any discounted rates and how to calculate the rate for each shipper, including whether any costs associated with El Paso's 1995 Capacity have been improperly included in the rates of eligible shippers.<sup>93</sup>

77. However, before a hearing could occur, parties submitted the 2006 Settlement. As explained above, the 2006 Settlement does not resolve all issues related to the Rate Case Filing. The 2006 Settlement established rates for the three-year settlement term, but it did not resolve issues related to MDOs or the continued applicability of Article 11.2 of the 1996 Settlement. While the Commission resolved many of these issues in the Technical Conference Orders, the 2006 Settlement was filed before the Commission addressed the requests for rehearing of the Technical Conference Orders. Plus, certain other issues were set for hearing by the March 20, 2006 Order. The 2006 Settlement addressed this by stating that any outstanding issues related to Article 11.2 and MDOs would be resolved by the Commission when it addressed the requests for rehearing of the Technical Conference Orders, and that the Commission's resolution of those issues would not take effect until the end of the three-year settlement period.

78. The Commission accepted the 2006 Settlement, notwithstanding that it left certain issues unresolved, because the settlement provided an overall just and reasonable resolution to this proceeding. As discussed in more detail below, the 2006 Settlement sets just and reasonable rates for the three-year settlement term. In doing so, the 2006 Settlement establishes a temporary compromise regarding the Article 11.2 issues for those three years. However, the 2006 Settlement also preserves parties' rights regarding the outstanding Article 11.2 issues by stating that those issues will be resolved when the Commission addresses the requests for rehearing of the Technical Conference Orders. Thus, while the 2006 Settlement defers the effectiveness of any Commission action on these issues until after the settlement term so as not to impact the settlement rates, it does not delay Commission resolution of the pending rehearing requests or impinge on parties' rights to advocate their positions on outstanding Article 11.2 issues. The approach was

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<sup>92</sup> March 20, 2006 Order at P 2, 24-32.

<sup>93</sup> *Id.* P 42-43.

reasonable, and in the time since Phelps Dodge submitted the instant rehearing request, the Commission has issued an order addressing the outstanding Article 11.2 issues.<sup>94</sup>

79. In spite of this, Phelps Dodge argues that the Commission erred in approving the 2006 Settlement because of its treatment of Article 11.2 issues. Specifically, Phelps Dodge argues the 2006 Settlement does not resolve all Article 11.2 implementation issues set for hearing by the March 20, 2006 Order, such as whether certain Article 11.2 costs may be treated as a discount adjustment in El Paso's *next* rate case.<sup>95</sup> The discount adjustment issue is not an issue in the 2006 Settlement because of the black box rates, and there is no requirement that a settlement resolve all issues for future rate cases in order to be approved by the Commission. Furthermore, as explained above, the 2006 Settlement preserved parties' rights with respect to the discount adjustment issue by providing that all outstanding Article 11.2 issues would be resolved by the Commission when it addresses the requests for rehearing of the Technical Conference Orders. In the time since Phelps Dodge filed its request for rehearing, the Commission did address the discount adjustment issue in the September 5, 2008 Order.<sup>96</sup>

80. The only other issue set for hearing by the March 20, 2006 Order was how to calculate the rates for each shipper applying the Article 11.2 guidelines, including whether the rates improperly include any 1995 Capacity costs. This leads into Phelps Dodge's second argument, which is that the 2006 Settlement does not provide sufficient information for the Commission to determine whether the settlement rates comply with Article 11.2(b) of the 1996 Settlement.

81. As explained above, Article 11.2(b) prohibits El Paso from including in the rates of eligible shippers costs related to unsubscribed or discounted 1995 Capacity. However, the non-Article 11.2(a) rates in the 2006 Settlement are black box rates, so it is impossible to determine what "costs" those rates include.

82. Black box settlements are agreements that establish rates, but do not set forth the cost-of-service elements or explain how the rates were derived.<sup>97</sup> In other words, parties

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<sup>94</sup> September 5, 2008 Order, 124 FERC ¶ 61,227 (2008). Rehearing requests of the September 5, 2008 Order are pending before the Commission.

<sup>95</sup> El Paso argued at the technical conference in this case that if Article 11.2 continues to apply, El Paso has the right to reallocate costs it cannot recover from the Article 11.2-protected shippers to other shippers or to contracts that are not covered by Article 11.2 as part of a discount adjustment.

<sup>96</sup> September 5, 2008 Order at P 119-120.

<sup>97</sup> *United Gas Pipe Line Co.*, 56 FERC ¶ 61,214, at 61,855 n.7 (1991).

to black box settlements agree to rates without identification or attribution of costs or adjustments for any particular component of those rates. Black box settlements are the outcome of arms-length negotiations rather than the strict application of formulas or policy. The Commission routinely approves black box settlements and, in doing so, does not require settling parties to justify individual elements of a settlement package.<sup>98</sup> Rather, in approving black box settlements, the Commission must ensure that it produces a just and reasonable outcome to the proceeding for all parties, including any contesting parties.

83. In this case, any divergence from exact incorporation of Article 11.2 of the 1996 Settlement is but one element for the Commission to consider in the whole of this assessment. As discussed in more detail below, the Commission, in considering the entire settlement package, determined the 2006 Settlement provides just and reasonable rates and substantial benefits to El Paso shippers, including Phelps Dodge. This determination is consistent with the Commission's standards for approving contested settlements, and acceptance of the 2006 Settlement rates need not be compromised by still further hearings on the adequacy of its treatment of Article 11.2 of the 1996 Settlement.

84. Moreover, in examining the 2006 Settlement's treatment of Article 11.2 issues, the Commission finds that the 2006 Settlement largely preserves the framework of Article 11.2 for the three-year term of the settlement.<sup>99</sup> For example, under the 2006 Settlement, all firm shippers with Article 11.2(a) contracts are to be provided Article 11.2(a) capped rates. The only adjustments to El Paso's traditional application of the Article 11.2(a) rate cap are the inclusion of the PIP Surcharge and the half-cent usage adder.

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<sup>98</sup> See, e.g., *El Paso Natural Gas Co.*, 89 FERC ¶ 61,164 (1999). However, Commission approval or acceptance of black box settlement rates does not generally constitute the approval of, or precedent regarding, any principle or issue in the proceeding.

<sup>99</sup> Phelps Dodge recognizes that the 2006 Settlement largely complies with Article 11.2 and the guidelines in the March 20, 2006 Order. In its initial comments opposing the 2006 Settlement, Phelps Dodge stated "the [2006] Settlement provides that Rate Schedule FT-1 shippers with Article 11.2(a) contracts are to be accorded Article 11.2(a) rate cap rates." See Phelps Dodge's December 26, 2006 Initial Comments in Opposition to Stipulation and Agreement at 13. Moreover, Phelps Dodge stated "it can be inferred that the [2006] Settlement relies on the March 20 Order's... findings that the expansion capacity is not subject to Article 11.2(a), and that 100% of such expansion capacity should be allocated to the former FR [full requirements] shippers." *Id.* at 14.

85. Phelps Dodge objects to these charges, arguing they are not consistent with Article 11.2(a). However, the Commission finds that these small departures are *de minimis* and are outweighed by the other benefits of the settlement.<sup>100</sup> As the Commission discusses below (detailed *infra* section 3(b)), the 2006 Settlement provides parties with a series of valuable features, and the inclusion of the PIP Surcharge and the half-cent usage adder do not undermine these benefits. Because the 2006 Settlement was negotiated as a whole, no one issue, such as the PIP Surcharge or the usage adder, should be looked at in isolation.

86. For these reasons, the Commission finds that Phelps Dodge's allegations of evidentiary shortcomings and incongruence with Article 11.2 are flawed and affirms its decision in the August 31 Order that Phelps Dodge's objections to the 2006 Settlement lack merit under the first *Trailblazer* approach.

**b. Second Trailblazer Approach**

87. Under the second *Trailblazer* approach, even if some individual aspects of a settlement may be problematic, the Commission may still approve a contested settlement as a package if the overall result of the settlement is just and reasonable.<sup>101</sup> Under this approach, the Commission need not render a merits decision on whether each element of the settlement package is just and reasonable, so long as the overall package falls within a zone of reasonableness.<sup>102</sup> The Commission must also include a finding under this approach that the contesting party would be in no worse position under the settlement than if the case were litigated.<sup>103</sup> The Commission has stated that the second *Trailblazer* approach is appropriate where the parties have expressed their intent that a settlement agreement be considered as a package.<sup>104</sup>

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<sup>100</sup> See August 31 Order at P 30.

<sup>101</sup> *Id.* at 62,342-43.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> See *Trailblazer, order on reh'g*, 87 FERC at 61,440 (stating that when parties make clear that they want their settlement considered as a package, the Commission will try to honor parties' intent).

88. Here, the parties to the 2006 Settlement expressed such intent that the agreement be reviewed as a whole.<sup>105</sup> Accordingly, the August 31 Order applied the second *Trailblazer* approach, and in doing so, found that the overall result of the 2006 Settlement was just and reasonable.<sup>106</sup> We agree with this determination.

89. The 2006 Settlement provides substantial benefits to all El Paso shippers. As the Commission noted in the August 31 Order, the rates in the 2006 Settlement are substantially lower than El Paso's filed rates.<sup>107</sup> In addition, the revenue crediting provisions provide some assurance that even if El Paso's revenues exceed expectations, any excess will be shared with shippers. Moreover, the 2006 Settlement eliminates the possibility that El Paso will pancake additional rate increases on top of the settlement rates during the settlement period. In doing so, the 2006 Settlement provides shippers with rate stability for the term of the settlement. This is a substantial benefit to shippers because it precludes two rate increase filings El Paso expected to make in 2006 and 2007. In addition, the 2006 Settlement provides shippers with broader penalty tolerance levels and more favorable point allocation/aggregation features than those accepted by the Commission in the March 23, 2006 Order. The 2006 Settlement also establishes working groups to address additional areas of concern, including tariff simplification, rate design, cost allocation, and fuel recovery. Moreover, the 2006 Settlement's resolution of these issues as an integrated package avoids protracted and expensive litigation that would likely result absent settlement.

90. Phelps Dodge does not dispute any of these benefits. However, on rehearing, Phelps Dodge reprises the argument that the record lacks sufficient evidence for the Commission to determine whether the 2006 Settlement as a whole is just and reasonable, even under the second *Trailblazer* approach. Phelps Dodge insists that without evidence in the record regarding El Paso's alleged capacity withholding and how the 2006 Settlement complies with Article 11.2, the Commission cannot show that Phelps Dodge is in no worse a position under the 2006 Settlement than if the case were litigated. Phelps Dodge argues that if the Commission were to permit it to litigate the issue of whether El Paso withheld capacity in 2000-2001, Phelps Dodge would receive even lower rates than the settlement rates.

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<sup>105</sup> See, e.g., El Paso Natural Gas and the Settling Parties' January 16, 2007 Joint Reply Comments in Support of Prompt Certification and Approval of the Offer of Settlement at 10.

<sup>106</sup> August 31 Order at P 60.

<sup>107</sup> *Id.* P 55.

91. What this argument misses, however, is that if Phelps Dodge were severed from the settlement to pursue litigation, it would be required to litigate the entire spectrum of issues in this proceeding, and not just the issues it chooses. While Phelps Dodge seems to suggest the Commission should sever just the Article 11.2 and capacity withholding issues for litigation by all parties, this approach is unreasonable. Not only would it upset the compositional balance of the 2006 Settlement for all other parties, it would also allow Phelps Dodge to enjoy the benefits of the 2006 Settlement, while retaining the ability to litigate the disfavored provisions.

92. Rejecting the 2006 Settlement in its entirety is not a reasonable option either. While this would provide Phelps Dodge with the opportunity for a hearing, it would also eliminate the extensive benefits the 2006 Settlement provides to the settling parties and disregard the wishes of every other El Paso shipper who supported the 2006 Settlement.

93. Thus, in order for Phelps Dodge to litigate, the Commission would have to sever Phelps Dodge for a hearing on all issues in the Rate Case Filing. Such a complex proceeding would surely result in substantial litigation costs. Indeed, to litigate the broad spectrum of issues involved in this case would surely cost more than the amount associated with the PIP Surcharge and usage rate increase.

94. Yet, Phelps Dodge argues it would be worse off under the 2006 Settlement. In making this argument, Phelps Dodge assumes that the Commission would permit the admission of evidence of El Paso's capacity withholding at a hearing. Phelps Dodge recognizes that unless this occurred, a hearing would be useless.<sup>108</sup> However, the Commission has discussed in detail above why it would not be proper to admit evidence of El Paso's alleged capacity withholding.

95. Even assuming the Commission did permit Phelps Dodge to admit this evidence and raise the issues it seeks to raise at a hearing, Phelps Dodge still might not prevail. Phelps Dodge argues that that the capacity withholding evidence, if considered, would result in Article 11.2(a) rate treatment for almost all of Phelps Dodge's capacity, including the approximately one-third of its capacity that is Expansion Capacity.<sup>109</sup> Phelps Dodge explained this argument in more detail in its initial comments opposing the 2006 Settlement and in the Lander Affidavit attached to those comments. The Lander

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<sup>108</sup> Phelps Dodge stated in its comments opposing the 2006 Settlement that severance of Phelps Dodge as a party "would be a useless act" because the genuine issues of material fact it wishes to litigate were excluded by the Suspension Order and July 7 Order. *See* Phelps Dodge's December 26, 2006 Initial Comments in Opposition to Stipulation and Agreement at 18-19.

<sup>109</sup> Phelps Dodge's October 1, 2007 Request for Rehearing at 22.

Affidavit explained that the 2006 Settlement rates appear to have been designed in accordance with the Commission's finding in the March 20, 2006 Order that the Expansion Capacity should be allocated to the former full requirements shippers, thereby reducing Phelps Dodge's Article 11.2(a) rate-capped capacity because Article 11.2(a) does not apply to Expansion Capacity.<sup>110</sup> The Lander Affidavit further explained that evidence concerning El Paso's culpability, if admitted, would at a minimum, require a finding such costs should be borne equally by all shippers, and not solely by the former full requirements shippers.<sup>111</sup> In other words, Phelps Dodge believes that if evidence of El Paso's alleged capacity withholding were admitted, the Commission would reverse its decisions in the March 20, 2006 Order that the Article 11.2(a) rate cap does not apply to Expansion Capacity and that the Expansion Capacity should be allocated to the former full requirements shippers.<sup>112</sup>

96. As explained in the background section of this order, the March 20, 2006 Order rejected Phelps Dodge's and other shippers' arguments that the Article 11.2(a) rate cap should apply to Expansion Capacity, stating that to find otherwise would ignore the orders in the Capacity Allocation Proceeding and the Power-Up Project certificate proceeding<sup>113</sup> and the express language of the 1990 Settlement.<sup>114</sup> In the Capacity Allocation Proceeding, the Commission interpreted section 3.6 of the 1990 Settlement to mean that El Paso does not have an unqualified obligation to construct capacity to meet the former full requirements shippers' needs at its own expense.<sup>115</sup> Moreover, in the certificate order authorizing the construction of the Power-Up Project, the Commission held that absent changed circumstances, El Paso may roll-in the costs of the Power-Up

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<sup>110</sup> Lander Affidavit at 7-8.

<sup>111</sup> *Id.* at 9-10.

<sup>112</sup> Phelps Dodge's argument reveals that its real objection to the 2006 Settlement is that it complies with the March 20, 2006 Order's determination that Article 11.2(a) does not apply to Expansion Capacity. However, this is not the appropriate forum for such an argument. The proper place to address this would be on rehearing of the March 20, 2006 Order.

<sup>113</sup> March 20, 2006 Order at P 68.

<sup>114</sup> Section 3.6 of the 1990 Settlement provides that "El Paso shall not be required to construct any facilities that are not economically justifiable. The provision of this section 3.6 shall survive the term of this Stipulation and Agreement."

<sup>115</sup> July 9, 2003 Order at P 96, 103-108.

Project in its next (this) rate case.<sup>116</sup> Based on the foregoing, the March 20, 2006 Order concluded that Article 11.2(a) does not preclude El Paso from including the costs of the Expansion Capacity, which it voluntarily constructed, in shippers' rates in the Rate Case Filing.<sup>117</sup>

97. In the September 5, 2008 Order, which issued after Phelps Dodge filed the instant rehearing request, the Commission affirmed the decision in the March 20, 2006 Order and expanded upon its reasoning.<sup>118</sup> The Commission explained that Article 11.2(a) only applies to eligible shippers' 1995 TSAs, and not new contracts. The Commission also explained that the Expansion Capacity was not a part of El Paso's system when the shippers entered into their 1995 TSAs. Thus, the Commission concluded that in using the Expansion Capacity, the full requirements shippers were using capacity above the levels of their 1995 TSAs and, therefore, the Article 11.2(a) rate cap does not apply to Expansion Capacity. The Commission stated that the former full requirements shippers must pay the full rate for the Expansion Capacity, just as historical contract demand shippers do for capacity above the level of their 1995 TSAs.<sup>119</sup>

98. The Commission fails to see why the admission of the capacity withholding evidence would warrant a reversal of these decisions. Phelps Dodge argues that if it were proven that El Paso's capacity withholding caused the shortfall in 2000-2001, the Commission would find that either El Paso should bear the costs of the Expansion Capacity, or at a minimum, these costs should be allocated amongst all shippers, and not just to the former full requirements shippers. However, this argument is not persuasive. As we explained above, regardless of El Paso's fault during 2000-2001, the Expansion Capacity was needed to meet the growing demands of the full requirements shippers on the system and, pursuant to the 1990 Settlement, El Paso was not required to build this additional capacity at its own expense. Thus, it was reasonable for El Paso to seek to recover the cost of the Expansion Capacity in this rate case, and the admission of evidence of El Paso's capacity withholding would not change this determination.

99. Moreover, Phelps Dodge's concern that the cost of the Expansion Capacity will be borne by only the former full requirements shippers is misplaced. In the March 20, 2006 Order, the Commission stated that the cost of the Power-Up Project should be allocated

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<sup>116</sup> See *El Paso Natural Gas Co.*, 103 FERC ¶ 61,280, at P 41-45 (2002), *reh'g denied*, 105 FERC ¶ 61,202, at P 14 (2003).

<sup>117</sup> March 20, 2006 Order at P 69.

<sup>118</sup> See September 5, 2008 Order at P 72-79, 84-88.

<sup>119</sup> *Id.* P 84-88.

to all of El Paso's customers.<sup>120</sup> With regard to Line 2000, the Commission stated the cost-specific method of including the costs of that project in the rates could be addressed at the hearing.<sup>121</sup> Because the hearing in this proceeding was terminated with the acceptance of the 2006 Settlement, the September 5, 2008 Order stated that, with respect to this issue, it will not prejudge the scope of any hearing in any future rate case.<sup>122</sup> Thus, Phelps Dodge's concerns regarding the cost allocation of the Expansion Capacity are unwarranted.

100. In light of this, the Commission finds Phelps Dodge's claim that it would be better off litigating to be unpersuasive. It is clear that Phelps Dodge's argument is premised on the belief that at a hearing the Commission would not only reverse its decision excluding the capacity withholding evidence (and, once admitted, find such evidence persuasive), but also reverse its decision that Article 11.2(a) does not apply to Expansion Capacity. This line of reasoning is highly speculative.

101. In contrast, the 2006 Settlement provides real and substantial benefits to all El Paso shippers, including Phelps Dodge. The El Paso rate case that the 2006 Settlement resolved was the first after a ten-year settlement rate moratorium, and the first after the significant changes implemented in the Capacity Allocation Proceeding. Needless to say, there were many complex and novel issues to be decided. The 2006 Settlement provides a reasonable resolution to these issues and received wide-spread support, even though no party obtained everything it wanted. By arguing that it would be better off litigating all of these issues anew in the hope of a better result, Phelps Dodge disregards all of the beneficial trade-offs and peace-saving benefits of the 2006 Settlement. Moreover, the benefit Phelps Dodge alleges will occur from litigating this case is too speculative to undermine the conclusion that it would be no worse off under the 2006 Settlement than if it were free to litigate further. Considering all of this, the Commission concludes that the 2006 Settlement will place Phelps Dodge in no worse a position than if the case were litigated by Phelps Dodge and El Paso in a severed proceeding.

102. For these reasons, the Commission denies rehearing and finds that the August 31 Order properly approved the 2006 Settlement under the second *Trailblazer* approach.

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<sup>120</sup> With the exception of Article 11.2(a) shippers, because their rates are capped. See March 20, 2006 Order at P 69.

<sup>121</sup> *Id.*

<sup>122</sup> September 5, 2008 Order at P 100.

**C. Article 13.4 of the 2006 Settlement**

103. Article 13.4 of the 2006 Settlement addresses the treatment of contesting parties who are severed from the settlement.<sup>123</sup> In its protest to the 2006 Settlement, Phelps Dodge argued that this provision would deny Phelps Dodge access to essential transportation services under certain sections of the El Paso tariff, should Phelps Dodge be severed from the 2006 Settlement.

**1. August 31 Order**

104. In the August 31 Order, the Commission stated that because it determined it was not appropriate to sever Phelps Dodge from the 2006 Settlement, Phelps Dodge's concerns regarding Article 13.4 were moot.

**2. Phelps Dodge's Request for Clarification**

105. Phelps Dodge requests clarification that the Commission has not made a ruling on the merits regarding the legality of Article 13.4 of the 2006 Settlement. Phelps Dodge requests further clarification that the Commission's finding in the August 31 Order regarding Article 13.4 may not be cited by any party to support a claim that Article 13.4 is lawful or should serve as applicable precedent in any future settlement negotiations on the El Paso system.

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<sup>123</sup> Article 13.4 states in relevant part:

If the Commission finds that a Contesting Party shall not be bound by the Stipulation, EPNG and the Settling Parties request the Commission to sever the Contesting Party and not make any provision of this Stipulation effective as to the Contesting Party, except as provided below. If any Contesting Parties are severed, such Contesting Parties may subscribe to any new service approved in the orders in this proceeding or any other service under the terms of EPNG's tariff; provided, however, that the rates applicable to any such services subscribed to by the Contesting Parties shall be the rates filed by EPNG in its July 10, 2006 compliance filing in this proceeding, pending final resolution by the Commission of the rates for such Contesting Parties. EPNG and the Settling Parties agree that severed Contesting Parties shall be allowed to benefit from the following provisions of the Stipulation: [list of provisions] ... All other provisions of this Stipulation shall not apply to Contesting Parties.

**3. Commission Determination**

106. The Commission has not made a ruling on the merits of the legality of Article 13.4 of the 2006 Settlement. The Commission need not address the issue of the legality of Article 13.4 because no party has been severed from the 2006 Settlement, rendering the issue moot.

The Commission orders:

Phelps Dodge's requests for rehearing are denied, as discussed in the body of this order.

By the Commission. Commissioners Spitzer and Moeller are not participating.

( S E A L )

Kimberly D. Bose,  
Secretary.