

UNITED STATES OF AMERICA 148 FERC ¶ 63,014
FEDERAL ENERGY REGULATORY COMMISSION

El Paso Natural Gas Company

Docket No. RP10-1398-003

INITIAL DECISION

(Issued September 17, 2014)

Appearances

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Donald G. Avery, Esq. and Andrew B. Kolesar III, Esq. on behalf of Arizona Electric Power Cooperative, Inc.

Bruce A. Connell, Esq. on behalf of ConocoPhillips Company

John P. Gregg, Esq. on behalf of the El Paso Municipal Customer Group

Glenn S. Benson, Esq. and Barbara S. Jost, Esq. on behalf of Freeport Minerals Corporation and Apache Nitrogen Products, Inc.

Jerry F. Coffey, Esq., Marcia A. Stanford, Esq., and Steven A. Weiler, Esq. on behalf of Gila River Power, LLC

Katherine B. Edwards, Esq. and John Paul Floom, Esq. on behalf of the Indicated Shippers – BP Energy Company, ConocoPhillips Company, and Shell Energy North America (US), LP

Victoria Lauterbach, Esq., David S. Shaffer, Esq., and Wendy B. Warren, Esq. on behalf of New Mexico Gas Company, Inc.

Keith T. Sampson, Esq. on behalf of Pacific Gas and Electric Company

Jonathan A. Bromson, Esq. on behalf of the Public Utilities Commission of the State of California

Russell Archer, Esq., J. Patrick Nevins, Esq., and Douglas K. Porter, Esq. on behalf of Southern California Edison

John R. Ellis, Esq. and *Jonathan J. Newlander, Esq.* on behalf of Southern California Gas Company and San Diego Gas and Electric Company

Matthew J. Agen, Esq., Douglas M. Canter, Esq., Keith A. Layton, Esq., and Devin T. Ryan, Esq. on behalf of Southwest Gas Corporation

Jason T. Gray, Esq. and Kathleen L. Mazure, Esq. on behalf of Texas Gas Service Company, a division of One Gas Inc.

Thomas E. Knight, Esq., James F. Moriarty, Esq., and Amy J. Welander, Esq. on behalf of UNS Gas, Tucson Electric Power

Hollis J. Alpert, Esq., William Collins, Esq., and Rachael N. Marsh, Esq. on behalf of the Federal Energy Regulatory Commission

JUDITH A. DOWD, Presiding Administrative Law Judge.

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I. BACKGROUND

1. In 1996, El Paso Natural Gas Company (EPNG) entered into a settlement agreement with its customers that addressed the risks associated with the approximately 35% of capacity on EPNG's system that was unsubscribed (1996 Settlement); the 1996 Settlement set rates and terms of service for ten years. The referenced unsubscribed capacity resulted from California local distribution company customers turning back their rights to capacity at the request of the California Public Utilities Commission (CPUC) as part of the industry-wide restructuring required by FERC Order No. 636.¹ In the 1996 Settlement, the parties agreed to share the risk of the unsubscribed capacity and to share the revenues realized when EPNG resold that capacity for the ten-year settlement period.²
2. Article 11.2 of the 1996 Settlement applied to the post-settlement period. Article 11.2(a) established a rate cap, such that rates for capacity then under contract by eligible shippers would be capped, subject to inflation, until the shippers' transportation service agreements (TSA) terminated. Then, under Article 11.2(b), even if eligible shippers entered into new TSAs in the future, their rates would never include costs attributable to unsubscribed capacity or to capacity subscribed at less than the maximum applicable tariff rate, up to the level of capacity in existence on EPNG's system at the time of the 1996 Settlement.³
3. Subsequent to the 1996 Settlement, EPNG's capacity became constrained, which led to two separate complaints against EPNG—the Capacity Allocation Proceeding⁴ and

¹ *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, FERC Stats. & Regs. ¶ 30,939, *order on reh'g*, Order No. 636-A, FERC Stats. & Regs. ¶ 30,950, *order on reh'g*, Order No. 636-B, 61 FERC ¶ 61,272 (1992), *order on reh'g*, 62 FERC ¶ 61,007 (1993), *aff'd in part and remanded in part sub nom. United Distrib. Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996), *order on remand*, Order No. 636-C, 78 FERC ¶ 61,186 (1997).

² *El Paso Natural Gas Co.*, 139 FERC ¶ 63,020, at P 3 (2012) (Initial Decision).

³ *El Paso Natural Gas Co.*, Opinion No. 517, 139 FERC ¶ 61,095, at P 8 & n.5 (2012) (Opinion No. 517).

⁴ *El Paso Natural Gas Co.*, 99 FERC ¶ 61,244, *clarified*, 100 FERC ¶ 61,285 (2002), *reh'g granted in part*, 104 FERC ¶ 61,045 (2003), *reh'g granted in part*, 106 FERC ¶ 61,233 (2004), *petition for review denied*, *Ariz. Corp. Comm'n v. FERC*, 397 F.3d 952 (D.C. Cir. 2005), *voluntary remand on other issues*, 115 FERC ¶ 61,259 (2006), *reh'g denied*, 120 FERC ¶ 61,170 (2007).

the CPUC Complaint Case.⁵ In the Capacity Allocation Proceeding, the Federal Energy Regulatory Commission (the Commission) directed EPNG to convert its full requirements contracts to contract demand agreements with specific demand limits up to EPNG's available capacity. This required amendment of the 1996 Settlement, but the Commission did not specifically modify Article 11.2.⁶

4. In 2005, EPNG filed a general Natural Gas Act (NGA) section 4 system-wide rate case, its first rate case in the ten years following the 1996 Settlement (2006 Rate Case). EPNG asked the Commission to find that the rate protections in Article 11 of the 1996 Settlement no longer applied and that any obligations of the settling parties had been extinguished and fully discharged as a result of the Capacity Allocation Proceeding. The Commission determined that the Article 11.2 rate caps and other rate provisions would continue to apply to eligible shippers beyond termination of the 1996 Settlement.⁷ The United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) affirmed the Commission's determination that the Article 11.2 rate cap remained in effect and rejected arguments that the Commission applied Article 11.2: (1) too broadly by holding that the rate cap continued to apply to the former full requirements shippers' contract demand contracts; or (2) too narrowly by holding that it did not apply to expansion capacity. The D.C. Circuit also held that the Commission reasonably adopted the presumption that the capacity of EPNG's system on December 31, 1995, the time of the 1996 Settlement, was 4,000 MMcf/d.⁸

5. The presumption provides that the requirement in Article 11.2(b) of the 1996 Settlement that rates charged to particular settlement shippers may not include certain unsubscribed or discounted capacity costs is not triggered if EPNG has subscribed service of at least 4,000 MMcf/d (a rough equivalent of the capacity EPNG had under subscription in 1995) priced at the rate cap or above.⁹ In Opinion No. 517, the

⁵ *Pub. Utils. Comm'n of Cal. v. El Paso Natural Gas Co.*, 94 FERC ¶ 61,338, *reh'g granted in part*, 95 FERC ¶ 61,368 (2001), *order approving contested settlement*, 105 FERC ¶ 61,201 (2003).

⁶ Opinion No. 517, 139 FERC ¶ 61,095 at PP 10–11.

⁷ *El Paso Natural Gas Co.*, 114 FERC ¶ 61,290 (2006), *reh'g denied*, 124 FERC ¶ 61,227 (2008), *reh'g denied*, 132 FERC ¶ 61,155 (2010), *aff'd*, *Freeport-McMoRan Corp. v. FERC*, 669 F.3d 302 (2012).

⁸ Opinion No. 517, 139 FERC ¶ 61,095 at PP 12–13.

⁹ *El Paso Natural Gas Co.*, Opinion No. 528, 145 FERC ¶ 61,040, at P 499 (2013) (Opinion No. 528) (citing *El Paso Natural Gas Co.*, 114 FERC ¶ 61,290 at P 60 (March 20, 2006 Order)).

Commission clarified that the presumption was “established to ‘simplify compliance’ . . . [and] is not the only method for determining compliance with Article 11.2(b).”¹⁰ The Commission explained that:

[A]n Article 11.2(b) analysis includes two parts: (1) a calculation of whether [EPNG]’s firm contracts at or above the rate cap exceed 4,000 MMcf/d and (2) a determination of whether [EPNG] proposes to shift the costs of unsubscribed or discounted capacity to the rates of Article 11.2(b) shippers.¹¹

Thus, the Commission stated, “If the presumption is not met, other evidence might show that Article 11.2(b) is otherwise satisfied.”¹²

6. In 2008, EPNG filed another general NGA section 4 system-wide rate case (2008 Rate Case), this time including tariff records that continued the operation of the rate caps established pursuant to Article 11.2 of the 1996 Settlement, and alternative records that terminated the rate caps. The Commission rejected EPNG’s alternative tariff records and set the primary ones for hearing procedures.¹³ The presiding judge issued an initial decision on January 14, 2011, finding that: (1) the Article 11.2 rate caps in the 1996 Settlement remain in effect, are just and reasonable, and should not be eliminated under the *Mobile-Sierra* public interest standard in light of changes to the [EPNG] system; (2) EPNG should not be allowed to reallocate the alleged revenue shortfall caused by the rate cap to other customers; (3) EPNG failed to meet the 4,000 MMcf/d subscription presumption and must implement the Article 11.2(b) rate adjustment; and (4) a shipper that acquires or retains a small Article 11.2 contract is entitled to the benefit of the Article 11.2(b) rate adjustment for all its load.¹⁴ The Commission affirmed the presiding judge on most rulings, but reversed the determination that EPNG failed to meet the 4,000 MMcf/d presumption, such that no additional rate adjustment under Article 11.2(b) was required.¹⁵

¹⁰ Opinion No. 517, 139 FERC ¶ 61,095 at P 323.

¹¹ *Id.* P 322.

¹² *Id.* P 323.

¹³ *El Paso Natural Gas Co.*, 124 FERC ¶ 61,124 (2008), *reh’g denied*, 133 FERC ¶ 61,129 (2010), *clarification and reh’g dismissed as moot*, 134 FERC ¶ 61,170 (2011).

¹⁴ *El Paso Natural Gas Co.*, 134 FERC ¶ 63,002 (2011).

¹⁵ Opinion No. 517, 139 FERC ¶ 61,095 at P 322.

II. PROCEDURAL HISTORY

7. On September 30, 2010, while the 2006 Rate Case was on appeal to the D.C. Circuit and the 2008 Rate Case was still pending before the presiding judge, EPNG filed another NGA section 4 system-wide rate case (2011 Rate Case). The Commission held that “Article 11.2 contract issues [would] be eligible for litigation in [the 2011 Rate Case] only to the extent that they were not finally decided in [the 2008 Rate Case].”¹⁶ The presiding judge issued the Initial Decision on June 18, 2012.¹⁷

8. On October 17, 2013, the Commission issued Opinion No. 528, an Opinion and Order on Initial Decision, affirming in part and modifying in part the Initial Decision and setting for a supplemental hearing, *inter alia*, the appropriate remedy for EPNG’s failure “to meet the requirements of Article 11.2(b)” of the 1996 Settlement.¹⁸ Regarding Article 11.2 issues generally, the Commission affirmed the presiding judge’s findings that: (1) “the asserted changed circumstances [on EPNG’s system] do not support a determination that Article 11.2 rates are not in the public interest or are unjust and unreasonable, or unduly discriminatory;” (2) EPNG “may not reallocate the revenue shortfall that arises due to the rate differential between Article 11.2 rates and recourse rates;” and (3) EPNG’s “proposed bifurcated cost of service is not just and reasonable because it would improperly shift costs from the Article 11.2 shippers to non-Article 11.2 shippers.”¹⁹ The Commission also explained that the presiding judge did not address whether EPNG “satisfied the requirements of Article 11.2(b) either by meeting the Commission’s presumption or by another means” or, if EPNG failed to satisfy Article 11.2(b), “how to determine the refund;” rather, he “found that these issues were moot because the Commission held in Opinion No. 517 that [EPNG] had met the Article 11.2(b) presumption in the 2008 rate case.”²⁰

9. The Commission, however, disagreed that the issues were moot. As to the first issue, the Commission applied the analytic framework from Opinion No. 517 to find that EPNG “failed to demonstrate that it met the 4,000 MMcf/d presumption.”²¹ The

¹⁶ *El Paso Natural Gas Co.*, 133 FERC ¶ 61,253, at P 14 (2010).

¹⁷ Initial Decision, 139 FERC ¶ 63,020 (2012).

¹⁸ *El Paso Natural Gas Co.*, Opinion No. 528, 145 FERC ¶ 61,040, at P 2 (2013) (Opinion No. 528).

¹⁹ *Id.* PP 449, 468, 490.

²⁰ *Id.* P 502 (citing Initial Decision, 139 FERC ¶ 63,020 at P 303 (citing Opinion No. 517, 139 FERC ¶ 61,095 at PP 322–330)).

²¹ *Id.* P 520.

Commission continued, however, to state that it “lack[ed] sufficient data to determine whether the costs of 1995 capacity are being charged to customers that are protected under Article 11.2(b) and what methodology is appropriate to ensure that Article 11.2(b) shippers do not bear the cost of unsubscribed or discounted 1995 capacity through rates for non-Article 11.2(a) service.”²² Thus, the Commission stated:

Because the Presiding Judge did not address whether [EPNG] satisfied the Article 11.2(b) requirements, the Commission remands this issue to the Office of Administrative Law Judges to determine whether [EPNG] proposes to shift the costs of unsubscribed or discounted 1995 capacity to the rates of Article 11.2(b) shippers, and, if so, how to determine an appropriate refund and/or otherwise ensure that Article 11.2(a) shippers do not bear the cost of unsubscribed or discounted 1995 capacity through rates for non-Article 11.2(a) service.²³

10. Providing further analysis, the Commission explained that having failed to meet the 4,000 MMcf/d presumption, EPNG provided “other evidence” in an attempt to prove that it complied with Article 11.2(b). The Commission found, however, that the peak day analysis and revenue analysis EPNG submitted “lack[ed] sufficient detail to determine what 1995 capacity costs are being recovered, and whether any such costs are being charged to Article 11.2(a) shippers through non-Article 11.2 contract rates.”²⁴ Consequently, the Commission held that EPNG “failed to demonstrate that it satisfies the Article 11.2(b) requirements, [so] it remains necessary to determine an appropriate means to ensure that Article 11.2(a) shippers do not bear the cost of unsubscribed or discounted 1995 capacity through the rates that Article 11.2(a) shippers pay for other non-Article 11.2(a) service.”²⁵ According to the Commission, the Rate Protected Shippers,²⁶ Texas Gas Service Company, a division of ONEOK, Inc. (TGS),²⁷ and Arizona Public Service

²² *Id.*

²³ *Id.* P 521.

²⁴ *Id.* P 526.

²⁵ *Id.* PP 526–527, 531.

²⁶ According to the list of Appearances in Opinion No. 528, the Rate Protected Shippers included Freeport-McMoRan Corporation, Apache Nitrogen Products, Inc., New Mexico Gas Company, Inc., Southwest Gas Corporation, El Paso Municipal Customer Group, UNS Gas, Inc., and ConocoPhillips Company.

²⁷ Note that TGS requested on February 5, 2014, that the Commission re-designate the name “Texas Gas Service Company, a division of ONEOK, Inc.” as “Texas Gas Service Company, a division of ONE Gas, Inc.” On July 2, 2014, TGS gave notice that it

Company proposed methods to calculate a remedy, but the presiding judge struck this testimony, except as offers of proof for exceptions.²⁸ Thus, the Commission continued, the “parties have not had an adequate opportunity to address the underlying issues, and there is an insufficient record for the Commission to make a determination.”²⁹

11. The Commission directed EPNG to file *pro forma* recalculated rates, consistent with Opinion No. 528, within sixty days. In addition to other findings, the Commission stated that the compliance filing should use a single cost of service and, under the billing adjustment methodology, there should be no adjustment to transfer the costs not recovered from the Article 11.2(a) rates to other EPNG shippers since EPNG, under the terms of the 1996 Settlement, assumed the full responsibility for those costs. The Commission directed “the parties in the remanded proceeding to use [EPNG]’s compliance filing as the basis from which to determine the appropriate level of costs reflected in contracts protected under Article 11.2(b) for which [EPNG] has agreed to assume responsibility and the adjusted rates applicable to those contracts.”³⁰

12. The Commission also explicitly determined that the following matters are not at issue in this proceeding: (1) issues related to whether EPNG’s compliance filing is in compliance with Opinion No. 528; (2) “issues related to the recourse rates applicable to contracts or services not subject to Article 11.2(b);” and (3) “issues regarding whether [EPNG] has met the 4,000 MMcf/d presumption, or otherwise satisfied the Article 11.2(b) requirements”³¹

13. On October 23, 2013, the Chief Administrative Law Judge (Chief Judge) issued an Order Designating Presiding Administrative Law Judge and Establishing Track II Procedural Time Standards in Docket No. RP10-1398-003.

14. The undersigned conducted a prehearing conference on November 7, 2013, and thereafter issued an Order Establishing Rules for the Conduct of Hearing and an Order Adopting Procedural Schedule.

anticipated withdrawing from this docket and would not be submitting an initial brief. Subsequently, according to RPS, Texas Gas renounced any rights under the 1996 Settlement, including any right to Article 11.2(b) rates. *See* RPS Reply Br. at 24.

²⁸ Opinion No. 528, 145 FERC ¶ 61,040 at P 531.

²⁹ *Id.*

³⁰ *Id.* PP 534–535.

³¹ *Id.* PP 535–536.

15. On November 15, 2013, ConocoPhillips Company (ConocoPhillips) filed a Request for Clarification of Opinion No. 528, or in the Alternative, Request for Expedited Issuance of an Order on Rehearing of Opinion No. 517 Regarding Article 11.2(a) Cost Recovery. That same day, El Paso Electric Company (EPE) also filed a Request for Rehearing of Opinion No. 528 and a Motion for Technical Conference on EPNG's upcoming compliance filing.

16. On November 18, 2013, the following participants filed Requests for Rehearing: Sempra Global and Golden Spread Electric Cooperative, Inc.; ConocoPhillips; EPNG; Southern California Gas Company and San Diego Gas & Electric Company (collectively, SoCalGas/SDG&E); the Hourly Services Shipper Group;³² the CPUC; the Arizona Corporation Commission and Southwest Gas Corporation (SWG); the Indicated Shippers;³³ TGS; UNS Gas, Inc. and Tucson Electric Power Company; and Southern California Edison Company. The rehearing requests were assigned to Docket No. RP10-1398-004.

17. On November 22, 2013, EPNG filed an Answer to EPE's Motion for Technical Conference and an Errata to that Answer. EPNG also filed a Motion to Stay the remand proceeding in Docket No. RP10-1398-003.

18. On December 2, 2013, EPNG filed an Answer opposing ConocoPhillips' Request for Clarification of Opinion No. 528, or in the Alternative, Request for Expedited Issuance of an Order on Rehearing of Opinion No. 517 Regarding Article 11.2(a) Cost Recovery. That same day, TGS filed an Answer in Support of ConocoPhillips' Requests.

19. On December 3, 2013, SWG filed a Motion for Leave to Answer and Answer to EPNG's Request for Rehearing. TGS and the Rate Protected Shippers (RPS)³⁴ also filed Answers to EPNG's Request for Rehearing on the same day, specifically regarding EPNG's request to clarify the scope of the remand proceeding.

20. On December 4, 2013, EPNG filed a Motion for Leave to Answer and Answer to ConocoPhillips' Request for Rehearing.

³² According to the Motion, the Hourly Services Shipper Group consists of Arizona Electric Power Cooperative, Inc., Sempra Global, and TGS.

³³ According to the Motion, the Indicated Shippers consist of BP Energy Company, ConocoPhillips, and Shell Energy North America (US), L.P.

³⁴ According to the Motion, the RPS consists of ConocoPhillips, the El Paso Municipal Customer Group (comprised of ten members), Freeport-McMoRan Corporation, New Mexico Gas Company, Inc., and SWG.

21. On December 9, 2013, the RPS filed an Answer to EPNG's Motion for Stay. That same day, TGS filed an Answer in Opposition to EPNG's Motion for Stay.
22. On December 12, 2013, EPNG filed an Answer to Motion for Leave of SWG to Answer EPNG's Rehearing Request.
23. On December 13, 2013, ConocoPhillips filed an Answer in Opposition to EPNG's Motion for Leave to Answer and Answer to ConocoPhillips' Request for Rehearing. That same day, the Commission granted Rehearing for Further Consideration in Docket No. RP10-1398-004.
24. On December 16, 2013, EPNG made its Opinion No. 528 Compliance Filing, containing the *pro forma* rates and workpapers ordered by the Commission. The Chief Judge denied EPNG's Motion for Stay on the same day.
25. On December 17, 2013, EPNG filed an Answer to the Answers to EPNG's Rehearing Request Regarding the Scope of the Hearing.
26. On December 19, 2013, TGS, the El Paso Municipal Customer Group, Freeport-McMoRan Corporation,³⁵ and SWG filed a Motion to Strike Portions of EPNG's Request for Rehearing.
27. On December 30, 2013, EPNG filed a Motion for Reconsideration, or in the Alternative, to Permit Interlocutory Appeal, of the Chief Judge's Order Denying Motion for Stay.
28. On January 3, 2014, EPNG filed an Answer to Motion to Strike Portions of its Rehearing Request.
29. On January 9, 2014, the Chief Judge denied EPNG's Motion for Reconsideration and Motion to Permit Interlocutory Appeal, which EPNG appealed to the Motions Commissioner on January 13, 2014.
30. On January 17, 2014, TGS filed an Answer in Opposition to EPNG's Interlocutory Appeal of the Chief Judge's Order. That same day, EPNG filed a Supplement to its Interlocutory Appeal.
31. On January 22, 2014, EPNG filed the Prepared Direct Testimony of M. Catherine Rezendes, with a summary of that testimony and attached exhibits. That same day, the Motions Commissioner refused to refer to the full Commission EPNG's Interlocutory Appeal.

³⁵ According to the July 3, 2014 Initial Brief filed by the Rate Protected Shippers, Freeport-McMoRan Corporation is now Freeport Minerals Corporation.

32. On February 11, 2014, TGS filed a Motion to Strike Testimony and Exhibits and Request for Shortened Response Time regarding EPNG's Direct Testimony. That same day, the RPS filed a Motion to Strike Testimony and Exhibits and Request for Shortened Response Time and Expedited Action regarding EPNG's Direct Testimony.
33. On February 12, 2014, EPNG filed an Answer to Request for Shortened Response Time. That same day, the undersigned issued an Order Shortening Time Period for Answers to the TGS and the RPS Motions to Strike Testimony and Exhibits.
34. On February 19, 2014, EPNG filed an Errata to the Prepared Direct Testimony of M. Catherine Rezendes and to certain attached exhibits.
35. On February 21, 2014, Commission Trial Staff (Staff) filed an Answer in Support of Motions to Strike Testimony. That same day, EPNG filed an Answer to the Motions to Strike Testimony and Exhibits.
36. On February 26, 2014, the undersigned issued an Order Granting in Part and Denying in Part Motions to Strike Testimony and Exhibits.
37. On March 4, 2014, SWG filed the Prepared Direct and Answering Testimony of Richard A. Jordan, with a summary of that testimony and attached exhibits. TGS filed the Prepared Remand Proceeding Answering Testimony of C. David Crisp, with a summary of that testimony and attached exhibits, and the Prepared Remand Proceeding Answering Testimony of John A. Cogan, with a summary of that testimony and attached exhibits. Staff filed the Prepared Direct Testimony of Vladimir Ekzarkhov, with a summary of that testimony and attached exhibits. The RPS filed the Prepared Answering Testimony of Gregory M. Lander, with a summary of that testimony and attached exhibits. The RPS filed an Errata to one of the attached exhibits on March 6, 2014, submitting the corrected exhibit.
38. On March 14, 2014, EPNG filed a Motion to Supplement its Request for Clarification Regarding the Scope of the Hearing, bringing to the Commission's attention the undersigned's Order Granting in Part and Denying in Part Motions to Strike Testimony and Exhibits.
39. On March 31, 2014, the RPS filed an Answer in Opposition to EPNG's Motion to Supplement its Request for Clarification Regarding the Scope of the Hearing. Staff also filed an Answer in Opposition to EPNG's Motion on the same day.
40. On April 1, 2014, SoCalGas/SDG&E filed the Prepared Cross-Answering Testimony of Jack N. Jones, with a summary of that testimony and attached exhibits. That same day, SoCalGas/SDG&E also filed a Motion for Leave to File Prepared Cross-Answering Testimony One Day Out of Time and a Motion for Leave to File Errata to Exhibits to Testimony.

41. On April 2, 2014, the undersigned issued an Order Shortening Time Period for Answers to Motions filed by SoCalGas/SDG&E to April 7, 2014. That same day, Staff filed a Motion to Substitute Witness and to Submit Supplemental Testimony, seeking to substitute Janice L. Radel for Staff witness Mr. Ekzarkhov, to submit Prepared Supplemental Testimony by Ms. Radel adopting portions of Mr. Ekzarkhov's testimony and exhibits, and to submit a Supporting Exhibit of Ms. Radel.
42. On April 7, 2014, the RPS filed a Motion to Strike Testimony and Exhibits Filed by SoCalGas/SDG&E and a Request for Shortened Answer Period. The RPS also filed an Answer to Motions Filed by SoCalGas/SDG&E.
43. On April 9, 2014, EPNG filed an Answer to Staff's Motion to Substitute Witness and to Submit Supplemental Testimony and a Motion for Extension of Procedural Schedule and for Shortened Response Time. The same day, TGS filed a Motion to Strike Testimony and Exhibits regarding SoCalGas/SDG&E's Cross-Answering Testimony, and SoCalGas/SDG&E filed an Answer to the RPS Request for Shortened Answer Period to their Motion to Strike. The undersigned also issued an Order Granting Motions Filed by SoCalGas/SDG&E and an Order Shortening Time Period for Answers to the RPS Motion to Strike.
44. On April 10, 2014, the undersigned issued an Order Shortening Time Period for Answers to EPNG's Motion for Extension of Procedural Schedule and an Order Shortening Time Period for Answers to the TGS Motion to Strike.
45. On April 14, 2014, the RPS and SWG filed a Joint Answer Opposing Motion for Extension of Procedural Schedule.
46. On April 15, 2014, SoCalGas/SDG&E filed an Answer to the RPS Motion to Strike. That same day, EPNG filed a Reply to Joint Answer Opposing Motion for Extension of Procedural Schedule, which the undersigned rejected as an improper answer to an answer in the Order Modifying Procedural Schedule issued the same day. The Order Modifying Procedural Schedule provided EPNG with additional time to file rebuttal testimony to Staff's supplemental testimony if Staff's Motion to Substitute Witness and to Submit Supplemental Testimony was granted.
47. On April 16, 2014, SoCalGas/SDG&E filed an Answer to the TGS Motion to Strike.
48. On April 21, 2014, the undersigned granted Staff's Motion to Substitute Witness and to Submit Supplemental Testimony. That same day, the undersigned also granted in part and denied in part the RPS and TGS Motions to Strike.
49. On April 23, 2014, EPNG filed the Prepared Rebuttal Testimony, Part I, of M. Catherine Rezendes, with a summary of that testimony and attached exhibits.

50. On April 25, 2014, SoCalGas/SDG&E filed a Motion for Leave to File Second Errata to Exhibits to Testimony.
51. On April 30, 2014, EPNG filed the Prepared Rebuttal Testimony, Part II, of M. Catherine Rezendes, with a summary of that testimony and attached exhibits.
52. On May 6, 2014, the RPS filed a Motion to Strike Rebuttal Testimony and Exhibits and Request for Shortened Response Time and Expedited Action. On May 8, 2014, the undersigned shortened the time period for answers to May 13, 2014.
53. On May 13, 2014, EPNG filed an Answer opposing the RPS' Motion to Strike. TGS and Staff both filed Answers in support of the Motion. That same day, the undersigned granted the SoCalGas/SDG&E Motion for Leave to File Second Errata to Exhibits to Testimony.
54. On May 16, 2014, the participants filed a Preliminary Joint Narrative Statement of Issues, a Joint Order of Witness List, and a Joint Index of Exhibits.
55. On May 19, 2014, the undersigned issued an Order denying the RPS' Motion to Strike Rebuttal Testimony and Exhibits.
56. On May 20, 2014, the participants filed a Corrected Joint Order of Witness List.
57. On May 23, 2014, EPNG, the RPS, TGS, SoCalGas/SDG&E, and Staff each filed Pre-Hearing Briefs.
58. On May 29, 2014, the undersigned issued an Order Establishing Rules for Submission of Testimony at Hearing.
59. On May 30, 2014, EPNG filed an Errata to Exhibit Nos. EPG-16R and EPG-28R.
60. The Hearing commenced on June 4, 2014, and continued through June 5, 2014. The following entities participated in the Hearing: EPNG; the RPS; SoCalGas/SDG&E; SWG; TGS; and Staff.
61. On June 19, 2014, the RPS filed proposed transcript corrections. On June 23, 2014, SoCalGas/SDG&E filed proposed transcript corrections. On June 30, 2014, EPNG and Staff each filed proposed transcript corrections.
62. On July 2, 2014, TGS filed a letter to the undersigned explaining that TGS reached an agreement with EPNG and was planning to withdraw from this proceeding.
63. On July 3, 2014, EPNG, the RPS, SoCalGas/SDG&E, and Staff each filed Initial Briefs. On July 30, 2014, the same participants each filed Reply Briefs.

64. On July 16, 2014, the undersigned issued an Order Adopting Transcript Corrections.

III. DISCUSSION & PARTY POSITIONS

65. On May 16, 2014, the participants filed a Joint Narrative Statement of Issues.³⁶ Each issue will be discussed in the order in which the issues were set out in that Statement.

A. **ISSUE 1: Whether, under EPNG's rate proposal as modified in Opinion No. 528, shippers protected by Article 11.2(b) would be charged costs of unsubscribed or discounted capacity as defined in the 1996 settlement?**³⁷

1. **El Paso Natural Gas Company**

66. EPNG argues that there is no shift in the cost of unsubscribed³⁸ or discounted 1995 capacity because the EPNG's revenues exceed the cost of the 1995 capacity in its current recourse rates. EPNG argues that it properly used a cost and revenue analysis to determine whether there was a shift in the cost of unsubscribed or discounted 1995 costs to the current recourse rates of Article 11.2(b) shippers. EPNG primarily relies upon the cost and revenue analysis produced by their witness Catherine Rezendes. Witness Rezendes calculated the cost of the 1995 facilities by identifying the net plant of the facilities in service in 1995 and determining the cost of these facilities in EPNG's current recourse rates. Ms. Rezendes uses the cost of facilities as the cost of capacity on the theory that the "cost of capacity can be measured only by reference to the facilities that create the capacity."³⁹

67. Ms. Rezendes determined that the cost of the 1995 facilities in EPNG's recourse rates is \$221 million.⁴⁰ EPNG maintains while the 1995 facilities originally cost well

³⁶ Joint Narrative Statement of Issues, Transmittal Letter, Docket No. RP10-1398-003 (filed May 16, 2014) (JNSI).

³⁷ *Id.* at 1.

³⁸ As EPNG correctly observed, no participant in this remanded proceeding has shown that any of EPNG's capacity is unsubscribed. The evidence is limited to discounted capacity. However, it is obviously possible in the future that EPNG will again have load that is unsubscribed.

³⁹ EPNG Reply Br. at 9.

⁴⁰ EPNG Initial Br. at 11; Ex. EPG-24R.

over \$400 million they have substantially depreciated over the last sixteen years. According to EPNG, the cost of those facilities is now significantly lower than their cost in 1995 when the article 11.2(a) rates were agreed to in the 1996 Settlement.⁴¹

68. EPNG argues that its current rates include approximately \$125 million in maintenance costs and \$82 million in costs associated with EPNG's Pipeline Integrity Program (PIP). According to EPNG, all such costs were incurred after 1995 and therefore are not properly included in the calculation of 1995 costs within the meaning of Article 11.2(b) of the 1996 Settlement.⁴²

69. EPNG asserts that, at the time of the 1996 Settlement, the major California shippers had just turned back large amounts of their capacity on EPNG. The East of California shippers (largely the 11.2(b) shippers) then negotiated Article 11.2(b) in an effort to protect themselves from the costs of continued or future capacity turn-backs of 1995 capacity.⁴³

70. In the earlier part of these proceedings, the Commission established a presumption to simplify a determination of whether article 11.2(b) is satisfied. In the March 20, 2006 Order, the Commission established a presumption that if El Paso had subscribed service of at least 4,000 MMcf/d at the rate caps level or above, its rates did not include any discounted or unsubscribed capacity.⁴⁴

71. EPNG cites the testimony of its witness, Ms. Rezendes, in which she calculated the revenue derived from the 4,000 MMcf/d of 1995 capacity that constitutes the Commission's presumption. Ms. Rezendes assertedly relied on the rationale of the presumption adopted by the Commission and assumed the highest rate contracts on the system are attributable to 1995 capacity. Ms. Rezendes first calculated the revenues derived from firm contracts priced at the Article 11.2(a) rate or higher referred to as "qualifying contracts" and found that the revenues from these qualifying contracts amount to \$413 million.⁴⁵ The qualifying contracts have a maximum daily quantity of 3,132,118 Dth/d.⁴⁶ Witness Rezendes also states that EPNG has 356,078 Dth/d of

⁴¹ *Id.* at 10-11 (citing Ex. EPG-16R at 21-22).

⁴² *Id.* at 11; Tr. 183. The parties agreed that the capacity of El Paso was approximately 4,000 MMcf/d in 1995.

⁴³ EPNG Initial Br. at 11 (citing Tr. 138-39; March 20, 2006 Order, 114 FERC ¶ 61,290 at PP 9-13).

⁴⁴ March 20, 2006 Order, 114 FERC ¶ 61,290 at P 60.

⁴⁵ EPNG Initial Br. at 12 (citing Ex. EPG-16R at 36; Ex. EPG-29R).

⁴⁶ *Id.* (citing Ex. EPG-29R at line 45).

Capacity Reservation Nominations (CRNs) that count toward the presumption. Together, the qualifying contracts and the CRNs total 3,488,196 Dth/d, which subtracted from the qualifying presumption of 4,068,000 Dth/d (the thermal equivalent of 4,000 MMcf/d of 1995 capacity), leaves a capacity shortfall of 579,804 Dth/d.⁴⁷ Next, Ms. Rezendes calculated the revenues derived from the 579,804 Dth/d of firm contracts with the highest discounted rate, until 4,068,000 Dth/d was reached. Ms. Rezendes concluded that the revenues derived from the discounted rate contracts that “fill” the 579,804 Dth/d “capacity shortfall” come to \$48 million⁴⁸ and the total of firm revenues derived from the 1995 capacity are approximately \$460 million.⁴⁹

72. Ms. Rezendes also calculated interruptible revenues derived from 1995 capacity on the premise that such revenues also cover the cost of 1995 capacity. She found that such revenues amount to \$20 million from interruptible transportation and park and loan services.⁵⁰ Ms. Rezendes acknowledged that interruptible sales are derived from both 1995 and post-1995 capacity. Accordingly, she apportioned the interruptible revenues between 1995 and post-1995 capacity by using a ratio of the 4,000 MMcf/d, of 1995 capacity to EPNG’s total mainline capacity of approximately 4,550 MMcf/d, inclusive of 550 MMcf/d of expansion capacity added after 1995. Applying that ratio to the \$20 million of interruptible revenues results in 1995-related interruptible revenues of \$17.5 million.⁵¹ Adding the \$17.5 million to the roughly \$460 million of firm revenues attributable to 1995 capacity results in total revenues attributable to 1995 capacity of about \$480 million.

73. EPNG contends that the costs shifted through the discount adjustment approved by the Commission in Opinion No. 528 are related to the capacity that EPNG constructed after 1995 and thus are not 1995 costs. In any event, the cost of the post-1995 capacity of \$174 million greatly exceeds the \$73 million of discounted costs shifted through the discount adjustment.⁵² The costs shifted through the discount adjustment only arose because of the pipeline expansion. The Commission has found that it would be

⁴⁷ *Id.* at 13.

⁴⁸ *Id.* (citing Ex. EPG-29R at 2, line 66).

⁴⁹ *Id.* (citing Ex. EPG-16R at 36-37; Ex. EPG-29R at 2, 4 (line 68, column f)).

⁵⁰ *Id.* (citing Ex. EPG-16R at 37).

⁵¹ *Id.* (citing Ex. EPG-16R at 37-38).

⁵² *Id.* at 14 (citing Ex. EPG-1R at 33-36; Ex. EPG-6R; Ex. EPG-7R; Ex. EPG-16R at 39).

“unreasonable to interpret Article 11.2(b) to require EPNG to absorb such costs, which only arise because of the expansions.”⁵³

74. EPNG also maintains that even if a portion of the PIP and maintenance costs and the entire discount adjustment of \$73 million were excluded from EPNG’s Current Recourse Rates and not counted as revenue; the pipeline’s revenue still exceeds the cost of 1995 capacity in the recourse rates by approximately \$260 million.

75. EPNG states that the cost of service of its entire system is approximately \$327 million, after PIP, maintenance, and the incrementally priced Willcox Lateral are deducted.⁵⁴ Comparing the \$221 million cost of the 1995 capacity to the total cost of \$327 million results in a ratio of 67% (two-thirds) of EPNG’s costs being attributable to 1995 capacity. Assuming that same ratio for EPNG’s maintenance and PIP costs, a total of about \$140 million would be attributed to 1995 capacity.

76. EPNG points out that in support of its position it performed a cost and revenue analysis based on the assumption of all adverse inferences against EPNG.⁵⁵ First, two-thirds of PIP and maintenance costs incurred after 1995 are included as 1995 costs in this exhibit. Second, the whole \$73 million in costs shifted through the discount adjustment to EPNG’s maximum recourse rates is entirely removed from the revenue side of the equation. Because the revenues attributable to 1995 capacity still exceed the cost of the 1995 capacity, even after making these adverse assumptions, EPNG has shown conclusively that Article 11.2(b) shippers will not pay for any discounted 1995 costs.

77. EPNG takes issue with Staff and RPS’s alleged interpretation of the Commission’s presumption. EPNG asserts that the opposing witnesses assume that since EPNG failed to meet the 4,000 MMcf/d threshold there must be some amount of unsubscribed or discounted 1995 capacity. From there, the opposing witnesses allegedly conclude that there must be a prohibited shift in the cost of discounted 1995 capacity to EPNG’s current recourse rates. EPNG contends that these witnesses provide no basis or support for their contention that a cost shift has occurred simply because the pipeline failed to meet the Commission’s presumption. EPNG proposes that the issue of whether there are costs of unsubscribed or discounted 1995 capacity in EPNG’s current rates can only be answered by determining the actual cost of 1995 capacity in EPNG’s current rates.

⁵³ *Id.* (citing *El Paso Natural Gas Co.*, 124 FERC ¶ 61,227, at P 98 (2008) (September 5, 2008 Order) (emphasis removed)).

⁵⁴ *Id.* at 15.

⁵⁵ Ex. EPG-47R.

78. EPNG acknowledges that the integrated nature of its system and operations makes it difficult to distinguish 1995 costs but contends that this fact does not compel a conclusion that there must be some costs of discounted 1995 capacity in EPNG's current recourse rates. Witness Rezendes testified that the cost of facilities that existed in 1995 in EPNG's current rates is not unknown. The pipeline's records show the dates when EPNG's facilities went into service and allow EPNG to identify the facilities that were in service as of December 31, 1995.⁵⁶ EPNG points out that it also is required by the Commission's accounting regulations to keep track of the capital costs of all of its facilities.⁵⁷ EPNG states that Ms. Rezendes was able to apply cost of service principles to develop a cost of service for those facilities based on the current costs in EPNG's compliance filing. Witness Rezendes computed the cost of service of the 1995 facilities by applying the depreciation rate and rate of return approved in Opinion No. 528.⁵⁸ Witness Rezendes concluded that the cost of 1995 service in EPNG's current rates is \$221 million.

79. EPNG asserts that the Commission's presumption based on at least 4,000 MMcf/d sold at rates equal to or greater than the applicable 11.2(a) rate is only one part of the presumption. EPNG contends that "[a]fter finding that EPNG did not meet the [first requirement of the] presumption", the Commission set for hearing the second part of whether EPNG proposes to shift the costs of unsubscribed or discounted 1995 capacity to the rates of Article 11.2(b) shippers.⁵⁹ According to EPNG, only EPNG has analyzed and answered the cost shift question, determining that there is no shift.⁶⁰

2. The Rate Protected Shippers

80. RPS states that the essence of the dispute is the correct route to compliance with Article 11.2(b) or what "compliance" means.⁶¹ RPS cites portions of the Commission's decisions in this case that reflect upon that question:

The Commission established the Threshold Presumption '[t]o simplify a determination of whether Article 11.2(b) is satisfied.' '[A]n Article 11.2(b)

⁵⁶ EPNG Initial Br. at 26 (citing Tr. 77-78).

⁵⁷ *Id.* (citing Ex. EPG-16R at 30-31).

⁵⁸ *Id.* at 26 n.42 (citing Ex. EPG-24R).

⁵⁹ EPNG Reply Br. at 4 (citing Opinion No. 528, 145 FERC ¶ 61,040 at P 521).

⁶⁰ *Id.* at 4-5 (citing Opinion No. 528, 145 FERC ¶ 61,040 at P 500 (quoting Opinion No. 517, 139 FERC ¶ 61,095 at P 322)).

⁶¹ RPS Initial Br. at 8.

analysis include two parts: (1) a calculation of whether El Paso's firm contracts at or above the rate cap exceed 4,000 MMcf/d and (2) a determination of whether El Paso proposes to shift the costs of unsubscribed or discounted capacity to the rates of Article 11.2(b) shippers.'

The Commission also has determined that the Threshold Presumption is 'not the only method for determining compliance with Article 11.2(b).'

The Commission held that EPNG's cost-revenue study in Phase 1 of the instant docket was invalid because it 'fails to acknowledge' the impact of the substantial discounts in [contract] rates.⁶²

81. RPS alleges that no party disputes the above statements. Rather, the parties disagree about how to make a determination of whether EPNG proposes to shift the costs of unsubscribed or discounted capacity to the rates of Article 11.2(b) shippers. RPS contends that since EPNG does not satisfy the Threshold Presumption, this establishes a "key factor in determining both EPNG's compliance with Article 11.2(b) and quantifying any Prohibited Costs that EPNG has included in the rates of Article 11.2(b) shippers."⁶³

82. RPS emphasizes that the 1996 Settlement was essentially a "risk sharing agreement" necessitated by a large number of defaults in the California area and was intended to insulate shippers from having to bear in their rates the costs allocable to EPNG's future unsubscribed/discounted capacity sales.⁶⁴ RPS contends that Article 11.2(b) insulates protected shippers from paying rates that again include EPNG's recovery of costs arising from the same discounted or unsubscribed capacity that they had already paid for in the "Risk Sharing Amounts" payment to EPNG under the 1996 Settlement.⁶⁵ Article 11.2(b) protects these shippers by requiring EPNG not to allocate, but rather to absorb, any such unsubscribed or discounted fixed costs.

83. RPS quotes the text of Article 11.2(b) as follows:

⁶² *Id.* at 8-9 (citing Opinion No. 528, 145 FERC ¶ 61,040 at P 530; Opinion No. 517, 139 FERC ¶ 61,095 at P 322, 323) (internal footnotes omitted)).

⁶³ *Id.* at 9.

⁶⁴ *Id.* at 10 (citing Opinion No. 528, 145 FERC ¶ 61,040 at P 453; March 20, 2006 Order, 114 FERC ¶ 61,290 at PP 9-15).

⁶⁵ *Id.* (citing 1996 Settlement Agreement, Art. 3.3; Opinion No. 517, 139 FERC ¶ 61,095 at PP 208, 238).

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 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).⁶⁶

84. RPS interprets the above-quoted text from the 1996 Settlement as being designed to remove all discounted and unsubscribed capacity costs from protected shippers' rates.⁶⁷ According to RPS, EPNG operates an integrated system and sells capacity without differentiating between 1995 and post-1995 capacity.⁶⁸ EPNG Witness Ms. Rezendes asserts that EPNG facilities can be tracked to pre or post-1995 capacity (Tr. at 174:17-18) but the Commission has previously found that "[EPNG's] capacity... cannot be physically attributed to pre-1995 or post-1995 capacity."⁶⁹

85. RPS emphasized the Article 11.2(b) language that protects eligible shippers from "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...to the [Article 11.2(b)] Shippers...that becomes unsubscribed or is subscribed at less than the maximum applicable tariff rate.*"⁷⁰ RPS makes the point that there is no mention of facilities or the cost of facilities in the Article 11.2(b) language.

86. RPS defines "capacity" "as the pipeline's contract space that corresponds with contract service rights of the pipeline's shippers."⁷¹ Facilities are defined as the "pipes and valves and related physical assets that replace, update and/or expand the pipeline's

⁶⁶ *Id.* at 12 (quoting Opinion No. 528, 145 FERC ¶ 61,040 at P 499 n.733) (emphasis added in brief).

⁶⁷ *Id.* at 15 (citing September 5, 2008 Order, 124 FERC ¶ 61,227 at P 96).

⁶⁸ *Id.* (citing Tr. 81:7-16, 132:13-133:1; Ex. S-6R).

⁶⁹ *Id.* at 15-16 (citing September 5, 2008 Order, 124 FERC ¶ 61,227 at P 98).

⁷⁰ *Id.* at 19-20 (citing 1996 Settlement Agreement, Article 11.2(b)) (emphasis added in brief).

⁷¹ *Id.* at 20 (citing Tr. 248:3-8).

ability to sell capacity.”⁷² RPS further states that pipelines “expend money to construct facilities, but shippers pay rates for capacity to deliver gas between specific points regardless of the facilities used.”⁷³

87. According to RPS, the Commission concluded in light of EPNG’s integrated system that there was no simple way to precisely account for or segregate the costs of 1995 capacity to determine if these precise costs have been shifted “for purposes of Article 11.2(b).”⁷⁴ The Commission determined that, because EPNG operates an integrated system under which it does not segregate utilized capacity by the age of the facilities providing such capacity, any bifurcated approach was unworkable.⁷⁵ Instead, the Commission found that because capacity additions after 1995 are made into to an integrated system and utilization of 1995 capacity cannot be distinguished, the costs related to that capacity cannot be identified either. Therefore, the Commission established the Presumption (Threshold) at the approximate level of 1995 capacity for the purpose of determining Article 11.2(b) compliance.⁷⁶

88. RPS sums up its position as follows: EPNG allocated the costs attributable to discounted or unsubscribed 1995 capacity contracts to maximum recourse rates and did not remove such costs from Article 11.2(b) shippers’ rates. Therefore, Article 11.2(b) shippers’ rates include prohibited costs. In short, an Article 11.2(b) shipper is paying prohibited costs in violation of Article 11.2(b) whenever (1) EPNG fails to meet the Threshold Presumption; (2) the Article 11.2(b) shippers pay a portion of EPNG’s total long-term firm and short-term firm discount adjustments as part of their rates; or (3) EPNG fails to absorb the portion of the discount adjustments paid by Article 11.2(b) shippers that is associated with the shortfall below the Threshold adopted by the Commission. RPS concludes that all three elements are present here and El Paso has shifted prohibited costs to Article 11.2(b) shippers.

89. In its Reply Brief, RPS argues that EPNG’s latest cost and revenue study should be disregarded for three reasons: (1) the cost and revenue study amounts to a second bite of the litigation apple; (2) in Opinion No. 528, the Commission found that a substantially similar study failed to show that EPNG was in compliance with Article 11.2(b); and

⁷² *Id.*

⁷³ *Id.* (citing Tr. 248:3-8; Tr. 318:17-18).

⁷⁴ *Id.* at 22 (citing September 5, 2008 Order, 124 FERC ¶ 61,227 at P 98).

⁷⁵ *Id.* (citing September 5, 2008 Order, 124 FERC ¶ 61,227 at P 98).

⁷⁶ *Id.* at 23 (citing Opinion No. 528, 145 FERC ¶ 61,040 at P 492; September 5, 2008 Order, 124 FERC ¶ 61,227 at P 98).

(3) the Commission further found in Opinion 528 that issues regarding whether EPNG has satisfied the requirements of 11.2(b) are not to be relitigated.⁷⁷ RPS points out that Staff concurs with its view that EPNG's cost and revenue study is fraught with potential for manipulation.⁷⁸ RPS contends that if EPNG's total discounts exceed EPNG's post-1995 expansion capacity quantities (550 MMcf/d or 539,350 Dth/d) then some of those discount-adjustment capacity quantities simply must be associated with 1995 capacity. RPS argues that rate increases associated with the discount adjustment must, in part, be due to discounting some 1995 capacity.⁷⁹

90. Finally, RPS contends that the briefs filed by SDG&E and SoCalGas should be ignored because these companies lack sufficient interest in the outcome of this case, since they are not eligible for Article 11.2(b) rates. RPS further argues that the only interest SoCalGas/SDG&E have in this case is the *Williston Basin*⁸⁰ issue, which is not to be decided in this case but is pending rehearing before the Commission on appeal from Opinion No. 528.

3. Southern California Gas Company and San Diego Gas & Electric Company

91. SoCalGas/SDG&E state that El Paso presented evidence of the current costs of its 1995 system facilities, and the revenue from the contracts countable towards the 4,000 MMcf/d capacity sales presumption threshold, citing the rebuttal testimony of El Paso Witness M. Catherine Rezendes.⁸¹ SoCalGas/SDG&E contend that this evidence establishes the following facts:

⁷⁷ RPS Reply Br. at 9 (citing Opinion No. 528, 145 FERC ¶ 61,040 at P 536).

⁷⁸ See RPS Initial Br. at 24; Staff Initial Br. at 24-26.

⁷⁹ RPS Reply Br. at 12 (citing Ex. RPS-49R; Lander, Tr. 247:19-248:8; 269:21-270:15; Rezendes, Tr. 84:2-22); RPS Initial Br. at 24-25.

⁸⁰ *Williston Basin Interstate Pipeline Co.*, 107 FERC ¶ 61,164 (2004). RPS correctly notes that *Williston* is pending before the Commission on appeal. No issue controlled by *Williston* is before me in this remand proceeding. Nevertheless, I have taken SoCalGas/SDG&E's briefs into account insofar as they reflect on the issues that properly are before me.

⁸¹ SoCalGas/SDG&E Initial Br. at 3; Ex. EPG-16R and attached Exs. EPG-23R, EPG-24R and EPG-29R; Ex. EPG-46R; Ex. EPG-47R.

1. The specific El Paso system facilities in existence on December 31, 1995 can be identified and their share of the current cost of service can be calculated.⁸²
2. The cost of service of the 1995 system is \$221,102,652, not including maintenance and PIP costs.⁸³
3. 67.49% is the proportion of 1995 system costs to the total cost of service, excluding Willcox Lateral costs (which are not rolled in) and excluding maintenance and PIP costs.⁸⁴
4. Including 67.49% of maintenance and PIP costs, the cost of service of the 1995 system is \$361,399,924.⁸⁵
5. The revenues from the contracts countable towards the 4,000 MMcf/d presumption are \$413,475,720 under the set of compliance rates that restrict the allocation of the discount adjustment to the zones in which the discounts were given.⁸⁶
6. The revenues from the contracts countable towards the 4,000 MMcf/d presumption are \$409,703,376 using the set of compliance rates that allocate the discount adjustment system-wide.⁸⁷

92. SoCalGas/SDG&E state that they agree with Staff and RPS that maintenance and PIP costs should be counted in the determination of the 1995 system costs,⁸⁸ since the system could not be operated lawfully without maintenance and PIP upgrades as required

⁸² SoCalGas/SDG&E Reply Br. at 3 (citing Ex. EPG-16R at 29:7-11; 30:18-31; Ex. EPG-24R).

⁸³ *Id.* (citing Ex. EPG-16R at 22:10-12; Ex. EPG-24R at line 11; Ex. EPG-46R at line 1).

⁸⁴ *Id.* (citing Ex. EPG-16R at 32:13-22; Ex. EPG-46R at n.1).

⁸⁵ *Id.* (citing Ex. EPG-46R; Ex. EPG-47R at line 2).

⁸⁶ *Id.* (citing Ex. EPG-16R at 36:5-17; Ex. EPG-29R at 2 of 4, line 65).

⁸⁷ *Id.* (Ex. EPG-16R at 37:8-13; Ex. EPG-29R at 4 of 4, line 65).

⁸⁸ *Id.* at 4 (citing Staff Initial Br. at 25-26; RPS Initial Br. at 24; Ex. EPG-16R at 35:9-36:4).

by applicable regulations.⁸⁹ However, since the revenues of about \$410 million or \$413 million from the capacity attributable to the 1995 system facilities exceed the approximately \$361 million of 1995 system costs, including maintenance and PIP costs, any possible rejection of EPNG's position on this issue does not change the outcome. Similarly, the issue of whether to include revenues from discounted contracts is irrelevant because they are not necessary to a determination of whether revenues exceed the amount of 1995 system costs.

93. In its Reply Brief, SoCalGas/SDG&E support EPNG's view that the El Paso system facilities in existence in December 1995 can be identified, so that their current costs of service can be calculated. Under this approach, SoCalGas/SDG&E contend that revenues from the capacity presumed to be attributable to the 1995 system facilities exceed the costs of these facilities and, therefore, there is no cost shift in the rates of any EPNG shipper.

94. SoCalGas/SDG&E also agree with Staff that EPNG's revenues should be increased by a \$17.5 million share of the revenues from interruptible services and by revenues from discounted contracts. However, SoCalGas/SDG&E contend that it is unnecessary to decide in this proceeding whether these revenues should be included or excluded in the analysis of the 1995 system costs and revenues, since EPNG's remaining revenues substantially exceed costs.

95. SoCalGas and SDG&E note that the *Williston Basin* issue impacts the issues set for hearing in this case but because the revenue under either a state-wide system or a zone-specific allocation exceed the costs of the December 31, 1995 system facilities, the *Williston Basin* issue does not affect the outcome of this case.

4. Commission Trial Staff

96. Staff argues that the purpose of this proceeding is to ascertain what portion of the recourse rates included in EPNG's compliance filing in this docket represents the costs of 1995 capacity covered by Article 11.2(b) and to develop appropriate rates for Article 11.2(b) shippers that exclude such costs.⁹⁰ Staff alleges that EPNG is required to bear the cost for 1995 capacity that becomes unsubscribed or discounted at less than the Article 11.2(a) rate. Staff quotes the Commission's definition of 1995 capacity as the first 4,000 MMcf/d (or 4,068,000 Dth/d) of firm capacity that is subscribed on the EPNG system at maximum rates.⁹¹ In the March 20, 2006 Order, the Commission established a

⁸⁹ *Id.* (citing Ex. EPG-16R at 32:13-18).

⁹⁰ Staff Initial Br. at 12 (citing Opinion No. 528, 145 FERC ¶ 61,040 at P 533).

⁹¹ *Id.* at 12-13 (citing March 20, 2006 Order, 114 FERC ¶ 61,290 at P 60).

presumption that Article 11.2(b) rate protections would not be triggered if El Paso had subscribed service of at least 4,000 MMcf/d, which is approximately equivalent to EPNG's subscribed capacity in 1995, priced at the rate cap or above.⁹² Consequently, by establishing the presumption, the Commission has determined that if EPNG is unable to sell a least 4,000 MMcf/d at rates equal to or greater than the applicable Article 11.2(a) rate as escalated, it must exclude the costs of such unsubscribed or discounted capacity from the rates of the protected Article 11.2(b) shippers.

97. Staff examined whether EPNG's recourse rates produce impermissible cost shifts to shippers protected by Article 11.2(b). Staff's approach is grounded in the language of Article 11.2(b) to the effect that "[EPNG] assumes full responsibility for any and all existing and future step-downs or terminations and the associated CD/billing determinants related to the capacity describe[d] in subparagraph (b)."⁹³ Based on this methodology, Staff has determined that EPNG's compliance rates improperly overcharge EPNG's shippers protected by Article 11.2(b) in each of the three rate periods at issue.

98. In Opinion No. 528, the Commission required EPNG to file compliance recourse rates for three rate periods: (1) rates reflecting the Commission's findings effective April 1, 2011; (2) rates reflecting the abandonment of the Tucson and Deming Compressor Stations, effective September 15, 2011; and (3) rates reflecting the Commission's findings under the Natural Gas Act (NGA) section 5 with a prospective effective date.⁹⁴ The Commission required the participants to prepare their analyses based on EPNG's compliance filing.⁹⁵ Accordingly, Staff examined EPNG's recourse rates based on EPNG's compliance filing as adjusted for each of these rate periods.⁹⁶

99. Staff maintains that for all three rate periods, EPNG's compliance recourse rates include 1995 capacity costs covered by Article 11.2(b) that cannot be included in the rates of Article 11.2(b) shippers. Staff asserts that EPNG's compliance rates are based on billing determinants that are reduced below the threshold level (which is 4,068,000 Dth/d,) less CRNs due to discount adjustments and/or unsubscribed capacity. Consequently, Article 11.2(b) shippers pay higher recourse rates than they would pay if the minimum threshold level is used. Staff argues that EPNG's use of reduced billing

⁹² *Id.* at 12-13.

⁹³ *Id.* at 12; Opinion No. 528, 145 FERC ¶ 61,040 at P 522 n.787.

⁹⁴ *Id.* at 15 (citing Opinion No. 528, 145 FERC ¶ 61,040 at P 754).

⁹⁵ *Id.* (citing Opinion No. 528, 145 FERC ¶ 61,040 at P 535).

⁹⁶ *Id.* (citing Ex. S-1R at 8:8-18-18:8).

determinants, which result in higher recourse rates, causes an inappropriate cost shift related to unsubscribed or discounted 1995 capacity.⁹⁷

100. In order to determine whether there is a cost shift for each rate period, Staff compared the compliance filing revenues with those that would be obtained using billing determinants, assuming EPNG met the threshold established by the Commission. Specifically, 3,711,922 Dth/d is the level that must be achieved to ensure that there are no unsubscribed or discounted 1995 capacity costs in the Article 11.2(b) rates. According to Staff Witness Radel:

[s]hippers protected by Article 11.2(b) should pay a transportation rate that is based on billing determinants that reflect a total of no less than 3,711,922 dekatherms per day which is the presumed threshold level established by the Commission, less [CRNs]. 3,711,922 dekatherms per day is the minimum level of billing determinants that should be used to calculate Article 11.2(b) rates....⁹⁸

Staff calculated the cost shift as shown below:

TABLE I

**Summary of Cost Shifts resulting in Overcharges
to Protected Article 11.2(b) shippers**

<u>Period</u>	<u>Excess Charges</u>
April 1, 2011 to September 14, 2011	\$3,169,715
From September 15, 2011 Annually	\$6,850,954
Prospective Period Annually	\$5,748, 370 ⁹⁹

101. Staff criticizes EPNG's cost shift analysis. EPNG Witness Rezendes claims that there is no cost shift based on an inappropriate assumption that 1995 facilities' costs and associated revenue should be extracted from EPNG's cost of service. According to Staff, Ms. Rezendes explicitly assumes that particular costs and revenues are attributable to 1995 or post-1995 facilities. Staff asserts that Ms. Rezendes' cost and revenue analysis, which attempts to extract 1995 and post-1995 cost and revenue, is inconsistent with Commission findings that EPNG operates an integrated system. Staff argues that EPNG concedes that its system is operationally integrated and that EPNG's customers do not

⁹⁷ *Id.* (citing Ex. S-1R at 6:19-7:7).

⁹⁸ *Id.* at 16 (citing Ex. S-1R at 6:13-18).

⁹⁹ *Id.* at 17.

purchase 1995 capacity or post-1995 capacity.¹⁰⁰ Staff maintains that although Ms. Rezendes believes it is possible to identify the facilities that EPNG constructed before 1995 and facilities EPNG constructed or acquired/purchased after 1995, the EPNG witness admits it may not be possible to separately identify capacity used on any day as being created by 1995 or post-1995 facilities.¹⁰¹ Staff points out that EPNG also does not maintain separate FERC accounts for 1995 and post-1995 facilities.¹⁰² Staff emphasizes the Commission's finding, quoted below:

[W]hen El Paso markets capacity today, it is marketing undifferentiated capacity which cannot be physically attributed to pre-1995 or post-1995 capacity. That is because it operates its system as an integrated whole and uses all of its capacity to serve the demands of all its customers. In these circumstances, we believe it reasonable, for purposes of Article 11.2(b), to attribute the first 4000 MMcf/d of firm maximum rate subscribed capacity to 1995 capacity.¹⁰³

102. Staff maintains that even though it may be possible to segregate EPNG's facilities into 1995 and post-1995 categories, the Commission has determined that it is inappropriate to do so, given the operational realities of its integrated system. The Commission also rejected a similar analysis made in Phase I of this proceeding by EPNG¹⁰⁴ in an attempt to show that it has otherwise satisfied the requirements of Article 11.2(b).¹⁰⁵ The Commission also found that the "issues regarding whether El Paso has met the 4,000 MMcf/d presumption, or otherwise satisfied the Article 11.2(b) requirements are not to be relitigated."¹⁰⁶ Furthermore, EPNG's analysis is dependent upon a bifurcated cost of service. Staff states that the Commission has ruled that EPNG's bifurcated cost of service that attempts to separate 1995 costs and post-1995 costs is

¹⁰⁰ *Id.* at 21-22 (citing Ex. EPG-1R at 34:14-18; Ex. EPG-16R at 28:17-22; Tr. 81:7-12, 130:10-20, 131:15-19; Ex. S-6R; Ex. RPS-30R).

¹⁰¹ *Id.* at 22 (citing Ex. S-7R; Ex. S-8R; Ex. S-9R, Ex. RPS-18R).

¹⁰² *Id.* (citing Ex. RPS-34R).

¹⁰³ *Id.* at 23 (citing *Freeport*, 669 F.d 302 at 312-13; Opinion No. 528, 145 FERC ¶ 61,040 at P 492; September 5, 2008 Order, 124 FERC ¶ 61,227 at P 98).

¹⁰⁴ *Id.* (citing Opinion No. 528, 145 FERC ¶ 61,040 at P 530).

¹⁰⁵ *Id.* at 23.

¹⁰⁶ *Id.* (citing Opinion No. 528, 145 FERC ¶ 61,040 at P 536).

inappropriate and that EPNG's submissions in this proceeding should reflect a single cost of service.¹⁰⁷

103. Staff begins its Reply Brief by arguing that in the earlier part of this proceeding EPNG unsuccessfully attempted to persuade the Commission that it had otherwise satisfied the requirements of Article 11.2(b) of the 1996 Settlement, relying on a cost and revenue study.¹⁰⁸ According to Staff, the Commission prohibited the participants to this remand proceeding from revisiting that finding, stating the "issues regarding whether El Paso has met the 4, 000 MMcf/d presumption, or otherwise satisfied the Article 11.2(b) requirements are not to be relitigated."¹⁰⁹

104. Staff contends that EPNG has violated the Commission's ban on relitigation by submitting a "corrected" cost and revenue study in order to address the Commission's concerns with the cost and revenue study EPNG filed in Phase I of this proceeding.¹¹⁰ EPNG claims that its failure to submit an adequate demonstration in Phase I is the reason why the Commission found that the record was inadequate to determine the issues it set for hearing in this remanded proceeding and that its "corrected" study cures that inadequacy.¹¹¹ Staff asserts that EPNG's theory is that the Commission did not find that all cost and revenue studies are an impermissible method for determining whether there was a shift in the cost of unsubscribed or discounted 1995 costs to EPNG's current rates of protected shippers.¹¹² Staff responds by citing RPS's initial brief to the effect that "the purpose of the remand hearing is not to provide another bite at the apple".¹¹³ Rather, the Commission remanded the proceeding because the record was inadequate and incomplete, since the remedy and related testimony had been struck by the Presiding Judge in Phase I of the proceeding.¹¹⁴ Staff contends that EPNG's current cost and revenue study should be rejected as improper relitigation of the Commission's Order.

¹⁰⁷ *Id.* at 24 (citing Opinion No 528, 145 FERC ¶ 61,040 at PP 490-98, 534-36).

¹⁰⁸ *See* Opinion No. 528, 145 FERC ¶ 61,040 at PP 526, 527, 530; *see also El Paso Natural Gas Co.*, 79 FERC ¶ 61,028, *reh'g denied*, 80 FERC ¶ 61,984 (1997).

¹⁰⁹ Staff Initial Br. at 32; Opinion No. 528, 145 FERC ¶ 61,040 at P 536.

¹¹⁰ Staff Reply Br. at 4; EPNG Initial Br. at 5-6.

¹¹¹ Staff Reply Br. at 4; EPNG Initial Br. at 5-6, 9.

¹¹² Staff Reply Br. at 4.

¹¹³ *Id.* at 5; RPS Initial Br. at 17.

¹¹⁴ Staff Reply Br. at 5.

105. Staff seeks to rebut EPNG's defense of its cost and revenue study, claiming such studies are commonly used in certificate proceedings to determine whether the costs of expansion facilities should be rolled into existing rates. Staff points out that the Commission, in Opinion No. 517, rejected EPNG's prior attempt to apply an analogous rolled-in rate methodology to Article 11.2, stating "the decision whether to design rates according to vintage or utilize a roll-in approach is made in the certificate proceeding, not post-hoc in a rate case. El Paso has chosen to roll in the expansion and safety costs into its recourse rates, and we need not revisit that decision here."¹¹⁵

106. Staff alleges that EPNG's compliance recourse rates include 1995 capacity costs covered by Article 11.2(b) that should not be included in the rates of Article 11.2(b) rate-protected shippers. EPNG's compliance rates are based on billing determinants that are reduced below the threshold level due to discount adjustments and/or unsubscribed capacity. Staff argues that, consequently, Article 11.2(b) rate protected shippers pay higher recourse rates than they would pay if the minimum threshold level were used. EPNG's use of reduced billing determinants, which results in higher recourse rates, causes an inappropriate cost shift related to unsubscribed or discounted 1995 capacity.¹¹⁶

5. Findings and Conclusions

107. This remand proceeding is the latest in a long-running dispute between EPNG and its rate protected shippers.¹¹⁷ The dispute concerns the ramifications of sections the 1996 Settlement that attempted to resolve the problem created by the withdrawal of California shippers who turned back their rights to capacity. Approximately 35% of the capacity on El Paso's system became unsubscribed. This excess capacity also threatened to increase the rates of the remaining El Paso customers.¹¹⁸ The settlement reached by the parties was a type of risk sharing arrangement which, *inter alia*, provided for annually escalated rate caps for contracts existing on December 31, 1995.¹¹⁹ More importantly, Article 11.2(b) of the settlement provides that the rates of eligible shippers would never include costs attributable to capacity up to the level on the EPNG system at the time of the 1996

¹¹⁵ *Id.* at 6; Opinion No. 517, 139 FERC ¶ 61,095 at P 300.

¹¹⁶ Staff Reply Br. at 10; Ex. S-1 at 6:19-7:14.

¹¹⁷ *See, supra*, PP 1-6.

¹¹⁸ Opinion No. 528, 145 FERC ¶ 61,040 at PP 6-7.

¹¹⁹ Article 3.3 of the Settlement Agreement requiring payment of risk sharing amounts by existing firm shippers. *See also* Opinion No. 517, 139 FERC ¶ 61,095 at PP 208, 238.

Settlement that becomes unsubscribed or is subscribed at less than the maximum applicable rates.¹²⁰

108. When this particular litigation began, EPNG was operating an integrated system that the Commission found was “marketing undifferentiated capacity which cannot be physically attributed to pre-1995 or post-1995 capacity.”¹²¹ Without being able to readily distinguish 1995 capacity from post-1995 capacity, the Commission established the Presumption: “[I]f 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.”¹²²

109. In Opinion No. 517, the Commission found that the presumption was not the only way to determine compliance with Article 11.2(b) of the Settlement. The Commission stated, “If the presumption is not met, other evidence might show that Article 11.2(b) is otherwise satisfied.”¹²³ In Part I of this case the Commission reviewed El Paso’s evidence and determined that it had not either met the 4,000 MMcf/d presumption or otherwise shown that it had complied with Article 11.2(b). The Commission specifically considered EPNG’s evidence consisting of a peak day analysis and a revenue analysis. Both studies were rejected by the Commission as “flawed.”¹²⁴ In this remand proceeding, EPNG offered a “corrected” cost and revenue study that is substantially similar to the rejected studies, again seeking to prove that it is in compliance with Article 11.2(b).¹²⁵ EPNG disregarded the Commission’s admonition in Opinion No. 528 that “issues regarding whether El Paso has met the 4,000 MMcf/d presumption or otherwise satisfied the Article 11.2(b) requirements are not to be relitigated” in this remand proceeding.¹²⁶

¹²⁰ I note that evidence in this proceeding shows that there are only about twenty-five companies that still enjoy Article 11.2(b) protection. RPS Reply Br. at 16 n.57.

¹²¹ Opinion No. 528, 145 FERC ¶ 61,040 at P 492 (quoting September 5, 2008 Order, 124 FERC ¶ 61, 227 at P 98).

¹²² *Id.* P 522.

¹²³ Opinion No. 517, 139 FERC ¶ 61,095 at P 323.

¹²⁴ Opinion No. 528, 145 FERC ¶ 61,040 at PP 527-530.

¹²⁵ There is no merit to EPNG’s contention that this case was remanded for a supplemental hearing to allow the Company to elaborate on its contention that it had “otherwise” met the Commission’s Presumption.

¹²⁶ Opinion No. 528, 145 FERC ¶ 61,040 at P 536.

110. EPNG Witness Rezendes' so-called "corrected" cost and revenue study has many of the same flaws its earlier studies contain. Witness Rezendes contends that when she or the Commission refer to the cost of 1995 capacity they are referring to the cost of facilities comprising EPNG's 1995 system. According to Witness Rezendes "[i]t is the cost of these facilities to which the prohibition against cost shifts applies."¹²⁷ Ms. Rezendes cites no authority for her assertion. Article 11.2(b) contains no reference to facilities or the cost of facilities. Likewise, Opinion No. 528 does not refer to facilities or cost of facilities as a way of determining capacity. Staff and RPS both distinguish capacity and cost of facilities as being separate subjects.¹²⁸ RPS cogently defines the term "capacity" as "the pipeline's contract space that corresponds with contract service rights of the pipeline's shippers.... Pipelines expend money to construct facilities but shippers pay rates of capacity to deliver gas between specific points regardless of the facilities used." Indeed, if capacity is measured by the cost of facilities, what are shippers buying when they buy capacity on a pipeline's system?¹²⁹

111. EPNG contends that its opposing parties have not adequately supported their case that EPNG intends to shift costs to Article 11.2(b) shippers. EPNG's arguments attempt to shift the burden of proof to the wrong parties. El Paso has the initial burden of proof that it has not shifted costs to Article 11.2(b) shippers. El Paso primarily has tried to meet its burden with its cost and revenue study by Ms. Rezendes. As discussed above, this study is flawed and cannot be given weight. It also violates the Commission's prohibition of relitigation.

112. Furthermore, Article 11.2(b) explicitly includes more than just the costs of the El Paso system on December 31, 1995. It also includes any cost, charge, surcharge, or add-on in any way related to the capacity of its system. Even assuming that facilities constructed before 1995 and those constructed or acquired after 1995 can be accurately identified, Ms. Rezendes admits it may not be possible to identify capacity used on any day as being created by 1995 or post-1995 facilities.¹³⁰ The Commission has recognized the integrated nature of El Paso's system and found that:

¹²⁷ Staff Initial Br. at 19.

¹²⁸ *Id.* at 8-9; RPS Initial Br. at 19-20

¹²⁹ As RPS points out, it specifically asked EPNG's Witness Rezendes to refine 1995 capacity costs and she attempted to rely on previously struck testimony and facilities costs. *See* RPS Initial Br. at 23 n.60.

¹³⁰ Staff Initial Br. at 22; Ex. S-7R; Ex. S-9R; Ex. RPS-18R.

[W]hen El Paso markets capacity today, it is marketing undifferentiated capacity which cannot be physically attributed to pre-1995 or post-1995 capacity. That is because it operates its system as an integrated whole and uses all its capacity to serve the demands of all of its customers.¹³¹

The integrated nature of El Paso's system made it "reasonable" for the Commission to adopt its 4,000 MMcf/d presumption rather than attempting to separate pre-1995 capacity from post-1995 capacity for purposes of Article 11.2(b).

113. Staff alone demonstrated the cost shifts of the three periods designated by the Commission.¹³² Staff compared EPNG's compliance filing revenues with those that would be obtained using billing determinants assuming EPNG meets the Commission Threshold. Staff Witness Radel found that 3,711,922 Dth/d is the level that EPNG must achieve to ensure that there are no unsubscribed or discounted 1995 capacity costs in the rates of Article 11.2(b) shippers. Staff supported its position with an exhibit showing this cost shifting which resulted in overcharges to Article 11.2(b) shippers.¹³³ Staff also produced a table specifying the amount of overcharges to Article 11.2(b) shippers for each of the three periods designated by the Commission. Thus, Staff found that during the period from April 1, 2011 to September 14, 2011 EPNG billed excess charges to Article 11.2(b) shippers in the Amount of \$3,169,715; from September 15, 2011 protected shippers annually were overcharged \$6,850,654; and for the prospective period protected shippers were annually overcharged, \$5,748,370.¹³⁴ I find that Staff has demonstrated EPNG's cost shifting and quantified the amount of overcharges to Article 11.2(b) shippers.¹³⁵

114. RPS treated the cost shift in less detail, but it too made the point that EPNG included prohibited costs in their rates. RPS summarized that:

[a]n Article 11.2(b) shipper is paying Prohibited Costs in violation of the 1996 Settlement whenever: (1) EPNG fails to meet the Threshold; (2) the Article 11.2(b) shipper pays a portion of EPNG's total long-term firm and short-term firm discount adjustments as part of its rates; and (3) EPNG fails to absorb the portion of the discount adjustments paid by Article 11.2(b)

¹³¹ September 5, 2008 Order, 124 FERC ¶ 61,227 at P 98.

¹³² See Ex. S-2R at 2, 4, and 7.

¹³³ Ex. S-1R at 6:13-18.

¹³⁴ See Staff Initial Br. at 17.

¹³⁵ Staff Initial Br. at 17.

shippers that is associated with the shortfall below the Threshold adopted by the Commission.¹³⁶

As RPS notes, all three of these elements are present here and RPS urges the undersigned to answer the Commission's first issues concerning whether prohibited costs are being shifted to Article 11.2(b) shippers with an unequivocal "yes."

115. Based primarily on Staff's submissions, with additional input by RPS, I agree that the issue of whether EPNG is engaged in shifting prohibited costs to Article 11.2(b) shippers is "yes", prohibited costs are being shifted to Article 11.2(b) shippers.

Conclusions

116. I find that EPNG has again failed to meet the burden of showing that under its latest rate proposal Article 11.2(b) shippers would not be charged the costs of discounted or unsubscribed capacity as defined in the 1996 Settlement.

B. ISSUE 2: If so, what is an appropriate remedy?

1. El Paso Natural Gas Company

117. EPNG argues that a remedy is not required. However, if a remedy is directed, El Paso supports a limited revenue deficiency methodology to calculate the amount of a rate adjustment to the recourse rates of Article 11.2(b) shippers. EPNG points out that the revenue deficiency methodology is reasonable, based on the facts of this case, and has also been advocated by other participants, namely Southern California Gas Company, San Diego Electric & Gas Company, and RPS.

118. The revenue deficiency methodology measures "the difference in revenues generated from the actual discounted rate in these contracts as compared to revenues that would have been generated had they been sold at the Article 11.2(a) rate."¹³⁷

119. EPNG identifies three primary issues concerning the revenue deficiency methodology if it were used to determine the amount of the rate adjustment: "(1) the level of the capacity shortfall that must be filled, (2) the discounted contracts that should be used to 'fill' the capacity shortfall to determine the revenue deficiency; and

¹³⁶ RPS Initial Br. at 31.

¹³⁷ EPNG Initial Br. at 34; Ex. EPG-1R at 56.

(3) whether interruptible revenues, or a portion thereof, should offset the revenue deficiency.”¹³⁸

120. EPNG believes that the capacity shortfall should be 579,804 Dth/d. EPNG cites to Ms. Rezendes who found a capacity shortfall of 579,804 Dth/d, and to RPS Witness Mr. Lander, who rounded up to 579,805 Dth/d in his alternative remedy.¹³⁹ However, EPNG criticizes Mr. Lander’s primary proposal based on a capacity shortfall of 614,139 Dth/d because the proposal relies on data that was provided prior to EPNG’s compliance filing.¹⁴⁰

121. EPNG asserts the rationale of the Commission’s presumption suggests that if EPNG fell short of the presumption, the next highest rate contracts should be considered to be attributable to 1995 capacity until the 4,000 MMcf/d presumption is met and discounted contracts are the result of capacity and cost additions after 1995. Sequencing the contracts is consistent with the rationale that the highest priced contracts sold by EPNG are attributable to 1995 capacity and avoids penalizing EPNG for seeking to maximize its revenues, which benefit all shippers, including Article 11.2(b) shippers.

122. In its Reply Brief, EPNG identifies as a “major area of disagreement” the dispute over whether to sequence contracts from highest to lowest or use a proportionate amount of all discounted contracts.¹⁴¹ EPNG disagrees with RPS Witness Mr. Lander’s alternative proposal that a proportionate share of EPNG’s discounted contracts should be counted.¹⁴²

123. EPNG explains that it would be unfair and contrary to the Commission’s rationale for EPNG to absorb costs due to the post-1995 expansions.¹⁴³ It cites to the September 5, 2008 Commission Order to support its position that the Commission presumed that the

¹³⁸ EPNG Initial Br. at 35.

¹³⁹ EPNG recognizes that Mr. Lander’s primary remedy proposes a remedy based on a capacity shortfall of 614,139 Dth/d. EPNG Initial Br. at 36.

¹⁴⁰ EPNG Initial Br. at 36-37.

¹⁴¹ EPNG identifies Ms. Rezendes, Mr. Crisp, and Mr. Jones, on the side of sequencing, and Mr. Lander, on the side of using proportionate share. EPNG Reply Br. at 21-22.

¹⁴² EPNG Initial Br. at 39-40.

¹⁴³ *Id.* at 39.

highest rate contracts use 1995 capacity.¹⁴⁴ Applying the same rationale supports filling the capacity threshold with the next highest rate discounted contracts.¹⁴⁵ Notwithstanding the integrated system, EPNG asserts that capacity can be attributed to 1995 capacity.

124. Additionally, EPNG alleges that any proposed remedy used to develop Article 11.2(b) rates must be offset with a portion of interruptible revenues attributable to 1995 capacity, including both the revenue deficiency methodology and Staff's imputed billing determinate methodology. EPNG explains that any contracts that cover the costs of 1995 capacity, including revenues from interruptible contracts, should be reflected in the determination of a rate adjustment. EPNG seeks support for its position from the Commission's findings in Opinion No. 517 that revenues from contracts, such as short-haul, backhaul, and east flow, should be counted towards the presumption because they "provide revenues that contribute to El Paso's cost of service."¹⁴⁶ Ms. Rezendes found that a portion of these revenues can be attributed to 1995 capacity and applied a ratio of 1995 capacity to total system capacity (88%).¹⁴⁷ EPNG asserts that it generated \$20 million in revenues from sales of interruptible service, and that such services use the entire system, including 1995 capacity.¹⁴⁸ Ms. Rezendes calculates that the sum of \$17.5 million (88%) should be offset against the revenue deficiency credited to the cost of service for purposes of calculating Article 11.2(b) rates.¹⁴⁹

125. Next, EPNG argues that the Commission Trial Staff's methodology of imputing billing determinants is flawed. EPNG alleges that the result of these flaws is that Staff's methodology imputes too many billing determinants, understates Article 11.2(b) rates, and does not accurately measure a prohibited cost shift.

126. EPNG alleges that Staff's proposed imputation of billing determinants under both of its proposed remedies fails to properly measure unsubscribed or discount-adjusted billing determinants. In essence, if there is a shortfall relative to the 4,000 MMcf/d presumption, imputing billing determinants at the maximum recourse rate instead of the Article 11.2(a) rate overstates both the cost shift and Staff's proposed adjustment rate. EPNG highlights Ms. Radel's testimony and alleges "that had she calculated the

¹⁴⁴ EPNG Reply Br. at 22 (citing September 5, 2008 Order, 124 FERC ¶ 61,227 at P 98).

¹⁴⁵ EPNG Reply Br. at 22.

¹⁴⁶ EPNG Initial Br. at 44 (citing Opinion No. 517, 139 FERC ¶ 61,095 at P 327).

¹⁴⁷ *Id.* (citing Ex. EPG-1R at 56; Ex. EPG-16R at 46).

¹⁴⁸ *Id.* at 44.

¹⁴⁹ *Id.* at 46.

discount-adjusted [billing determinants] by resort to the Article 11.2(a) rate, her starting point [billing determinant] level would be higher and the level of [billing determinants] Staff proposes to impute would be lower.”¹⁵⁰

127. EPNG opposes Staff’s primary remedy because it was revised to take account of CRNs and the alternative remedy because it was revised to avoid double-counting of discount-adjusted billing determinants.¹⁵¹ EPNG alleges that although these mistakes were fixed, others remain, rendering the Staff approach arbitrary and not supported by any rationale.¹⁵²

128. Additionally, EPNG believes that Staff’s proposed imputation of billing determinants under both proposed remedies fails to properly take into account short-term firm revenues. EPNG explains that “by designing rates on all of EPNG’s capacity that is available for sale on a firm basis and then assuming through a revenue credit that EPNG made additional sales of firm service, Staff’s methodologies improperly assume that EPNG sold more capacity than it has to sell, which is impossible.”¹⁵³ Staff’s methodology understates proposed Article 11.2(b) rates because it fails to add back \$20 million in short-term firm revenues to the costs upon which Staff designs such rates.¹⁵⁴ EPNG argues that Staff should have either included short-term firm billing determinants in the starting point of its analysis or short term revenues that were credited to the cost of service should have been restored.¹⁵⁵ By disregarding short-term revenues in its starting point, EPNG asserts that Staff imputes too many billing determinants, understates its proposed 11.2(b) rates and does not accurately measure a prohibited cost shift.¹⁵⁶

2. The Rate Protected Shippers

129. RPS believes that a remedy is necessary and that the most appropriate remedy is a revenue crediting calculation. RPS alleges that its proposed revenue crediting remedy results in just and reasonable rates, while other parties’ remedies do not. Although RPS advocates for the revenue crediting remedy, they recognize that “the two ends of the

¹⁵⁰ *Id.* (citing Tr. 353:4-12 (primary remedy) and Tr.355:1-6 (alternative remedy)).

¹⁵¹ *Id.* at 45.

¹⁵² EPNG Reply Br. at 27.

¹⁵³ EPNG Initial Br. at 48.

¹⁵⁴ *Id.*

¹⁵⁵ EPNG Reply Br. at 29.

¹⁵⁶ *Id.*

spectrum . . . creates a range of revenue credits from \$10 million by EPNG to \$60 million. . . .”¹⁵⁷ RPS calculates the revenue credit at either \$37,551,384 or \$35,452,000, under its primary and alternative cases, respectively.

130. RPS points out that all parties agree that under the revenue credit calculation the starting point is a determination of the shortfall quantity.¹⁵⁸ However, the parties’ approaches vary over subsequent steps. To determine its proposed revenue credit, RPS calculates a proportionate factor by dividing the shortfall quantity by the threshold amount.¹⁵⁹ Then, RPS applies the total revenue credit to the total compliance costs of service to reduce the maximum recourse rates across the board. Finally, RPS explains that despite its calculation of a reduction to the maximum recourse rates across the board, EPNG need only adjust the rates of Article 11.2(b) shippers.¹⁶⁰

131. In its calculations, RPS relies on a proportionate factor to determine the amount of each discounted contract’s capacity costs to fill the shortfall amount. This reliance is based on an assumption that all discounted contracts contributed equally to EPNG’s failure to meet the threshold.¹⁶¹

132. RPS cites the integrated nature of the EPNG system as justification for an assumption that all discounted contracts contributed equally to EPNG’s failure to meet the threshold in equal proportions.¹⁶²

133. RPS alleges that EPNG’s revenue credit calculation is not an appropriate compliance remedy.¹⁶³ RPS takes particular issue with EPNG’s proposed remedy because Ms. Rezendes makes no actual attempt to calculate a total revenue credit.¹⁶⁴ By

¹⁵⁷ RPS Reply Br. at 22.

¹⁵⁸ RPS Initial Br. at 33.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 34.

¹⁶¹ *Id.*

¹⁶² *Id.* at 35.

¹⁶³ *Id.* at 36.

¹⁶⁴ RPS Initial Br. at 36.

failing to make this effort, EPNG's remedy would have the effect of denying only the Article 11.2(b) shippers the benefit of interruptible and East End revenues.¹⁶⁵

134. RPS asserts that the sequencing of discounted contracts from highest to lowest is not supported by the Commission's Threshold Presumption because the presumption treats all capacity contracts priced at or above the Article 11.2(a) rate the same when determining whether the threshold is met. RPS claims that all firm capacity discounted below the Article 11.2(a) rate should be treated uniformly when calculating the remedial revenue credit and explains that its methodology meets this requirement.¹⁶⁶ RPS identifies a logical fallacy in Ms. Rezendes' assumption that unsubscribed and discounted capacity must first be attributed to post-1995 capacity. RPS points to the Commission's finding that it was appropriate to presume the first 4,000 MMcf/d of maximum rate capacity is 1995 capacity, not post-1995 capacity.¹⁶⁷ RPS also contends that EPNG's revenue credit calculation assumes that the least discounted contracts use 1995 capacity, despite the Commission's findings that EPNG markets undifferentiated capacity that cannot be physically attributed to 1995 or post-1995 capacity.

135. RPS explains that short-term firm contracts should not be excluded in the revenue credit calculation. RPS asserts that short-term firm contracts contribute to the shift of prohibited costs to Article 11.2(b) shippers.¹⁶⁸ Moreover, RPS explains that it is immaterial whether most short-term firm discounts are awarded in one zone or another because the cost of short-term firm discounts is borne by shippers system wide.¹⁶⁹

136. RPS's two remedies employ the same revenue credit methodology and only vary in the number used to calculate the short-fall quantity, which causes the proportionate factor to vary in the two cases. In its primary case, RPS's witness Mr. Lander relies on Commission Opinion No. 528, which finds that the shortfall was 614,139 Dth/d.¹⁷⁰ In his alternative case, Mr. Lander uses a shortfall of 579,805 Dth/d based on EPNG's compliance filing.¹⁷¹ Mr. Lander's alternative remedy is designed to account for the Commission's directive not to relitigate EPNG's failure to satisfy the Threshold and to

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 37.

¹⁶⁸ *Id.* at 39-40.

¹⁶⁹ *Id.* at 40-41.

¹⁷⁰ RPS Initial Br. at 45.

¹⁷¹ *Id.*

rely on the compliance filings.¹⁷² Mr. Lander's remedies take account of the many criticisms RPS has made of EPNG's proposed remedy.

137. RPS seeks to discredit SoCalGas/SDG&E's proposed remedy because it values the shortfall quantity based on the highest priced, least discounted EPNG contracts, contrary to Commission Opinion No. 528.¹⁷³ In fact, RPS believes that it can reasonably be inferred that for purposes of valuing the shortfall below the Threshold, the Commission would treat all long-term and short-term firm capacity sold below the Article 11.2(a) rates on the same basis as valuing the shortfall quantity.¹⁷⁴

138. RPS believes that the EPNG, SoCalGas/SDG&E, and Staff remedies are all inferior to the RPS remedy. However, RPS explains that although EPNG and SoCalGas/SDG&E remedies are arbitrary, Staff's is not.¹⁷⁵ RPS recognizes that "[t]he Staff method of imposing an at-risk position on EPNG is not arbitrary, unlike EPNG's method, and it properly recognizes that pursuant to Article 11.2(b), EPNG agreed to bear the risk of discounted and unsubscribed 1995 capacity."¹⁷⁶

139. RPS states that any remedy adopted needs to be reflected in a tariff provision to prevent further relitigation of the same issues.

140. In its Reply Brief, RPS reiterates its discussion related to the revenue crediting remedy. Although RPS offered two alternative remedies, the only difference between them is the amount of shortfall, discussed *infra*.¹⁷⁷ RPS repeats that the remedies proposed by other parties do not offer even-handed or rational methods to fill the capacity shortfall.

141. RPS also explained in its Reply Brief why no offset to the revenue credit should be made using interruptible revenues, as proposed by EPNG.¹⁷⁸ Because the Commission did not count interruptible service toward meeting the threshold, it has determined that

¹⁷² *Id.*

¹⁷³ *Id.* at 42-43.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 44.

¹⁷⁶ *Id.*

¹⁷⁷ RPS Reply Br. at 20-21.

¹⁷⁸ *Id.* at 20.

the ability to meet the threshold presumption should not reflect interruptible service.¹⁷⁹ RPS goes on to conclude that there is no basis to reduce the shortfall quantity, or the cost of service derived from it, because it would allow EPNG to raise Article 11.2(b) compliance rates by reducing the protections provided by Article 11.2(a). Additionally, RPS points out that Staff agrees with RPS that EPNG's proposed remedy double-counts by attributing interruptible revenues to 1995 capacity although they were already credited to the cost of service.¹⁸⁰

3. Southern California Gas Company and San Diego Gas & Electric Company

142. SoCalGas/SDG&E disagree with Staff's remedy, asserting that "[t]here is simply no good reason to choose Staff's methodology over the revenue credit methodology used by [EPNG, SoCalGas/SDG&E, and RPS][.]"¹⁸¹ SoCalGas/SDG&E assert that the revenue deficiency remedy is simpler than Staff's billing determinant methodology, and more easily accounts for CRNs and discounted contracts at or above the applicable Article 11.2(a) rate.¹⁸²

143. SoCalGas/SDG&E assert that the first step in calculating the amount of the revenue credit is to determine the amount of the capacity shortfall, which SoCalGas/SDG&E contend is 579,804 Dth/d.¹⁸³ The next step, according to SoCalGas/SDG&E, is to determine the value of the 579,804 Dth/d capacity shortfall. SoCalGas/SDG&E states that this is done by looking:

to the set of all long-term firm discounted contracts in existence on the last day of the test period in this rate case, identify the 579,804 Dth/d of those contracts with the highest discounted rates in relation to the applicable Article 11.2(a) rate, and subtract the annual revenues under those discounted rate contracts from the annual revenues that would be obtained at the applicable Article 11.2(a) zone rates.¹⁸⁴

SoCalGas/SDG&E asserts that the dollar amount of the revenue shortfall is \$10,094,385.

¹⁷⁹ *Id.* at 23.

¹⁸⁰ *Id.* at 24.

¹⁸¹ SoCalGas/SDG&E Initial Br. at 8.

¹⁸² *Id.*

¹⁸³ *Id.* at 9.

¹⁸⁴ *Id.*

4. Commission Trial Staff

144. Staff proposes two remedies—a so-called “primary remedy” and an “alternative remedy”—that eliminate the costs inappropriately shifted to Article 11.2(b) eligible shippers. Although Staff acknowledges that “[r]evenue-crediting and adjusting billing determinants are two different rate-design tools that can achieve the same result[.]”¹⁸⁵ Staff supports its proposed primary remedy, but provided the alternative remedy “should the Commission determine that the costs related to the shortfall represent the costs of 1995 capacity that should be excluded from Article 11.2(b) shippers’ recourse rates.”¹⁸⁶ Staff asserts that its billing determinant-based approach can have the same effect as, but is more easily applied than, a revenue-crediting approach.¹⁸⁷

145. Staff’s primary remedy involves calculating Article 11.2(b) rates based on billing determinants that have been increased, as compared to EPNG’s compliance filing, up to the 3,711,922 Dth/d threshold.¹⁸⁸ Staff explains that the 3,711,922 Dth/d threshold is the presumed level that must be achieved to ensure that no unsubscribed or discounted 1995 capacity costs are included in the Article 11.2(b) shippers’ recourse rates.¹⁸⁹ Staff asserts that the primary remedy, which imputes billing determinants, ensures that capacity costs are allocated consistent with that threshold level. Staff then calculated reservation rates for eligible Article 11.2(b) shippers based on total billing determinants, adjusted to include these imputed levels. Finally, Staff calculated the revenue shortfall that EPNG would absorb assuming these rates are applied to the shippers listed in EPNG’s compliance filing.¹⁹⁰

146. Staff asserts that its primary remedy is not based directly on the 579,805 Dth/d shortfall. Thus, Staff proposed an alternative remedy should the Commission determine that the imputed amount of billing determinants should be limited to the 579,805 Dth/d shortfall. Under Staff’s alternative remedy, Staff “adjusted the rate design billing determinants by imputing up to the level of the shortfall of 579,805 Dth/d, less long-term firm discounted billing determinants at less than the Article 11.2(a) rate included in

¹⁸⁵ Staff Reply Br. at 17.

¹⁸⁶ Staff Initial Br. at 31 (citing Ex. S-4R at 7:6–13).

¹⁸⁷ Staff Reply Br. at 18.

¹⁸⁸ Staff Initial Br. at 31.

¹⁸⁹ *Id.* at 32.

¹⁹⁰ *Id.*

EPNG's compliance filing, for Period 3."¹⁹¹ Staff states that the alternative remedy "is the same as [Staff's] primary methodology, except that it uses the shortfall as the imputed billing determinant level."¹⁹² Staff asserts, as it did for the primary remedy, that the reservation rates were derived using Ms. Radel's adjusted billing determinants and the reservation cost of service reflected in EPNG's compliance filing.¹⁹³

147. Staff argues that EPNG's criticisms of the primary and alternative remedies are misplaced. First, Staff contends that it does not treat the shortfall capacity as unsubscribed, because "Staff's remedy rate designs include billing determinants associated with all of [EPNG's] long-term firm discounted contracts."¹⁹⁴ Second, Staff argues that any offset for interruptible revenues that EPNG proposes would improperly penalize "Article 11.2(b) shippers by reversing, exclusively for Article 11.2(b) shippers, a credit that benefits all other shippers that pay the maximum rate on [EPNG's] system."¹⁹⁵ Third, EPNG's attack on Staff's "treatment of short-term firm contracts is irrelevant because [Staff's] proposed remedies do not require the imputation of volumes associated with short-term firm discounted contracts[.]" according to Staff.¹⁹⁶ Fourth, Staff argues that EPNG is incorrect when it criticizes its imputation of billing determinants at the maximum rate, because the billing determinants that Staff imputes are all associated with contracts at less than the Article 11.2(a) rate.¹⁹⁷

148. Finally, Staff contends that EPNG's sequencing of discounted contracts from highest-to-lowest rate to fill the shortfall is inappropriate. Staff argues that the "integrated nature of EPNG's system, which gave rise to the Presumption, requires a proportionate approach to filling the shortfall."¹⁹⁸ Staff states that the "Commission opinions and orders upon which EPNG relies contain no directive regarding the Article 11.2(b) remedy or the ordering of contracts for such a remedy."¹⁹⁹ Staff additionally

¹⁹¹ *Id.* at 36 (citing Ex. S-4R at 6:20–23; Ex. S-5R).

¹⁹² *Id.* (citing Ex. S-4R at 6:23–7:5).

¹⁹³ *Id.* at 37 (citing Ex. S-4R at 6:23–7:5).

¹⁹⁴ Staff Initial Br. at 38.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 39.

¹⁹⁸ Staff Reply Br. at 20.

¹⁹⁹ *Id.*

argues that SoCalGas/SDG&E, like EPNG, cannot demonstrate a link between the highest-rate contract below the Article 11.2(a) rate on EPNG's system and the 1995 capacity shortfall, or, conversely, a link between the lowest-rate contracts and post-1995 capacity.²⁰⁰

5. Findings and Conclusions

149. Having determined that El Paso has not met its burden of proof and has not otherwise demonstrated that there have been no cost shifts to Article 11.2(b)-protected shippers, as discussed *supra*, a remedy is necessary, as required by Opinion No. 528. The Commission, in Opinion No. 528 stated:

To the extent that shippers hold contracts protected by Article 11.2(b), their rates should not incorporate costs of unsubscribed or discounted 1995 capacity (through the discount adjustment or otherwise). The hearing should determine what portion of the recourse rates represents costs of 1995 capacity covered by Article 11.2(b) and develop an appropriate rate for these contracts which excludes such costs.²⁰¹

150. Staff's so-called "primary remedy" appropriately and reasonably removes the improper shift of costs of unsubscribed or discounted capacity below the Article 11.2(a) rates to eligible 11.2(b) shippers. Accordingly, for the reasons set forth below, Staff's remedy—which imputes billing determinants up to the 3,711,922 Dth/d threshold—is adopted in full.

a. Proposed Remedies

151. Staff advances a billing determinant-based approach, which Staff contends "eliminates the rate impact of EPNG's discounts of 1995 capacity below the Article 11.2(a) rate."²⁰² Pursuant to Staff's billing determinant-based remedy, Staff Witness Ms. Radel "imputed billing determinants to ensure that capacity costs are allocated consistent with" the 3,711,922 Dth/d threshold level.²⁰³ Ms. Radel "derived reservation rates for eligible Article 11.2(b) shippers based on total billing determinants that she adjusted to include these imputed levels."²⁰⁴ She then calculated the revenue shortfall

²⁰⁰ *Id.* at 21.

²⁰¹ Opinion No. 528, 145 FERC ¶ 61,040 at P 533.

²⁰² Staff Reply Br. at 16.

²⁰³ Staff Initial Br. at 32.

²⁰⁴ *Id.*

that necessarily must be absorbed assuming that the rates calculated pursuant to the remedy are applied to shippers listed in EPNG's compliance filing.²⁰⁵ Ms. Radel then calculated rates attributable to three different rate periods.

152. Ms. Radel, for the first period (Period 1), effective April 1, 2011, and for the second period (Period 2), effective September 15, 2011, "increased the billing determinants underlying EPNG's compliance filing recourse rates proportionately to all zones and rates."²⁰⁶ Staff asserts that this method is consistent with EPNG's compliance filing, which socializes discount adjustments across all zones for Period 1 and Period 2. Staff asserts that the imputed billing determinant calculations for Period 1 and Period 2 are shown in Exhibit No. S-2R at pages 1 and 3.²⁰⁷ The reservation rates that flow from the remedy for the first two periods, shown in Exhibit No. S-2R at pages 1 and 3, column k(1), are derived by "dividing the reservation cost of service by [Ms. Radel's] adjusted Article 11.2(b) reservation billing determinants for each period."²⁰⁸

153. Ms. Radel asserts that based on her proposed rates, EPNG should be directed to absorb and refund to Article 11.2(b) shippers \$3,169,715 for Period 1, and \$6,850,954 for Period 2, assuming that none of the current Article 11.2(b) contracts expire. For the prospective period (Period 3), Ms. Radel "increased the billing determinants consistently with the allocation in EPNG's compliance filing."²⁰⁹ Ms. Radel calculated the reservation rates in the same manner she calculated those rates for Period 1 and Period 2, by using the adjusted billing determinants and the reservation cost of service reflected in EPNG's compliance filing for the prospective period. Accordingly, Ms. Radel argues that EPNG should absorb \$5,748,370 annually, assuming all existing Article 11.2(b) contracts remain in effect.²¹⁰

154. Alternatively, EPNG, SoCalGas/SDG&E, and RPS assert that a remedy that uses a revenue-crediting approach is most appropriate for removing the improper cost shift to Article 11.2(b) shippers. The revenue-crediting approach "measures the difference in the revenues generated from the actual discounted rate in these contracts as compared to revenues that would have been generated had they been sold at the Article 11.2(a)

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 32-33; Ex. S-1R at 9.

²⁰⁷ Staff Initial Br. at 33 (citing Ex. S-1R at 10: 20-11:19, 13:8-14:7).

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 33-34.

²¹⁰ *Id.* at 34 (citing Ex. S-1R at 17:13-18:8; Ex. S-2R at 7; Ex. S-4R at 8:1-2).

rate.”²¹¹ These parties each begin their calculations by establishing the capacity shortfall, which “is the amount of additional capacity that, if sold at or above the Article 11.2(a) rate in the first instance, would cause EPNG to be in compliance with Article 11.2(b).”²¹² The parties dispute the amount of the capacity shortfall.²¹³ The parties then determine the revenue deficiency. However, the parties differ in their approaches to calculating the revenue deficiency.

155. EPNG and SoCalGas/SDG&E calculate the revenue deficiency by filling “the shortfall by sequencing EPNG’s discounted contracts from highest to lowest rate until the 4,068,000 Dth/d capacity threshold is met.”²¹⁴ EPNG asserts that:

Sequencing discounted contracts from highest to lowest rate is the most logical and reasonable [*sic*] because it is consistent with the rationale of the Commission’s presumption that the highest priced contracts sold by EPNG are attributable to 1995 capacity and it avoids penalizing EPNG for seeking to maximize its revenues for the benefit of all shippers, not just the Article 11.2(b) shippers.²¹⁵

156. Thus, the witnesses for EPNG and SoCalGas/SDG&E “propose to use the discounted contracts with the highest rates” for the purpose of filling the capacity shortfall, which they argue is “consistent with the Commission’s presumption that the highest rate contracts on the EPNG system are attributable to 1995 capacity.”²¹⁶

157. Alternatively, Mr. Lander, on behalf of RPS, contends that use of a proportionate amount of all long-term and short-term discounted contracts is more appropriate, with which Staff agrees.²¹⁷ Mr. Lander took the capacity shortfall and divided it by the threshold amount to derive a proportionate factor, which is 39.24% under the RPS Primary Case, or 37.05% under the RPS Alternative Case.²¹⁸ Using the proportionate

²¹¹ EPNG Initial Br. at 34 (citing Ex. EPG-1R at 56).

²¹² RPS Initial Br. at 32.

²¹³ EPNG Initial Br. at 35 (“All the witnesses in this case other than Mr. Lander agree that the capacity shortfall is 579,804 Dth/d or 579,805 Dth/d.”).

²¹⁴ *Id.* at 38.

²¹⁵ *Id.*

²¹⁶ EPNG Reply Br. at 21-22.

²¹⁷ Staff Reply Br. at 17; Staff Initial Br. at 28–29, 40–42; RPS Initial Br. at 32-35.

²¹⁸ RPS Initial Br. at 32.

factor, Mr. Lander took a proportionate amount²¹⁹ of “each discounted long-term firm and short-term firm transaction below the Article 11.2(a) rate during the test period and assumes it was instead sold at the applicable Article 11.2(a) rate to calculate a total revenue credit” of \$37,551,384 for the Primary Case or \$35,452,060 for the Alternative Case.²²⁰

158. Mr. Lander then allocated shares of the gross revenue credit he calculated to “affected Article 11.2(b) shippers according to their proportion of system-wide zonal Article 11.2(b) capacity for each of the applicable compliance scenarios” in EPNG’s Compliance Filing.²²¹ The total revenue credit was then applied to “the compliance cost of service to reduce the maximum recourse rates across the board. However, EPNG only needs to adjust the rates paid by the Article 11.2(b) shippers.”²²²

b. Discussion

159. Although Staff’s billing determinant-based approach can achieve the same result as the revenue-crediting approach offered by the other parties in this proceeding,²²³ Staff’s billing determinant-based remedy represents an approach that is more easily and fairly administered, neutral, and precise. Although the remedies offered by EPNG, SoCalGas/SDG&E, and RPS have been thoroughly considered, Staff’s billing determinant-based approach represents a just and reasonable approach to removing any improper cost shift to Article 11.2(b) shippers. None of the parties have submitted persuasive evidence that would indicate that Staff’s remedy should not be implemented in the instant proceeding. Thus, Staff’s so-called “primary remedy” is adopted.²²⁴

²¹⁹ RPS asserts that the “proportionate amount” is “the amount in annualized average Dth/d of each contract discounted below the Article 11.2(a) rate multiplied by the proportionate factor of each discounted below the Article 11.2(a) rate multiplied by the proportionate factor.” RPS Initial Br. at 32 n.70.

²²⁰ RPS Initial Br. at 33.

²²¹ *Id.*

²²² *Id.* at 33-34.

²²³ Tr. 166:1-5; SoCalGas/SDG&E Initial Br. at 7–8.

²²⁴ *See Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967) (“Finally, we observe that the breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies and sanctions, including enforcement and voluntary compliance programs in order to arrive at maximum effectuation of Congressional objectives.”) (Footnote omitted); *see also*

160. Article 11.2(b) requires EPNG to bear any costs for 1995 capacity that becomes unsubscribed or is discounted at less than the maximum applicable tariff rate (*i.e.*, the Article 11.2(a) rate). The 1995 capacity threshold set by the Commission is 4,068,000 Dth/d of firm capacity that is subscribed on the EPNG system at maximum rates.²²⁵ Staff correctly notes that:

By establishing the presumption, the Commission has determined that if EPNG is unable to sell at least 4,000 MMcf/d at rates equal to or greater than the applicable Article 11.2(a) rates as escalated, it must exclude the costs of such unsubscribed or discounted capacity from the rates of the protected Article 11.2(b) shippers.²²⁶

As is discussed *infra*, EPNG's recourse rates yield improper cost shifts to Article 11.2(b) protected shippers, as EPNG did not meet the 4,000 MMcf/d presumption and used reduced billing determinants that resulted in higher recourse rates. Staff's billing determinant-based remedy removes this improper cost shift for Period 1, Period 2, and Period 3, and requires EPNG absorb these costs.

161. Staff determines whether there was an improper cost shift in each of the three rate periods by comparing "the compliance filing revenues with those that would be obtained using billing determinants assuming EPNG met the [4,000 MMcf/d] threshold established by the Commission."²²⁷ Staff uses 3,711,922 Dth/d as the level that ensures that the Article 11.2(b) rates do not improperly include unsubscribed or discounted 1995 capacity costs.²²⁸ When comparing the revenues derived from Article 11.2(b) shippers annually at

Arkansas La. Gas Co. v. Hall, 453 U.S. 571, 589 n.7 (1981) (decisions interpreting substantially identical provisions of the FPA and NGA are to be interpreted interchangeably).

²²⁵ March 20, 2006 Order, 114 FERC ¶ 61,290 at P 60.

²²⁶ Staff Initial Br. at 13.

²²⁷ *Id.* at 16.

²²⁸ The 3,711,922 Dth/d amount reflects the 4,000 MMcf/d threshold, less CRNs. CRNs are appropriately excluded from the threshold amount because CRNs "are treated as subscribed capacity but are not included in EPNG's compliance filing Billing Determinants." Staff Initial Br. at 16 n.8 (citing Ex. EPG-37R at 10:13–11:16). *See also* Staff Initial Br. at 11 ("Trial Staff and El Paso's joint stipulation resolved EPNG's criticisms regarding the treatment of CRNs under Trial Staff's primary methodology and regarding the double-counting of certain billing determinants under Trial Staff's alternate methodology.").

the recourse rates, and the lower revenues derived annually using the rates designed based on the 3,711,922 Dth/d level, Staff determined the amount improperly shifted to Article 11.2(b) shippers for each of the three rate periods.²²⁹ Staff calculates \$3,169,715 of excess charges to 11.2(b) customers for Period 1; \$6,850,954 for Period 2; and \$5,748,370 for Period 3.²³⁰

162. Based on these overcharges, Staff's remedy appropriately calculates Article 11.2(b) rates based on billing determinants that have been increased, as compared to EPNG's compliance filing, up to the 3,711,922 Dth/d threshold. Staff then derived reservation rates for Article 11.2(b) protected shippers based on total billing determinants that were adjusted to include these imputed levels.

163. Staff's primary remedy is appropriate for a number of reasons. First, the primary remedy calculations that Staff supports match Staff's cost shift determinations, and comport with Article 11.2(b), in a precise, accurate, and reasonable manner. Article 11.2(b) provides:

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).²³¹

Staff's remedy appropriately accounts for EPNG's overcharges and, in accordance with Article 11.2(b), ensures that EPNG bears the responsibility for the existing and future step-downs or terminations, discounted contracts, and the associated CD/billing determinants related to the capacity as described in Article 11.2(b).

164. Second, Staff's primary remedy avoids the unnecessary arbitrariness from which the remedies proposed by the other parties in this proceeding suffer. Staff's primary remedy is not susceptible to the possible manipulation and machinations associated with the revenue-deficiency remedy the other parties support. For example, all the parties,

²²⁹ See Staff Initial Br. at 16–17.

²³⁰ Period 2 and Period 3 are calculated on an annual basis. Staff Initial Br. at 17.

²³¹ Opinion No. 528, 145 FERC ¶ 61,040 at P 7 n.5.

except Staff, support the revenue-deficiency methodology, which determines the deficiency in revenues generated by some assumed level of discounted rate contracts that are attributable to the capacity shortfall. Furthermore, all these parties agree that the initial step for calculating a remedy based on this approach is determining the amount of the capacity shortfall. However, the parties diverge from this point forward with respect to the remaining steps for calculating the remedy based on this methodology. EPNG and SoCalGas/SDG&E contend that the capacity shortfall is 579,804 Dth/d,²³² while RPS argues that the capacity shortfall is 614,139 Dth/d.²³³

165. The parties also differ in how to fill the capacity shortfall amount with the discounted contracts. EPNG and SoCalGas/SDG&E, on the one hand, support filling the shortfall amount by “sequencing EPNG’s discounted contracts from highest to lowest rate until the 4,068,000 Dth/d capacity threshold is met.”²³⁴ On the other hand, RPS supports using a “proportionate amount of all long-term and short-term discounted contracts[.]”²³⁵ EPNG also suggests an additional calculation under the revenue-deficiency methodology, which is to offset the revenue credit by interruptible transportation revenues that EPNG contends are attributable to 1995 capacity.²³⁶

166. The divergence and disagreement among the parties, illustrated by these examples, concerning the revenue-deficiency methodology highlights its subjectivity and arbitrariness, which Staff’s remedy avoids.²³⁷ The fact that all parties, except for Staff, support the revenue-deficiency methodology, yet cannot agree on the various calculations that underlie that method demonstrates not only the subjectivity of the methodology itself, but also the inherent arbitrariness of adopting one party’s calculations over the other, especially in light of Staff’s neutral approach.²³⁸ This conclusion is reinforced by

²³² EPNG Initial Br. at 35.

²³³ *Id.* at 36; RPS Reply Br. at 20–21.

²³⁴ EPNG Initial Br. at 37–38.

²³⁵ *Id.* at 38.

²³⁶ RPS Reply Br. at 23; EPNG Initial Br. at 44.

²³⁷ *See, e.g.*, RPS Initial Br. at 35.

²³⁸ *See, e.g.*, RPS Reply Br. at 21 (“Witnesses for RPS and EPNG sequence discounted contracts to fill the capacity shortfall in different ways and obtain different results.”).

Staff's assertion that "[r]evenue-crediting and adjusting billing determinants are two different rate design tools that can achieve the same result."²³⁹

167. Third, the September 5, 2008 Order appears to prohibit the use of a capacity shortfall. The Commission, in the September 5, 2008 Order, stated "[t]he first 4000 MMcf/d presumption ensures that El Paso must have subscribed capacity at maximum rates that is equivalent to the capacity that existed on its system in 1995 before it can propose to include the cost of unsubscribed or discounted capacity in the rates of eligible shippers."²⁴⁰ As discussed *supra*, EPNG has not satisfied its burden of showing that it met the presumption, nor has it provided "other evidence [that] might show that Article 11.2(b) is otherwise satisfied."²⁴¹ Thus, unsubscribed or discounted capacity may not be included in the rates of eligible shippers, and, therefore, in any remedy adopted. The shortfall amount—on which EPNG's, RPS's, and SoCalGas/SDG&E's remedies, as well as Staff's alternative remedy rely—consist of that unsubscribed and discounted capacity that the Commission stated could not be included in protected shippers' rates if EPNG failed to satisfy its burden. Consequently, any remedy adopted herein may not be reduced by unsubscribed or discounted capacity, as relying on the capacity shortfall to implement a remedy would eviscerate the protections afforded to shippers protected by Article 11.2(b). Staff's primary remedy is the only remedy that does not improperly rely on the capacity shortfall.

168. Additionally, Staff is the only participant to illustrate a cost shift to the Article 11.2(b) shippers' rates, whose method and presentation were clear, easily discernible, and precise. Further, Staff's approach is fully in accordance with the Commission's Opinion No. 528 remand, as it uses the EPNG compliance filing data as a basis for its testimony and exhibits.²⁴² The other approaches on the record offered by the remaining participants do not achieve this combined result. While RPS shows how it would calculate its revenue-credit-based methodology, it does not specifically show the calculations illustrating EPNG's cost shift, as required by Opinion No. 528. Accordingly, this serves as yet another basis to accept Staff's primary remedy.

169. Overall, Staff's approach is an objective, neutral, and accurate remedy that obviates determining, for example, whether the capacity shortfall should be filled with highest-to-lowest discounted contracts or a proportionate amount of long-term and

²³⁹ Staff Reply Br. at 16–17.

²⁴⁰ 124 FERC ¶ 61,227 at P 98.

²⁴¹ Opinion No. 517, 139 FERC ¶ 61,095 at P 323.

²⁴² See Opinion No. 528, 145 FERC ¶ 61,040 at P 533; see generally Ex. S-1; Ex. S-2R; Ex. S-3R.

short-term discounted contracts, or determining whether any revenue credit should be reduced by a portion of interruptible revenues associated with 1995 capacity. Staff's imputed billing determinant-based remedy is a just and reasonable method for undoing the cost shifts EPNG caused, which Article 11.2(b) proscribes, thereby assigning EPNG the responsibility for absorbing those costs.²⁴³

170. Despite the aforementioned, EPNG raises four points contending that Staff's remedy is flawed: (1) Staff's remedy treats the entire shortfall as unsubscribed; (2) Staff's remedy should include a credit for interruptible revenues as an offset; (3) Staff's remedy does not properly reflect short-term firm sales; and (4) Staff's remedy improperly imputes billing determinants at the maximum rates instead of the Article 11.2(a) rate.²⁴⁴ EPNG's arguments opposing Staff's primary remedy are unpersuasive.

171. First, Staff does not treat the entire shortfall as unsubscribed. Rather, as Staff notes, the primary remedy designs "Article 11.2(b) rates by imputing billing determinants in addition to those included in El Paso's compliance-filing rate design."²⁴⁵ Because EPNG's compliance filing rates include discount-adjusted billing determinants associated with EPNG's long-term firm discounted contracts, Staff's primary remedy necessarily includes discount-adjusted billing determinants associated with EPNG's long-term firm discounted contracts.²⁴⁶

172. Second, interruptible revenues should not offset any remedy imposed in this proceeding. EPNG argues that:

²⁴³ See RPS Initial Br. at 44 ("The Staff method of imposing an at-risk position on EPNG is not arbitrary, unlike EPNG's method, and it properly recognizes that pursuant to Article 11.2(b), EPNG agreed to bear the risk of discounted and unsubscribed 1995 capacity."). Note also that RPS asserts that "[a]ny remedy adopted by the Commission should require EPNG to revise its tariff to reflect a method for calculating the new Article 11.2(b) rates adopted through the Remand Hearing." RPS Initial Br. at 46. I find that requiring EPNG to propose and/or adopt tariff language codifying its method for calculating Article 11.2(b) rates in accordance with current and future Commission decisions is a matter more appropriate for the Commission to decide. Accordingly, this Initial Decision declines to rule on this particular issue.

²⁴⁴ Staff Initial Br. at 37. EPNG raised two additional issues, which EPNG and Staff resolved through a joint stipulation. Staff Initial Br. at 38.

²⁴⁵ Staff Initial Br. at 39 (citing Ex. S-1R at 8:22-9:2; Ex. S-4R at 6:13-15, 6:23-7:4).

²⁴⁶ See *id.* (citing Ex. S-4R at 6:13-15).

In Opinion No. 517, the Commission reversed the Presiding Judge's refusal to count toward the presumption certain types of contracts, such as short-haul, backhaul and east flow contracts. The Commission found that these contracts should be counted because they 'provide revenues that contribute to [EPNG's] cost of service.' It therefore follows that any contracts that cover the costs of 1995 capacity, including revenues from interruptible contracts, should be reflected in the determination of an Article 11.2(b) rate adjustment. Thus, as stated by Ms. Rezendes, at least a portion of these revenues can be attributed to 1995 capacity and should be applied to offset any revenue deficiency used to calculate Article 11.2(b) rates.²⁴⁷

EPNG's proposal to offset the remedy by interruptible remedies is inappropriate.

173. EPNG includes a cost-of-service revenue credit for EPNG's interruptible revenues in its compliance filing.²⁴⁸ Staff correctly asserts that this credit acts as a reduction for the cost-of-service for EPNG's facilities, which benefits all shippers that pay EPNG's compliance-filing recourse rates. Staff's imputation of billing determinants already reflects this credit, because Staff's remedies appropriately rely on EPNG's compliance filing. Accordingly, to offset any remedy imposed in the instant proceeding with interruptible revenues would unjustly preclude protected shippers from enjoying the benefit of the credit from which all other shippers benefit. Such action is impermissible.

174. Third, EPNG is incorrect when it asserts that Staff's remedy does not properly reflect short-term firm sales. EPNG contends:

The problem is not that Staff failed to impute short-term firm [billing determinants]. Rather the problem is that it failed to include short-term firm [billing determinants] in its starting [billing determinant] level (or increase the costs by short-term firm revenue credit), which erroneously increases the level of [billing determinants] Staff needed to impute to arrive at its targeted [billing determinant] level. As a result, Staff's methodology imputes too many [billing determinants], understates its proposed Article 11.2(b) rates and does not accurately measure a prohibited cost shift.²⁴⁹

Contrary to EPNG's assertion, Staff's remedy does not reflect "a revenue credit for the sale of short-term capacity and the level of billing determinants properly reflect these

²⁴⁷ EPNG Initial Br. at 44 (internal citation omitted).

²⁴⁸ Staff Initial Br. at 42 (citing Tr. 166:6-18).

²⁴⁹ EPNG Reply Br. at 29.

sales, which utilize capacity.”²⁵⁰ Staff’s primary remedy ensures that no short-term firm discounted contracts serve as a revenue credit. Staff’s remedy includes imputed volumes that can be attributed to long-term firm capacity sales and does not impute volumes associated with short-term discounted contracts. Staff explains Ms. Radel’s basis for this conclusion:

[I]f your level that you’re imputing up to, which is the short fall less the already included long-term firm discounted number, if that number is such that it’s higher than the remaining long-term firm discount contracts, then yes, you would have to go, then, to short-term firm. But. . . if you’re still below that number, then the short-term has no effect.²⁵¹

Staff has adequately explained that its primary remedy obviates the imputation of volumes associated with short-term firm discounted contracts.

175. Fourth, EPNG’s argument that Staff’s remedy improperly imputes billing determinants at the maximum rates instead of the Article 11.2(a) rate is unpersuasive. EPNG asserts that “both of Staff’s proposed remedies measure discounts by reference to EPNG’s maximum recourse rates, not the Article 11.2(a) rates.”²⁵² EPNG argues that imputing billing determinants at the maximum recourse rate instead of the Article 11.2(a) rates “overstates both the cost shift and Staff’s proposed rate adjustment.”²⁵³ EPNG’s contention lacks merit. Staff’s primary remedy imputes billing determinants up to the threshold level, less CRNs, which “reverse[s] the effect of any discounting below the Article 11.2(a) rate or unsubscribed capacity.”²⁵⁴ Having determined in this Initial Decision that EPNG failed to meet the Threshold, the appropriate remedy should impute billing determinants to produce revenues equal to those that EPNG would have received had it met the presumption, which, here, is 3,711,922 Dth/d. Accordingly, the imputed billing determinants are necessarily at the Article 11.2(a) rates, not the maximum recourse rates.

²⁵⁰ Staff Initial Br. at 44 (citing Tr. 176:20–177:17).

²⁵¹ *Id.* at 44 n.23 (citing Tr. 367:7–14).

²⁵² EPNG Initial Br. at 46.

²⁵³ *Id.*

²⁵⁴ Staff Initial Br. at 46.

IV. ORDER

176. The omission from this Initial Decision of any argument or portion of the record raised by the participants in their briefs does not mean that it has not been considered. All such arguments have been evaluated and found to either lack merit or significance to the extent that their inclusion would only tend to lengthen this Initial Decision without altering its substance or effect.

177. IT IS ORDERED, subject to review by the Commission on exceptions or on its own motion, as provided by the Commission's Rules of Practice and Procedure, that within thirty (30) days of the issuance of the final order of the Commission in this proceeding, all parties shall take appropriate action to implement all the rulings in this decision.

Judith A. Dowd
Presiding Administrative Law Judge

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