

125 FERC ¶ 61,309
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

El Paso Natural Gas Company

Docket No. RP08-426-000
RP08-426-001

ORDER ON TECHNICAL CONFERENCE

(Issued December 18, 2008)

1. On June 30, 2008, El Paso Natural Gas Company (El Paso) filed revised tariff sheets that proposed new services, a rate increase for existing services, and changes in certain terms and conditions of service.¹ On August 5, 2008 the Commission issued an order accepting and suspending El Paso's primary tariff sheets, subject to conditions and the outcome of a hearing and technical conference.² The Commission held a technical conference on September 11, 2008, to discuss the new services and new terms of service, including penalties. In this order the Commission will partially accept and partially reject the new services and penalties proposed by El Paso, as discussed below.³

I. Background

2. On June 30, 2005, in Docket No. RP05-422-000, El Paso filed a general system-wide rate case, which modified rates, proposed a number of new services, and revised a number of terms and conditions of service (2006 Rate Case). The 2006 Rate Case constituted El Paso's first general rate case in ten years. On December 6, 2006, El Paso submitted a settlement agreement, which the Commission subsequently approved on

¹ On July 22, 2008, El Paso filed revised tariff sheets in Docket No. RP08-426-001 to correct a typographical error in its original filing.

² *El Paso Natural Gas Co.*, 124 FERC ¶ 61,124 (2008) (August 5 Order).

³ See the Appendix for the list of tariff sheets approved by this order subject to conditions.

August 31, 2007 (the 2006 Rate Case Settlement).⁴ The current rates for service on El Paso's system were established by the 2006 Rate Case Settlement, which terminates on December 31, 2008. The 2006 Rate Case Settlement required El Paso to file a new general rate case on June 30, 2008, to be effective on January 1, 2009.

II. El Paso's Filing

3. On June 30, 2008, El Paso filed revised tariff sheets that proposed new services, a rate increase for existing services, and changes in certain terms and conditions of service. In the August 5 Order, the Commission accepted and suspended El Paso's primary tariff sheets,⁵ subject to conditions and the outcome of a hearing and technical conference. On September 11, 2008, the Commission held a technical conference to address the new penalties and terms and conditions of service proposed by El Paso.

4. Initial comments on the technical conference were due September 26, 2008, with reply comments due October 10, 2008. The following parties submitted initial comments: El Paso; Southwest Gas Corporation (Southwest Gas); Golden Spread Electric Cooperative, Inc. (Golden Spread); GS Electric Energy Cooperative (GSE); El Paso Municipal Consumer Group (EPMCG); Texas Gas Service Company, a division of ONEOK, Inc. (Texas Gas); UNS Gas, Inc. (UNS); Tucson Electric Power Company (Tucson); Southwestern Public Service Company (SPS); Salt River Project Agricultural Improvement and Power District (Salt River); Southern California Gas Company (SoCal Gas); San Diego Gas & Electric Company (SDG&E); Electric Generator Coalition⁶ (EGC); Indicated Shippers;⁷ Arizona Public Service Company (APS); Public Service Company of New Mexico (PNM); El Paso Electric Company (El Paso Electric); and Arizona Corporation Commission (ACC).

5. The following parties submitted reply comments: El Paso; SPS; EGC; Southwest Gas; Texas Gas; Salt River; Tucson; UNS; PNM; SoCal Gas; SDG&E; APS; the ACC;

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

⁵ El Paso submitted primary and alternate tariff sheets when it filed its rate case.

⁶ EGC members include: Arizona Electric Power Cooperative, Inc.; Blythe Energy, LLC; Dynegy Arlington Valley, LLC; Gila River Power, L.P.; Golden Spread; GSE; New Harquahala Generating Company, LLC; and Sempra Global.

⁷ The Indicated Shippers include: BP America Production Company and BP Energy Company; Chevron Natural Gas, a Division of Chevron U.S.A. Inc.; ConocoPhillips Company; Shell Energy North America (US), L.P.; and Occidental Energy Marketing, Inc.

Indicated Shippers; and El Paso Electric. In addition, the following parties filed supplemental reply comments: El Paso; PNM; Salt River; El Paso Electric; EGC; APS; UNS; Tucson; EPMCG; the ACC; Texas Gas; and SPS.

III. Discussion

6. This order addresses issues raised by the parties regarding El Paso's proposed new services, penalties, and other non-rate provisions of its tariff.⁸ Upon review of the record and submissions of the parties, the Commission finds that many of El Paso's proposed modifications to its services and penalties are just and reasonable, including, but not limited to,⁹ the proposed revisions to the limited firm hourly virtual area and no-notice services, the tiered penalty structure, the revised critical condition penalty rate, the inclusion of the California border spot price in the monthly index, the aggregation of transportation service agreements (TSA) for overrun purposes, the revised definitions of hourly scheduling penalties and safe harbor tolerances, the imposition of the authorized overrun rate for overruns containing quantities from non-telemetered points, the changes to strained and critical operating condition (SOC/COC) procedures, and the elimination of seasonal shoulder month flexibility and sculpted maximum daily quantities (MDQ). As such, the Commission will accept the tariff sheets listed in the Appendix, subject to modifications set forth below, to be effective January 1, 2009.

7. While the Commission accepts many of El Paso's tariff revisions, the Commission rejects El Paso's proposals regarding reservation charge credits, the inclusion of 100 percent of Hourly Entitlement Enhancement Nominations (HEEN) in overrun quantities, and the non-critical penalty rates. In addition, the Commission directs El Paso to change its tariff provisions concerning HEEN, the elimination of grandfathered pressure commitments, gas quality waivers, and flow control. The Commission will address El Paso's proposed fuel savings sharing mechanism in a subsequent order. The Commission directs El Paso to submit revised tariff sheets in a compliance filing within 30 days of the date of this order reflecting the modifications discussed below.

⁸ The Commission set the cost of service, cost allocation, and rate design portions of El Paso's filing for hearing. *See* August 5 Order, 124 FERC ¶ 61,124 at P 28.

⁹ All tariff revisions not specifically discussed in the body of this order are accepted.

A. Services**1. Limited Firm Hourly Virtual Area Service**

8. El Paso proposes a new limited firm hourly virtual area transportation service (Rate Schedule FTH-V) that will be available at delivery points within the Permian Basin virtual area. El Paso explains that the service will provide firm non-uniform hourly gas transportation to small shippers (defined as shippers with service up to 10,000 Dth per day) in an area that El Paso has historically been able to provide only ratable service. El Paso states the new service will be priced similarly to Rate Schedule FTH-3.¹⁰ El Paso explains that FTH-V service provides for 150 percent hourly flexibility for up to five hours of the gas day, 130 percent hourly flexibility for up to nine hours of the gas day (limited such that no more than six hours may be consecutive), and 120 percent hourly flexibility for up to twelve hours of the gas day. El Paso asserts this service will provide small Permian Basin shippers with a great deal of flexibility within the virtual area.

2. Initial Comments

9. Several parties support the establishment of the FTH-V service and note that shippers should have the tools available to mitigate, if not eliminate, exposure to penalties on the El Paso system. Two parties, Golden Spread and SPS, filed negative comments on El Paso's proposed FTH-V service.

10. Golden Spread states that it does not oppose the provision, but urges El Paso to explore ways to afford a greater degree of hourly flexibility on a firm basis to any Permian Basin virtual area customer, not just local distribution companies (LDCs) or shippers who can use the FTH-3 model. Further, Golden Spread argues that El Paso should be required to demonstrate whether it can provide hourly firm services up to a 10,000 Dth daily contract quantity to all its shippers in the virtual area, and not just small shippers.

11. SPS argues that El Paso's proposal is unduly discriminatory and that El Paso should implement comparable services for other Permian Basin shippers, not just small customers. SPS states that currently it is exposed to the same penalties as other shippers,

¹⁰ El Paso states it modeled the new FTH-V service after its existing FTH-3 service. FTH-3 is an hourly firm transportation service available to small and large customers that provides two different hourly peak periods of different duration and a magnitude up to 200 percent of uniform hourly flow rate.

but without access to El Paso's firm services, which would enable it to mitigate its exposure to such penalties.

12. SPS states that the Commission's acceptance of the proposed FTH-V service should be subject to the condition that El Paso must, upon the request of any shipper located in the Permian Basin virtual area, determine whether and to what extent its system is operationally capable of providing hourly services for such shipper. SPS argues that El Paso's willingness to offer the service up to 10,000 Dth per day indicates that El Paso's system is operationally capable of providing some level of hourly services for SPS. SPS argues that its claim is further supported by El Paso's designation of the point delivering gas to SPS as an eligible FTH-V service point. SPS argues that El Paso should not be allowed to invoke a general limitation as a sufficient justification for refusing to determine whether it is operationally capable of providing a customized firm hourly service for larger shippers at specific delivery points in the virtual area. SPS states that El Paso should assess whether this service can be provided up to 10,000 Dth per day for larger shippers upon request. SPS contends that heretofore El Paso has refused to assess its operational ability to provide customized hourly services for virtual area shippers that do not qualify for the proposed FTH-V service. SPS requests that the FTH-V service proposal be summarily rejected unless the Commission also grants the relief requested by SPS, or alternatively, the issue should be set for hearing.

3. Reply Comments

13. El Paso states that with respect to SPS' request that it perform an analysis and determine its capabilities, El Paso has done so and regrets that it cannot provide FTH-V service to all shippers in the virtual area. El Paso further asserts that it has already determined that it cannot provide FTH-V service to SPS without an upgrade in facilities. El Paso explains that due to the complexity of El Paso's multi-directional, reticulated facilities in the virtual area, El Paso cannot offer this firm service to shippers with loads of more than 10,000 Dth per day at a single D-code.

14. El Paso also opposes parties' requests that the Commission expand the scope of the hearing in this case to include an examination of El Paso's proposed FTH-V service. El Paso argues that the hearing in this case should focus on rate issues, and should not allow an operational fishing expedition. El Paso asserts that it would provide FTH-V service to more shippers if it could.

15. Texas Gas asserts that El Paso's explanation of how it determines whether capacity is available for FTH-V service addresses SPS' concerns, and agrees with El Paso that the FTH-V service should be approved.

4. Commission Determination

16. The Commission accepts El Paso's proposal to provide limited FTH-V service in the virtual area. This service will benefit small Permian Basin virtual area shippers by providing them with a flexible, non-uniform hourly gas transportation service in an area where historically only ratable service was available. SPS and Golden Spread argue that El Paso should be required to provide this service to all shippers in the virtual area, and not just certain shippers. The Commission disagrees. El Paso has specifically explained that it has studied the area and determined that due to operational limitations, it cannot provide FTH-V service to shippers with contracts greater than 10,000 Dth per day. Thus, El Paso is not declining to provide FTH-V service on an unduly discriminatory basis, but for operational reasons.

17. In addition, there is nothing in El Paso's proposed tariff language that makes a large shipper ineligible to receive service under Rate Schedule FTH-V,¹¹ if it requests service for a contract less than or equal to 10,000 Dth per day.¹² FTH-V service will provide a significant benefit to shippers in the Permian Basin virtual area with contracts less than or equal to 10,000 Dth per day. The Commission declines to reject this service because El Paso's system cannot operationally afford to service contracts larger than that amount. For the reasons discussed above, the Commission accepts Rate Schedule FTH-V as proposed.

5. No-Notice Transportation Service

18. El Paso proposes to revise its existing no-notice transportation (NNT) service to make the service more attractive to shippers needing balancing flexibility. El Paso states that only one shipper currently holds an NNT contract and that shipper has notified El Paso that it will terminate that contract prior to the end of the test period.

a. Daily Netting

19. Pursuant to El Paso's current tariff, no-notice balances under an NNT contract are held at each delivery point and netting is not permitted across those points on a daily

¹¹ El Paso's proposed Rate Schedule FTH-V section 1.4, Sheet No. 129 provides as follows: "[s]hipper is limited to one Executed TSA with a TCD of no more than 10,000 dth per day for service under this Rate Schedule in the form contained in this Tariff."

¹² El Paso stated that it modeled this service using its FTH-3 service, which is not limited to specific shippers, large or small.

basis. El Paso proposes to revise no-notice service to permit daily netting of NNT balances among all delivery points on a contract. El Paso states that this revision will allow shippers to take advantage of offsetting positive and negative balances among their delivery points, which will provide the shippers with increased flexibility to manage their no-notice requirements.

i. Initial Comments

20. Indicated Shippers, Texas Gas, and UNS/Tucson support El Paso's proposal to enhance no-notice service by permitting daily netting of imbalances across all delivery points.

21. Southwest Gas states that although it does not oppose El Paso's no-notice service expansion, it does not believe that the proposal goes far enough. Southwest Gas states El Paso does not address the fact that it is difficult for shippers to manage no-notice service, which is tied to delivery balances, when El Paso does not provide shippers with balancing data in a timely or accurate manner.

22. SoCal Gas and SDG&E do not oppose El Paso's proposal, but note that there is little incentive for shippers to contract for no-notice service in the absence of a daily scheduling penalty.

ii. Commission Determination

23. The Commission accepts El Paso's proposal to revise its no-notice service. El Paso's proposal to permit daily netting of NNT balances among all delivery points on a contract will allow shippers to take advantage of offsetting positive and negative balances among their delivery points. It will also provide shippers with increased flexibility in managing their no-notice requirements.

24. Shippers express concerns that, even with this change, no-notice service is still unappealing and difficult to manage. While the service revision may not satisfy all customers, no-notice service is optional and El Paso's proposed revisions represent an improvement to the service. We encourage El Paso to work with shippers to continue to improve no-notice service to make it more appealing to shippers.

b. Delivery Transfers

25. El Paso proposes to allow for delivery transfers to alternate premium service delivery points located on a shipper's primary receipt-to-delivery flow path. Under the current tariff provision, El Paso transfers unused daily/hourly entitlement quantities at

any one point to another of the shipper's primary delivery points, so long as it is upstream and in the same geographic region.¹³

i. Initial Comments

26. Southwest Gas contends that El Paso's daily and hourly delivery transfer, which El Paso provides as a part of no-notice and premium hourly services, should be available for all transportation services and not tied solely to no-notice and premium hourly services. Southwest Gas states that these delivery transfers provide for the netting of transportation imbalances – hourly and daily – across D-Codes as part of the no-notice and premium hourly services. Southwest Gas states that in the past, El Paso has represented that it cannot provide imbalance netting on a daily basis across D-Codes, yet El Paso's premium services seem to provide the very netting El Paso said it cannot provide. Southwest Gas further argues that the netting of imbalances, which is required by the Commission,¹⁴ is separate and distinct from no-notice and premium hourly services. Southwest Gas states that while El Paso's proposal to include within path alternate points in the delivery transfer process is beneficial, Southwest Gas believes that El Paso has used the daily and hourly delivery transfer provision to tie two separate and unrelated service functions. Therefore, Southwest Gas requests that the Commission direct El Paso to provide daily and hourly imbalance netting across D-Codes for all firm contract shippers.

ii. Reply Comments

27. Texas Gas agrees with Southwest Gas' argument that El Paso cannot limit the delivery transfer feature to premium services. Texas Gas argues that delivery transfers are the equivalent of netting, and the Commission requires pipelines to establish provisions permitting shippers to net and trade imbalances.¹⁵ Texas Gas argues the Commission must require El Paso to comply with that regulation for all services, and not just premium services.

¹³ See El Paso's FERC Gas Tariff, Second Revised Volume No. 1A, Second Revised Tariff Sheet No. 147C (Rate Schedule NNT § 2.7).

¹⁴ 18 C.F.R. § 284.12(b)(2)(ii) (2008).

¹⁵ *Id.*

iii. Commission Determination

28. The Commission accepts El Paso's proposal to permit delivery transfers to alternate premium points because it will increase shipper flexibility and make no notice service more attractive.

29. The Commission denies parties' requests that El Paso offer delivery transfers to all shippers, and not just to shippers with premium and no-notice service. Contrary to parties' contentions, delivery transfers are not the equivalent of netting. Under section 284.12(b)(2)(ii) of the Commission's regulations, the Commission requires pipelines to permit shippers and their agents to offset imbalances accruing on different contracts held by the shipper with the pipeline and to trade imbalances with other shippers where such imbalances have similar operational impact on the pipeline's system.¹⁶ The delivery transfer option that El Paso allows for shippers who contract for no-notice and premium services is different. Delivery transfers permit shippers to transfer unused daily/hourly entitlement quantities to their next upstream operationally equivalent primary delivery point in the same geographic region. The two are distinguishable because netting is an after-the-fact billing process that allows shippers to balance out quantities that shippers would otherwise be penalized for, while delivery transfers allow a shipper to shift its entitlements from one point to another eligible point during the gas day. Moreover, shippers on the El Paso system are already entitled to net consistent with the Commission's regulations under section 32.2 of El Paso's tariff.¹⁷

30. Accordingly, the Commission denies Southwest Gas and Texas Gas' alternate proposal, and finds El Paso's provisions regarding delivery transfers to be just and reasonable.

B. Penalties

1. Tiered Critical Condition Daily Penalty

31. El Paso proposes a tiered critical condition daily penalty assessment which increases the penalty rate as shippers go increasingly out of balance. The application of the critical condition penalty rate for daily penalties will be determined with a tiered structure based on the lower of a shipper's daily delivery variance percentage or the shipper's daily imbalance quantity. El Paso states that a benefit of the tiered penalty

¹⁶ *Id.*

¹⁷ See El Paso's FERC Gas Tariff, Second Revised Volume No. 1A, Substitute Original Sheet No. 362D (section 32.2(e) of the General Terms and Conditions (GT&C)).

method is that it acknowledges that when a smaller shipper is out of balance by a small quantity, this may result in a large imbalance percentage.

a. Initial Comments

32. A number of commenters, including APS, the Indicated Shippers, PNM, Southwest Gas, Texas Gas, and UNS/Tucson, support El Paso's proposed tiered penalty structure. El Paso Electric states that the proposal is unnecessary, cumbersome, and overly complicated. Southwest Gas requests clarification that the tiered penalties apply only after the safe harbor quantities are exceeded and apply to all shippers, large and small.

b. Commission Determination

33. We will accept El Paso's proposal to implement a tiered penalty structure for critical condition daily penalties. The tiered structure, as El Paso states, will reduce shippers' exposure to penalties and yet will encourage shippers to minimize variances. Accordingly, the Commission finds this proposal to be just and reasonable.

34. With regard to Southwest Gas' other request for clarification, El Paso clarifies in its reply comments that while critical condition penalties are assessed on the full daily imbalance quantity when a shipper exceeds the tolerance level, hourly scheduling penalties and daily unauthorized overrun penalties are assessed only on the amounts above the safe harbor tolerance limits.¹⁸ The Commission accepts El Paso's explanation in response to Southwest Gas's request for clarification.¹⁹

2. Critical Condition Penalty Rates

35. El Paso proposes to lower the critical condition penalty rate applicable to daily unauthorized overruns, hourly scheduling penalties, and Rate Schedule OPAS from ten times the monthly system cash-out index price (monthly spot), to two times the higher of monthly spot or the daily mid-point spot price (daily spot) for hourly scheduling penalties and an average of two times the higher of monthly spot or daily spot for daily penalties.

¹⁸ See El Paso's October 10, 2008 Reply Comments at 42-44.

¹⁹ See section III.B.12 of this order for a further discussion on the imposition of penalties with regard to the safe harbor tolerance level.

El Paso states that for consistency, it also proposes to change the SOC/COC penalty rate from two times daily spot to two times the higher of monthly spot or daily spot.²⁰

a. Initial Comments

36. El Paso states that it chose the higher of the monthly cash-out or daily mid-point spot price because it has found no correlation between either of these prices and a critical period event. El Paso adds that because its refinement creates more uncertainty as to the level of the penalty, it provides greater incentive for shippers to stay within contract or schedule entitlements, and creates a lower incentive for shippers to game the system.

37. Several parties agree with El Paso's proposal to reduce the critical penalty rate. However, EGC and Golden Spread contend that the Commission should approve this proposal, subject to condition that El Paso eliminate the use of daily spot, or use the higher of the monthly and weekly average price because daily price indices are too volatile to be used in the critical penalty rate.²¹ Alternatively, EGC suggests changing the proposal to equal the average of monthly and daily spot prices, as opposed to the higher of the prices.

b. Reply Comments

38. El Paso disagrees with EGC that the proposal should be modified to use the average weekly price index because the daily price indices are too volatile. El Paso, SoCal Gas, and SDG&E argue that the level of volatility provides the proper incentive for shippers to schedule accurately. In addition, El Paso states that the Commission has approved numerous critical condition penalties on other pipelines based on multiples of a

²⁰ El Paso states it is unclear whether the monthly spot or the daily spot is the higher rate. Therefore, El Paso proposes to compare the two prices for determination of the critical condition penalty rate, in order to select the higher of the two.

²¹ The Electric Generators cite to several cases where the Commission stated that the single day price can be extremely volatile and may not be appropriately representative of prices. *See Southern Natural Gas Co.*, 74 FERC ¶ 61,230 (1996); *Southern Star Central Gas Pipeline, Inc.*, 103 FERC ¶ 61,257 (2003); *Texas Gas Transmission Corp.*, 97 FERC ¶ 61,349 (2001); *Columbia Gulf Transmission Co.*, 97 FERC ¶ 61,244 (2001).

daily spot price index.²² Furthermore, El Paso notes that its currently-effective SOC/COC daily imbalance penalty rate is based on the daily spot price.

39. EGC states that the cases cited by El Paso are inapposite because they involve daily imbalance penalties and overrun charges, not hourly scheduling penalties. In addition, EGC states that the Algonquin, Columbia, and Dominion tariffs provide that no penalties may be imposed unless the excess hourly take threatens system integrity or deliveries to firm shippers. In contrast, El Paso's critical condition hourly scheduling penalty applies even if system integrity or delivery to a firm shipper is not threatened by the excess hourly take. EGC argues that the Commission should require El Paso to adopt the same limitation on when the pipeline may impose such penalty or require El Paso to adopt the less volatile average price.

40. El Paso contends that this proposal is not like the cases referred to by EGC, which were intended to compensate the pipeline for the use of its gas over time in non-critical periods. In addition, El Paso states that the cases cited by EGC are distinguishable because they involve monthly cash-out penalties or penalties for failure to return loaned gas as part of park and loan service, rather than critical condition scheduling penalties. El Paso asserts that the Commission has specifically approved a penalty linked to a daily index precisely because the daily index is volatile and therefore provides the right incentive. El Paso argues that its proposal is just and reasonable.

c. Commission Determination

41. The Commission accepts El Paso's proposed penalty rate modification. El Paso's proposal will reduce the critical penalty rate from ten times the monthly spot to two times the higher of monthly spot or the daily spot, for hourly scheduling penalties, and an average of two times the higher of monthly spot or daily spot for daily penalties. As the commenters assert, the daily spot is volatile. However, it is precisely for this reason that El Paso proposed using the daily spot price. The Commission has previously recognized that the essential purpose of penalty charges "is to deter undesirable shipper behavior."²³

²² El Paso cites *Algonquin Gas Transmission, LLC*, 115 FERC ¶ 61,067 (2006); *Columbia Gas Transmission Corp.*, 114 FERC ¶ 61,134 (2006); *Eastern Shore Natural Gas Co.*, 114 FERC ¶ 61,011 (2006); *Midwestern Gas Transmission Co.*, 112 FERC ¶ 61,345 (2005); *Gulf South Pipeline*, 98 FERC ¶ 61,278, at 62,175-176 (2002); *Paiute Pipeline Co.*, 109 FERC ¶ 61,139, at P 14-19 (2004).

²³ See *Northern Natural Gas Co.*, 77 FERC ¶ 61,282, at 62,235-37 (1996), *reh'g denied*, 78 FERC ¶ 61,355, at 62,494 (1997). See also, e.g., *Trunkline Gas Co.*, Opinion No. 441, 90 FERC ¶ 61,017, at 61,078 (2000).

Moreover, the Commission has approved the use of the daily spot price for critical condition penalties on other pipelines and has considered the volatility of the daily spot price to be appropriate because it encourages shippers to avoid the penalty.²⁴ In this case, El Paso has determined that reducing the critical penalty rate, in conjunction with basing the penalty on monthly and daily spot prices, will accomplish that purpose.

42. Furthermore, El Paso states that it is unclear whether the monthly spot or the daily spot is the higher rate, which shows that there are times when either of the two can be higher. We find that not knowing the level of the penalty on a given day will provide an incentive for shippers to schedule properly. In addition, El Paso's proposal only applies to critical condition penalties. Thus, EGC's request that the use of the daily spot price only apply when system integrity is threatened is unnecessary, since critical condition penalties by definition only apply when system integrity is threatened. Accordingly, the Commission rejects EGC's request and accepts El Paso's proposed penalty rate modifications as just and reasonable.

3. Maximum Delivery Obligation and Maximum Hourly Obligation Penalties and Critical Condition Declarations on Laterals

43. El Paso states that in response to shippers' concerns, it has studied whether its system operationally requires the application of Maximum Delivery Obligation and Maximum Hourly Obligation (MDO/MHO) penalties in non-critical conditions. El Paso concludes that enough flexibility may exist in its mainline system to suspend the use of MDO/MHO penalties in non-critical conditions on a trial basis. However, El Paso states that because laterals consist of smaller diameter and lower pressure pipelines, the same flexibility does not exist on its lateral distribution system. El Paso therefore proposes a new COC declaration provision that will allow a critical condition to be declared if necessary to protect the operational integrity of a delivery lateral. El Paso states that so long as the new COC provision for laterals is implemented, El Paso will, on a limited trial basis, charge a zero rate for all MDO/MHO penalties that occur during non-critical operating conditions.

²⁴ See, e.g., *Algonquin Gas Transmission, LLC*, 115 FERC ¶ 61,067 (2006); *Columbia Gas Transmission Corp.*, 114 FERC ¶ 61,134 (2006); *Eastern Shore Natural Gas Co.*, 114 FERC ¶ 61,011 (2006); *Midwestern Gas Transmission Co.*, 112 FERC ¶ 61,345 (2005); *Gulf South Pipeline*, 98 FERC ¶ 61,278, at 62,175-176 (2002); *Paiute Pipeline Co.*, 109 FERC ¶ 61,139, at P 14-19 (2004).

a. Initial Comments

44. Most shippers support the MDO/MHO penalty removal, but argue that the proposed lateral critical operating condition declaration is unnecessary because El Paso already has this authority under section 33.2 of its tariff. They state that the existing provisions are adequate because they require El Paso to take all the steps necessary for declaring a shipper-specific critical operating condition prior to calling a lateral or system-wide critical operating condition.

b. Reply Comments

45. Shippers argue that notwithstanding having adequate critical operating condition declaration authority, El Paso has generally failed to exercise this authority properly, and instead typically calls system-wide SOC/COCs rather than targeting shipper-specific critical operating conditions. Salt River supports this assertion by providing evidence that El Paso called critical operating conditions on ten days during the 15-month period ending March 2008, concluding that conditions were severe enough to warrant a critical operating condition only 2.2 percent of the time. Salt River further argues that the proposed provision would encourage El Paso to continue its non-shipper-specific approach for laterals by making blanket SOC/COC declarations that affect all parties on a lateral. Salt River argues that El Paso has not met its burden of demonstrating why its existing tariff needs to be changed. Moreover, Salt River requests that the Commission require El Paso to demonstrate that it has taken all reasonable and necessary steps to identify the specific shippers causing a problem, prior to calling a COC on a lateral or system-wide basis.

46. Southwest Gas contends that the proposed revisions create uncertainty because they do not clearly incorporate the existing tariff's obligation to issue a shipper-specific critical operating condition, as the existing provisions do. Similarly, UNS/Tucson argues that the proposed tariff language may inadvertently grant El Paso additional rights that it does not currently have. Additionally, the ACC argues that it is unreasonable to subject shippers to penalties with little or no prior knowledge of changing circumstances, and argues that El Paso needs to provide shippers with timely information on the operational status of laterals so that shippers can monitor their behavior and avoid penalties.

47. El Paso states that it will withdraw its proposed lateral COC tariff language upon Commission affirmation that El Paso is authorized under section 33.2(e) of its existing tariff to declare an immediate emergency COC on a delivery lateral under specified circumstances.²⁵ El Paso argues that Salt River's assertion that El Paso has failed to

²⁵ Texas Gas, Southwest Gas, and UNS/Tucson support El Paso's proposal to withdraw these tariff provisions.

adequately exercise its existing critical condition declaration authority is beyond the scope of this proceeding. However, El Paso notes that it is willing to review its procedures and work with its shippers to apply these procedures in the least obtrusive manner.

c. Commission Determination

48. El Paso has agreed to withdraw its proposed lateral critical operating condition tariff language upon Commission affirmation that El Paso already has the authority to declare an immediate emergency COC on a delivery lateral. Section 33.2(e) of El Paso's tariff already provides that "[i]n the event of an emergency situation where safety or overall system integrity is at immediate risk, Transporter may invoke a COC immediately without first declaring an SOC ("Emergency COC")." No shippers disagree that El Paso currently has the authority to declare a critical operating condition on a delivery lateral. The Commission finds that it is important for El Paso to have this ability in order to ensure system integrity and service reliability. However, equally important is the need for El Paso to minimize the impact of COC declarations on shippers by targeting COCs to the fewest shippers feasible, consistent with the Commission's Order No. 637.²⁶ The shippers do not dispute that pursuant to section 33.2 of its tariff, El Paso already has the authority to declare immediate critical operating conditions on laterals if it determines that it is unable to call a more limited shipper-specific COC. The Commission accepts this interpretation.

49. The Commission also accepts El Paso's proposal to eliminate MDO/MHO penalties in non-critical conditions for the trial period. El Paso has agreed to monitor delivery point operator activities throughout the trial period and ultimately determine whether non-critical MDO/MHO penalties are necessary. As stated in its filing, El Paso will provide this information to the Commission no later than April 1, 2010.

²⁶ *Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services*, Order No. 637, FERC Stats. & Regs. ¶ 31,091, at 31,312, *clarified*, Order No. 637-A, FERC Stats. & Regs. ¶ 31,099, *reh'g denied*, Order No. 637-B, 92 FERC ¶ 61,062 (2000), *aff'd in part and remanded in part sub nom. Interstate Natural Gas Ass'n of America v. FERC*, 285 F.3d 18 (D.C. Cir. 2002), *order on remand*, 101 FERC ¶ 61,127 (2002), *order on reh'g*, 106 FERC ¶ 61,088, (2004) *aff'd sub nom. American Gas Ass'n v. FERC*, 428 F.3d 255 (D.C. Cir. 2005) (Order No. 637).

4. Overrun Charges and the Aggregation of Transportation Service Agreements

50. El Paso proposes a revision to the daily overrun rate applicable to shippers that have multiple TSAs. Pursuant to the 2006 Rate Case Settlement, overrun charges are determined based on the aggregation of all services provided under all of a shipper's contracts on that day. These overrun charges are billed as a weighted average rate for all the delivery points included in all of the contracts held by a shipper.

51. In this proceeding, El Paso is proposing to continue the contract aggregation feature in determining overruns. However, El Paso contends that shippers should pay for overrun service at rates comparable to, and based on, the service provided. El Paso claims that, otherwise, the rate averaging causes El Paso to under-collect for the transportation service actually provided. El Paso therefore proposes to revise the daily overrun rate applicable to a shipper that has multiple TSAs under various rate schedules to provide that the authorized and unauthorized daily overrun rates for these shippers will be the highest rate for the applicable zone of delivery.

a. Initial Comments

52. A number of commenters support the continuation of aggregation but oppose the proposal to charge the highest rate for overruns. They request that El Paso retain the use of the weighted average rate, as agreed to in the 2006 Rate Case Settlement. They argue that use of the highest rate will affect shippers unevenly depending on their portfolios and will unduly discriminate against single contract shippers. They argue that El Paso has the necessary measurement and contract data to determine overruns by rate zone. They further argue that overruns are a daily issue, not an hourly issue, because when a shipper overruns a daily contract quantity, it does not necessarily overrun hourly quantities.

53. APS asserts that overrun service is the same service whether under Rate Schedule FT-1 or FT-H and that the rate should thus be the same. APS and Southwest Gas contend that the more appropriate rate should be the FT-1 rate. UNS/Tucson and Texas Gas suggest that, if discounted contracts are included in the weighting calculation, the applicable zone maximum rate should be used in lieu of the discount rate. Alternatively, UNS/Tucson state that, if the Commission determines that a single contract rate is more appropriate than a weighted average, the ratable flow FT-1 rate is the most appropriate. EGC and Salt River argue that El Paso should either not apply the highest rate if all delivery points are in the same zone, or give shippers the right to opt out of aggregation. EPMCG argues that El Paso's proposal is unfair to those shippers using only primary delivery points and that El Paso does not meet the burden of showing that its proposal is more just and reasonable than the status quo. EPMCG and the Indicated Shippers argue that it is just as likely that a shipper will be overcharged with the weighted average rate as it is that the shipper will be undercharged. The Indicated Shippers argue that the proposal is unjust and unreasonable because it would charge shippers for services that they may

not have received. Southwest Gas asserts that the proposal would result in over-collection of service costs.

54. SoCal Gas and SDG&E support El Paso's proposal because it aligns cost responsibility with cost causation while preserving the substantial shipper benefit of aggregation.

b. Reply Comments

55. El Paso replies that choosing the highest rate is the only approach that will not provide a shipper with the opportunity to overrun its contracts at lower rates. While El Paso acknowledges that it does know where gas is flowing, El Paso contends the aggregation feature makes this information virtually meaningless. El Paso states that because of aggregation, it cannot know under what contract the unauthorized overrun gas is flowing because shippers do not nominate unauthorized overruns. El Paso is willing to allow shippers a one-time opportunity to opt-out of contract aggregation to assure that overruns are charged at the rate under the contract that was overrun.

c. Commission Determination

56. We will accept El Paso's proposal. Under a tariff provision negotiated in the 2006 Rate Case Settlement, El Paso currently provides contract aggregation for overrun purposes, which means that on a given day, El Paso compares a shipper's total takes under its multiple TSAs with that shipper's total contract entitlements to determine the overrun quantity. Because shippers' total takes are aggregated, El Paso cannot attribute an overrun quantity to a specific contract. Thus, in negotiating the 2006 Rate Case Settlement, the settling parties agreed to determine the overrun charge by the weighted average rate for all of a shipper's TSAs. As a result, a shipper who overruns one contract does not incur an overrun penalty unless its takes exceed its total contract entitlements for the day. This aggregation feature provides a benefit to shippers by lowering their penalty exposure.

57. El Paso proposes to retain the aggregation feature, but change the overrun penalty calculation. The Commission's review of the proposed tariff provisions shows that, in situations where a shipper overruns its contracts, El Paso proposes to charge the highest rate for the zone of delivery for all TSAs under which the shipper received service that day.²⁷ Thus, for the calculation of the overrun penalty, El Paso will only use the TSAs

²⁷ El Paso's proposed Statement of Rates, Sheet No. 29.01, provides that the "daily overrun charge or penalty shall be assessed by multiplying the daily overrun quantity by the highest rate for the applicable zone of delivery under all rate schedules for which service was provided on that Day."

used by the shipper that day, in the rate zone for which the overrun occurred. El Paso will not use the highest rate under all rate zones for all TSAs, regardless of delivery. Thus, if a shipper's overrun occurs in a lower rate zone, the overrun penalty will be determined by the highest rate in that lower rate zone, and not by the highest rate in the higher rate zone where the overrun did not occur. This addresses the commenters' concern about El Paso charging an overrun penalty for a rate zone different from the zone in which the overrun occurred.

58. We further find that it is appropriate to include the rates for hourly services in the determination of the overrun penalty. Hourly services include daily as well as hourly entitlements with corresponding overrun penalties. Hourly service entitlements are included in the aggregation feature. Therefore, it is reasonable to include these hourly services in the overrun calculation. Furthermore, the Commission disagrees with APS' suggestion that the overrun rate should be the same for all services. El Paso's existing tariff provides for overrun charges based on the firm rate equivalent of the rate schedule.²⁸ Thus, the Commission has approved overrun charges based on the underlying rate schedules resulting in different levels of overrun charges for different services. We will therefore deny APS' proposal to charge the FT-1 rate for aggregated overrun service.

59. El Paso states that it is willing to offer a one-time opportunity for shippers to opt out of the aggregation feature. Thus, shippers who would prefer to have their overrun penalties calculated on a contract-specific basis may choose that option. Given the benefits shippers receive from the aggregation feature and the ability of shippers to opt out of aggregation, the Commission accepts El Paso's use of the highest rate for the rate zone in which the overrun occurred as just and reasonable.

5. Non-Critical Penalty Rates

60. El Paso's existing non-critical condition penalty rate for hourly scheduling penalties, daily unauthorized overruns, and Rate Schedule OPAS penalties is two times the interruptible transportation (IT) rate. El Paso states that since it is proposing to charge short-term and interruptible services at a 250 percent firm rate equivalent, the current non-critical condition penalty rates would increase two and one-half times. El Paso is thus proposing to change the non-critical penalty rates so that they are based on the applicable firm or interruptible rate equivalent, instead of the IT rate. El Paso states

²⁸ El Paso FERC Gas Tariff, Second Revised Sheet No. 28D, states that the Daily Authorized Overrun rate for Rate Schedule FT-H is "not more than Maximum Daily FT-H 100% Load Factor Rate and not less than Minimum Daily FT-H Usage Rate," and the Daily Unauthorized Overrun charge for quantities equal to or less than the safe harbor tolerance quantities is also the Daily Authorized Overrun Rate.

that this change will continue the current pricing relationship for these penalty rates. El Paso states that it will assess penalties based on the type of service the shipper is using. In other words, El Paso will either charge the interruptible rate, short-term firm rate, or long-term rate, as applicable, based on the appropriate service.

a. Initial Comments

61. EGC and Golden Spread agree that the penalties should not be based on the 250 percent IT rate. EGC suggests that the unauthorized overrun rate should be two times the 100 percent IT rate, while Golden Spread suggests that all penalty rates be based on the rates for long-term FT-1 rates.

b. Commission Determination

62. In the orders implementing Order No. 637, the Commission found that a pipeline may propose a nominal penalty for non-critical periods, not to exceed twice its IT rate, that is sufficient to provide an incentive to nominate overrun volumes, but also takes into account the lessened impact such unauthorized overruns will have on the system.²⁹ Alternatively, a pipeline may retain its existing penalty, but must waive the unauthorized overrun penalty if the unauthorized overrun does not cause operational problems.³⁰ Moreover, the Commission has rejected a previous proposal by El Paso to implement non-critical penalties based on the 100 percent load factor of the corresponding rate schedule.³¹ The Commission instead required that the non-critical penalties be based on the IT rate, consistent with Commission precedent, and limited them to two times the IT rate.³²

63. Accordingly, the Commission finds that El Paso's proposal to base its non-critical penalty on the applicable rate schedule is unjust and unreasonable. As stated in prior orders, the Commission's policy requires use of the IT rate, as the basis for a non-critical penalty.

64. The Commission also finds that, if no change is made, the non-critical penalties could effectively increase to 250 percent of the IT rate if El Paso's proposed IT rate is

²⁹ See *Colorado Interstate Gas Co.*, 122 FERC ¶ 61,256, at P 86 (2008). See also *Questar Pipeline Co.*, 98 FERC ¶ 61,159, at 61,584 (2002).

³⁰ *Id.*

³¹ See *El Paso Natural Gas Co.*, 115 FERC ¶ 61,280, at P 26-27 (2006).

³² *Id.*

ultimately approved. The Commission agrees with El Paso that such an increase is unwarranted. Basing the non-critical penalties on a 250 percent IT rate is unreasonable because it significantly increases those penalties, contrary to Commission precedent that such non-critical penalties should be nominal.³³ In this circumstance, we find that use of a 100 percent load factor IT rate, which is effectively the currently-approved IT rate, is a reasonable non-critical penalty, consistent with Commission precedent.³⁴

65. We further find that El Paso's hourly scheduling penalty should be the 100 percent load factor IT rate, and not two times the IT rate, as was previously accepted in the 2006 Rate Case.³⁵ As EGC and Golden Spread explain, the Commission's ruling on this issue in the 2006 Rate Case was challenged on rehearing, but those rehearing requests were dismissed as moot as a result of the 2006 Rate Case Settlement and never decided on the merits. Accordingly, we find that the appropriate hourly scheduling penalty here should be the 100 percent IT rate because this penalty level will provide an incentive for shippers to schedule accurately and will reasonably compensate the pipeline for its lost opportunity costs, consistent with Commission precedent.³⁶

6. The Inclusion of HEEN in Overruns

66. HEEN is an enhanced scheduling right under El Paso's Rate Schedules FT-1, FT-H, NNTD, and NNTH, that increases service flexibility by allowing for non-uniform hourly flows of gas. Specifically, HEEN permits a shipper to designate some portion of its daily entitlement to be used to support expected non-uniform rates of flow during the gas day. This tariff feature allows shippers to nominate peak hour requirements separately through the use of a HEEN nomination. However, the sum of HEEN nominations and flowing gas nominations may not exceed, on a primary firm basis in any one hour, the peak hourly entitlement under the shipper's MDQ. If it does, this is considered a daily unauthorized overrun. These daily unauthorized overruns are calculated by adding together the shipper's flowing gas scheduled quantities and HEEN scheduled quantities and comparing that total to the shipper's contract demand.

³³ See Order No. 637 at 31,317.

³⁴ *Id.*

³⁵ *El Paso Natural Gas Co.*, 114 FERC ¶ 61,305, at P 107 (2006) (March 23 Order).

³⁶ See *Columbia Gas Transmission Corp.*, 124 FERC ¶ 61,122 at P 10. See also *Natural Gas Pipeline Co. of America*, 103 FERC ¶ 61,174 (2003).

67. El Paso states that during the 2006 Rate Case Settlement negotiations, it recognized that its customers needed time to change to its new services and penalty structures. El Paso explains that as a result, the 2006 Rate Case Settlement provides that until December 31, 2008, only 50 percent of the HEEN scheduled quantities will be used in determining daily unauthorized overruns.

68. In this proceeding, El Paso states that its shippers may still need some time to complete the transition to the new service and penalty structure implemented in the 2006 Rate Case Settlement. El Paso therefore proposes a gradual increase for the 2009 calendar year, where only 75 percent of HEEN scheduled quantities are applied to the calculation of daily unauthorized overruns, rather than the 100 percent. El Paso states that under its proposal, as of January 1, 2010, 100 percent of HEEN scheduled quantities will be included in the calculation of daily unauthorized overruns.

a. Comments

69. Most shippers, with the exception of SoCal Gas and SDG&E, request that the Commission reject El Paso's proposal to increase the amount of HEEN included in the overrun calculation. The commenters argue that El Paso has not met its burden of demonstrating that the current 50 percent level results in a negative impact on its system.

70. The commenters argue that El Paso's proposal to include 100 percent of HEEN in the overrun calculation will severely limit shippers' use of HEEN and increase shippers' daily penalty exposure, contrary to the purpose of the HEEN service. PNM and EGC contends that under El Paso's proposal, a customer will be faced with a situation where if the customer utilizes its full HEEN rights, and then has an unanticipated divergence in takes, it risks exposure to daily overrun penalties. The parties argue that in effect, the contract overrun penalty becomes an indirect scheduling penalty, which the Commission has previously rejected.³⁷ El Paso Electric and PNM contend that shippers would again be placed in a no-win situation, unable to avoid either an hourly scheduling penalty or an unauthorized overrun penalty.

71. The commenters also contend that El Paso's proposal would allow El Paso to charge shippers twice, or even three times, for the same capacity – once through firm rates, a second time through an unauthorized overrun charge, and a third time to the extent El Paso sells the unused upstream capacity as interruptible service.

72. The commenters also argue that HEEN should not be included in the calculation of overruns because overruns are only measured on the basis of actual flowing gas. The

³⁷ Parties cite *El Paso Natural Gas Co.*, 121 FERC ¶ 61,265 (2007).

commenters note that in the March 23, 2006 Order on Technical Conference in the 2006 Rate Case, the Commission stated that overruns are considered “quantities of gas taken in excess of a shipper’s contract demand.”³⁸ The commenters argue that a HEEN nomination is fundamentally different from the flowing gas the Commission had in mind in the March 23 Order because unlike flowing gas, the capacity used to meet nominated HEEN hourly entitlements is provided largely through linepack in the market area near the points of delivery. The commenters therefore contend that there is no justification for inclusion of any HEEN nominations in the overrun calculation, which are, by definition, quantities of flowing gas, not quantities of unused capacity.

73. The commenters also argue that the proposal to include 100 percent of HEEN nominations in the overrun calculation would unreasonably assume that 100 percent of a shippers’ nominated HEEN is reserved by El Paso. The commenters note that HEEN does not reserve a shipper’s capacity rights back to the receipt point, and thus, does not use the full contract flow path. Instead, HEEN uses capacity on the system, but only from some pre-designated intermediate point to the delivery point. Therefore, the commenters argue that it is inappropriate and unreasonable to use 100 percent of HEEN nominations in the calculation of overrun quantities.

74. SoCal Gas and SDG&E state that HEEN services do use pipeline capacity, because once HEEN quantities are nominated, those HEEN quantities also have to be reserved and the reservation of space is a use of pipeline capacity. SoCal Gas and SDG&E state that because HEEN uses pipeline capacity in this way, HEEN nominations in their entirety must be considered in determining whether a shipper has exceeded its contractual rights, and thus is subject to an overrun charge. SoCal Gas and SDG&E acknowledge that when using HEEN, a shipper may only utilize a portion of the full contract path to deliver gas to an alternate delivery point or may release that portion of its capacity. However, SoCal Gas & SDG&E state that whether or not a shipper chooses to take advantage of the myriad of options available to it with regard to its upstream contract rights should not be determinative of whether the full HEEN quantity should be included in the overrun calculations. SoCal Gas and SDG&E argue that instead, the fact that the HEEN uses physical capacity and makes that capacity unavailable for use by other shippers, should be determinative.

75. In response, El Paso Electric argues that the Commission should disregard SoCal Gas and SDG&E’s supporting comments because these parties have a vested economic interest in El Paso’s assessment of penalties against its other shippers since they will share in the penalty revenues.

³⁸ March 23 Order, 114 FERC ¶ 61,305 at P 91.

76. Texas Gas also disagrees with SoCal Gas and SDG&E's argument that because shippers may use the upstream portion of their path with HEEN, 100 percent of the HEEN nomination should be considered in the overrun calculation. Texas Gas responds that just because a shipper can use that capacity does not mean the shipper actually used that capacity. Moreover, Texas Gas explains, shippers have already paid to reserve this capacity. Texas Gas therefore argues that there is no basis for charging shippers an overrun charge for the use of capacity within their total contract demand when HEEN capacity, which is not flowing gas, generally only has an impact within 300 miles of the delivery point and does not use the shipper's full contract path.

77. In response to El Paso's assertion at the technical conference that HEEN is a segmentation of capacity, Salt River asserts that the process of segmentation on the El Paso system is extremely complex and non-transparent. Salt River states that in the absence of an overrun penalty, shippers have no means on either a real-time or after-the-fact basis to verify how its segmented capacity is being treated by El Paso. Salt River asserts that in light of Order No. 637, this lack of transparency is unacceptable for any shipper attempting to avoid a penalty when scheduling their full contract capacity rights on any date. Salt River states that until El Paso makes the segmentation process "as easy as possible,"³⁹ consistent with Order No. 637, it is premature to modify the 50 percent HEEN capacity factor for calculating daily overruns.

78. Salt River states that if the Commission accepts El Paso's HEEN proposal, it should require that (1) El Paso explicitly state in its tariff that shippers have a right to segment their capacity when employing a HEEN nomination, or forego segmentation in return for a percentage reduction in the quantity of HEEN used in the overrun calculation; (2) if a shipper chooses to segment, the currently defined HEEN Qualified Delivery Points shall constitute a discrete segment and the remaining upstream capacity shall remain available for segmentation; (3) for those shippers who forego segmentation rights, continue to use 50 percent of the HEEN nomination and allow El Paso to retain the right to use the segment upstream of the HEEN point for interruptible and other transportation services; and (4) El Paso modify its Electronic Bulletin Board (EBB) to ensure that a shipper can verify how its segmented capacity is being treated by El Paso.⁴⁰

³⁹ Order No. 637 at 31,304.

⁴⁰ Southwest Gas opposes Salt River's position regarding the use of 100 percent of HEEN in the overrun calculation if a shipper can segment. Southwest Gas states that instead, it supports retaining the 50 percent provision or eliminating inclusion of HEEN quantities.

79. The commenters also rebut El Paso's assertion that the Commission previously approved El Paso's original proposal to include 100 percent of HEEN in the overrun calculation. PNM states that the original provision was buried in the tariff and not discussed at the first technical conference in the 2006 Rate Case. PNM states that as soon as the pipeline's position regarding the inclusion of 100 percent of HEEN in overruns came to the attention of shippers, they vigorously protested it. PNM states that the dispute was eventually resolved in the 2006 Rate Case Settlement. PNM thus argues that the issue was never resolved by the Commission on the merits. The Indicated Shippers further point out that settlement agreements are non-precedential. The commenters further argue that regardless of how the tariff provision originated, El Paso still bears the burden of demonstrating that the proposed tariff change is just and reasonable, a burden the commenters contend El Paso has not met.

80. The commenters further assert that contrary to El Paso's assertion, the provision to include 50 percent of HEEN nominations in the overrun calculation was not an accommodation for shippers to make the transition to the new rates and services. The parties state that they never intended the 50 percent provision to be removed after the termination of the 2006 Rate Case Settlement and that nowhere in the 2006 Rate Case Settlement does it state that this provision was transitional. The parties contend that El Paso has failed to provide any evidence that the inclusion of 50 percent of HEEN in overruns was transitional or temporary.

81. El Paso Electric argues that there is no need for HEEN service on the El Paso system. El Paso Electric suggests two alternatives to HEEN service. First, El Paso Electric states that instead of measuring hourly entitlements by scheduled volumes, El Paso could measure hourly entitlements and related hourly penalties by the hourly profile embedded in reserved capacity (i.e., total contract demand or TCD). El Paso Electric states that under this alternative, if a shipper stayed within the hourly profile of its reserved hourly capacity, it would have no hourly penalties, and if the shipper flowed volumes on a daily basis less than its TCD, the shipper would have no overrun penalty.

82. El Paso Electric's second alternative to HEEN is that El Paso amend its "no bump" rule, which prohibits firm shippers from bumping interruptible and alternate point nominations in cycles 4, 5, and 6. El Paso Electric states that permitting firm shippers to have priority over interruptible and alternate point nomination in late cycles would allow firm shippers to adjust their nominations as demand unfolds during the day.

83. The Indicated Shippers oppose EGC's "no bump" proposal because it is contrary to the Commission-approved North American Energy Standards Board (NAESB) guidelines. The Indicated Shippers also argue that EGC's proposal would render alternate point rights virtually meaningless, since that service would not be guaranteed to flow until cycle 7, only four hours prior to the conclusion of the gas day.

b. Reply Comments

84. El Paso contends that shippers will not face a no-win penalty situation under the HEEN proposal because they can avoid overrun charges by keeping their HEEN and flowing gas to a level that does not exceed their total contract demand. In addition, El Paso states that shippers can avoid hourly scheduling penalties by using HEEN or by contracting properly if they lack sufficient HEEN quantities to cover all of their hourly flow variations. El Paso further states that it is not attempting to create a *de facto* daily non-critical scheduling penalty. El Paso contends it is proper to apply a daily overrun charge to all daily capacity quantities used by the shipper that exceed their total contract demand.

85. El Paso argues that shippers are incorrect in stating that El Paso seeks to double-charge shippers for the same capacity. El Paso contends that this allegation mistakenly blurs the distinction between a reservation charge and an overrun charge. El Paso notes that a reservation charge is paid to reserve capacity, while an overrun charge is paid for the customer's use of capacity and specifically applies when the customer uses more capacity than it has reserved.

86. El Paso argues the Commission should approve its proposal to reflect all HEEN quantities in the overrun calculation, consistent with the Commission's original approval of the HEEN feature in the March 23 Order. El Paso states that because the 100 percent level was just and reasonable at the time of the March 23 Order, it necessarily follows that the 100 percent level is just and reasonable now. El Paso notes that although the Commission approved inclusion of 100 percent of HEEN in the overrun calculation in the March 23 Order, the parties agreed in the 2006 Rate Case Settlement to modify that calculation to include 50 percent of HEEN for the term of the 2006 Rate Case Settlement. El Paso states that the transition period provided by the 2006 Rate Case Settlement will terminate on December 31, 2008, and therefore, the Commission should approve its proposal to return, over a two-year period, to the 100 percent level the Commission originally approved.

87. El Paso states that no shipper seriously contends that HEEN is not a use of capacity. El Paso argues that HEEN utilizes daily pipeline capacity by enabling shippers to use the pipeline as a form of storage and, as a result, El Paso is unable to use the HEEN capacity to serve other shippers for the entire day. El Paso additionally argues that hourly flow variations significantly impact the system because they consume daily capacity for 300 to 400 miles, not just hourly capacity at the delivery location.

88. El Paso also argues that under Commission policy, if a customer overruns its capacity rights on any segment of the pipeline, it must pay an overrun charge. El Paso states that for instance, if a customer reserves 100 units of capacity over a 500 mile path, and the customer uses 150 units of capacity on 300 miles of that path, it must pay an overrun charge of 50 units, even though it makes no use of the remaining 200 miles of the

path. El Paso argues that just because the customer elected not to use the remaining 200 miles of its capacity reservation does not change that the customer must pay an overrun charge of 50 units. El Paso contends that the same principle should apply here and that arguments that less than 100 percent of HEEN capacity should count for daily contract overrun are inconsistent with Commission policy.

89. El Paso disagrees with shippers' arguments that 100 percent of daily HEEN capacity should not count for daily contract overruns purposes unless a customer has elected to use or release capacity upstream of the HEEN point. El Paso states that it has shown that Commission policy treats an overrun of a segment of a shipper's path as an overrun of the shipper's entire capacity in that path. Therefore, El Paso concludes that it is just and reasonable to include 100 percent of a shipper's use of daily HEEN capacity towards daily contract overrun, regardless of whether the shipper has used or released capacity upstream of where the shipper used capacity for HEEN service.

90. Furthermore, El Paso assures shippers that its transportation rights, including its ability to use HEEN, are fully segmentable. El Paso states that in the right circumstances, a shipper could use the entire contracted path with various HEEN and flowing gas nominations in a fully segmented manner. However, El Paso notes that it has discovered an anomaly in its walk-the-pipe computer system logic, and it is working to revise it to permit such segmenting. Therefore, El Paso states that Salt River's computer program-based objections should not bar the Commission from concluding that El Paso's new HEEN proposal is just and reasonable.

91. With regard to El Paso Electric's proposal to amend the "no bump" rule, El Paso states that its no bump rule reflects current Commission policy.⁴¹ El Paso contends that El Paso Electric's alternative proposal does not provide a basis on which to reject the HEEN proposal. El Paso argues its proposal is just and reasonable and should be accepted.

c. Commission Determination

92. The current HEEN tariff provision agreed to by the settling parties in the 2006 Rate Case Settlement provides for 50 percent of HEEN nominations to be included in the overrun calculation. The shippers argue they did not intend the 50 percent HEEN provision in the 2006 Rate Case Settlement to be temporary. Notwithstanding the parties' intentions, nothing in the 2006 Rate Case Settlement or the existing tariff language prevents El Paso from proposing to modify the HEEN provision in the instant

⁴¹ El Paso cites the March 23 Order, 114 FERC ¶ 61,305 at P 220.

rate case.⁴² However, as discussed below, the Commission rejects El Paso's proposal to include HEEN nominations in the overrun calculation phased in over two years.⁴³

93. El Paso introduced HEEN as a service enhancement designed to provide shippers with additional scheduling flexibility within contract entitlements to serve intra-day swings in demand. Shippers argue that El Paso's proposal would severely limit their use of HEEN and increase shippers' penalty exposure. The Commission agrees. El Paso is proposing to impose a daily overrun charge that could apply when a shipper's flowing gas is in excess of scheduled quantities, but still within contractual limits. In this situation, penalties would apply because for some hours of the day the shipper's flowing gas exceeded its contract entitlement. Since the shipper's daily flow remained within its contract demand, the Commission has historically viewed these variances as scheduling variances that may be subjected to scheduling penalties, but not treated as overruns. As the Commission explained in the March 23 Order, overruns are quantities of gas taken in excess of a shipper's contract demand.⁴⁴ HEEN nominations are not the same as flowing gas. HEEN reserves capacity to be used for flowing gas later in the day and thus should not be included in the daily overrun calculation. In addition, commenters argue that HEEN quantities should not be included in overrun calculations because HEEN does not reserve capacity for the full contract flow path. El Paso responds that under Commission policy, an overrun charge is paid whether the customer uses the full contract path or not, so this distinction is irrelevant. The Commission finds that while HEEN reserves capacity within the shipper's MDQ for the shipper to use as flowing gas later in the gas day, the reservation, in and of itself, is not equivalent to flowing gas.

94. In addition, El Paso's proposal to include 100 percent of HEEN in the overrun calculation is inconsistent with our prior orders rejecting daily scheduling penalties. If implemented, the inclusion of 100 percent of nominated HEEN quantities in the overrun calculation will have the same effect as the previously proposed non-critical daily scheduling penalty, which the Commission rejected in the 2007 Order on Technical

⁴² All arguments as to whether the Commission previously approved the inclusion of 100 percent of HEEN nominations in the March 23 Order are moot because the parties settled this issue in the 2006 Rate Case Settlement.

⁴³ El Paso proposes to increase the amount of HEEN included in the overrun calculation to 75 percent for 2009 and 100 percent thereafter. For the purposes of this order, the Commission will refer to El Paso's entire proposal as its proposal to include 100 percent of HEEN nominations in the overrun calculation.

⁴⁴ See March 23 Order, 114 FERC ¶ 61,305 at P 91.

Conference.⁴⁵ For example, assume a shipper has a TSA with a maximum daily quantity of 10,000 Dth, and that shipper schedules 5,000 Dth of daily quantities for the following day and nominates its full HEEN nomination of 5,000 Dth. If the shipper exceeds its scheduled quantities by 1,000 Dth in any given hour it would incur a daily overrun penalty at the end of the day. This occurs because El Paso would include in the calculation 100 percent of the shipper's HEEN nomination (5,000 Dth), in addition to the shipper's actual flows (6,000 Dth), for a total of 11,000 Dth, which is 1,000 Dth more than the shipper's total contract demand. Thus, the shipper would be charged a daily overrun penalty even though the shipper's actual takes (6,000 Dth) were below the shipper's total contract demand (10,000 Dth).

95. In the 2007 Order on Technical Conference the Commission explained that with the daily scheduling penalty in place, if shippers used the scheduling flexibility provided by El Paso's package of services, they would either be exposed to an hourly or a daily non-critical scheduling penalty, with no reasonable way to avoid both.⁴⁶ As a result, the Commission stated that implementing a daily non-critical scheduling penalty without adequate opportunities for shippers to minimize or avoid the new penalty would be patently unfair and contrary to long-standing Commission policy.⁴⁷ The order further stated that the addition of a non-critical daily scheduling penalty would prevent shippers from effectively utilizing HEEN and the premium services and from minimizing or avoiding the incurrence of penalties.⁴⁸ El Paso's proposal to include 100 percent of HEEN nominations in the overrun calculation would essentially be the same as implementing the daily scheduling penalty because it would place shippers in a position where it would be extremely difficult to avoid some kind of penalty. Thus, when considered in combination with the existing penalties and service structure in place on El Paso's system, El Paso's new HEEN proposal is unjust and unreasonable.

96. We also find that it is inappropriate to include any HEEN quantities in the calculation of daily overrun charges. El Paso has failed to satisfactorily explain how or why it is appropriate to apply a daily penalty to violations of an hourly "service." The

⁴⁵ El Paso proposed a daily scheduling penalty in the 2006 Rate Case proceeding and in Docket No. RP07-511-000. In both cases, the Commission rejected the penalty. See March 23 Order, 114 FERC ¶ 61,305 at P 118; *El Paso Natural Gas Co.*, 121 FERC ¶ 61,265 (2007) (2007 Order on Technical Conference).

⁴⁶ 2007 Order on Technical Conference at P 30.

⁴⁷ *Id.*

⁴⁸ *Id.* P 27.

Commission acknowledges it approved El Paso's largely uncontested 2006 Rate Case Settlement with a form of this daily penalty structure (the provision was effectively nullified by calculating penalties on just 50 percent of HEEN quantities), but it made no merits call on the appropriateness of the specific provision. It is appropriate to charge hourly scheduling penalties when shippers' actual gas flows exceed their scheduled amount for portions of the day. However, consistent with the Commission's orders rejecting the daily scheduling penalty, a shipper should not be subject to a daily overrun penalty unless its flowing gas exceeds its total contract demand. Therefore, the Commission rejects El Paso's proposal to use 100 percent of HEEN nominations in the calculation of daily overrun penalties and directs El Paso to revise its tariff provisions accordingly.

97. El Paso Electric proposes two alternatives to HEEN service on the El Paso system. Since El Paso is not proposing to eliminate HEEN service altogether, El Paso Electric must demonstrate that the current HEEN service is unjust and unreasonable and that its proposals are just and reasonable. The Commission finds that El Paso Electric has failed to meet this burden. As explained above, HEEN is an important component of El Paso's portfolio of services because it helps shippers manage hourly demand requirements and permits them to use their services in a more flexible manner

98. In addition, El Paso Electric's "no bump" proposal is unjust and unreasonable because it contradicts current Commission policy approving NAESB standards which El Paso is required to adopt and observe. El Paso Electric's second proposal is that El Paso measure hourly entitlements and related hourly penalties by the hourly profile embedded in reserved capacity. While this may be another just and reasonable alternative to HEEN, El Paso Electric has failed to demonstrate that El Paso's current HEEN service is unjust and unreasonable. The Commission therefore rejects El Paso Electric's proposals.

99. In its comments regarding El Paso's HEEN proposal, Salt River raises concerns about El Paso's treatment of segmentation. Salt River states that while segmentation is a useful service because it helps shippers minimize their exposure to penalties, shippers are unable to effectively utilize this service because they do not know how El Paso is treating their segmented capacity. El Paso responds that it has discovered an anomaly in its computer system regarding segmentation and that it will be fixed. The Commission encourages the parties to work together to resolve this issue and maximize the transparency of the segmentation service. It is important that shippers have the ability to understand and monitor the services El Paso offers, so that they can utilize the services effectively and minimize their overrun quantities.

7. Overrun Rate and Non-Telemetered Points

100. El Paso proposes to revise its tariff to provide that to the extent a daily unauthorized overrun quantity contains non-telemetered quantities due to the lack of real-time measurement equipment, such quantities shall be assessed at the lower authorized

overrun rate. El Paso states that this will minimize the shipper's exposure to penalty rates when overrunning its daily contract quantity using non-telemetered meters.

a. Initial Comments

101. PNM states that El Paso's proposal is a step in the right direction but that it does not go far enough in remedying the currently unjust and unreasonable assessment of daily and hourly penalties to shippers based on their activity at non-telemetered points. PNM suggests that El Paso be required to establish a single principle in its tariff that is analogous to the current MDO/MHO penalty provision that adopts its methodology for all daily and hourly penalties. PNM proposes the following be included in El Paso's tariff:

Daily and hourly penalties shall be adjusted to reflect the exclusion of flow data associated with meters that do not have active telemetry capability (temporary outages excepted) into the VISA system on a real time basis in all instances where the inclusion of such data would cause a penalty to be assessed or increased.

102. UNS/Tucson and Texas Gas Service support PNM's position. The Indicated Shippers support El Paso's proposal.

b. Reply Comments

103. In response to PNM's request, El Paso states that it has already agreed to excuse MDO and MHO penalties at non-telemetered points, and has agreed not to assess a penalty on daily unauthorized overruns at non-telemetered points. El Paso asserts that PNM's proposal amounts to a further request to be excused from hourly scheduling and SOC/COC penalties at the D-code level. El Paso states that such an expanded penalty waiver is not required by Commission policy and that PNM has not justified such an expansion.

104. El Paso further argues that because the delivery meters on the El Paso system that do not have telemetry are relatively small, the assessment of penalties resulting from scheduling deviations at those points will be insignificant. El Paso also asserts that its proposal is well within the bounds of Commission policy which allows penalties to be assessed on shippers lacking real-time data.⁴⁹ El Paso contends that PNM has failed to

⁴⁹ El Paso cites *Northern Natural Gas Co.*, 101 FERC ¶ 61,203, at P 69, 171 (2002) (*Northern Natural Gas*); *Gulf South Pipeline Co., LP*, 98 FERC ¶ 61,278 (2002) (*Gulf South*).

demonstrate why data from meters without real-time measurement should be exempt from the calculation of hourly scheduling and SOC/COC penalties at the D-Code level.

c. Commission Determination

105. The Commission accepts El Paso's proposal to revise its tariff to provide that, to the extent a daily unauthorized overrun quantity contains overruns from non-telemetered points, those amounts shall be billed the authorized overrun rate for service rendered. As the commenters note, the Commission has in the past rejected pipelines' efforts to assess penalties at points with no daily or hourly metering because shippers are unable to track the activity at those points or modify their behavior to avoid penalties.⁵⁰ However, in this case, El Paso is not attempting to impose an improper penalty on activity at non-telemetered points. Rather, El Paso is proposing to charge shippers with non-telemetered points the authorized overrun rate when they overrun their gas quantities. Unlike the unauthorized overrun rate, the authorized overrun rate does not include a penalty component. Thus, El Paso's proposal simply permits it to charge non-telemetered shippers for the overrun transportation service it provided. The Commission finds this to be just and reasonable and accepts El Paso's proposal.

8. The Inclusion of California Border Spot Prices in the Monthly Index

106. El Paso proposes to revise the monthly spot price for its monthly system cash-out index price to include a California border spot price. El Paso states that with the pending addition of new California flows related to North Baja receipt points, and the customer-requested change to Rate Schedule PAL for California park and loan activity, it is appropriate to add the California border spot price to cash-out and daily spot price determinations. El Paso states that because shippers' economic decisions may often be based on the price of gas in California, modifying the monthly cash-out index price will better reflect market sensitivities to California as an El Paso system pricing indicator.⁵¹ El Paso states that the current tariff provides that the calculation of the system average rate is based on receipt quantities, so that the California price only affects the system weighted average price to the extent that there are scheduled California receipts of gas.

⁵⁰ See *Northern Natural Gas Co.*, 72 FERC ¶ 61,051, at 61,292 (1995); *Williams Natural Gas Co.*, 62 FERC ¶ 61,261, at 62,757 (1993), *order on reh'g*, 64 FERC ¶ 61,165, at 62,416 (1993).

⁵¹ Prepared Direct Testimony of Richard L. Derryberry, Exhibit No. EPG-153 at 44-45.

a. Initial Comments

107. The Indicated Shippers, Southwest Gas, and Texas Gas argue that the inclusion of California border spot prices in the monthly index should be rejected as unjust and unreasonable. The commenters contend that the proposal does not accurately reflect the value of the gas El Paso purchases for its cash-out account, as supply basin prices do. They argue that the proposal would unjustly inflate the cash-out price because it reflects the gas commodity cost and it would additionally force shippers to pay for transportation to the California border, even if they do not receive service at the California border. In addition, the commenters argue that El Paso has not provided any evidence that it purchases gas for system supply at the California border.

108. Moreover, the commenters note that pursuant to section 32.3 of El Paso's current tariff, if a shipper has only one supply basin listed in its transportation service agreement, it would only pay the cash-out index price for that supply basin. However, under El Paso's new proposal, a shipper with multiple supply basins would pay a cash-out price that includes the California border price, even if that shipper does not have deliveries to California. Therefore, the commenters argue that inclusion of the California border price in the cash-out calculation is unjust and unreasonable.

109. SoCal Gas and SDG&E state that the Indicated Shippers' objections to El Paso's proposal overlook the fact that El Paso receives gas supplies from California. SoCal Gas and SDG&E further explain that El Paso's tariff bases the weighting of the monthly system cash-out index price among three receipt locations based on the quantities entering El Paso's system, so the use of the weighted average based on actual receipts during the previous quarter is an objective and neutral measure.

110. Golden Spread objects to El Paso's proposal to include the California border price in the cash-out mechanism to the extent the price is used in the calculation of the critical hourly scheduling penalty for shippers in the Permian Basin. Golden Spread argues that the index pricing points used to derive the critical period hourly scheduling penalty for Permian Basin area shippers paying the production area rates should be limited to the geographical area of the system that they are permitted to use.

111. El Paso responds that this ignores the purpose of the penalty, which is to deter scheduling deviations, not to compensate the pipeline for particular costs. El Paso also reiterates that its proposal substantially reduces the hourly scheduling penalty in critical conditions, from ten times to two times the applicable index price. That being said, El Paso argues the Commission has previously approved a much higher penalty for the El Paso system. El Paso further states that the Indicated Shippers have not cited any precedent requiring El Paso to demonstrate that it purchases gas for system supply at the California border. El Paso argues its proposal should be accepted because parties have failed to demonstrate that it is unjust and unreasonable.

b. Commission Determination

112. The Commission finds El Paso's proposal to revise the monthly spot price to include a California border spot price is just and reasonable. The Commission also finds that this change will ensure that the monthly spot price will reflect the effect of California spot prices on the overall system index price, since El Paso receives gas from California.

113. It is unnecessary to require El Paso to demonstrate that it purchases gas from California receipt points, as the Indicated Shippers request, because the system cash-out price is calculated based on a weighted average. El Paso's current tariff states that the system cash-out price is computed based on a weighted average of the monthly San Juan and Permian Basin index prices.⁵² El Paso's current tariff further provides that the calculation of the system average rate is based on receipt quantities.⁵³ Thus, if El Paso does not purchase any gas at California receipt points, the cash-out price will accurately reflect this and will not be improperly influenced by California prices. The Commission finds this also addresses shippers' concern about the inclusion of the cash-out price in the calculation of the hourly scheduling penalty. Finally, revenues net of costs must be refunded to shippers. Including the California prices in the cash-out calculation will not enrich El Paso. Based on the foregoing, the Commission accepts El Paso's proposal.

9. Definition of Hourly Scheduling Penalty

114. El Paso proposes to modify the definition of "Hourly Scheduling Penalty Quantity" in section 1.33 of its tariff to include the statement that "the hourly scheduling penalty quantity consists of two components, a scheduling quantity and an overrun quantity."

a. Initial Comments

115. EGC opposes this change, arguing that overruns are not relevant to hourly takes. EGC explains that the Commission considers overruns to be quantities in excess of a shipper's daily contract quantity, not hourly.⁵⁴ EGC asserts that the definition is important in determining whether any portion of the hourly scheduling penalties are considered to be overrun charges, which are retained by El Paso instead of credited to its customers.

⁵² See El Paso's FERC Gas Tariff, Second Revised Volume No. 1A, First Revised Sheet No. 362I (section 32.3(c) of the GT&C).

⁵³ *Id.*

⁵⁴ EGC cite the March 23 Order, 114 FERC ¶ 61,305 at P 91, 130, 134.

b. Reply Comments

116. El Paso replies that EGC is incorrect and that the Commission approved an hourly scheduling penalty for takes exceeding 1/24th of a shipper's scheduled amounts, but directed that such excess takes must be separately identified as (1) scheduling penalties for takes within contract demand and (2) overruns for takes that exceed contract demand.⁵⁵ El Paso further states that the Commission confirmed that it had previously approved El Paso's hourly overrun penalties in the December 20 Order.⁵⁶ El Paso further explains that, while the 2006 Rate Case Settlement required El Paso to merge the two components of hourly overrun together, El Paso is striving to make clear the difference between the scheduling and overrun components, to be consistent with the March 23 Order.

c. Commission Determination

117. The Commission accepts El Paso's proposed modification to the definition of hourly scheduling penalty. El Paso's proposed revision merely clarifies that the hourly scheduling penalty is composed of a scheduling penalty component and an overrun component. This clarification is consistent with the Commission's findings in the March 23 Order and does not change the penalty itself. We note that the hourly scheduling penalty may not contain an overrun component if the delivered quantities are within contract levels, but in excess of scheduled amounts. If the delivered quantities exceed contract levels, however, El Paso is entitled to recover the cost of providing that overrun service, as provided in its tariff.

10. Safe Harbor Tolerances

118. Section 6.2(b)(iv) of El Paso's current Rate Schedule FT-1 states that "in non-Critical Conditions, a Shipper is *entitled to* a daily Safe Harbor Tolerance Quantity..." (emphasis added) before the imposition of a daily unauthorized overrun penalty.⁵⁷ El Paso proposes to change this provision to state that "in non-Critical Conditions, a Shipper is *given the benefit of* a daily Safe Harbor Tolerance Quantity..." (emphasis added).

⁵⁵ El Paso cites the March 23 Order, 114 FERC ¶ 61,305 at P 130.

⁵⁶ El Paso cites *El Paso Natural Gas Co.*, 121 FERC ¶ 61,266 at P 17 (2007) (December 20 Order).

⁵⁷ See El Paso's FERC Gas Tariff, Second Revised Volume No. 1A, Third Revised Sheet No. 114B.

a. Initial Comments

119. APS, UNS/Tucson, and Texas Gas argue that El Paso fails demonstrate why the change from “entitlement” to “benefit” is needed or just and reasonable. APS states that in making this change, El Paso appears to be laying the groundwork for eliminating or reducing the safe harbor tolerance. APS asserts that safe harbor tolerances are present in all pipeline tariffs and can be accurately described as an entitlement. Texas Gas states that when the definition of “entitlement” is compared to the definition of “benefit,” it is clear that the tariff revision is not merely semantic, as El Paso asserts. Texas Gas states that the change would eliminate a right which may not be abridged without due process.

b. Reply Comments

120. Southwest Gas and EGC join APS, UNS/Tucson, and Texas Gas in arguing that El Paso has failed to demonstrate that the change from “shipper is entitled” to “shipper is given the benefit of” is just and reasonable.

121. El Paso responds that its proposal to modify section 6.2(b)(iv) of Rate Schedule FT-1 to state that safe harbor tolerances are a “benefit” as opposed to an “entitlement” is just and reasonable because shippers are not entitled to take more or less gas than scheduled on the pipeline. El Paso asserts that a penalty-free tolerance level is a benefit provided to the shipper, not an additional increment of MDQ or total contract demand, as Texas Gas and APS seems to believe.

c. Commission Determination

122. The Commission accepts El Paso’s proposal to refer to the safe harbor tolerance quantity in section 6.2(b)(iv) as a benefit. As El Paso explains, a safe harbor tolerance, in the context of overrun penalties, is not an entitlement because shippers do not have the right to take more or less gas than scheduled on the pipeline. Parties are concerned that by making this wording change, El Paso may be laying the groundwork to eliminate safe harbor tolerances. In response, the Commission notes that if El Paso proposes to change any portion of its tariff, including those portions relating to safe harbors, the Commission must find the change to be just and reasonable.

11. Penalties for Volumes Scheduled in the Opposite Direction of an SOC/COC

a. Initial Comments

123. EGC argues that El Paso should charge only the non-critical penalty if a shipper packs or drafts in the opposite direction of an SOC/COC.⁵⁸ EGC states that El Paso does not impose penalties on daily imbalances in the opposite direction, but does for hourly variances. EGC asserts that because the hourly scheduling penalty is only applied to excess takes (drafts), this tariff provision only applies to pack SOC/COC events. EGC argues that shippers who are net packers of the system during draft SOCs should be acknowledged as helping, even though they should be penalized for hourly excesses, but only on a non-critical basis.

b. Reply Comments

124. El Paso opposes EGC's proposed modification to the tariff, which El Paso alleges is not a part of its filing, and so must be adjudicated under section 5 of the Natural Gas Act (NGA). El Paso states that if a shipper exceeds its hourly entitlement during a critical period, it should be penalized at the critical hourly penalty rate, regardless of whether it packed the system on a daily basis during a draft SOC/COC. El Paso states if a shipper exceeds its hourly scheduled quantities, even for one hour, that can prevent El Paso from maintaining contract pressures at that location or cause a drop in pressure at other locations. Thus, El Paso argues EGC's proposal should be rejected.

c. Commission Determination

125. The Commission rejects EGC's proposal that El Paso only charge the non-critical SOC/COC penalty if a shipper packs or drafts in the opposite direction of an SOC/COC. El Paso has not proposed to modify this section of its tariff. Under section 5 of the NGA, EGC must first demonstrate that El Paso's current non-critical penalty provision is unjust and unreasonable. El Paso states that these penalties are necessary for operational reasons because if a shipper exceeds its hourly scheduled quantities, this can prevent El Paso from maintaining contract pressures at that location or cause a drop in pressure at other locations. The Commission finds that EGC has failed to demonstrate that the existing non-critical penalty provision is unnecessary on an operational basis. Accordingly, the Commission rejects EGC's proposal.

⁵⁸ EGC explains that the SOC/COCs declared by El Paso are either "draft," when shippers are taking more gas from the system than is received by El Paso, or "pack," when shippers are taking less gas from the system than is received by El Paso.

12. SOC/COC Penalties for Volumes in Excess of the Safe Harbor Tolerance Level

a. Initial Comments

126. EGC argues that El Paso's SOC/COC tariff provisions must be revised so that shippers are assessed SOC/COC penalties on only the portion of daily imbalances exceeding the safe harbor tolerance level. EGC asserts that El Paso's witness, Mr. Derryberry, testified that the "shipper is not assessed a penalty on the 10% safe harbor" and "shippers are only billed penalties on the amounts above their safe harbor limits."⁵⁹ EGC states that in the instant filing, El Paso failed to revise its SOC/COC provisions to conform with Mr. Derryberry's testimony, Commission policy,⁶⁰ and other portions of its tariff.⁶¹ EGC explains that El Paso's SOC/COC provisions apply penalties to the total daily imbalance quantity.

b. Reply Comments

127. El Paso asserts that its tariff provisions clearly state that SOC/COC penalties will apply to the entire daily imbalance quantity when shippers exceed the safe harbor tolerance level. El Paso states that since it is not proposing to modify this provision, EGC must demonstrate under section 5 of the NGA that El Paso's existing SOC/COC penalty provision is unjust and unreasonable.

⁵⁹ See Prepared Direct Testimony of Richard L. Derryberry, Exhibit No. EPG-153, at 28.

⁶⁰ EGC cites *AES Ocean Express LLC*, 111 FERC ¶ 61,291, at P 30 (2005) (*AES Ocean Express*) (approving scheduling penalty during times of system stress assessed only on quantities in excess of allowed variance); *Equitrans, Inc.*, 63 FERC ¶ 61,009 at 61,079 (1993) (directing Equitrans to revise its tariff "to state that imbalance penalties will be calculated only on that portion of the imbalance that is in excess of 4 percent, rather than on the entire imbalance") citing *Trunkline Gas Co.*, 40 FERC ¶ 61,015, at 61,037 (1987) (*Trunkline*); *Tenn. Gas Pipeline Co.*, 56 FERC ¶ 61,463, at 62,629 (1991) (stating that the Commission has required that imbalance penalties be assessed only to volumes in excess of the tolerance level) citing *Trunkline* 40 FERC at 61,037.

⁶¹ EGC cites El Paso FERC Gas Tariff, First Revised Sheet No. 392A (Hourly Scheduling Penalties).

128. El Paso explains that the testimony by Mr. Derryberry that EGC references was intended to illustrate how El Paso's proposed tiering structure works.⁶² El Paso states that while illustrating tiering, Mr. Derryberry used an example involving a daily unauthorized penalty, and in reference to that penalty, correctly stated that shippers are only billed "on the amounts over their safe harbor limits."⁶³ El Paso explains that Mr. Derryberry did not mean to suggest that El Paso was proposing to change its existing SOC/COC tariff provision, which provides that SOC/COC penalties apply to the entire daily imbalance once the safe harbor is exceeded.

129. El Paso states that in the cases EGC cites in support of its position, the Commission has approved or required pipelines to apply scheduling or imbalance penalties only to quantities in excess of a specific threshold. However, El Paso points out that in none of these cases, has the Commission prohibited a pipeline from assessing a penalty on the entire imbalance amount when a shipper exceeds the tolerance level in a *critical condition* period. El Paso explains that the only case cited by EGC that addresses penalties during critical conditions is *AES Ocean Express*, where the Commission merely approved a penalty provision proposed by the pipeline.⁶⁴

130. El Paso states that to prevent harm to the system in a critical condition, it is essential that shippers not exceed safe harbor levels. El Paso therefore argues that it is just and reasonable to impose a penalty on the entire imbalance amount if a shipper does exceed the safe harbor level in a critical condition. El Paso states that since EGC has not met its section 5 burden, the Commission should reject its proposal.

c. Commission Determination

131. The Commission rejects EGC's suggestion that El Paso should only apply SOC/COC penalties to the amount of imbalance quantity that exceeds the safe harbor tolerance. Since El Paso is not proposing to change this tariff provision, EGC must demonstrate under section 5 of the NGA that El Paso's existing SOC/COC penalty provision is unjust and unreasonable. The Commission does not find that to be the case. In the precedent EGC cites, the Commission stated that imbalance penalties should be assessed only on volumes in excess of the tolerance level. However, the Commission has

⁶² El Paso cites Exhibit No. EPG-153.

⁶³ *Id.* P 28, lines 8-11.

⁶⁴ *AES Ocean Express*, 111 FERC ¶ 61,291 at P 30.

only imposed this limitation on pipelines for penalties during non-critical conditions.⁶⁵ Strained or critical conditions are different because system integrity is threatened. For this reason, the Commission has held that pipelines may impose substantial penalties during critical conditions.⁶⁶ Here, El Paso states that its SOC/COC penalty provision is necessary to ensure that shippers do not exceed safe harbor levels and to prevent harm to the system during a critical condition. The Commission finds this to be just and reasonable, and therefore rejects EGC's proposal.

C. SOC/COC Procedures

1. Changes to SOC Probability Notices

132. Currently, El Paso posts a "Probability Notice" of a system-wide SOC event based on current linepack levels and the operating parameters of the Washington Ranch storage facility.⁶⁷ To ensure that non-critical hourly system fluctuations do not unnecessarily prompt the issuance of an SOC warning, El Paso proposes to change the Probability Notice linepack level review from a one-hour average reading to a six-hour average reading. El Paso states that a change to a six-hour reading more reasonably represents operating conditions, is a better indicator of trends, and will help eliminate hourly anomalies that do not affect the overall condition of linepack levels.

133. El Paso's tariff currently provides for the posting of an updated Probability Notice each nomination cycle. However, El Paso explains that the posting of such notices during a declared SOC event has caused some confusion among shippers, especially when the Probability Notice has been posted after an SOC has been declared. To avoid any confusion, El Paso proposes to discontinue posting Probability Notices during a declared SOC event.

a. Initial Comments

134. SoCal Gas and SDG&E explain that El Paso's tariff includes two "triggers" for declaring an SOC event based upon an hourly reading of system linepack, one for low-

⁶⁵ In *AES Ocean Express*, the Commission approved a pipeline's proposed scheduling penalty that, during times of system stress, was assessed on volumes in excess of an allowed variance. *Id.* P 30. However, the Commission did not state that this limitation was required for all scheduling and imbalance penalties during critical conditions.

⁶⁶ *Id.*

⁶⁷ See section 33.1 of the GT&C of El Paso's tariff.

linepack (7,000 MMcf) and one for high-linepack (7,900 MMcf). SoCal Gas and SDG&E state that these parameters are too broad and too far from normal operating parameters, and so are of little practical use. In support of their position, SoCal Gas and SDG&E state that in only one of the 37 occasions where El Paso declared an SOC or COC event did system linepack cross the thresholds listed in El Paso's tariff.

135. SoCal Gas and SDG&E state that in the instant filing, rather than revising these parameters, El Paso proposes to replace the one-hour linepack reading with a six-hour reading. SoCal Gas and SDG&E argue that the practical result of this revision will be to make the linepack thresholds wider, despite the fact that those thresholds have never been breached before previous El Paso declarations that critical conditions exist. SoCal Gas and SDG&E thus oppose the proposed change as unsupported and unreasonable.

b. Reply Comments

136. El Paso disagrees with SoCal Gas and SDG&E that changing line pack triggers from a one-hour reading to six-hour consecutive average reading will make the line pack trigger thresholds wider. El Paso states that its review of the timing of recent SOC/COC declarations indicates that its proposal will not affect the need to declare a critical condition or the frequency of critical condition declarations. El Paso explains that its proposal will instead moderate the number of postings that need to be made explaining why an SOC was not called. El Paso contends that SoCal Gas and SDG&E have not offered a reason to question El Paso's operational judgment that a six-hour reading is a more representative measure than a one-hour reading.

137. Salt River argues the Commission should accept El Paso's proposed six-hour linepack trigger for SOC declarations. Salt River states that contrary to SoCal Gas and SDG&E's position, El Paso's proposal does not widen the threshold for declaring an SOC event. Salt River explains that the proposal merely changes the duration that El Paso must observe the threshold being violated before it acts. Salt River argues that SoCal Gas and SDG&E misrepresent the data they cite. Salt River explains that of the 37 warnings or declarations made from January 2006 to March 2008, 27 were warnings, and only seven actually resulted in a critical event. Salt River thus argues that 20 of the warnings allowed shippers to take the necessary action to avoid a critical event. Salt River further argues that El Paso is in the best position to make operational judgments about the parameters of declaring a critical event.

138. Texas Gas and UNS/Tucson support El Paso's proposal to change to six-hour linepack readings for SOC Probability Notices. The parties contend that the proposal will smooth out aberrations in linepack fluctuations and reduce the number of SOC declarations caused by factors other than gas supplies on the pipeline. Texas Gas also points out that SoCal Gas and SDG&E are exempt from SOC declarations due to their OBAs with El Paso, and therefore, have an interest in forcing El Paso to call unnecessary critical events so that they receive discounted rates from the revenue credits they collect.

c. Commission Determination

139. The Commission accepts El Paso's proposed revisions to its SOC Probability Notice procedures. The change to a six-hour average reading will decrease the likelihood that non-critical hourly system fluctuations will unnecessarily prompt the issuance of an SOC warning. The proposed change does not widen the threshold for declaring an SOC event. Rather, it increases the time over which El Paso will observe system operating conditions when deciding whether to issue a Probability Notice. According to El Paso, a six-hour reading more reasonably represents operating conditions and is a better indicator of trends. We find that El Paso has made a reasonable operational judgment regarding its system, and therefore we accept this tariff revision as just and reasonable.

2. Shipper Assistance Procedures

140. El Paso proposes to modify its rate schedules to include procedures relating to a shipper's offer to assist in system loading needs in order to avoid a scheduling or overrun penalty. Under El Paso's existing tariff, El Paso will waive penalties when it agrees that a shipper may go out of balance or take hourly quantities in excess of its hourly contractual entitlement in order to help the system. El Paso states that in the past there have been some misunderstandings as to whether, and to what extent, El Paso needed and accepted shipper assistance. To avoid any such misunderstandings, El Paso proposes to implement more formal procedures that require written offers of assistance, and written acceptances from El Paso, before a shipper will be excused from penalties.

a. Initial Comments

141. APS argues the Commission should reject the shipper assistance procedures proposed by El Paso. APS argues the proposal to submit an offer in writing is burdensome and inefficient and will discourage shipper assistance. APS supports a more informal and efficient mechanism that does not require a written agreement. APS thus requests that the Commission direct El Paso to remove the requirement for written offers and written acceptances before shippers can help the system.

142. In addition, APS states that consideration should be given to compensating shippers for helping the system. APS states that penalty revenues could be refunded directly to shippers that helped offset the offending shipper imbalances. APS further requests that the Commission set for hearing the broader issues of whether there are other provisions that would encourage shipper assistance.

143. UNS/Tucson argues that El Paso will not be able to process and issue a written penalty waiver in a timely enough manner for shippers to aid in critical conditions. UNS supports Salt River's suggestion at the technical conference that the existing and well understood nomination and scheduling process serve as an avenue to efficiently accomplish the desired communications.

b. Reply Comments

144. Salt River argues El Paso should implement the simple fix it suggested at the technical conference of implementing a nomination, which would provide an easy and efficient means of obtaining mutual agreement on an offer of assistance. Salt River states that while El Paso says it is receptive to shipper offers of assistance, it creates hurdles rather than incentives for shippers to provide such assistance. Salt River states the Commission should require a date certain by which shipper assistance nominations will be operational.

145. UNS/Tucson object to APS' proposal to directly refund penalty revenues to shippers that help offset the offending shipper imbalances. UNS/Tucson state that by making this suggestion, APS fails to recognize the benefit provided by shippers that are in balance or out of balance in the opposite direction who have not sought pipeline approval for such actions. UNS/Tucson state that although these shippers also help the system, developing a way to recognize such assistance may prove unworkable. UNS/Tucson thus support retaining the current tariff provision, which states that all non-offending shippers share in the penalty revenue.

146. El Paso states that it will look into Salt River's suggestion that El Paso provide an electronic "check the box" mechanism during the nomination process that would allow a shipper to offer, and El Paso to accept, such assistance when making nominations. However, El Paso states that due to the time and resources that may be needed to program and implement this alternative, El Paso cannot commit to the alternative approach at this time. El Paso states that in the meantime, requiring written offers and acceptances will prevent misunderstandings and add minimal time since the requests and acceptances may be procured by email or fax.

147. With regard to APS' request that penalty revenues be refunded directly to the shippers that help offset imbalances, El Paso states that this proposal is beyond the scope of this proceeding. El Paso states that the only issues properly before the Commission in this case, and specifically the technical conference phase of this case, are El Paso's proposed revisions to its tariff which were set for review at the technical conference. El Paso states that it is open to discussing this matter directly with APS; however, it will not respond to the protest here because it is beyond the scope of this proceeding.

c. Commission Determination

148. The Commission accepts El Paso's proposed changes to its shipper assistance procedures. El Paso's requirement that shippers submit their offers to assist the system in writing, and wait for an approval from El Paso in writing, is just and reasonable. This procedure will prevent misunderstandings as to whether, and to what extent, El Paso needs and accepts shipper assistance. Shippers are concerned that this process will discourage shipper assistance because it will be overly burdensome and time consuming.

However, as El Paso points out, obtaining the necessary written approval by e-mail or fax would not be any more burdensome than the phone calls shippers currently make to offer assistance.

149. While Salt River's proposal to include an option for shipper assistance during the nomination process may streamline procedures, it is not necessary and does not change the import of El Paso's proposal. Accordingly, we will not require El Paso to modify its tariff, but direct it to explore whether such software revisions are feasible.

150. The Commission also denies APS' request that penalty revenues be refunded directly to the shippers that help offset offending shipper imbalances. El Paso is not proposing to modify its existing penalty crediting mechanism, but APS suggests that this change will be an improvement. However, the standard is not whether APS can come up with a better provision, but whether APS can demonstrate that El Paso's existing tariff provision is unjust and unreasonable, and its alternative is just and reasonable. The Commission finds that APS has not met this burden. Many shippers help the system during a critical condition, some by providing El Paso-approved shipper assistance, and others by simply staying in balance. The current tariff provision recognizes this by providing that all non-offending shippers share in the penalty revenue. APS failed to demonstrate that this approach is unjust and unreasonable, and therefore, the Commission denies APS' alternative proposal.

151. In addition, the Commission denies APS' request that the Commission set for hearing the broader issues of whether there are other provisions that would encourage shipper assistance. The Commission believes El Paso's current tariff provisions regarding shipper assistance are just and reasonable and so a hearing on this matter is not necessary. If APS has a specific concern regarding shipper assistance and a certain tariff provision, the Commission encourages El Paso to work with APS to resolve the issue. Further, we encourage El Paso and its customers to work cooperatively to explore ways to streamline procedures, reduce costs, and increase system efficiency.

D. Contracting Practices

1. Seasonal Shoulder Month Flexibility

152. El Paso proposes to remove from its tariff the seasonal shoulder month increase/decrease contract option. As a result of the 2006 Rate Case Settlement, seasonal shippers subscribing to the new services offered under Rate Schedules FDBS, FT-H, NNTD, and NNTH were allowed to elect to increase or decrease TCD for the shoulder month of April and/or October between fifty and one hundred fifty percent of their May through September TCD. Notwithstanding this 2006 Rate Case Settlement allowance, these services otherwise specifically provide that a shipper's seasonal contract quantity must remain uniform for each month of the season.

153. This shoulder month contract accommodation was a negotiated settlement item that allowed existing shippers a one-time opportunity to reduce or increase their contract demand during a shoulder month as they transitioned to the new service structure. Therefore, El Paso believes this provision is no longer needed. El Paso argues that allowing new premium service shippers the ability to hold a different TCD for April and/or October limits El Paso's ability to sell capacity to other shippers on an annual or seasonal basis and thus, limits the ability to spread its cost collection over a larger contract quantity base. El Paso states that the removal of the shoulder month accommodation would not change any existing contract but prevents future escalation of a problem.

a. Initial Comments

154. The commenters generally support continuation of the seasonal shoulder month provisions and oppose El Paso's proposal to eliminate the provisions from its tariff. They argue that the 2006 Rate Case Settlement provisions were not transitional and that shippers' "transition" to new services is not yet complete, given the ongoing changes in services and rates on El Paso's system.

155. UNS/Tucson state that without the seasonal shoulder month flexibility, they would be left with no alternative but to oversubscribe during one of the two periods, and this is not an efficient use of capacity. Texas Gas states that removing this provision will force LDCs to take excess shoulder capacity and this inefficient use of pipeline capacity might leave El Paso inadequate pipeline capacity to meet peak summer electric generation loads.

b. Reply Comments

156. El Paso asserts that the 2006 Rate Case Settlement provided shippers the transitional right to convert their existing FT-1 contracts to premium services, convert back to FT-1 service, or switch among premium services, if they provided notice to El Paso by June 1, 2008, effective January 1, 2009. El Paso further states that if shippers exercised such conversion rights, the 2006 Rate Case Settlement granted them the further right to retain certain service features. El Paso contends that the transition is largely complete, with the right to recontract terminating on June 1, 2008, and the 2006 Rate Case Settlement terminating on December 31, 2008. El Paso argues that shippers have had more than ample time to complete the transition to the new services and that the commenters have given no reason to continue these transitional measures that El Paso only agreed to for a discrete period. El Paso argues that an extension of the transition measures would adversely affect its system. El Paso states that the shoulder month measures exacerbate the stranded capacity situation on El Paso's system because they permit shippers to contract for peak capacity while shifting the risk of off-peak capacity onto El Paso and its remaining shippers.

c. Commission Determination

157. We will accept El Paso's proposal to eliminate the seasonal shoulder month accommodation for new conversions to premium service. That provision was included in the 2006 Rate Case Settlement as a new, one-time right that shippers could exercise within 60 days of the effective date of the settlement. Therefore, pursuant to the 2006 Rate Case Settlement, this right is not available to shippers who elect to convert to premium services after that deadline. The seasonal shoulder month accommodation was not in effect prior to the 2006 Rate Case Settlement, and thus, appears to be a transition mechanism for FT-1 shippers converting to premium services. Shippers had notice that this right was only available for a specified time period. Moreover, El Paso has confirmed that this elimination will not affect existing contracts that contain the seasonal shoulder month provision. If a shipper exercises its ROFR rights in the future for these contracts, the seasonal shoulder month provisions will also not be affected. For these reasons, we find that El Paso's elimination of the seasonal shoulder month accommodation for shippers converting to premium service after June 1, 2008 is reasonable.

2. Sculpted MDQs

158. The 2006 Rate Case Settlement also permitted shippers to convert a sculpted (i.e., varying monthly contract quantities) FT-I contract to the new firm service options while retaining sculpted monthly delivery point rights (i.e., sculpted maximum delivery quantities or sculpted MDQs). El Paso proposes removing this provision from its tariff for the same reasons it seeks removing the seasonal shoulder month provision. El Paso states that it intended this provision only as a temporary transition mechanism and not as a permanent right for new shippers. In addition, El Paso states that the removal of the sculpted MDQ conversion tariff provision will give El Paso the opportunity to reduce unused monthly capacity over time. El Paso states that the removal of this provision will not change any existing contracts.

a. Initial Comments

159. The commenters generally support continuation of the sculpted MDQ provisions and oppose El Paso's proposal to eliminate the provision from its tariff. They argue that the 2006 Rate Case Settlement provisions were not transitional and that shippers' "transition" to new services is not yet complete, given the ongoing changes in services and rates on El Paso's system. APS argues El Paso should clarify that this provision will remain for existing contracts and ROFR rights.

b. Reply Comments

160. As with the seasonal shoulder month provision, El Paso argues that shippers have had more than ample time to complete the transition to the new services and that the

commenters have given no reason to continue these transitional measures that El Paso only agreed to for a discrete period. El Paso argues that an extension of the transition measures would adversely affect its system. El Paso states that, as with the shoulder month measure, sculpted MDQs exacerbate the stranded capacity situation on El Paso's system because they permit shippers to contract for higher monthly MDQs during peak periods, while shifting the risk of off-peak capacity onto El Paso and its remaining shippers. El Paso also argues that sculpted MDQs make recontracting difficult.

c. Commission Determination

161. We will accept El Paso's elimination of the grandfathered sculpted MDQ. In the 2006 Rate Case, the Commission required El Paso to provide former full requirements shippers with varying monthly MDQs because there was insufficient capacity to serve their full needs.⁶⁸ These sculpted MDQs enabled El Paso to meet the firm requirements of its shippers because the varying monthly needs of its shippers offset each other to a certain degree. The Commission stated that:

The Commission will not, however, require El Paso to provide sculpted monthly MDQ rights for any new services, due to difficulties these rights present for future contracting and management of the system. Thus, if a shipper with a varying monthly MDQ right signs a new contract for new services and reduces its existing FT-1 contract amount, only the remaining portion of the FT-1 contract would retain these sculpted monthly MDQ rights.⁶⁹

162. We agree that sculpted MDQs can present contracting and management challenges for El Paso. El Paso is no longer in a constrained capacity situation, but instead faces unsubscribed capacity. Sculpted MDQs have provided a useful tool to maximize service when El Paso's system was fully subscribed, but they are no longer needed to meet the firm requirements of El Paso's shippers when the system is less than fully subscribed. We will accept El Paso's proposal to eliminate the grandfathered sculpted monthly MDQ and conversion rights provision, with the caveat that El Paso may not reduce a shipper's level of service. Accordingly, we find that El Paso may not reduce the shipper's MDQ for the remaining portion of the existing FT-1 contract below the highest monthly MDQ for that contract without mutual agreement with the shipper.

⁶⁸ March 23 Order, 114 FERC ¶ 61,305 at P 228.

⁶⁹ *Id.* P 229.

3. Grandfathered Pressure Commitments

163. El Paso proposes to remove the grandfathered right to pressure commitments when converting to an El Paso premium service. El Paso states that the grandfathered pressure commitments accommodation was a negotiated settlement item that El Paso intended as a temporary transition mechanism and not as a permanent right for new shippers. El Paso states that as the 2006 Rate Case transition is largely complete and parties are generally satisfactorily conducting business under the current service model, these provisions are no longer required to facilitate the conversion to new services. Moreover, El Paso asserts that the removal of the grandfathered pressure commitment may result in increased lateral capacity sales or lateral flexibility over time.

a. Initial Comments

164. The commenters generally support continuation of the grandfathered pressure commitments and oppose El Paso's proposal to eliminate the provision from its tariff. They argue that the 2006 Rate Case Settlement provisions were not transitional and that shippers' "transition" to new services is not yet complete, given the ongoing changes in services and rates on El Paso's system.

165. PNM argues that grandfathered pressure commitments should be continued as an ongoing customer protection that facilitates customers' abilities to purchase more tailored services, assuming the pipeline has the ability to provide those services. PNM states that removing this provision could undermine El Paso's objective to have customers buy the services they need.

166. UNS disagrees with El Paso's proposal to eliminate the grandfathered pressure commitment because LDCs, like UNS, rely on the grandfathered pressure commitments to support the operation of their systems. UNS states that its systems are designed and constructed based on these pressure commitments, and their elimination could have a negative impact on the safe and reliable operation of the LDC's systems.

b. Reply Comments

167. As with the other provisions, El Paso argues that shippers have had more than ample time to complete the transition to the new services and that the commenters have given no reason to continue these transitional measures that El Paso only agreed to for a discrete period. El Paso argues that the pressure commitments were never intended to apply to an hourly service that requires more capacity and is more difficult to manage operationally. El Paso states that it never agreed to provide pressure commitments for conversions to new hourly services after the end of the transition period. El Paso notes that it will work with its shippers as their business needs change and will make every effort to accommodate minimum or maximum pressure guarantees in a not unduly discriminatory fashion when shippers contract for hourly services.

c. Commission Determination

168. We will also accept El Paso's proposed elimination of the grandfathered pressure commitments for converted contracts, subject to modification, as discussed below. The grandfathered pressure commitment provision allowed FT-1 shippers who recontracted to FT-H hourly service to have a grandfathered right to the FT-1 pressure commitment for the period of the original term of the FT-1 contract. Under El Paso's proposal here, existing FT-1 contracts will continue to have the pressure commitments that are contained in the existing FT-1 contracts; however, the ability to include FT-1 pressure commitments in new hourly services will be eliminated. The Commission finds this change to be just and reasonable because, as El Paso explains, the grandfathering of pressure commitments was a transitional feature. El Paso cannot continue to offer this because hourly service requires more capacity and is more difficult to manage operationally. While shippers will no longer have the unilateral right to retain their FT-1 pressure commitment if they recontract a new FT-H contract, El Paso will work with shippers in a not unduly discriminatory manner to accommodate pressure requirements when shippers contract for new hourly services in the future. As with the seasonal shoulder month provision and sculpted MDQs, pressure commitments in existing contracts will not be affected by this change. Similarly, if a shipper converts a portion of its existing FT-1 contract to a new service, the shipper should retain the pressure commitment for the remaining portion of its FT-1 contract. We note that El Paso's tariff is unclear on this point and therefore direct El Paso to modify its tariff accordingly.

E. Other Tariff Issues

1. Flow Control

169. El Paso proposes to replace its existing tariff provisions concerning the installation and use of flow control equipment with a more general provision that states El Paso may install and/or operate flow control equipment at any time. El Paso is also proposing to remove the current requirement that shippers reimburse El Paso for the cost of installing the flow control equipment. El Paso further proposes not to assess hourly scheduling penalties in any period that flow control equipment is used to physically restrict the flow of gas. El Paso contends that this will allow shippers the option of requesting the use of flow control in lieu of the application of hourly scheduling penalties.

170. El Paso states that it already uses flow control equipment in various locations of its system by mutual agreement of the parties. El Paso explains that it uses the equipment for pressure control and to meet contractual obligations. El Paso further asserts that flow control is common industry practice. El Paso states that its proposed language is not unduly discriminatory and is similar to that of other pipelines. El Paso explains that by proposing this flow control provision, it seeks to reasonably respond to pipeline fluctuations that can be detrimental to system operations or that are inconsistent with a shipper's contractual rights.

171. El Paso states that the flow control measures implemented by North Baja Pipeline, LLC (North Baja), Natural Gas Pipeline of America, LLC (Natural Gas Pipeline), and Southern Natural Gas Company (Southern Natural) are all examples of Commission-approved flow control provisions in non-critical conditions, similar to the provision El Paso proposes. El Paso argues that without an adequate flow control provision, it is at a disadvantage at points where El Paso's system interconnects with pipelines that have more liberal flow control authority, such as the dual interconnect with Transwestern Pipeline Company, LLC's (Transwestern) system.⁷⁰ El Paso contends that without adequate flow control provisions, El Paso maybe forced to absorb the operational swings at these dual interconnection points, in addition to the packs and drafts on its own system.

a. Initial Comments

172. Many parties object to El Paso's proposed flow control provision. Several parties also state that they would support a reasonable tariff provision designed to address El Paso's concern regarding dual-connected customers with Transwestern's Phoenix Lateral. Other commenters fully disagree with the proposal, stating that El Paso's disadvantage with Transwestern is strictly speculative.

173. Most commenters argue that El Paso has not shown a need for this provision given El Paso's existing penalty structure, as well as its existing COC flow control tariff provisions, which already allow the installation of flow control equipment where it is operationally needed to keep the system safe and reliable. They contend that El Paso has not provided a sufficient explanation as to why the current COC tariff provisions are inadequate to meet its system operational needs. Salt River further contends that the provision is unnecessary because the current penalty and flow control provisions have, in the past 15 months, adequately controlled shipper behavior and maintained pipeline integrity almost 98 percent of the time.

174. The commenters further argue that granting El Paso the unilateral authority to turn off electric generation facilities could cause reliability problems for electric utilities by damaging expensive generating equipment, triggering disturbances that violate the North

⁷⁰ On November 15, 2007, the Commission issued an order in Docket No. CP06-459-000, granting Transwestern a certificate of authorization to construct and operate the Phoenix Expansion Project. The expansion will enable Transwestern to transport up to 500,000 Dth of gas per day from the San Juan Basin, located in southern Colorado and northern New Mexico, to markets in central and southern Arizona. As part of the project, Transwestern will operate approximately 95 miles of 42-inch diameter pipeline and 164 miles of 36-inch diameter pipeline extending from its existing mainline near Ash Fork, Arizona, to El Paso's existing East Valley Lateral near Coolidge, Arizona.

American Electric Reliability Council's (NERC) reliability requirements, and jeopardizing the ability of LDCs to meet their obligatory public service duties. In support of their position, the commenters point to three occasions where El Paso erroneously triggered flow control at two different Salt River generating facilities resulting in unit trips and significant operation and maintenance expenses. The commenters argue that the acceptance of the flow control provision could potentially and easily lead to additional incidents. Golden Spread urges that El Paso's proposal should be modified to limit the involuntary use of flow control to critical periods and to permit the continued use of flow control equipment upon mutual agreement. Moreover, the ACC urges the Commission to take into account the importance of coordination between the natural gas and electric industries because actions in one industry can have consequences in the other industry.

175. The commenters also contend that it is critical to have notice prior to the use of flow control so that shippers can arrange for alternate supplies or contact El Paso to correct misinformation.

176. The commenters also object to the potential cost consequences of accepting the proposed provision. Commenters state that at the technical conference, El Paso estimated that flow control equipment could cost approximately one million dollars per meter. Commenters argue that at this price, the installation of flow control equipment could potentially lead to millions of dollars in costs that would be included in system rates without any demonstration by El Paso of need or system benefit.

177. The commenters assert that although El Paso's proposed flow control provision is similar to provisions of other pipelines, it must be recognized that El Paso has chosen to control shipper behavior through a multi-layered penalty structure that other pipelines do not impose. Moreover, El Paso Electric states that under Transwestern's flow control provision, shippers can reschedule deliveries upon a two hour prior notice, unless it is during a critical operating condition. The parties state that under North Baja's provision, installation of flow control is upon mutual agreement or if unauthorized overruns threaten the system. Parties further explain that Natural Gas Pipeline's provision, like El Paso's existing tariff provision, requires mutual agreement, and if that is unsuccessful, the pipeline can, with written request, install flow control if the shipper fails to restrict hourly takes. The parties explain that while Southern Natural's flow control provision is nearly identical to El Paso's proposal, Southern Natural's situation is different because its flow control provision was implemented before restructuring when Southern Natural bought and sold gas and needed to ensure that shippers did not take more than their share. Even in that circumstance, the parties point out that the Commission still required Southern Natural to provide four hours notice and required that no flow control could be used if Southern Natural was providing interruptible service anywhere on its system at the time. The commenters also argue that there is no evidence that Southern Natural's flow control provision was ever questioned, much less contested. Lastly, the commenters state that Mojave's flow control provision appears to permit its use only as a last resort, and only to

preserve system integrity. In addition, the ACC adds that the El Paso system is distinguishable because it does not have the same tools, such as storage, that the other pipelines have, which would ameliorate the effect of flow control on shippers.

178. Finally, SoCal Gas and SDG&E contend that El Paso's failure to differentiate between OBA and non-OBA locations with respect to its request for tariff authority to install flow control equipment is unreasonable. The ACC argues that to limit the installation and use of flow control equipment to only East-of-California market delivery points, while exempting very large California interconnect delivery points due to OBAs, is unduly discriminatory.

b. Reply Comments

179. One of El Paso's primary concerns is that it will be at an operational and competitive disadvantage at dual interconnect points with Transwestern's pipeline system. El Paso states that without an adequate flow control provision governing its dual interconnect points, it may ultimately (1) be required to follow whatever control procedure the other parties require since El Paso does not have the same negotiating freedom to require flow control under its artificially restricted tariff, and (2) be required to absorb the bulk of the operational swings occurring at the dual interconnects, making its system more difficult to operate. El Paso states that shippers have failed to address how El Paso can successfully face this problem with dual-connected shippers. El Paso further contends that, at a minimum, El Paso would maintain operational and competitive parity by using the same tariff language as Transwestern uses to govern the points dually connected with El Paso's system.

180. El Paso states that shippers have mischaracterized flow control as a device that would be used to cut off gas flows to a shipper. El Paso notes that flow control acts to limit the flow of gas under certain circumstances, and can help ensure the safe and reliable operations of the pipeline. El Paso argues that various shippers have instead portrayed a nightmare scenario. El Paso argues that those assertions are speculative and are not supported by any evidence of serious harm to electric generation facilities or possible curtailment of LDC customers. El Paso additionally notes that some shippers, including ones opposing this provision, have recently agreed to flow control on Transwestern's Phoenix Lateral expansion project, demonstrating that concerns about flow control causing grave damage to the electric grid or to LDC systems are overblown. In addition, El Paso argues that it is far more likely that its gas pipeline system could fail to meet minimum delivery pressure obligations due to the lack of adequate flow control tools to protect pipeline reliability and system integrity. El Paso adds that the

Commission does not require pipelines to show that serious disruptions have already occurred in order to propose reasonable measures to ensure system reliability.⁷¹

181. Notwithstanding its need for the proposed provision, El Paso states it is willing to withdraw the flow control proposal, without prejudice, subject to El Paso's ability to file new tariff language in a separate filing under section 4 of the NGA after engaging in discussions with its shippers on the issue. However, El Paso continues to request elimination of its existing flow control provisions because El Paso believes that the provisions may be interpreted as requiring El Paso to demonstrate multiple acts of misconduct by a shipper during critical conditions prior to the installation or operation of flow control equipment at a particular location. El Paso contends that the current provision is potentially harmful to the operation of the system because El Paso should not have to wait for a problem to occur in order to act. El Paso states that, if needed, it will rely on its inherent authority to install and use flow control until it obtains Commission approval of revised flow control language. El Paso states that the need to resolve this issue is acute because Transwestern will soon have the ability to use flow control in critical and non-critical conditions, while El Paso will only be able to install flow control upon mutual agreement with the shipper.

182. Salt River, El Paso Electric, EGC, APS, UNS/Tucson, EPMCG, Texas Gas, and the ACC state that El Paso's proposal to withdraw its proposed flow control provisions should be accepted. However, they oppose El Paso's request to tie the withdrawal to the elimination of its current flow control provision. They argue that there is insufficient record or legal support to totally eliminate flow control provisions from the tariff, and that El Paso has not demonstrated that its existing tariff is unjust and unreasonable. The commenters contend that having no provision at all and leaving flow control decisions to El Paso's discretion is unjust and unreasonable.

c. Commission Determination

183. The Commission accepts El Paso's proposal to withdraw the proposed flow control provisions while El Paso and its shippers work together to generate a flow control provision that is just and reasonable for all parties. The Commission acknowledges El Paso's right to install and use flow control to preserve the operational safety and reliability of its system. However, the Commission believes it would be unreasonable for El Paso to use flow control without notice to shippers, especially when El Paso seeks the authority to impose flow control during non-critical operating conditions. Thus, the Commission encourages the parties to develop a provision that allows El Paso the discretion to install and use flow control equipment, but that also includes a reasonable

⁷¹ El Paso cites the March 23 Order, 114 FERC ¶ 61,305 at P 40.

prior notice requirement. The Commission directs El Paso to file its new flow control provision within 90 days of the issuance of this order.

184. The Commission rejects El Paso's request to eliminate its existing flow control provision. The current flow provision should remain during the interim period to ensure that there are some parameters in the tariff governing how and when El Paso may use flow control while the parties negotiate a new flow control provision.

2. Reservation Charge Credits

185. Currently, El Paso provides shippers with reservation charge credits when it is unable to schedule shippers' nominated and confirmed quantities on a firm daily basis, subject to certain conditions.⁷² El Paso proposes to revise this provision to state that reservation charge credits will be reduced accordingly if any quantities are scheduled and taken in a subsequent cycle. El Paso states that it has experienced situations where a shipper that has been denied capacity in cycles 2 or 3, has had its nominations fully scheduled in a later nomination cycle.⁷³ El Paso states that in this situation, shippers essentially receive free transportation service by receiving transportation charge credits even though their service was fully scheduled. El Paso states that its proposal would eliminate this inequity.

a. Initial Comments

186. The Indicated Shippers argue El Paso's reservation charge credits proposal should be rejected because it is inconsistent with the reasons the Commission gave when requiring El Paso to implement reservation charge credits on its system. The Indicated Shippers state that in an order issued November 28, 2003, in the Capacity Allocation Proceeding, the Commission required El Paso to pay reservation charge credits "as one of the many steps to ensure the reliability of firm service on its system" and that they were "intended to provide an incentive for El Paso to minimize disruptions to firm service."⁷⁴ The Indicated Shippers state that El Paso's proposal to reduce reservation charge credits when quantities are taken in a subsequent cycle removes the incentive for El Paso to minimize disruptions to firm service.

⁷² See El Paso's FERC Gas Tariff, Second Revised Volume No. 1A, Second Revised Sheet No. 381, section 39 of the GT&C.

⁷³ El Paso states that examples of these instances are set forth in Exhibit No. EPG-18.

⁷⁴ *El Paso Natural Gas Co.*, 105 FERC ¶ 61,262, at P 15 (2003).

187. The Indicated Shippers explain that if El Paso is permitted to take scheduled quantities in later cycles, shippers would be forced to (1) access additional supplies to ensure reliable firm service during the service interruption; and (2) find additional customers for the interrupted supply once El Paso is able to take the gas in a later cycle. The Indicated Shippers argue that this places an undue burden on shippers who are paying for “reliable” firm service and would not help minimize service disruptions. The Indicated Shippers argue that if El Paso requires shippers to strictly comply with their contractual obligations (on an hourly and daily basis), El Paso should not be permitted to avoid reservation charge credits when it is unable to provide scheduled firm service on a timely basis.

b. Reply Comments

188. El Paso argues that the Indicated Shippers overlook the fact that by scheduling a shipper’s nomination for service in a later cycle, El Paso has in fact fulfilled its scheduling and contractual obligations.

c. Commission Determination

189. The Commission rejects El Paso’s proposal to reduce shippers’ reservation charge credits if gas quantities are scheduled and taken in a subsequent cycle. As the Commission has explained in its prior orders, reservation charge credits are important because they provide El Paso with the incentive to minimize service disruptions and ensure the reliability of firm service on the system.⁷⁵ If El Paso fails to schedule shippers’ gas quantities in the cycle that they are nominated and confirmed, then El Paso has not provided shippers with the firm service they contracted for, regardless of whether the gas is scheduled in a subsequent cycle. As the commenters explain, shippers in this situation may be forced to find additional gas supplies to ensure reliable service during that cycle. Since, in this instance, El Paso fails to provide reliable firm service and places an extra burden on shippers, it should not be permitted to reduce shippers’ reservation charge credits. These credits are meant to provide El Paso with an incentive to minimize disruptions to firm service.⁷⁶ The Commission rejects El Paso’s proposal as unjust and unreasonable because it undermines this purpose.

⁷⁵ *Id.*

⁷⁶ *Id.*

3. Fuel Savings Sharing Mechanism

a. El Paso's Proposal

190. The fuel savings sharing mechanism was originally negotiated as part of the 2006 Settlement.⁷⁷ The provision allows El Paso to elect to incur the full cost of a capital project designated to reduce the amount of fuel and lost and unaccounted for fuel (L&U) consumed on its system in exchange for a share of the projected savings attributable to that project. Pursuant to the 2006 Settlement, El Paso retains 80 percent of the fuel savings as a result of the designated project for a five year period, while 20 percent of the fuel savings is returned to the shippers. Thereafter, 100 percent of the fuel and L&U savings are passed on to the shippers on the El Paso system.

191. El Paso states that due to the timing of the Commission's acceptance of the 2006 Settlement, little time remained in the designated settlement period to evaluate and pursue capital projects that would qualify under the mechanism. Therefore, El Paso states that rather than removing the fuel savings sharing mechanism, El Paso is proposing to continue what it believes will be a beneficial arrangement to both the pipeline and its shippers.

192. One change to the mechanism that El Paso proposes is for the payback period to be changed from five years to seven years. El Paso states that this change results from El Paso's expectation that certain projects may not qualify under this provision at a five year payout but would under a seven year payout. Thus, El Paso states that it has determined that the payback period for the incentive mechanism must be increased to account for the time necessary to recover its investment.

b. Commission Determination

193. The Commission will address El Paso's proposed fuel savings sharing mechanism in a subsequent order.⁷⁸

4. Force Majeure

194. El Paso proposes to modify the force majeure provision in its tariff. El Paso states that the force majeure provision it proposes will allow El Paso to act in a more timely

⁷⁷ See the 2006 Rate Case Settlement, Article 5.1; El Paso's FERC Gas Tariff, Second Revised Volume No. 1A, Original Sheet No. 324A.

⁷⁸ The Commission is in the process of reviewing a similar fuel savings sharing proposal in *Texas Gas Transmission, LLC*, Docket Nos. RP09-7-000 and RP09-7-001.

manner to restore or maintain pipeline operations and/or service to its shippers when a force majeure event occurs on El Paso's system. El Paso states that this provision will permit El Paso to waive tariff provisions, such as deadlines related to scheduling, contract request and amendment procedures, capacity release, point redesignation, capacity sales timelines, and imbalance resolution procedures, but only if the aforementioned actions do not place new obligations on shippers. El Paso asserts that this waiver authority will help El Paso more efficiently manage the force majeure event and allow for continued service to shippers.

a. Comments

195. The shippers argue that El Paso's force majeure proposal should be rejected because it is overly broad and would grant El Paso unreviewable discretion to waive its tariff obligations during force majeure situations. The commenters note that the Commission recently rejected a virtually identical force majeure waiver provision in the *Cheyenne Plains* case because it would grant the pipeline overly broad discretion to waive tariff obligations.⁷⁹ Salt River also points out that El Paso has the option of seeking Commission authorization to waive administrative provisions on a case-by-case basis, rather than through a force majeure provision.⁸⁰ Salt River further argues that El Paso's existing SOC/COC provisions provide sufficient flexibility to allow El Paso to take action in emergency situations affecting system operations and integrity.

196. El Paso acknowledges that the Commission rejected a similar provision in *Cheyenne Plains*, and agrees to withdraw its proposed force majeure waiver provision without prejudice so that it may refile a more narrowly tailored provision.

b. Commission Determination

197. The Commission accepts El Paso's offer to withdraw the proposed force majeure provision and refile a more narrowly tailored version at a later date. Until that time, El Paso's existing force majeure tariff provision will remain in effect.

5. Gas Quality Waiver

198. El Paso proposes a tariff provision that allows El Paso and a delivery point operator to agree to waive the existing tariff gas quality specifications and accept deliveries of gas that do not conform to those specifications. The provision requires that

⁷⁹ The parties cite *Cheyenne Plains Gas Pipeline Co., LLC.*, 124 FERC ¶ 61,109, at P 9 (2008) (*Cheyenne Plains*).

⁸⁰ *Id.* P 9.

El Paso determine that its operations and commitments to its customers will not be adversely affected by the delivery of such gas. The provision also states that El Paso will post all gas quality waiver agreements on its EBB.

a. Comments

199. Commenters (APS, the Indicated Shippers, Salt River, SoCal Gas, SDG&E, and UNS/Tucson) generally support El Paso's proposal, but suggest certain modifications. APS and Salt River request assurance that only the consenting parties be subject to the non-conforming gas. Salt River states that, given the nature of El Paso's system and the greater risk that commingling may adversely impact existing contractual obligations with other shippers, Salt River requests that (1) the Commission require El Paso to modify its proposal in section 5.5 consistent with the approved provision in *Cheyenne Plains* provision to include the requirement that the mutual agreement be in writing and include the duration of the agreement and that El Paso will use its "reasonable" operational judgment and act in a not unduly discriminatory manner; (2) the provision reflect El Paso's existing tariff obligation to conform to delivery specifications set forth in section 5.10 of the GT&C; and (3) El Paso be required to attest, in each EBB posting, that no shipper other than the shipper with whom the written agreement has been reached has or will receive any non-conforming supplies during the temporary waiver period. SoCal Gas and SDG&E do not oppose the proposal so long as the waiver is conditioned on mutual agreement between El Paso and the delivery point operator.

b. Commission Determination

200. We will accept El Paso's gas quality proposal, subject to certain modifications. Consistent with section 5.4 of El Paso's tariff, which addresses waiver of quality specifications at receipt points, proposed section 5.5 should also specify that El Paso will use "reasonable" operational judgment in a not unduly discriminatory manner in granting these waivers. Section 5.5 should also clarify that the mutual agreement must be written and that it is with the delivery point operator. El Paso's proposed section 5.5 states that El Paso will ensure that the non-conforming gas does not adversely affect its ability to provide adequate service to its customers "consistent with the applicable Rate Schedule and the GT&C." This statement includes section 5.10, as requested by Salt River. Finally, we direct El Paso to clarify that only consenting parties will be subject to the non-conforming gas. These modifications address the commenters' concerns and are consistent with *Cheyenne Plains*.⁸¹

⁸¹ *Id.* See also *Cheyenne Plains' FERC Gas Tariff, Volume No. 1, First Revised Sheet No. 241 (section 5.4-5.6 of the GT&C).*

F. Miscellaneous Clarifications and Requests by the Parties**1. Revenue Crediting**

201. El Paso proposes a revenue crediting mechanism under which it will credit 75 percent of the portion of the revenue it collects from short-term rates that exceeds the related long-term rates to the extent that its total revenues exceed the annual cost of service established in this rate case.

a. Initial Comments

202. EPMCG argues it is unclear whether the proposed changes to El Paso's revenue crediting tariff provision were intended to be part of the technical conference proceedings, or were intended to be resolved at hearing. EPMCG argues this provision is more properly included in the rate hearing. However, EPMCG states that if the Commission disagrees, it believes El Paso's revenue crediting provision will be rendered unjust and unreasonable by the Commission's acceptance of El Paso's other proposals on rate levels (such as the 250 percent rates). EPMCG argues that El Paso's revenue crediting proposal will allow it to retain a great deal of excess revenue that it currently credits to long-term, firm capacity shippers. EPMCG contends that a revenue sharing mechanism based on revenues in excess of El Paso's annual cost of service would provide greater assurance to cost-based shippers that they will be fairly reimbursed.

b. Reply Comments

203. Texas Gas shares EPMCG's concerns regarding the reasonableness of El Paso's revenue crediting mechanism. However, Texas Gas states that given the numerous issues of material fact raised by El Paso's revenue crediting proposal, and because it is interrelated with El Paso's short term rate proposal, Texas Gas believes this issue should be addressed at the hearing.

204. If it is not addressed at the hearing, Texas Gas Service recommends that the proposal be rejected because it would allow El Paso to over-recover its cost of service. In addition, Texas Gas contends that revenue credits should be limited to maximum rate shippers. Texas Gas states that providing revenue credits to discounted shippers would unreasonably increase the subsidization of discounted shippers by maximum rate shippers.

c. Commission Determination

205. The Commission clarifies that the just and reasonableness of El Paso's revenue crediting mechanism will not be addressed in the technical conference proceeding. Because the revenue crediting proposal is closely intertwined with El Paso's short-term rate proposal, the Commission finds that it is more appropriately examined at the hearing.

2. Tariff and OBA Interaction

a. Initial Comments

206. APS argues that the Commission should investigate the interaction between El Paso's proposed tariff revisions and El Paso's Operating and Balancing Agreements (OBA).⁸² APS explains that El Paso's tariff states that its critical operating condition procedures are not intended to supersede OBAs at receipt and delivery meters.⁸³ APS explains that allowing the OBAs to "trump" the critical condition procedures prevents a shipper from reviewing El Paso's tariff and understanding what procedures are being applied at meters where OBAs are in place. APS states that consequently, it cannot determine the impact that El Paso's proposed changes will have on meters also governed by OBAs. APS requests the Commission to address this issue and identify the specific terms and conditions of the tariff that will be superseded by OBAs, so that it is apparent whether the tariff is being applied in a just and reasonable and non-discriminatory manner.

b. Reply Comments

207. El Paso responds that APS' request is beyond the scope of this proceeding. El Paso states that the only issues properly before the Commission in this case, and specifically the technical conference phase of this case, are El Paso's proposed revisions to its tariff which were set for review at the technical conference. El Paso states that it is open to discussing this matter directly with APS, however, it will not respond to the protest here because it is beyond the copy of this proceeding.

⁸² An OBA is a contract between two physically interconnected parties specifying the procedures to be used in processing imbalances or differences in hourly flows between parties. An OBA ensures that a shipper, once it has properly nominated and had its gas confirmed, will not be subject to imbalance penalties resulting from the transfer of gas between the pipelines.

⁸³ See El Paso's FERC Gas Tariff, Second Revised Volume No. 1A, Fifth Revised Sheet No. 367 (section 33.7 of the GT&C).

c. Commission Determination

208. The Commission denies APS' request. In Order No. 587-G, the Commission stated that pipelines must make OBAs available to any person requesting copies.⁸⁴ Should APS have a question about how a specific tariff provision will interact with an OBA, APS may request copies of El Paso's OBAs and attempt to reconcile the two. If APS is unable to satisfactorily resolve the issue, the Commission encourages El Paso to work with APS and its other shippers to answer such questions. APS has not raised a specific case or controversy here, and so further analysis is not possible at this time, and is outside the scope of this proceeding.

3. Refund Obligation

209. EGC explains that the Commission imposed a refund obligation on El Paso's collection of any rate increase proposed in this proceeding.⁸⁵ EGC states that it is not clear whether this refund obligation also applies to the penalties and charges that are derivative of the rates subject to refund. EGC argues that to avoid any confusion, the Commission should impose an explicit refund condition that applies to the rates, penalties, and other charges collected by El Paso.

210. The Commission clarifies that the refund obligation imposed on El Paso in the August 5, 2008 Order includes penalties and any other charges improperly collected by El Paso.

G. Conclusion

211. The Commission finds that El Paso has met its burden of proof under section 4 of the NGA to show that its proposed tariff provisions concerning the limited firm hourly virtual area and no-notice services, the tiered penalty structure, the revised critical condition penalty rate, the inclusion of the California border spot price in the monthly index, the aggregation of TSAs for overrun purposes, the definitions of hourly scheduling penalties and safe harbor tolerances, the imposition of the authorized overrun rate for overruns containing quantities from non-telemetered points, the SOC/COC procedures, and the elimination of seasonal shoulder month flexibility and sculpted MDQs are just and reasonable.

⁸⁴ *Standards for Business Practices of Interstate Natural Gas Pipelines*, Order No. 587-G, FERC Stats. & Regs. ¶ 31,062, at 30,676 (Apr. 16, 1998), *order on reh'g*, Order No. 587-I, FERC Stats. & Regs. ¶ 31,067 (Sept. 29, 1998).

⁸⁵ *El Paso Natural Gas Co.*, 124 FERC ¶ 61,124, at P 30 (2008).

212. However, the Commission rejects El Paso's proposals regarding reservation charge credits, the inclusion of 100 percent of HEEN in overrun quantities, and the non-critical penalty rates.

213. The Commission will also require El Paso to file revised tariff sheets consistent with the conditions imposed in this order regarding HEEN, the elimination of grandfathered pressure commitments, gas quality waivers, and flow control. The Commission will address El Paso's proposed fuel savings sharing mechanism in a subsequent order.

The Commission orders:

(A) The Commission accepts the tariff provisions concerning the limited firm hourly virtual area and no-notice services, the tiered penalty structure, the revised critical condition penalty rate, the inclusion of the California border spot price in the monthly index, the aggregation of TSAs for overrun purposes, the revised definitions of hourly scheduling penalties and safe harbor tolerances, the imposition of the authorized overrun rate for overruns containing quantities from non-telemetered points, the changes to SOC/COC procedures, the elimination of seasonal shoulder month flexibility, and sculpted MDQs.

(B) The Commission rejects the tariff provisions concerning reservation charge credits, the inclusion of 100 percent of HEEN in overrun quantities, and the non-critical penalty rates. The Commission will address El Paso's proposed fuel savings sharing mechanism in a subsequent order.

(C) The tariff sheets listed in the Appendix are accepted effective January 1, 2009, subject to the modifications and clarifications in this order.

(D) El Paso must submit revised tariff sheets within 30 days of the date of this order reflecting the modifications set forth in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Appendix

**El Paso Natural Gas Company
Docket No. RP08-426-000
Tariff Sheets Accepted Subject to Conditions
Effective January 1, 2009
Second Revised Volume No. 1-A**

Thirty-Sixth Revised Sheet No. 1
Thirtieth Revised Sheet No. 28
Seventh Revised Sheet No. 28A
Fourth Revised Sheet No. 28B
Fifth Revised Sheet No. 28C
Fourth Revised Sheet No. 28D
Fourth Revised Sheet No. 28E
Fourth Revised Sheet No. 28F
Original Sheet No. 28F.01
Fourth Revised Sheet No. 28G
Original Sheet No. 28H
Fourth Revised Sheet No. 29.01
First Revised Sheet No. 29B
Fourth Revised Sheet No. 101A
Fourth Revised Sheet No. 106
Fourth Revised Sheet No. 110A
Twelfth Revised Sheet No. 111
Tenth Revised Sheet No. 112
Third Revised Sheet No. 112A
Tenth Revised Sheet No. 113
Fourth Revised Sheet No. 114A
Fourth Revised Sheet No. 114B
Fourth Revised Sheet No. 115
Second Revised Sheet No. 125A
Sixth Revised Sheet No. 126
Original Sheet No. 126A
Ninth Revised Sheet No. 128
Eighth Revised Sheet No. 129
First Revised Sheet No. 129A
Original Sheet No. 129B
Original Sheet No. 129C
Original Sheet No. 129D
Original Sheet No. 129E
Original Sheet No. 129F

**El Paso Natural Gas Company
Docket No. RP08-426-000
Tariff Sheets Accepted Subject to Conditions
Effective January 1, 2009
Second Revised Volume No. 1-A**

Original Sheet No. 129G
Original Sheet No. 129H
Original Sheet No. 129I
Third Revised Sheet No. 131
Fourth Revised Sheet No. 145B
Fourth Revised Sheet No. 145C
Fourth Revised Sheet No. 145D
Fourth Revised Sheet No. 145E
Fourth Revised Sheet No. 145F
Third Revised Sheet No. 145F.01
Third Revised Sheet No. 145G
Third Revised Sheet No. 145J.01
Third Revised Sheet No. 145K.01
Third Revised Sheet No. 145K.02
Third Revised Sheet No. 146A
Second Revised Sheet No. 146B
Third Revised Sheet No. 147B
Third Revised Sheet No. 147C
Second Revised Sheet No. 147C.01
Original Sheet No. 147C.02
Third Revised Sheet No. 147D
Second Revised Sheet No. 147D.01
Third Revised Sheet No. 147E
Third Revised Sheet No. 147F.01
Fourth Revised Sheet No. 147G
Fourth Revised Sheet No. 147G.01
Fourth Revised Sheet No. 148B
Fourth Revised Sheet No. 148C
Fourth Revised Sheet No. 148D
Fourth Revised Sheet No. 148E
Fourth Revised Sheet No. 148F
Third Revised Sheet No. 148F.01
Original Sheet No. 148F.02
Fourth Revised Sheet No. 148G

**El Paso Natural Gas Company
Docket No. RP08-426-000
Tariff Sheets Accepted Subject to Conditions
Effective January 1, 2009
Second Revised Volume No. 1-A**

Second Revised Sheet No. 148G.01
Third Revised Sheet No. 148H
Third Revised Sheet No. 148K.01
Third Revised Sheet No. 148L.01
Third Revised Sheet No. 148L.02
Fifth Revised Sheet No. 150
Third Revised Sheet No. 150B
Third Revised Sheet No. 150C
Third Revised Sheet No. 200A
Fourteenth Revised Sheet No. 202
Original Sheet No. 202.01
Third Revised Sheet No. 202B.01
Fifth Revised Sheet No. 202C
Fourth Revised Sheet No. 202D
Third Revised Sheet No. 202E
Original Sheet No. 202E.01
Second Revised Sheet No. 202F
Eleventh Revised Sheet No. 211A
Original Sheet No. 211B
Eighth Revised Sheet No. 212
Eighth Revised Sheet No. 214A
Sixth Revised Sheet No. 227
Fifth Revised Sheet No. 238
Fourth Revised Sheet No. 239
Fourth Revised Sheet No. 247
Fourth Revised Sheet No. 284A
Fifth Revised Sheet No. 285
First Revised Sheet No. 290A.01
Sixth Revised Sheet No. 297
Seventh Revised Sheet No. 311
Second Revised Sheet No. 324A
Third Revised Sheet No. 362F
Third Revised Sheet No. 362G
Third Revised Sheet No. 362I

**El Paso Natural Gas Company
Docket No. RP08-426-000
Tariff Sheets Accepted Subject to Conditions
Effective January 1, 2009
Second Revised Volume No. 1-A**

Third Revised Sheet No. 362J
Seventh Revised Sheet No. 363
First Revised Sheet No. 363.01
Third Revised Sheet No. 363A
First Revised Sheet No. 363A.01
Fourth Revised Sheet No. 363B
First Revised Sheet No. 363B.01
First Revised Sheet No. 363D
Sixth Revised Sheet No. 364
Third Revised Sheet No. 364A
Fourth Revised Sheet No. 365
Third Revised Sheet No. 366
Fifth Revised Sheet No. 367
Fifth Revised Sheet No. 372
Second Revised Sheet No. 378B
Third Revised Sheet No. 381
Second Revised Sheet No. 382
Third Revised Sheet No. 383
Third Revised Sheet No. 387
Second Revised Sheet No. 388
Second Revised Sheet No. 388A
Second Revised Sheet No. 388B
First Revised Sheet No. 388C
Third Revised Sheet No. 389
Second Revised Sheet No. 389A
Second Revised Sheet No. 389B
Second Revised Sheet No. 392A
Fourth Revised Sheet No. 414
Sheet Nos. 459 - 478
Original Sheet No. 479
Original Sheet No. 479A
Original Sheet No. 479B
Original Sheet No. 479C
Original Sheet No. 479D