

123 FERC ¶ 61,258
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

El Paso Natural Gas Company

Docket Nos. RP05-422-024
RP05-422-026

ORDER ON REHEARING AND COMPLIANCE

(Issued June 13, 2008)

1. On January 22, 2008, El Paso Natural Gas Company (El Paso), Arizona Public Service Company (APS), and Southwest Gas Corporation (Southwest) requested rehearing of the Commission's December 20, 2007 Order¹ in the above-captioned docket. The December 20 Order found that the requests for rehearing in El Paso's general rate case proceeding were moot due to a settlement and dismissed them, with the exception of the rehearings concerning El Paso's maximum delivery obligations (MDOs)² and maximum hourly obligations (MHO),³ which the December 20 Order addressed on the merits. The December 20 Order also clarified that the Commission's March 23, 2006 Order⁴ had in fact rejected El Paso's proposed daily scheduling and variance charges. As discussed below, the Commission grants in part and denies in part the parties' requests for rehearing of the December 20 Order.

¹ *El Paso Natural Gas Co.*, 121 FERC ¶ 61,266 (2007) (December 20 Order).

² An MDO is the maximum amount of gas that a shipper would be entitled to receive from El Paso at a specific meter within a delivery code on a primary firm basis at the minimum delivery pressure defined in the shipper's transportation service agreement (TSA). *See* December 20 Order at n.3.

³ An MHO is the maximum amount of gas that a shipper would be entitled to receive from El Paso per hour at a specific meter within a delivery code on a primary firm basis at the minimum delivery pressure, and is derived from the MDO. *Id.*

⁴ *El Paso Natural Gas Co.*, 114 FERC ¶ 61,305 (2006) (March 23 Order).

2. On January 14, 2008, El Paso filed revised tariff sheets⁵ in compliance with the December 20 Order's directive to clarify the procedures governing MDOs/MHOs. El Paso requests an effective date of May 1, 2008, to allow sufficient time to modify its electronic systems to amend shipper contracts to reflect certain changes proposed in the filing. As discussed below, the Commission finds that El Paso's revised tariff sheets generally comply with the December 20 Order, and accepts the revised tariff sheets, effective May 1, 2008, subject to certain conditions.

I. Background

3. On June 30, 2005, El Paso filed a general system-wide rate case. El Paso's filing included a proposal to modify certain of its existing delivery codes (D-Codes).⁶ In conjunction with these tariff revisions, El Paso proposed a new firm rate schedule (Rate Schedule OPAS), which would allow delivery point operators (DP Operators) to aggregate and manage individual delivery points within a D-Code for scheduling and billing purposes. Under El Paso's Rate Schedule OPAS, each D-Code has a maximum daily quantity (MDQ) assigned to it, and scheduling and contracting is done at that level. El Paso also proposed to assign MDOs to individual delivery points within the D-Code to specify how much of the D-Code's total volume may be taken at a particular meter. Assigning MDOs to individual delivery points is a change, because historically on El Paso's system, a shipper's right to transportation service was held and managed at the D-Code level, not at the meter level.⁷

4. In an order issued July 29, 2005, the Commission accepted the tariff sheets, suspended their effectiveness for five months to become effective January 1, 2006, subject to refund and condition, and established hearing procedures and technical conferences. On March 23, 2006, the Commission issued an order on the issues addressed at the September and October 2005 technical conferences, including El Paso's MDO/MHO proposal.⁸ The March 23 Order, among other things, accepted El Paso's proposal to modify existing D-Codes, establish MDOs, and institute a new Rate Schedule OPAS. Several parties filed timely requests for rehearing of the March 23 Order.

⁵ See Appendix.

⁶ A D-Code is a geographic area on El Paso's system where gas is delivered. El Paso created D-Codes to allow the aggregation of multiple physical delivery meters within a specific geographic area. See December 20 Order at n.17.

⁷ See El Paso's July 24 MDO Report at 2.

⁸ See March 23 Order.

5. On December 6, 2006, El Paso filed a settlement resolving most of the issues set for hearing and technical conference in this proceeding (Rate Case Settlement). The settling parties were not able to reach agreement with regard to the MDO/MHO issues. Thus, on August 31, 2007, when the Commission issued an order approving the Rate Case Settlement,⁹ the MDO/MHO issues remained unresolved.

6. In the December 20 Order, the Commission addressed the pending requests for rehearing of the March 23 Order. The Commission found that the majority of the requests for rehearing of the March 23 Order were moot due to the Rate Case Settlement and dismissed them, with the exception of those involving El Paso's MDO/MHO proposal.¹⁰ In addressing this MDO/MHO proposal on the merits, the Commission affirmed its finding in the March 23 Order that El Paso's MDOs/MHOs proposal is reasonable, subject to certain modifications. The Commission also clarified certain aspects of El Paso's MDO/MHO proposal. Specifically, the December 20 Order clarified that El Paso's proposal provides shippers firm delivery rights to meters within D-Codes, but also found that El Paso need not provide physical pathing rights to each meter delivery point. The December 20 Order required that El Paso include in its Transportation Service Agreements (TSAs) the MDQs for individual meters within the D-Codes, but only to the extent that the sum of the MDQs does not exceed the MDQ for the D-Code. The Commission further found that El Paso should provide notice of the operational reasons for terminating an OPAS agreement if El Paso seeks to terminate the OPAS agreement before the end of the agreement's term.

7. In addition, the December 20 Order approved El Paso's methodology for allocating MDOs among shippers and found that El Paso need not include each step of this allocation process in its tariff. The Commission determined that it was not clear when El Paso would reduce MDOs, and therefore ordered El Paso to clarify in its tariff the circumstances that would require a reduction in a shipper's MDOs and the parameters for such a reduction. In addition, the Commission required that El Paso continue to develop MDO/MHO levels for subscribers of FT-2 service that provide sufficient flexibility for these shippers, while also ensuring firm service to other shippers. Further, the Commission found that shippers who make contributions in aid of construction of lateral upgrades are not entitled to any preference in the MDO allocation process. The Commission also stated that whether to construct additional lateral capacity, and who should pay for this construction, is a decision for El Paso and the shippers requesting additional capacity. Further, the Commission required El Paso to modify its tariff to exempt any meters that have no hourly and/or daily measurement equipment from MDO/MHO penalties under the OPAS agreements. Finally, the Commission found that

⁹ *El Paso Natural Gas Co.*, 120 FERC ¶ 61,208 (2007) (August 31 Order).

¹⁰ In addition, the December 20 Order clarified that the March 23 Order denied El Paso's proposed daily scheduling penalty and daily variance charge.

assigning MDOs/MHOs to individual delivery points is consistent with the Commission's flexible point policy.

8. El Paso and Southwest filed timely requests for rehearing of the December 20 Order. APS filed a timely request for clarification and rehearing of the December 20 Order.

II. Requests for Rehearing

A. MDO/MHO Allocation Methodology

1. Background

9. As discussed above, in 2005 the Commission held technical conferences to clarify certain aspects of El Paso's general rate case filing. One of the issues addressed at the technical conferences was El Paso's proposal to assign MDOs/MHOs to each individual delivery point within the D-Code. In a post-technical conference filing, El Paso provided a Meter Allocation Report, which displayed the full allocation of El Paso's system from the D-Codes to the individual meters, and explained in detail its methodology for allocating these MDOs/MHOs among shippers.¹¹

10. In that filing, El Paso states that it used an allocation methodology similar to those approved in *Amoco*¹² and in the *Capacity Allocation Proceeding*.¹³ Specifically, El Paso states that it examined the annual average usage of capacity (based on data from August 1, 2004 to July 31, 2005) at each D-Code and examined how such historical use was distributed to the individual meters within each D-Code. El Paso explains that it then applied a distribution ratio, determined by use of the recent historical data to meters, to the different monthly contract demands that each shipper was allocated in the *Capacity Allocation Proceeding* (as such contract demands had been modified by shipper requested changes approved by El Paso).

11. El Paso states that next it compared these monthly allocated results at each meter with actual average monthly use at each meter during the last calendar year. If the

¹¹ See El Paso's October 3, 2005 Technical Conference Follow-Up Filing.

¹² *Amoco Energy Trading Co. v. El Paso Natural Gas Co.*, 93 FERC ¶ 61,060 (2000), *order on clarification*, 93 FERC ¶ 61,222 (2000), *order on reh'g*, 94 FERC ¶ 61,225 (2001) (*Amoco*).

¹³ *El Paso Natural Gas Co.*, 99 FERC ¶ 61,244 (2002), 100 FERC ¶ 61,285 (2002), *order on reh'g*, 104 FERC ¶ 61,045 (2003), 104 FERC ¶ 61,244 (2003), *order on reh'g*, 106 FERC ¶ 61,233 (2004), *aff'd*, *Arizona Corporation Commission v. FERC*, 397 F.3d 952 (2005), 115 FERC ¶ 61,259 (2006) (*Capacity Allocation Proceeding*).

monthly actual observed volume at the meter was greater than the annual allocation to the meter, then El Paso states it used the monthly percentage to reallocate the MDOs to sufficiently cover the monthly observed volume. If a month's observed D-Code volume exceeded the contractual D-Code volume, El Paso states it made a downward adjustment to those observed D-Code volumes. El Paso explains it then adjusted MDOs at each meter to account for the different monthly weighted usage where actual volumes at meters were above the annual volume, but within contractual limits. El Paso states that as a final check, it confirmed the meter results with a physical capacity model, which revealed that El Paso allocated to some smaller laterals total volumes that were greater than the laterals were physically capable of delivering. Thus, El Paso explains that it reallocated those excess volumes proportionately to other meters within the D-Codes based on the original ratios discussed above.

12. El Paso explains it allocated the MDOs of FT-2 shippers pursuant to the same methodology as described above, but also made a separate adjustment to ensure that these small shippers had an MDO allocation that was at least 120 percent of their historically observed capacity. El Paso states that it made this additional 20 percent adjustment to allow for future growth for these small shippers.

13. El Paso explains that its allocation methodology ensures that a shipper's firm primary contract rights remain the same (i.e., a shipper's contract rights held at the D-Code equal the meter level entitlements assigned to shippers through El Paso's allocation methodology).¹⁴ El Paso states if a shipper elects to schedule to the meter instead of using a D-Code on a forward basis, this initial allocation would be used to establish meter level TSA quantities.¹⁵

14. Since the October 3, 2005 post-technical conference filing, El Paso has submitted to the Commission a series of reports further explaining its MDO/MHO allocation methodology and chronicling the status of the MDO allocation process. In these reports El Paso has explained that the initial allocation process described above was only a starting point in determining MDQs and MDOs/MHOs.¹⁶ In December 2005, El Paso allowed shippers to shift the initial MDQ allocations between meter level delivery points within particular D-Codes (MDQ Adjustment Process).¹⁷ The resulting meter entitlements established the basis for a shipper's MDQ at each delivery meter, unless the

¹⁴ El Paso's July 24, 2006 MDO Report at 2.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See El Paso's Feb. 16, 2006 MDQ Adjustment Report (describing the parameters of the December 2005 open season).

DP Operator controlling the meter executed an OPAS agreement.¹⁸ El Paso reported the results of the December 2005 adjustments in its February 16 MDQ Adjustment Report (February MDQ Report).¹⁹

15. Following the initial MDQ allocation and MDQ Adjustment Process, El Paso executed OPAS agreements with interested parties in April 2006.²⁰ These initial OPAS agreements contained MDOs that when summed were equal to the D-Code MDQs, and MHOs that were equal to 1/24 of the MDO quantity.²¹

16. In May 2006, El Paso held an open season permitting DP Operators to request MDOs/MHOs greater than those defined in their current OPAS agreements.²² El Paso also adjusted MDO levels where possible to at least 110 percent of the greater of the non-coincident peak volumes for the location reported in El Paso's FERC Form 567 for 2004 or 2005. El Paso states that in general, and where possible, the new MDOs are at least the greater of 10 percent above the previous meter MDO or the demonstrated (nameplate) maximum burn capability of the meter location.²³ The new MDO levels were reflected in amended OPAS agreements, effective August 1, 2006.²⁴ El Paso reaffirms that its initial allocation process was only a starting point because DP Operators were permitted to revise the MDO/MHO allocations to exceed the contractual MDQs at a D-Code during the May 2006 open season.²⁵ El Paso states that it has continued to respond to DP Operator requests for increased MDOs/MHOs and will grant these requests on a not unduly discriminatory basis.²⁶

¹⁸ *Id.* at 2.

¹⁹ *Id.*

²⁰ El Paso's Jan. 22, 2007 MDO Quarterly Status Report at 2.

²¹ *Id.*

²² El Paso's July 24, 2006 MDO Report at 2-3.

²³ *Id.* at 3.

²⁴ *Id.*

²⁵ *Id.* at 2.

²⁶ *See* El Paso's January 22, 2007 MDO Quarterly Status Report at 2-3 (stating that El Paso will grant these requests if it determines it can do so without adversely affecting its ability to provide service to other similarly situated shippers, and DP Operators can demonstrate a need for the additional flexibility).

17. The Commission approved El Paso's allocation methodology in the March 23 Order.²⁷ In the December 20 Order the Commission addressed parties' requests for rehearing of the March 23 Order and reaffirmed its decision approving El Paso's MDO/MHO allocation methodology.²⁸ The Commission found that El Paso used an initial allocation methodology similar to that used in *Amoco* and the *Capacity Allocation Proceeding*, and noted El Paso's efforts to involve shippers in modifying the initial allocation amounts.²⁹ The Commission found that this process resulted in a just and reasonable distribution of capacity amounts among shippers.³⁰

2. Rehearing Request

18. Southwest requests rehearing of the December 20 Order's approval of El Paso's MDO/MHO allocation methodology. Southwest does not ask that the Commission modify the MDOs/MHOs reflected in the currently-effective OPAS agreements. Southwest states that while these MDOs/MHOs are too low in many cases, the currently-effective OPAS agreements reflect customer-specific negotiated monthly MDOs/MHOs, as much as they do any specific allocation methodology. However, Southwest states that El Paso's allocation methodology is inconsistent with Commission policy and precedent, and if applied in the future, could harm the capacity market in central Arizona by allocating pipeline lateral capacity without regard to transportation contract demands, or any other allocative efficiency factor.

19. Southwest specifically argues that El Paso's allocation of MDOs/MHOs based on historical deliveries is inconsistent with Commission policies regarding infrastructure improvement and pipeline transportation competition. Southwest states that because service under Rate Schedule OPAS is free, in order for the allocation of MDOs/MHOs to be consistent with the Commission's policy of efficient capacity allocation, it must reflect the relative cost responsibilities inherent in shipper transportation contract demands. Southwest contends that the allocation methodology approved in the December 20 Order, which is based on "historical deliveries" without any relationship to contract demands, will fail to promote competition or send the appropriate price signals to encourage the development of pipeline infrastructure.

20. Southwest further contends El Paso's allocation methodology will discourage the rational allocation of lateral resources. Southwest specifically objects to the

²⁷ March 23 Order at P 152, 156, 160.

²⁸ December 20 Order at P 41, 55.

²⁹ *Id.* at P 55.

³⁰ *Id.*

December 20 Order's finding that El Paso and its shippers requesting additional flexibility should decide whether to construct additional lateral capacity and who should pay for those facilities. Southwest contends this finding perpetuates uncertainty regarding the allocation of capacity resources, the pricing of capacity resources, and the allocation of costs associated with the construction of new lateral capacity. Southwest argues that without a rational allocation factor that reflects economic value, the parties may make unnecessary lateral expansions.

21. Southwest also contends that El Paso's proposal results in the allocation of capacity resources in an unduly discriminatory manner. Southwest points out that El Paso's open season rules limited LDCs' total initial MDOs/MHOs to their aggregate MDQs plus 10 percent, while electric generators had no limit tied to their MDQs, but were entitled to MDOs/MHOs up to their maximum nameplate plant burn capability. Southwest further argues that since El Paso did not base its allocation methodology on a common factor, such as shippers' contract demands, the outcome will unduly discriminate against certain parties. Southwest explains that El Paso has historically provided certain electric utility shippers with greater D-Code flexibility than other shippers, and therefore, basing allocations on historical deliveries to D-Codes will unduly discriminate against those shippers with historically low D-Code flexibility.

22. As evidence of El Paso's discriminatory allocation of capacity resources, Southwest cites the arrangement between Salt River and El Paso relating to the sale of the East Valley Lateral. Southwest contends El Paso has given Salt River special D-Code preferences and MDO allocations in connection with the agreement of sale of the East Valley lateral. Southwest notes that the December 20 Order rejected APS's contentions that its contributions to the cost of upgrading a lateral entitled APS to preference in MDO/MHO allocations, and Southwest argues that Salt River should be treated similarly.

23. Southwest also argues the December 20 Order's approval of El Paso's MDO/MHO allocation departs from Commission precedent. Southwest disagrees with the Commission's finding in the December 20 Order that El Paso's proposal is similar to the proposals approved in *Amoco* and the *Capacity Allocation Proceeding* because both were based on recent historical takes. Southwest asserts that in *Amoco*, the Commission ordered El Paso to allocate the delivery point capacity pursuant to the shipper's transportation contract rights, not historical takes. Southwest argues its proposal is consistent with *Amoco*. Southwest also explains that in the *Capacity Allocation Proceeding*, while the full requirements customers were allocated a transportation contract demand based on historical deliveries, the contract demand customers were allocated capacity based on contract demands. Southwest explains that the use of historical data for full requirements shippers in the *Capacity Allocation Proceeding* was unique to the objective there – to establish initial contract demand quantities for former full requirements shippers. Southwest argues that the Commission provides no explanation in the December 20 Order for departing from the precedent established in

Amoco and the *Capacity Allocation Proceeding* that capacity should be allocated among contract demand shippers based on contract demand quantities.

24. *Commission Determination.* The Commission denies Southwest's rehearing request on this issue and reaffirms its approval of El Paso's MDO/MHO allocation methodology. As we stated in the December 20 Order, El Paso's proposal to establish MDOs and allocate excess capacity to shippers to enhance flexibility among proximate delivery points provides a significant benefit to shippers. Assigning an MDO for each delivery point and for each shipper results in more clearly defined rights for shippers, so as to avoid curtailments, and maintain system reliability. While there are many alternative ways El Paso could have chosen to allocate MDO/MHO flexibility, the Commission finds that the allocation methodology El Paso proposes is reasonable.

25. El Paso first established initial allocations by considering shippers' historical usage. As we stated in the December 20 Order, the process El Paso used in initially allocating MDOs is similar to the methodologies used in *Amoco* and the *Capacity Allocation Proceeding* because the initial allocation was based on each shipper's contract demand. El Paso apportioned MDOs at each meter point based on historical deliveries so that each shipper's contract demand was divided among its meter points. Thus, in the initial allocation, the total MDOs equaled a shipper's contract demand.

26. While the initial MDO allocation process was similar to those used in *Amoco* and the *Capacity Allocation Proceeding*, the circumstances in each of those proceedings were not identical. Unlike in *Amoco* and the *Capacity Allocation Proceeding*, El Paso's initial MDO allocations were only a starting point. Once El Paso determined these initial allocations, El Paso allowed shippers to adjust their MDQs among meters within the D-Code in the MDQ Adjustment Process. In addition, after the parties executed OPAS agreements, El Paso held another open season permitting DP Operators to request MDOs/MHOs greater than those defined in their current OPAS agreements. Thus, El Paso did not strictly rely on shipper historical usage when allocating MDOs/MHOs, but involved shippers in the MDO allocation process, and solicited shipper requests for modifications to their initial allocation levels. The Commission reaffirms that El Paso's process for allocating MDOs/MHOs, which is both flexible and collaborative, is just and reasonable.

27. On rehearing, Southwest does not object to the Commission's approval of the MDO/MHO allocations that were the result of this process and that are reflected in the current OPAS agreements. However, upon the expiration of these agreements, Southwest is concerned about the prospective effect of El Paso considering historical takes when allocating MDO flexibility. Specifically, Southwest argues that El Paso's allocation methodology will fail to send the appropriate cost signals for new construction or encourage efficient capacity allocation, and that to effectively send these signals, MDO allocations should reflect shippers' relative transportation contract demands. However, Southwest's concerns are misplaced.

28. MDO flexibility does not correlate to shippers' contract demands. Shippers with identical contract demands may have varying needs for flexibility and, therefore, may require different MDO quantities. In addition, MDO flexibility is different from firm mainline capacity. While firm mainline capacity is capacity that is for sale on El Paso's system, MDO flexibility simply allows shippers to use capacity behind D-Codes to move deliveries among meter points within contract demand quantities. Since MDO flexibility is not the functional equivalent of firm mainline capacity, allocation of MDOs need not be tied to shippers' contract demands. In this way, the situation here is distinguishable from *Amoco* and the *Capacity Allocation Proceeding*, where the issues were the allocation of limited mainline capacity and the possibility that the pipeline may not be able to meet shippers' firm contract demands. Here, where the issue is the allocation of excess delivery flexibility, a more flexible and open allocation methodology, as El Paso proposes, is appropriate.

29. In addition, MDO allocations do not need to be tied to contract demands to send market signals for the construction of new laterals. In the December 20 Order we stated that in instances where capacity is insufficient to provide MDO/MHO allocations at the levels some shippers request, the parties may decide additional construction is needed.³¹ Up to this point, allocating MDOs/MHOs has been a collaborative process between El Paso and its shippers. In the future, we expect El Paso to continue to involve shippers in the MDO/MHO allocations process and to accommodate shippers' flexibility needs within the operational constraints of the system. We are also confident that the parties can address, and resolve, the related issue of constructing additional lateral capacity for greater MDO flexibility in the same collaborative fashion. It is for this reason that we stated in the December 20 Order that whether to construct lateral capacity, and who should pay for those facilities, is a decision made between El Paso and the shippers requesting additional MDO flexibility.³² As explained above, MDO flexibility is not the functional equivalent of firm mainline capacity and, therefore, El Paso is not under any obligation to build additional capacity. Rather, if shippers seek additional MDO flexibility, the parties may work together to develop a solution, which may involve construction to increase lateral capacity.

30. Southwest also argues that El Paso's consideration of historical usage results in unduly discriminatory MDO/MHO allocations because, historically, El Paso has granted some shippers, such as electric generators, greater D-Code flexibility than others. Southwest further objects to El Paso's decision to limit the initial MDOs/MHOs of electric generators to their maximum nameplate burn capability, while limiting LDCs' initial MDOs/MHOs to their aggregate MDQs plus 10 percent. The Commission does not find this to be unduly discriminatory. As explained above, shippers have different

³¹ December 20 Order at P 41.

³² *Id.* at P 68.

flexibility needs, irrespective of their contract demands. One example of this is that electric generators' flexibility needs tend to exceed those of other shippers in that they may need to shift deliveries from one generating facility to another on short notice. It is for this reason that El Paso has historically given electric generators greater D-Code flexibility. Since LDCs and electric generators are not similarly situated as to their flexibility needs, El Paso's decision to allocate their MDOs/MHOs differently is just and reasonable, and not unduly discriminatory.

31. In addition, while basing initial allocations on historical usage and setting different limits for LDCs and electric generators may have resulted in different allocation amounts for LDCs and electric generators, as explained above, El Paso's initial allocations were only a starting point in the process. Southwest, as an LDC, has been afforded the opportunity to adjust its initial allocations to the extent it believed they were insufficient to meet its current requirements. Southwest, and all other shippers on the El Paso system, will continue to have this option to adjust MDO/MHO allocations when negotiating future OPAS agreements. Therefore, the Commission rejects Southwest's argument that El Paso's MDO/MHO allocation process is unduly discriminatory.

32. Lastly, Southwest argues that accepting El Paso's allocation methodology departs from Commission precedent. Specifically, Southwest argues that in the *Capacity Allocation Proceeding*, allocating the transportation contract demands of full requirements customers based on historical deliveries was a solution to a unique situation because full requirements customers did not have contract demands. However, the situation here is unique as well. Just as the Commission allocated full requirements customers capacity in the *Capacity Allocation Proceeding* based on historical deliveries because they formerly did not have contract demands, here El Paso is allocating MDOs to shippers based on historical deliveries because shippers did not have MDOs/MHOs prior to implementation of Rate Schedule OPAS. As we stated in the March 23 Order, defining rights at individual meter points is the final step in the process of defining capacity rights on El Paso's system that started with *Amoco* and continued with the *Capacity Allocation Proceeding*.³³ Thus, the Commission finds that El Paso's allocation methodology is consistent with Commission precedent.

33. For the foregoing reasons, Southwest has not convinced us that El Paso's allocation methodology is unjust and unreasonable and, therefore, the Commission rejects Southwest's request for rehearing on this issue.

B. Contributions In Aid of Construction & MDO Allocations

34. In the December 20 Order, the Commission found that whether a shipper provided contributions in aid of construction (CIAC) of laterals does not give that shipper

³³ March 23 Order at P 160.

preference in the MDO allocation process.³⁴ The Commission explained that CIAC relates to the financing of facilities and is separate from the MDO allocation process.³⁵

35. APS requests that the Commission reconsider its finding that APS's CIAC does not give APS any preference in the MDO allocation process. APS explains that it paid El Paso to expand the capacity of its laterals at both the West Phoenix and Red Hawk power plants to ensure that sufficient capacity was available to serve these facilities. APS contends that shipper contributions to lateral improvements should be a factor in any capacity allocation methodology, including the MDO allocation process. APS argues that the Commission's rationale in the December 20 Order for rejecting this suggestion – that a shipper's CIAC relates to the financing of the facilities and is therefore separate from the MDO allocation process – lacks a reasoned explanation. APS further argues that the Commission's decision is inconsistent with the policy stated elsewhere in the December 20 Order that, if capacity is insufficient to provide MDO/MHO allocations at the levels requested by shippers, parties may decide that additional construction is needed. APS argues that if a party pays for construction to support requested increases to MDOs/MHOs, that party should be entitled to preferential allocation of that newly constructed capacity. APS further contends the Commission should take steps, such as this one, to encourage shippers to invest in infrastructure. APS argues the Commission should model its treatment of shippers financing the construction of lateral upgrades to gas pipelines after its treatment of transmission customers constructing interconnection facilities or network upgrades for transmission providers on the electric transmission system.

36. *Commission Determination.* The Commission affirms its position in the December 20 Order that CIAC does not give shippers preference in the MDO/MHO allocation process. As discussed above, the MDO/MHO allocation process is a flexible, collaborative process whereby El Paso and its shippers work together to determine reasonable allocations based on the operating limits of the laterals. Granting shippers who make CIAC preference in MDO/MHO allocations undermines the flexibility of this process and reduces the collaborative discretion available for allocating these amounts in a way that both protects firm service rights and ensures system reliability.

37. Additionally, as stated in the December 20 Order, the construction and financing of laterals are separate matters governed by the provisions of El Paso's tariff. Specifically, section 4.2 of Rate Schedule FT-1 provides that shippers will pay El Paso for the construction of facilities needed to provide service under Rate Schedule FT-1. Tying the financing and construction of laterals to the MDO/MHO allocation process

³⁴ *Id.* at P 58.

³⁵ *Id.*

would unnecessarily complicate the process and limit El Paso's ability to define needed service flexibility rights as broadly as possible.

C. Posting of MDO/MHO Capacity

38. Southwest also requests on rehearing that the Commission require El Paso to post all available MDO/MHO capacity on its EBB. Southwest contends capacity posting obligations promote open and not unduly discriminatory access to service by notifying shippers when capacity is available and permitting the monitoring of capacity awards by the pipeline.

39. Southwest further requests that the Commission require El Paso to allocate all of its available delivery flexibility, if requested by a shipper, on an ongoing basis, and not withhold any MDO/MHO rights for future purposes.

40. *Commission Determination.* The Commission denies Southwest's rehearing request on this issue. While pipelines are required to post all available pipeline capacity,³⁶ the posting requirement pertains to unsubscribed capacity that is available for sale. MDO/MHO flexibility is different from unsubscribed capacity available for sale. As opposed to a clearly specified amount of capacity that El Paso can sell, MDO/MHO flexibility provides shippers with the ability to move deliveries between meters within a D-Code (up to the limits of the delivery point) pursuant to a no-fee OPAS agreement. Since MDO/MHO flexibility is not the functional equivalent of unsubscribed capacity for sale, El Paso is not required to allocate all available MDO/MHO flexibility or to post such flexibility on its EBB.

41. In addition, posting MDO/MHO flexibility would be difficult and unduly burdensome for El Paso because it is constantly changing and difficult to track. El Paso's tariff already requires El Paso to provide shippers with sufficient information regarding MDO/MHO flexibility, including identifying all D-Codes, individual meters, and related MDOs on the EBB. Therefore, we deny Southwest's request for rehearing on this issue.

D. Daily Draft Scheduling Penalty & Daily Pack Variance Charge

42. The December 20 Order clarified that the Commission intended to reject El Paso's daily variance charge and scheduling penalty in the March 23 Order and denied El Paso's request for rehearing on this issue.³⁷

43. El Paso requests that on rehearing the Commission reconsider or rescind the December 20 Order's clarification of the March 23 Order. El Paso argues the Rate Case

³⁶ See 18 C.F.R. § 284.13(d)(1) (2007).

³⁷ December 20 Order at P 17.

Settlement resolved the issues of the daily scheduling and variance penalties for the three-year period covered by the moratorium, subject to El Paso's right to file a new rate case in 2008, and therefore, there was no need for the Commission to rule on these issues in the December 20 Order. El Paso further argues the Commission should have dismissed as moot the pending rehearing requests of the March 23 Order on the daily scheduling penalties, as it did for the rehearing requests on other issues.

44. *Commission Determination.* The Commission agrees with El Paso that the Rate Case Settlement resolved the issues of the daily scheduling penalty and the daily variance charge for the three-year period covered by the moratorium,³⁸ and therefore, the requests for rehearing of the March 23 Order regarding these penalties are moot. As such, rather than denying El Paso's request for rehearing on this issue, the December 20 Order should have found that El Paso's rehearing request was moot, and the Commission so clarifies on rehearing.

45. In addition to denying El Paso's rehearing request, the December 20 Order also clarified the March 23 Order's rejection of the daily variance charge. Though the Commission's holding in the March 23 Order was mooted by later events (i.e., the Rate Case Settlement), the March 23 Order is still an existing final order that the Commission may clarify. Therefore, we find that the December 20 Order's clarification of the March 23 Order's rejection of the daily variance charge need not be vacated or rescinded.

E. Order No. 637 Paths

46. The Commission clarified in the December 20 Order that El Paso's proposal does not require El Paso to provide physical pathing rights to the meter delivery points.³⁹ The Commission stated that while the MDO proposal does provide firm rights for delivery at the meter delivery points behind the D-Codes that shippers formerly did not have, defining physical paths to each delivery point would decrease El Paso's ability to maximize D-Code scheduling flexibility.⁴⁰

47. On rehearing, El Paso requests that the Commission clarify that El Paso need not provide Order No. 637 paths to the meter. Specifically, El Paso seeks clarification that the Commission did not require El Paso to provide physical threaded paths to the meters so that El Paso's shippers continue to have the flexibility to use any delivery point within the D-Code. El Paso believes the December 20 Order held that El Paso is not required to

³⁸ See Rate Case Settlement, Stipulation and Agreement at p. 24, 52, 66.

³⁹ *Id.* at P 33.

⁴⁰ *Id.*

provide physical pathing rights to the meters, but should provide defined contract rights at meters within D-Codes.

48. *Commission Determination.* We will grant El Paso's request for clarification. El Paso's system and its currently-approved tariff do not provide specific, defined paths to each meter point. The D-Code and MDO/MHO concept, accepted and approved in the Rate Case Settlement, allows flexibility among meter delivery points. Specific pathing would reduce available flexibility. Therefore, consistent with the D-Code and MDO/MHO methodology and our prior orders, El Paso is not required to provide physical pathing rights to the meter points.

III. Request for Clarification

49. APS requests clarification as to whether the Commission intended in the December 20 Order to adopt the MDQs in El Paso's February 16, 2006 MDQ Adjustment Report (February Report)⁴¹ as the final statement of the MDQs for each delivery meter. APS explains the Commission held that El Paso must include in the TSAs the MDQs for the individual meters. However, APS states the Commission did not specify particular levels of MDQs at each meter. APS seeks clarification that the Commission did not, by referring to the MDO quantities set forth in the February Report,⁴² intend to adopt the February Report as the final MDQs to be reflected in the TSAs at each meter.

50. *Commission Determination.* The Commission clarifies that in the December 20 Order it did not adopt El Paso's February Report as the final MDQs to be included in the TSAs at each meter. The Commission mentioned the February Report in the December 20 Order because the MDQs included in that report were the basis for El Paso's initial allocations. Since that time El Paso has held open seasons and worked with shippers to adjust their MDQs. El Paso has subsequently filed updated reports reflecting the changes resulting from these negotiations. For example, in its compliance filing, El Paso states that since the February 2006 Report, the meter quantity levels have been revised and are reflected in the January 1, 2008 MDO Report.⁴³ Thus, El Paso is appropriately using the most recent data when determining the MDQs to include in TSAs.

⁴¹ El Paso has submitted a series of reports, including the February Report, describing its MDO/MHO allocation methodology and chronicling the status of the MDO allocation process.

⁴² See December 20 Order at P 19.

⁴³ El Paso submitted its January 2008 MDO Report as an attachment to its January 14 Compliance Filing.

IV. Compliance Filing

51. On January 14, 2008, El Paso submitted tariff sheets to clarify the procedures concerning the applications of MDOs. In compliance with the December 20 Order, the proposed tariff sheets specify that if a shipper elects to contract and schedule at the aggregate meter D-Code level, the shipper's TSA will contain the MDQs for each individual meter within that D-Code. In its filing El Paso also explains that the contracted MDQs at each individual meter represent the maximum delivery meter quantity, and so for ease of reference, El Paso designates them "CMQs," or meter contracted maximum quantity. El Paso states the sum of the individual meters' CMQs equals the D-Code MDQ. El Paso further explains that a CMQ is the contract quantity at the meter below which the associated MDO in the OPAS agreement will not be reduced. El Paso states that if a shipper elects to discontinue contracting and scheduling at the D-Code level, the D-Code MDQ will no longer apply, and the CMQ will be the MDQ for that meter.

52. El Paso also revised Rate Schedule OPAS to provide the general circumstances when El Paso would reduce an MDO and the parameters of such adjustments. El Paso included a new section 6.3 in the Rate Schedule OPAS listing examples of the circumstances which may warrant a reduction to a DP Operator's MDO/MHO quantities due to an operational or contract change. In sections 6.4 and 6.5, El Paso sets forth the procedures applicable to El Paso and the DP Operator in the event the OPAS agreements must be revised to reduce MDO quantities.

53. El Paso states that adding CMQs to shippers' TSAs affects the point redesignation process. As such, El Paso proposes to revise Sheet No. 287A to state that when a shipper requests to redesignate a primary D-Code on its TSA, the shipper will also be required to specify the delivery meters and associated CMQs within that D-Code. El Paso further explains that a redesignation request may require El Paso to take back MDO quantities from another DP Operator. El Paso proposes to update Sheet No. 287B to reflect a later effective date to accommodate adequate notification to the DP Operator before implementing a change.

54. El Paso states that though the December 20 Order requires El Paso to revise its tariff to exempt certain meters from MDO/MHO penalties, no tariff revisions are required to accomplish this. El Paso explains that an agreement included in the Rate Case Settlement⁴⁴ provides that MDO/MHO violation penalties will not be assessed at delivery meters that do not have active telemetry capability. Therefore, El Paso states it need not revise its tariff to comply with this directive in the December 20 Order.

⁴⁴ See section 9.1(c) of the Rate Case Settlement.

55. El Paso states that it will execute new TSAs that specify CMQs for shippers that contract at an aggregate meter D-Code level. El Paso includes in its filing a January 1, 2008 MDO Report that reflects the current MDO levels and will form the basis for determining the CMQ quantities.⁴⁵ El Paso indicates it is in the process of conducting a 30-day adjustment period whereby shippers may adjust or shift the proposed CMQ levels for each meter with a D-Code listed in their TSAs based on the current MDO report, if such adjustments do not threaten system integrity or adversely affect other firm shippers.

A. Notice and Protests

56. Notice of El Paso's filing was issued on January 17, 2008. Interventions and protests were due as provided in section 154.210 of the Commission's regulations.⁴⁶ Pursuant to Rule 214,⁴⁷ all timely filed motions to intervene and any motions to intervene out-of-time filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt this proceeding or place additional burdens on existing parties. APS and Southwest filed protests. They object to proposed tariff language giving El Paso discretion to change existing pressure requirements. In addition, Southwest objects to numerous elements of the proposed MDO reduction procedures, and APS requests clarification. These comments are discussed below.

57. On February 14, 2008, APS filed an answer to Southwest's protest. On February 27, 2008, as corrected February 29, 2008, El Paso filed an answer to Southwest's and APS's protests. On February 29, 2008, Southwest filed an answer to APS's answer. On March 13, 2008, Southwest filed an answer to El Paso's February 29 answer. On March 18, 2008, Salt River filed an answer to Southwest's March 13 Answer. On March 25, 2008, APS filed an answer to Southwest's March 13 answer. On April 9, 2008, Southwest filed an answer to APS's March 25 answer. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure⁴⁸ prohibits an answer to a protest and

⁴⁵ El Paso explains that its prior February 2006 Report contained a meter level allocation to each shipper, such that the meter quantities equaled the total delivery point MDQs. El Paso states that the February 2006 Report formed the basis for the initial MDO allocations and OPAS agreements. El Paso states that meter quantity levels have been subsequently revised to reflect the addition of new or modified facilities, the conversion to hourly services, and an extreme cold weather event, and are reflected in the January 1, 2008 MDO report.

⁴⁶ 18 C.F.R. § 385.210 (2007).

⁴⁷ 18 C.F.R. § 385.214 (2007).

⁴⁸ 18 C.F.R. § 385.213(a)(2) (2007).

answer unless otherwise ordered by the decisional authority. We will accept the answers of APS, El Paso, Southwest, and Salt River because they provided information that assisted us in our decision-making process.

B. Discussion

58. The Commission finds that El Paso's revised tariff sheets generally comply with the December 20 Order, but will require El Paso to make certain changes, as described below.

1. MDO Reduction Criteria

59. In El Paso's original filing, section 2.5(d) of Rate Schedule OPAS provided for the revision of a D-Code if El Paso determined that changes in system operations would result in a D-Code that may potentially degrade the firm rights of other shippers for firm service reliability. This section stated that El Paso may require this D-Code revision or termination of the D-Code within fourteen days notice. The December 20 Order found that this section was not clear and required El Paso to modify its tariff to state the general circumstances when El Paso would reduce a shipper's MDOs and the parameters for such a reduction.⁴⁹

a. Compliance Filing

60. El Paso revised section 2.5(d) to provide that any reductions to MDO/MHO levels will be undertaken pursuant to section 6 of Rate Schedule OPAS. In section 6.2, El Paso clarifies the operational circumstances that may require a reduction of MDO/MHO quantities. Section 6.3 describes the parameters for such a reduction.

61. If El Paso and the DP Operator agree to the MDO/MHO quantity reductions, the parties will amend or replace the OPAS agreement to reflect modified levels and El Paso will post these quantities on its EBB, pursuant to section 6.4. In the event parties cannot agree on a reduction, section 6.5 provides a default methodology for determining reductions. Section 6.5 provides, in part:

Should DP Operator and Transporter be unable to agree on the reduced MDO/MHO quantities, Transporter will determine the operational factors that result in the smallest MDO/MHO adjustment quantity and/or the impact to the fewest meters within the D-Code, in its best judgment and on [sic] a not unduly discriminatory manner. Where, consistent with prudent operation of the pipeline, the minimized impacts could be equally distributed to more than one DP Operator, Transporter shall allocate the

⁴⁹ December 20 Order at P 37.

MDO reductions pro rata (based on CMQs) among all Shipper CMQs at the affected DP Operator's locations.

b. Protests

62. In its original protest, Southwest objects to El Paso's proposed language in section 6.5 on several grounds. Specifically, Southwest opposes allocating MDO reductions *pro rata* based on CMQs. Southwest argues that doing so would unduly favor DP Operators with MDOs/MHOs greatly above their CMQs. Southwest contends that MDO reductions should instead be allocated based on relative amounts of MDOs above CMQs in a region, until all DP Operators have the same percentages of MDOs/MHOs in excess of CMQs.

63. Southwest further objects to the language in section 6.5 stating that El Paso will determine the operational factors that result in the "smallest MDO/MHO adjustment quantity and/or the impact to the fewest meters within the D-Code." Southwest contends that reducing the MDOs of a DP Operator with the greatest relative MDOs/MHOs should take priority over the goals of implementing the smallest possible reductions and impacting the fewest meters. Southwest argues that if El Paso aims to make the smallest possible reduction, the entire reduction may be made to the MDOs above CMQ of a DP Operator that has relatively little excess MDO, which would be an unjust, unreasonable, and unduly discriminatory result.

64. In its February 27 answer, El Paso responds that any MDO reduction should achieve two goals: (1) the MDO reduction should result in the smallest absolute reduction quantities feasible on a system-wide basis; and (2) the reduction should attempt to minimize the impact on any one shipper, where possible, and should allocate the reduction based on total shipper CMQ at the affected meters. El Paso asserts that its approach achieves these goals, while Southwest's proposal would unnecessarily affect more DP Operators and result in less total system flexibility. APS agrees with El Paso that Southwest's proposal would result in greater aggregate MDO reductions than necessary. El Paso and APS also argue that Southwest's arguments should be dismissed as a collateral attack on an allocation methodology already approved in the December 20 Order.

65. On February 29, El Paso submitted an errata to its February 27 answer and included in this filing examples of how El Paso would allocate MDO reductions. After reading these examples, Southwest states in its March 13 answer that El Paso's proposed tariff language does not accurately reflect how El Paso intends to allocate MDO reductions. Southwest states that the proposed tariff language states that El Paso will allocate MDO reductions based on CMQs, while El Paso's examples reallocate new MDO levels based on CMQs, capped at the existing MDO quantities. Southwest requests that the Commission require El Paso to revise section 6.5 to reflect El Paso's intentions as demonstrated by its examples.

66. APS protests El Paso's clarification of its MDO reallocation process in its February 29 errata as inconsistent with El Paso's proposed tariff language. APS argues that the clarified allocation methodology would revise the MDO allocations found just and reasonable by the December 20 Order. APS contends CMQs are an irrelevant criterion upon which to base MDOs and should not be used in the calculation of MDO reductions, but only as a floor below which MDOs cannot be reduced.

67. Despite El Paso's clarification in its February 29 errata, Southwest still has concerns about section 6.5. Specifically, Southwest objects to section 6.5 permitting El Paso to determine MDO reductions "in its best judgment." Southwest argues the purpose of including such a phrase is unclear because El Paso has an inherent obligation to make determinations in good faith and diligently. Southwest requests that the phrase "in its best judgment" be removed or that it be clarified that this phrase reflects the requirement of good faith and diligence on El Paso's part and does not provide El Paso with additional discretion or leeway in making MDO determinations.

68. El Paso argues that the phrase "best judgment" is well defined in Commission regulatory decisions and needs no further defining. El Paso states that, if requested by the Commission, it will insert the word "operator" between "best" and "judgment," to clarify the applicable standard for decisions.

69. Finally, Southwest argues that throughout proposed section 6.5, "DP Operator" should be referred to in the plural, rather than singular. Southwest argues that this revision will clearly establish that El Paso may not apply the MDO reduction criteria to only one DP Operator in the region, when the MDOs of more than one DP Operator affect the availability of MDOs in a region, particularly in the case of points in overlapping D-Codes. Southwest contends its proposed revisions are consistent with El Paso's intended meaning and are necessary to clarify section 6.5.

70. *Commission Determination.* The Commission finds that, in large part, El Paso's tariff revisions clarify the circumstances when it would reduce MDOs and the parameters for such reductions, in compliance with the December 20 Order. Section 6.2 provides several examples of the circumstances that could prompt an MDO/MHO reduction and section 6.3 states that such reductions will be limited to an amount commensurate with the operational factors necessary to protect firm service rights and system reliability. With the addition of these provisions, El Paso sufficiently informs its shippers of the circumstances when MDO/MHO reductions are to likely occur, and if reductions do occur, the criteria on which they will be based.

71. El Paso also foresaw that parties may not agree on MDO/MHO reduction amounts. As such, section 6.5 sets forth the criteria El Paso will use to determine MDO/MHO reductions should the parties not agree on the reduction quantities. In this section, El Paso states that it will determine "the operational factors that result in the smallest MDO/MHO adjustment quantity and/or the impact to the fewest meters within

the D-Code, in its best judgment and in a not unduly discriminatory manner.” The Commission finds that seeking the smallest MDO/MHO adjustment and/or the impact to the fewest meters are valid factors for El Paso to consider when reducing MDOs/MHOs. Doing so will minimize the overall impact on El Paso’s shippers and result in efficient use of system capacity. The Commission also finds that El Paso may apply these criteria using its “best judgment.” This language does not grant El Paso any greater discretion than it already has to determine reductions based on the factors listed in its tariff. All actions taken by the pipeline to administer its tariff must be reasonably exercised. Given the operational complexities of running a pipeline, and because there is no one formula for determining MDO/MHO reductions, it is appropriate for El Paso to make these determinations on a case-by-case basis following the guidelines set forth in its tariff.

72. However, the Commission expects El Paso to balance the goals of achieving the smallest MDO/MHO reductions and/or the impact on the fewest meters, with efforts to spread reductions across multiple shippers where feasible, so that reductions are not unduly discriminatory and do not unnecessarily impact a single shipper. Section 6.5 requires El Paso to engage in such balancing by distributing reductions across multiple shippers, so long as doing so is consistent with prudent operation. In addition, as section 6.5 states, El Paso must make these determinations on a not unduly discriminatory basis after considering the operational factors and the impact on all affected shippers.

73. The Commission further finds that El Paso’s proposal to base *pro rata* MDO/MHO reductions on shippers’ CMQs is reasonable. As illustrated by the examples El Paso provided in its February 27 and 29 pleadings, when MDO reductions are necessary and the parties cannot agree on the reduction amount, El Paso will determine the total MDO quantity that is in excess of shippers’ CMQs, and then allocate that excess MDO quantity to existing shippers *pro rata* based on their CMQs, with the caveat that the new MDOs cannot exceed existing MDOs. Thus, under this approach, El Paso will determine new MDO levels based on shippers’ CMQs. More specifically, El Paso bases the new allocation on a shipper’s contract demand level, and not on its initial MDO quantity in excess of that contract demand. While there may be alternate approaches to determine MDO reductions, we find El Paso has supported that its method is reasonable. El Paso proposes an objective approach, tied to contract demand levels, that it can fall back on when parties cannot otherwise agree on MDO reductions. However, El Paso’s tariff language describing this process is not clear, as evidenced by the conflicting interpretations in the parties’ protests. As such, we will require El Paso to clarify this portion of section 6.5.

74. Finally, the Commission finds that El Paso should revise section 6.5 to refer to DP Operators in the plural, rather than singular. The Commission’s reading of section 6.5 indicates that El Paso is referring to “more than one DP Operator” and thus the change merely clarifies the intent of the section. El Paso is directed to revise section 6.5 as discussed above.

2. Termination Procedures

75. Section 2.5 states that if the parties cannot agree to revisions to MDO/MHO levels, either party may terminate the OPAS agreement on fourteen days written notice. Section 2.5 also states that such MDO/MHO revision will be undertaken pursuant to section 6 of Rate Schedule OPAS.

76. As discussed above, sections 6.5 of Rate Schedule OPAS sets forth the factors El Paso will consider when reducing MDOs/MHOs, should the parties be unable to agree on the reduction quantities. Once El Paso determines these reductions, section 6.5 states that El Paso will advise the DP Operator of the reduced quantities in writing and by posting them on the EBB. Pursuant to this section, the EBB posting will be deemed to revise the existing OPAS agreement and the new MDO/MHO quantities shall become effective no earlier than the fifth business day following the posting. Section 6.5 further states that if the DP Operator does not agree to the new MDO/MHO quantities, it may terminate the OPAS agreement upon three days written notification to El Paso.

Protests

77. Southwest contends the termination procedures in section 6.5 provide El Paso with improper and excessive leverage to impose unreasonable MDO/MHO quantity reductions on DP Operators. Southwest argues DP Operators should not have to either accept El Paso's reduced quantities or forego Rate Schedule OPAS scheduling flexibility. Southwest contends that under El Paso's proposed tariff revisions, in order for DP Operators to maintain Rate Schedule OPAS flexibility, they must give up their section 5 Natural Gas Act (NGA) right to challenge MDO/MHO reductions, even if the shipper believes El Paso has not properly applied its tariff criteria. Southwest further argues that the December 20 Order did not intend to make El Paso's MDO/MHO reduction procedures immune from challenge. Southwest contends the Commission found the opposite, otherwise there would be no need for El Paso to establish procedures and parameters for such reductions. Southwest states section 6.5 should be revised so that the DP Operator may accept a proposed MDO reduction, subject to protest (if the DP Operator notifies El Paso within 3 days and files the protest with the Commission within 15 days of the amended OPAS agreement), and any MDO penalties levied by El Paso under the reduced OPAS agreement will be subject to refund pending Commission action on the protest.

78. El Paso contends the procedures for terminating OPAS agreements in section 6.5 do not deprive shippers of their NGA section 5 rights. El Paso states that any shipper who believes El Paso has violated its tariff or the Commission's regulations may file a complaint with the Commission for relief, and section 6.5 does not negate or encumber this right. However, El Paso also points out that a DP Operator does not have an inviolable right to an OPAS agreement, and cites the language in section 2.5 stating that El Paso can terminate an OPAS agreement upon fourteen days notice. El Paso states that

section 6.5 simply gives DP Operators an additional opportunity to evaluate and agree (or disagree) with the MDO/MHO reductions.

79. *Commission Determination.* The Commission finds that section 6.5 does not provide El Paso with improper and excessive leverage to impose unreasonable MDO/MHO quantity reductions on DP Operators. The process for reducing MDOs/MHOs that El Paso proposes is a collaborative one that grants shippers ample opportunity to work with El Paso to establish reasonable MDO/MHO reductions that work for all parties. El Paso states in its February 27 answer that in the event MDO/MHO reductions become necessary, it will first attempt to work cooperatively with the affected DP Operators and shippers to come to a mutual agreement on the revised MDO/MHO levels. Only in the event that the parties cannot agree will El Paso determine MDO/MHO reductions pursuant to section 6.5. If the MDO/MHO reduction amounts El Paso determines are unworkable for DP Operators, as a last resort option, DP Operators may terminate the OPAS agreement. The Commission finds that this multi-step, collaborative process does not grant El Paso excessive leverage to impose unreasonable MDO/MHO reductions on DP Operators. The termination procedures in section 6.5 do not undermine this. It is important for El Paso to have the last say in determining MDO/MHO reductions because, as the operator of the pipeline, El Paso is in the best position to determine what reduction amounts are necessary to protect firm service rights and to ensure system reliability.

80. In addition, El Paso's OPAS service is premised on the condition that El Paso may reduce the scheduling flexibility provided through MDOs/MHOs when necessary to protect the shippers' firm rights and/or ensure service reliability. Thus, in signing up for this service, shippers are aware that their MDOs/MHOs may change throughout the course of an OPAS agreement. Granting DP Operators the option to terminate the OPAS agreement should they dislike their revised MDO/MHO amounts is reasonable, and does not grant El Paso excessive leverage.

81. The Commission also finds that the termination procedures in section 6.5 do not undermine shippers' rights to file complaints with the Commission. Any party alleging that El Paso has failed to comply with Rate Schedule OPAS has the same legal options as a party challenging El Paso's actions with regard to any other part of El Paso's tariff, (i.e., a shipper may file a complaint but will have no refund protection).

82. While the Commission approves of El Paso's general procedures for terminating OPAS agreements should the parties be unable to agree on MDO/MHO reductions, we find that the provisions for notification of termination are not clear. Section 2.5 of Rate Schedule OPAS provides that if the parties cannot agree to new MDO/MHO quantities, either party may terminate the OPAS agreement on fourteen days written notice. Section 6.5 states that if the DP Operator does not agree with the new quantities, it may terminate the OPAS agreement upon three days written notice to El Paso. Based on these provisions, it is not clear how many days notice parties must give in order to terminate

the OPAS agreement. Therefore, the Commission finds that El Paso must explain how the termination process works (with an example) and why there are two different notice periods for termination (fourteen days and three days).

3. Discretion to Change Pressure Requirements

83. El Paso proposes new section 6.3(c) which provides:

MDO adjustments will not change existing pressure requirements as specified in the DP Operator's OPAS and/or Shipper's TSA, unless required or agreed to by Transporter.

84. APS and Southwest object to this provision because it gives El Paso the unilateral right to reduce pressure requirements in a shipper's OPAS agreement or TSA in connection with an MDO adjustment. Southwest argues that El Paso's proposal is beyond the scope of a compliance filing and must be rejected.

85. In its answer, El Paso agrees that it may not make a unilateral change in a pressure commitment in a TSA during the term of the TSA without some other change in the TSA, such as a shipper's request to change its volume.⁵⁰ To address Southwest's and APS's concerns, El Paso proposes to clarify the proposed section 6.3(c) to read as follows:

Downward MDO adjustments will not change existing pressure requirements as specified in Shipper's TSA(s), unless other mutually agreed upon changes in the TSA(s) require a change in the pressure requirements.⁵¹

86. In Southwest's March 13 answer, Southwest states that the revisions to section 6.3(c) that El Paso proposed in its answer appear to resolve Southwest's protest on this issue.

87. *Commission Determination.* The Commission finds that the revised language El Paso proposed in its answer is just and reasonable. As the parties recognize, a pipeline may not change the pressure requirements in a TSA without a Commission finding that such change was required by the public interest. The language El Paso proposed in its answer clarifies this and eliminates Southwest's and APS's concerns. Therefore, the Commission directs El Paso to file revised tariff sheets to modify section 6.3(c) consistent with its answer.

⁵⁰ See El Paso's February 29, 2008 answer at 5-6.

⁵¹ *Id.*

4. East Valley Lateral Issue

88. Southwest argues the Commission should find that the agreement of sale between Salt River Project Agricultural Improvement & Power District (Salt River) and El Paso regarding the East Valley Lateral does not provide Salt River with any special protection from MDO/MHO reductions. According to Southwest, Salt River has asserted that El Paso provided it with special MDO/MHO rights through the East Valley Lateral agreements, which preclude any reduction in the MDOs/MHOs currently allocated to Salt River, unless and until Salt River reduces its contractual MDQs.

89. Southwest states that the Commission did not address these issues in the December 20 Order and that Southwest filed for rehearing of the December 20 Order contending, among other things, that the Commission erred in not addressing and rejecting Salt River's contentions. Southwest asserts that Salt River's contentions are germane to this compliance filing as well, and that it is therefore necessary and appropriate for the Commission to address those contentions when it addresses this filing.

90. Both El Paso and Salt River respond that Salt River is not exempt from the MDO adjustment provisions and will participate in the CMQ process on the same basis as any other shipper. Southwest replies that it interprets the statement by El Paso and Salt River as follows: (1) Salt River will be subject to the MDO adjustment provisions on the same basis as other DP Operators; (2) Salt River's sale of the East Valley Lateral to El Paso will not be viewed as creating any special rights or distinguish Salt River from other shippers in evaluating whether Salt River is similarly situated under an undue discrimination analysis and neither El Paso nor Salt River will claim that special treatment for Salt River exists; and (3) Salt River will participate in the CMQ process on the same basis as any other shipper.

91. Salt River responds that it concurs with Southwest's first and third interpretations, which are sufficient to resolve Southwest's concerns here. Salt River further states that, with regard to the second interpretation, however, to the extent that Southwest believes or may seek to argue in the future that this interpretation extends beyond either the applicability to Salt River of section 6 of Rate Schedule OPAS or the participation by Salt River in the CMQ process, Salt River reserves the right to raise any and all arguments in opposition to such claims.

92. *Commission Determination.* The Commission finds that in light of the answers filed by El Paso and Southwest, there are no issues for the Commission to resolve relating to Salt River's sale of the East Valley Lateral and the MDO adjustment procedures. As such, we will reject Southwest's protest on this issue.

5. Posting Requirement

93. Southwest argues that El Paso should amend its tariff to require that El Paso post all available MDO/MHO flexibility on its EBB and that it allocate all available flexibility that is requested. Southwest contends that the posting requirement will allow DP Operators and shippers to monitor allocations of available capacity and avoid potential undue discrimination.

94. El Paso argues that Southwest's argument is misplaced. El Paso states that in support of its argument, Southwest improperly relies on Commission regulations and precedents that require the posting of transportation capacity that is available for purchase. El Paso contends these authorities are not relevant for MDOs because MDOs do not reserve or consume capacity. El Paso explains that MDOs are merely a scheduling convenience and a flexible option provided by El Paso without reservation charge or any other cost to the DP Operators.

95. In addition, El Paso argues that the Commission has never required pipelines to allocate every dekatherm of scheduling flexibility. El Paso states that, instead, its goal is to maximize MDO scheduling flexibility while at the same time preserving its right to sell transportation capacity under a TSA. El Paso argues MDO scheduling flexibility should be left to El Paso's discretion to be exercised on a not unduly discriminatory basis.

96. El Paso further contends that Southwest's request for posting and assignment of MDO rights is beyond the scope of a protest to a compliance filing. El Paso states that the availability of MDO scheduling flexibility is dependent on a number of different variables and is not identical to or comparable to available transportation capacity. In addition to the complexity of posting available MDO flexibility, El Paso states that it already posts an enormous amount of information, including available transportation capacity, OPAS agreements, and related MDO levels. El Paso thus contends that requiring posting of available MDO scheduling flexibility would add unnecessary complexity without providing meaningful information about transportation capacity availability.

97. *Commission Determination.* The Commission will not require El Paso to post all available MDO/MHO flexibility on its EBB. While pipelines are required to post all available capacity for purchase, we agree with El Paso that MDOs/MHOs are a flexible scheduling option and not the same as available capacity for purchase. In addition, as we stated above, posting available MDO/MHO flexibility will be difficult and unduly burdensome on El Paso due to the complexity and number of variables involved, and may not provide meaningful information to shippers. Further, other pipelines are not required to post this information. El Paso's tariff currently provides that it will identify all effective D-Codes, individual meters, and related MDOs on the EBB. Furthermore, just as pipelines are prohibited from withholding capacity, El Paso is required to provide

requested service (including service under Rate Schedule OPAS) when feasible. We will therefore deny Southwest's request.

6. APS's Request for Clarification

98. APS seeks clarification that El Paso's maximum contractual delivery obligation at any meter shall be the higher of the CMQ or any applicable MDO/MHO in effect for such meter under an OPAS agreement.

99. El Paso replies that APS's request represents a fundamental misunderstanding about MDOs. El Paso states that MDOs do not represent a transportation delivery obligation imposed on El Paso, but are a commitment by shippers not to take away any more than their MDO limits. El Paso states that its transportation delivery obligations are defined by the multi-meter D-Code MDQ and the CMQ contained in a shipper's TSA. El Paso contends no additional tariff clarification is necessary.

100. *Commission Determination.* The Commission denies APS's request for clarification. As El Paso explains, MDOs do not obligate El Paso to deliver the MDO quantity, but provide the limit that may be delivered at that point. El Paso's delivery obligations are embodied in the MDQs and CMQs contained in a shipper's TSA.

7. Waiver of Notice Requirement

101. El Paso requests an effective date for its proposed tariff sheets of May 1, 2008 and requests waiver of the Commission's 60 day notice requirement set forth in section 154.207 of the Commission's regulations.⁵² El Paso argues that good cause exists to grant such waiver because the proposed tariff revisions necessitate programming changes and waiver will allow for the execution of revised TSAs concurrent with the completion of the programming changes. Because El Paso needs time to implement its proposal, we find good cause to grant waiver of the maximum 60 day notice requirement.

⁵² 18 C.F.R. § 154.207 (2007).

The Commission orders:

The tariff sheets listed in the Appendix are accepted, subject to the modifications discussed in the body of this order. El Paso is directed to file revised tariff sheets, as discussed in the body of this order, within 15 days of the date of this order.

By the Commission. Commissioner Spitzer not participating.

(S E A L)

Kimberly D. Bose,
Secretary.

Appendix

El Paso Natural Gas Company
Tariff Sheets Accepted Effective May 1, 2008,
Subject to Conditions

Second Revised Volume No. 1-A

Fourth Revised Sheet No. 150
Fourth Revised Sheet No. 150A
First Revised Sheet No. 150E
Original Sheet No. 150F
Original Sheet No. 150G
Eighth Revised Sheet No. 287A
Third Revised Sheet No. 287B
Sixth Revised Sheet No. 358
Original Sheet No. 358A
Second Revised Sheet No. 417A
Fourth Revised Sheet No. 480C
Second Revised Sheet No. 481C
Fourth Revised Sheet No. 482C
Fourth Revised Sheet No. 483C