UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Georgia Public Service Commission   Docket Nos. RP04-92-001
RP04-92-002

ORDER DENYING REHEARING IN PART AND GRANTING REHEARING IN PART AND DIRECTING COMPLIANCE FILING

(Issued January 24, 2005)

1. On May 17, 2004, Scana Energy Marketing, Inc. (Scana) filed a request for rehearing of the Commission's order in this proceeding issued on April 15, 2004.[1] On the same day, Atlanta Gas Light Company (Atlanta) filed proposed capacity release tariff provisions in compliance with the April 15, 2004 Order. As discussed below, this order denies Scana's request for rehearing in part and grants rehearing in part, and modifies Atlanta's compliance by directing Atlanta to file a Statement of Operating Conditions. This order benefits customers because it facilitates the State of Georgia's retail open access program in a manner consistent with the Commission's capacity release policies and regulations.

I. Scana's Request for Rehearing

A. Background

2. In June 2003, the Georgia Public Service Commission (GPSC) considered two plans for the release of interstate capacity held by Atlanta. One plan, which was proposed by several parties including Atlanta, allowed Atlanta to allocate and release Part 284 capacity on upstream interstate pipelines to Georgia marketers in accordance with their Georgia market share (Joint Plan). In addition, participating marketers would take assignment of that capacity subject to the recall rights of Atlanta.

[1] *Georgia Public Service Commission*, 107 FERC ¶ 61,024 (2004) (April 15, 2004 Order).

3. Under a second plan proposed by Scana, Atlanta would essentially permanently release all of its interstate capacity to Scana (or another Georgia marketer that might opt into this plan) and that marketer would exercise all contract rights with respect to such released interstate capacity. In response to concerns that if the marketer were leaving the state, were unable to pay its bills, or were to file for bankruptcy such that Atlanta could not recall the capacity and the GPSC could not force the marketer to return the capacity, Scana proposed that the GPSC could amend the marketer's individual certificate of authority to require the marketer to assign its interstate capacity contract to another Georgia marketer, Atlanta, or the GPSC. Alternatively, Scana also proposed that Scana (or a marketer opting into Scana's plan of assignment) could execute with the GPSC an agreement whereby the marketer would agree to "voluntarily reassign interstate capacity assets . . . to any third party designated by the [GPSC]" upon occurrence of certain prescribed events.

4. In an order issued in July 2003, the GPSC ultimately adopted the Joint Plan and stated that it was concerned that Scana's proposed plan was inconsistent with the Commission's capacity release regulations.[2]

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[2] Specifically, the GPSC stated that:

> The [GPSC] finds and concludes that the Scana plan fails to offer a solution to the difficulties arising from the conflicts between the FERC jurisdiction and the [GPSC's] obligations . . . to ensure that capacity is reassigned back to Georgia upon the exit of a marketer from this State, and its duty to ensure that it can impose temporary directives to reassign capacity to protect Georgia consumers. The [GPSC] is troubled by the suggestion that either it or a marketer could run an interstate capacity assignment program outside of the FERC's capacity release mechanism. The [GPSC] is also troubled by the potential for losing its ability to enforce its directives, as it is required to do by statute. The [GPSC] regulates [Atlanta] and Scana has not demonstrated sufficiently how the [GPSC] would be able to enforce its directives once [Atlanta] ceases to be the contract party and loses its ability to recall capacity pursuant to its [GPSC-] approved tariff.

GPSC Final Order at 11. To support these findings, the GPSC cited to *Gulf South Pipeline Co.*, 103 FERC ¶ 61,129 (2003) (*Gulf South*), *reh'g denied,* 107 FERC ¶ 61,273 (2004), where the Commission rejected a Gulf South tariff provision that would have provided end-users or local distribution companies (LDCs) that did not hold firm transmission capacity the opportunity to assume contracts that had

(continued…)

5. Because the GPSC believed that the issues raised in Scana's proposed plan concerned the GPSC's jurisdiction and were not settled and may be raised again, in November 2003, the GPSC filed a Petition for Declaratory Order (GPSC Petition) and requested that the Commission issue a declaratory order to remove uncertainty as to the determination between the GPSC's and Commission's jurisdiction over conditions placed on the release of interstate capacity. Specifically, the GPSC requested that the Commission address the following question:

> Whether the FERC would preempt the Georgia Commission if the Georgia Commission adopted a plan that provided for the permanent assignment of the interstate capacity assets currently held by Atlanta Light Company to certificated natural gas marketers and placed conditions upon that assignment of the interstate capacity assets.

In the April 15, 2004 Order, the Commission granted the GPSC's Petition and answered the above question in the affirmative. The Commission also provided guidance on the application of the Commission's capacity release policies.

6. The April 15, 2004 Order found that, consistent with our previous findings involving interstate capacity that serves the Georgia retail market,[3] adoption of Scana's plan would require Commission authorization because the plan would allow the GPSC to regulate access to capacity on interstate pipelines, which is within the Commission's exclusive jurisdiction.[4] Further, as such authorization would be contrary to Commission policy and precedent, the Commission found that it must be rejected.

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been suspended or terminated. *Gulf South*, 103 FERC ¶ 61,129 at P 70. The Commission held that such a provision was unjust and unreasonable and would result in the allocation of capacity in a discriminatory manner, contrary to the Natural Gas Act (NGA) and to Commission policy, and that granting parties the opportunity to assume capacity contracts in order to assure continued service "outside the capacity release process" would unlawfully "create two groups of customers, those who are subject to capacity release and those who are exempt." *Id.* at P 73.

[3] *See*, *inter alia, Atlanta Gas Light Co.,* 85 FERC ¶ 61,102 at 61,381-82; *Atlanta Gas Light Co.,* 100 FERC ¶ 61,071 at P 21 (2002).

[4] April 15, 2004 Order at P 29-35.

7. Specifically, the Commission found that restrictions on the use of interstate capacity under Scana's plan would be at odds with the Commission's pro-competition, open-access regulatory policies because it allows Atlanta, or whomever the GPSC designates, to control disposition of interstate capacity solely to benefit Georgia customers. The April 15, 2004 Order explains that under Scana's plan, following an assignment by Atlanta to a Georgia marketer, if the marketer did not want to renew the contract, or if a specified event required the marketer to assign its capacity (e.g., a market share drop), the marketer would be required to assign the capacity to a party designated by the GPSC, i.e., another Georgia marketer servicing only Georgia customers. The Commission found that because under Scana's plan the interstate capacity generally would be used solely to benefit Georgia customers, Scana's plan would remove that capacity from the interstate market, contrary to the Commission's pro-competitive and open access policies that favor granting the capacity to shippers who value it the most.

The Commission stated that:

> In Order No. 636, the Commission required interstate pipelines to restructure their services in order to improve the competitive structure of the natural gas industry. The regulatory changes were designed "to ensure that all shippers have meaningful access to the pipeline transportation grid so that willing buyers and sellers can meet in a competitive, national market to transact the most efficient deals possible." Scana's plan, which assigns Atlanta's capacity to Scana and/or other Georgia certified marketers, would restrict access to that interstate capacity only to other Georgia marketers or Atlanta. This would occur outside of Commission authorized capacity assignment procedures which require access to that capacity be made available to shippers serving other markets on the national transportation grid. As such, Scana's restrictions would deny shippers other than other Georgia marketers or Atlanta meaningful access to this capacity.[5]

8. In addition, the Commission found that Scana's plan would result in the release of capacity outside the Commission's capacity release program. The Commission stated that the fact that such releases would occur within the original term of Atlanta's contract with the interstate pipeline or pursuant to a contract between GPSC and the shipper does not give the state or the shipper authority to mandate allocation of the released capacity only to shippers using the capacity to serve Georgia customers. The Commission also found that Scana's plan was not voluntary, but rather would contractually enforce state-

[5] *Id.* at P 36 (footnotes omitted).

mandated requirements limiting access to and use of the subject interstate capacity.[6] The Commission stated that Order No. 636 ended authorization of individual capacity assignment mechanisms and that the Commission has rejected plans, similar to Scana's, which assigned capacity outside the capacity release program pursuant to state unbundling programs.

B. Scana's Arguments

9. Scana argues that replacement shippers should be allowed to permanently assign capacity without further Commission review of third-party agreements. Scana states that the April 15, 2004 Order did not contradict the assumption that Atlanta could permanently release interstate contracts to Georgia marketers, in whole or in part, without Commission approval. Scana states, however, that the April 15, 2004 Order made new law when it held that if a marketer and the GPSC enter into a voluntary agreement to allow the GPSC to direct the marketer's behavior during some subsequent event (such as drastic loss of market share), the Commission would preempt the GPSC from enforcing that third-party agreement. Scana asserts that this is important because many replacement shippers enter into financing arrangements with third parties, and if the Commission's policy would preempt all third-party conditions on the replacement shippers, financing would become difficult.

10. In addition, Scana argues that the Commission cannot achieve its goal because the Commission cannot add conditions to Atlanta's blanket certificate at this time.

11. Also, Scana argues that if the April 15, 2004 Order were allowed to stand, it would call into question retail restructuring proceedings in other states, such as Pennsylvania, where if an incumbent distribution company released interstate capacity to a marketer, and that marketer exits that market, the marketer must offer the supplier of last resort a right of first refusal on those interstate contracts.

12. Scana notes that the dilemma for the Georgia marketers is that the GPSC will insist that Atlanta control the interstate capacity if that is the only acceptable means available for the GPSC to impose conditions without fear of federal preemption. Scana argues that if Atlanta controls the capacity, the marketers will be locked into a common cost structure dictated by Atlanta and devoid of any competitive opportunity. Scana asserts that the public interest would be best served if the Commission and the GPSC could cooperate to fashion an approach that would provide the GPSC with the reliability assurances it seeks while allowing the marketers to control their own interstate capacity.

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[6] *See* Georgia Code Ann. § 46-4-155(e)(13) and 46-4-155(e)(14) (2002).

13. Scana argues that nothing in the record of the Order No. 636[7] proceeding supported a concern that a replacement shipper after a permanent capacity release would engage in undue discrimination if it voluntarily entered into a contract or accepted a conditioned state commission certificate that required it to engage in a permanent capacity release transaction should some future event occur.

14. Finally, Scana argues that the voluntary nature of the condition (in the Scana plan) is undisputed by the parties and is not relevant. First, Scana states that both the Georgia Statute and the text of the Scana plan require a marketer affirmatively to elect to participate in the plan and that the subject conditions will not arise unless the marketer volunteers for those elections. Second, Scana states that the subject conditions would be stated in both the marketer's GPSC certificate of authority and a contract between the GPSC and the marketer and that if the marketer did not agree to those conditions, it could contest before the GPSC the addition of those conditions in its certificate or it could refuse to execute the GPSC/marketer contract.

15. Scana concludes by stating that the Commission should allow the Scana plan to go forward because it represents a prudent balancing of the tension between the Commission's need to establish a national market for pipeline capacity with the GPSC's need to assure reliable service.

C. Discussion

1. Procedural Matters

16. Atlanta and the GPSC filed answers to Scana's request for rehearing. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R.

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[7] *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, 57 Fed. Reg. 13,267 (April 16, 1992), FERC Stats. and Regs., Regulations Preambles (January 1991 - June 1996) ¶ 30,939 at 30,446-48 (April 8, 1992); *order on reh'g*, Order No. 636-A, 57 Fed. Reg. 36,128 (August 12, 1992), FERC Stats. and Regs., Regulations Preambles (January 1991 - June 1996) ¶ 30,950 (August 3, 1992); *order on reh'g*, Order No. 636-B, 57 Fed. Reg. 57,911 (December 8, 1992), 61 FERC ¶ 61,272 (1992); *reh'g denied*, 62 FERC ¶ 61,007 (1993); *aff'd in part and remanded in part*, *United Distribution Companies v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996); *order on remand*, Order No. 636-C, 78 FERC ¶ 61,186 (1997).

§ 385.213(a)(2) (2004), prohibits answers to a request for rehearing. We are not persuaded to waive this prohibition, and Atlanta's and the GPSC's unauthorized answers are rejected.

2. Analysis

17. We will grant rehearing in part and deny rehearing in part. We reaffirm our previous conclusion that the reassignment of interstate capacity is subject to the Commission's exclusive jurisdiction under the Natural Gas Act. Therefore, any reassignment of an LDC's capacity on interstate pipelines as part of a state unbundling program must conform to the Commission's capacity release regulations, absent a waiver of those regulations. Scana does not contest this holding of the April 15, 2004 Order in its rehearing request. Rather, it asserts that the Commission's capacity regulations permit Atlanta to make a permanent release of its capacity to a marketer and permit the marketer to then enter into an agreement with the GPSC "to allow the GPSC to direct the marketer's behavior during some subsequent event (such as drastic loss of market share)."[8] In particular, Scana contends that the marketer should be able to enter into an agreement that would permit the GPSC to direct the marketer to permanently release the capacity to another entity when necessary to ensure that the interstate capacity remains available to serve Georgia consumers.

18. Scana's rehearing request does not provide sufficient detail concerning the agreements it envisions marketers entering into with the GPSC for the Commission to address Scana's specific proposal. However, the Commission will grant rehearing in part in order to clarify that the Commission's capacity release regulations do permit a state commission to condition a marketer's participation in a retail unbundling program on its agreeing in advance to a prearranged release back to the LDC that would permit the LDC to obtain the marketer's capacity at the maximum rate, if the marketer became unable to fulfill the needs of its retail customers and the LDC needed the capacity to meet its obligations as a supplier of last resort.

19. The Commission adopted its capacity release regulations in Order No. 636 in order to:

> promote efficient load management by the pipeline and its customers and, therefore, efficient use of the pipeline capacity on a firm basis throughout the year. Because more buyers will be able to reach more sellers through

[8] Scana rehearing request at 9.

> firm transportation capacity, capacity reallocation comports with the goal of improving nondiscriminatory, open-access transportation to maximize the benefits of the decontrol of natural gas at the wellhead and in the field.[9]

In order to assure that capacity releases are made on a not unduly discriminatory basis, section 284.8(e) of the Commission's regulations requires that "the pipeline must allocate released capacity to the person offering the highest rate (not over the maximum rate)."

20. State retail unbundling is consistent with the Commission's overall goal in Order No. 636 of improving the competitive structure of the natural gas industry by promoting access to the interstate pipeline transportation grid and the wellhead market so that willing buyers and sellers can meet in a competitive, national market to transact the most efficient deals possible.[10] Therefore, the Commission does not wish to discourage state retail unbundling programs that give retail end-users a greater choice of suppliers from whom to purchase their gas. However, state retail unbundling programs typically require the LDC to continue to be the provider of last resort for their former retail customers. This raises the issue of how, consistent with the Commission's capacity release policies, to give the marketers the opportunity to obtain capacity on interstate pipelines the marketers need to serve retail customers, while still maintaining the ability of the LDCs to meet their supplier of last resort obligation.

21. The Commission also recognizes that states may, as suggested by Scana, wish to permit the LDC to permanently release its interstate pipeline capacity to marketers participating in the retail unbundling program, instead of having the LDC only make temporary releases. Or the state may wish to permit the LDC to simply allow its contracts with the interstate pipeline to expire, while the marketers enter into their own contracts with the pipeline. These alternatives to the temporary release approach may allow the marketers to obtain capacity at a lower cost and/or make more efficient use of the capacity. However, it would be difficult for the state to take either of these approaches without having some method for the state Commission or the LDC to reclaim the capacity from the marketer if the marketer fails to meet its obligations to serve its retail customers. Otherwise, the LDC might not be able to carry out its obligations as a supplier of last resort.

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[9] Order No. 636, ¶ 30,939 at 30,418, *quoted by United Distribution Companies v. FERC*, 88 F.3d 1105, 1149 (D.C.Cir. 1996).

[10] *Id.*

22. In Order No. 636, and the regulations, we sought to provide releasing shippers with sufficient flexibility to release capacity in competition with pipeline capacity and assure reliable service to the retail customer, while remaining consistent with the goal of ensuring that interstate capacity is allocated on a not unduly discriminatory basis to its highest valued use. We therefore provided releasing shippers with the ability to choose pre-arranged replacement shippers and provided that the pre-arranged replacement shippers would have the right to that interstate capacity as long as they match the highest bid for that capacity.[11] As the Commission stated: "Under the capacity release mechanism, an LDC can negotiate a prearranged deal with an end user and that end user will receive the capacity as long as it matches the best offer."[12] Under these regulations, any prearranged deal at maximum rates would result in the prearranged replacement shipper retaining that capacity. Moreover, since Order No. 636, the Commission has recognized that placing too many restrictions on the ability to release capacity will only serve to diminish the incentive for shippers to release capacity, which will reduce competition in the sale of capacity by pipelines to the detriment of the ultimate gas rate payer.[13]

23. Therefore, a state may be able to develop a retail access program in which marketers obtain their own capacity, but enter into an advance prearranged deal that would require the release of that capacity back to the LDC at the maximum rate to the extent that an LDC needs the capacity for operational or reliability reasons. Since the LDC would be required to pay the maximum rate for the release, it would place the highest possible value on the capacity, thereby ensuring that the prearranged deal was not unduly discriminatory. Thus, consistent with Order No. 636, *et al.*, wherein the Commission adopted provisions for prearranged releases which LDCs could use to assure

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[11] 18 CFR § 284.8 (c) &(e); Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation, Order No. 636-A, FERC Stats. & Regs. Regulations Preambles (1991-1996] ¶ 30,950, at 30,554-55 (1992).

[12] *Id*. at 30,555.

[13] For example, the Commission exempted short-term (31 days or less) capacity release transactions from the bidding requirement recognizing that such transactions need to take place quickly, and that the bidding requirement would create administrative delays. Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation, Order No. 636-A, FERC Stats. & Regs. Regulations Preambles (1991-1996] ¶ 30,950, at 30,553-54 (1992).

service to their own end-user customers,[14] such a plan can be acceptable as long as it meets the foregoing non-discrimination requirement and otherwise complies with the Commission's capacity release regulations and policies.[15] To the extent that the April 15 Order indicated that this cannot be done, we grant rehearing.

II. Compliance Filing

A. Background

24. In its April 15, 2004 Order, the Commission reiterated that Atlanta's release of interstate pipeline capacity is subject to a blanket certificate under section 7(c) of the NGA and is subject to the exclusive jurisdiction of the Commission since such capacity is utilized to perform the transportation of natural gas in interstate commerce.[16] The Commission found that Atlanta's GPSC-approved tariff might unduly restrict access to and use of interstate pipeline released capacity in violation of the Commission's capacity release policies and, further, might unduly restrict the flexibility of marketers like Scana to most effectively obtain and use released interstate pipeline capacity. The Commission, therefore, required Atlanta to file with the Commission a capacity release rate schedule to enable us to review the Georgia program consistent with our capacity release regulations.

B. Summary of the Compliance Filing

25. In its filing, instead of providing a proposed FERC capacity release rate schedule, Atlanta simply filed a copy of section 13 of its GPSC tariff in the original state tariff format with a few changes to comply with certain specific rulings of the Commission in the April 15, 2004 Order.

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[14] *See* Order No. at 61,995-97; *United Distribution Companies v. FERC*, *et al.*, 88 F.3d 1105, 1159-60 (D.C. Cir. 1996) ("as FERC notes, an end-user can be sure of receiving capacity by entering into a pre-arranged deal with its LDC at the maximum allowable rate.").

[15] We disagree with Scana's characterization that its plan is voluntary. However, even if the plan were involuntary, it would be fine as long as it complies with the Commission's rules and regulations.

[16] *Citing*, *inter alia*, *Atlanta Gas Light Company*, 85 FERC ¶ 61,102 (1998) and *Atlanta Gas Light Company*, 100 FERC ¶ 61,071 at P 21 (2002).

26. Under the tariff provisions submitted, all of Atlanta's capacity on interstate pipelines in excess of the capacity retained for its operational purposes is released in temporary releases into capacity pools, access to which is limited to Georgia marketers (Georgia gas sellers certificated by the GPSC). The capacity in the pool is then allocated to those marketers, partly on a monthly basis and partly on a longer term basis, based on their share of the Georgia market, with various recall conditions including recalls at the directive of the GPSC.

C. Notice of Filing, Comments and Protests

27. Notice of Atlanta's filing was published in the *Federal Register*,[17] with interventions and protests due on or before June 4, 2004. Scana filed a protest and comments (Scana protest). Atlanta filed an answer to Scana's protest, then filed to supplement its answer. The GPSC also filed an answer to Scana's protest. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2004) prohibits answers to a protest unless ordered by the decisional authority. We will accept Atlanta's answer because it has provided information that has assisted us in our decision-making process. We will accept the GPSC's answer for the same reason.

D. Discussion

1. Form and Scope of Tariff

a. Protests and Answer

28. In its Protest, Scana asserts that the filing should be rejected for failure to comply with the clear direction of the April 15, 2004 Order to file a coherent, self-contained document setting forth its capacity release terms and procedures. Instead, it observes, Atlanta merely filed section 13 of its existing GPSC Tariff with a few modifications. Further, Scana submits that Atlanta did not file all provisions of its Georgia tariff that are relevant to capacity release. Scana states that the GPSC Tariff contains an extensive set of definitions, but Atlanta does not include any of these in its proposed capacity release tariff.

29. Scana also submits that section 17.2 of Atlanta's GPSC Tariff should be filed in a FERC rate schedule. Scana believes that the delivery by displacement discussed in section 17.2, which requires marketers to shift firm transportation nominations on

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[17] 69 Fed. Reg. 31,982 (2004).

Southern from the Macon Pool Group to the Atlanta Pool Group in order to accommodate liquefied natural gas (LNG) delivery by displacement from the Macon Pool Group to the Atlanta Pool Group, is transportation as defined in 18 C.F.R. § 284.1(a).[18] As a result, Scana argues, this provision is relevant to the terms and conditions under which Atlanta will release Southern firm transportation to marketers and should be included in Atlanta's FERC rate schedule. Scana also asserts that section 17.2 should be clarified as to what extent this requirement constitutes a segmentation of released capacity in what appears to be a reticulated zone of the Southern system.

30. In its Answer, the GPSC, in general, argues that approval of Atlanta's tariff is the exclusive responsibility of the GPSC and that, by approaching the Commission with its comments, Scana is trying to bypass and circumvent the requirements of Georgia law. The GPSC argues that it is acting in accord with Georgia law and that one purpose of requiring Atlanta to contract for interstate capacity is that under Georgia law, there are certain criteria that must be met to ensure that the capacity will be used solely for Georgia retail customers.

31. In its Answer, Atlanta states that it objects to any revisions proposed by Scana to its GPSC Tariff that would affect Atlanta's state-regulated behind-the-city-gate operations and impose interstate pipeline requirements on Atlanta's activities as a Hinshaw pipeline. Atlanta argues that, as a Hinshaw pipeline, its activities and GPSC Tariff are not subject to Commission regulation.

b. <u>Commission Determination</u>

32. In the April 15 Order, the Commission directed Atlanta to file a FERC rate schedule. However, we have since reconsidered the nature of that requirement.

33. As a general matter, the Commission does not require firm shippers to file rate schedules governing how they will release their interstate capacity. That is because a shipper's capacity releases are governed by the capacity release provisions in the tariffs the interstate pipelines on file with the Commission. However, in this case, Atlanta and the GPSC have developed extensive, highly detailed provisions that will govern how Atlanta releases, and recalls, its interstate capacity on an ongoing basis, in conjunction with a state retail unbundling program. In the circumstances of an ongoing release program like this one, the Commission finds that it must have an opportunity to review

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[18] In section 1.73 of Atlanta's GPSC tariff, "Pooler" is defined as a marketer or any other person who is a producer, broker, retail customer or group of retail customers, who has been engaged by one or more retail customers to be responsible for the delivery of gas to Atlanta's citygate for such customers.

Atlanta's proposed method of allocating its jurisdictional, interstate capacity among Georgia marketers so that the Commission can determine whether Atlanta's program violates our capacity release regulations. For example, as discussed later, the question of how an LDC will be treating its own discounted transportation capacity impacts the bidding requirement of the Commission's capacity release regulations, and the Commission needs to have a filing before such a program begins to ensure that the release of discount capacity meets our regulations.

34. For this purpose, it is not necessary that Atlanta file a formal FERC tariff that meets the requirements in Part 154, subpart B concerning the form and composition of a FERC tariff, as well as the other requirements of Part 154 concerning the filing of tariff provisions concerning terms and conditions of service. Rather, it is sufficient for Atlanta to file its capacity release provisions in a form akin to the Statement of Operating Conditions, which section 284.123(e) requires to be filed by intrastate pipelines performing NGPA section 311 interstate service. Thus, Atlanta's filing need not include actual tariff sheets or rate schedules, but may be in whatever format it chooses. Therefore, to the extent that Atlanta wishes to use the same format as it uses in its GPSC tariff, that is acceptable.

35. However, the Statement of Operating Conditions filed by Atlanta with this Commission should include only its provisions related to the prearranged release of interstate pipeline capacity to Georgia marketers and the recall of such capacity by shippers on interstate pipelines.[19] Atlanta's filing of a somewhat modified version of section 13 of its GPSC Tariff included provisions relating to the allocation of its own "Firm Distribution Service," as well as provisions related to the release of its interstate pipeline capacity entitlements. For our purposes, it is only necessary that Atlanta file its provisions related to the release and recall of its interstate capacity. The Commission has

[19] All other capacity release tariff requirements including, for example, provisions defining procedures for temporary and permanent releases and re-releases of capacity, contracting requirements, nominating and scheduling such capacity, pipeline billing, creditworthiness, North American Energy Standards Board (NAESB) standards, and Form of Service Agreements, are in the respective interstate pipeline tariffs and govern such matters. *See* section 42 ("CAPACITY RELEASE") to Transco's FERC Gas Tariff, Third Revised Volume No. 1, at Second Revised Sheet No. 374B through 3rd Revised Sheet No. 338, and section 22 ("SHIPPER RELEASE OF FIRM CAPACITY") to Southern's FERC Gas Tariff, Seventh Revised Volume No. 1, at First Revised Sheet No. 164 through Eight Revised Sheet No. 187.

no intention to assert jurisdiction over Atlanta or its GPSC Tariff as related to state-regulated, behind the city gate operations and services on its facilities in Georgia.

36. Therefore, we will require Atlanta to file with the Commission a Statement of Operating Conditions within 30 days of the date of this order that shall contain only provisions related to the release and recall of interstate capacity.

37. In this regard, we will require Atlanta to submit a detailed response to Scana's request that Atlanta be directed to include language reflected in section 17.2 of its GPSC Tariff in its FERC rate schedule. Scana states that section 17.2 requires Georgia marketers to shift nominations on Southern to implement a shift in regasified LNG from the Macon pool to the Atlanta pool and, therefore, such movements are transportation within our jurisdiction. Atlanta does not appear to have responded specifically to Scana's request. We agree that transportation by Southern by displacement is within our exclusive jurisdiction and, therefore, the release of such capacity also is within our jurisdiction. However, we require additional information from Atlanta and we will address Scana's protest on this issue following our review of Atlanta's response. We are unclear as to the purpose of section 17.2 and will require Atlanta to file with the Commission additional information within 30 days of the date of this order to explain section 17.2.

2. Capacity Allocation

38. Typically, a state retail unbundling program provides for the LDC to temporarily release the capacity it holds on interstate pipelines to marketers participating in the retail unbundling program. Atlanta’s retail unbundling program is of this type, albeit more detailed than most. Atlanta’s tariff provides for it to release its interstate capacity not used for operational purposes into a pool, which is then allocated, partly on a monthly basis and partly on a longer term basis, solely to the Georgia marketers based on their share of the Georgia retail market for use in serving Georgia retail consumers.

39. Section 284.8 of the Commission's regulations permits a shipper to prearrange releases of its capacity to replacement shippers. If the prearranged release is at the maximum rate, it need not be posted to give others a chance to bid on the capacity. However, if the prearranged release is at less than the maximum rate, the release must be posted so that others can bid a higher rate. If the bidding results in a tie, the shipper in the prearranged deal wins the capacity. Thus, it is clear that an LDC can direct its capacity releases solely to the marketers in its state’s retail unbundling program without giving others the opportunity to obtain the capacity through bidding only if the marketers agree to pay the maximum rate.

40. Therefore, we find that so long as the marketers participating in a retail unbundling program are willing to pay the maximum rate, it is not unduly discriminatory for the LDC to release its interstate capacity solely to those marketers. Thus, there is no need to impose any other restrictions on the LDC's release of its capacity to marketers. The Commission's regulations expressly permit releasing shippers to prearrange releases with replacement shippers of their choice, and, if the prearranged replacement shipper offers to pay the maximum rate, the pipeline must allocate the capacity to that shipper.[20] Moreover, the underlying purpose of requiring that capacity releases be allocated on a non-discriminatory basis is to "ensure that the shipper that places the highest value on capacity receives it."[21] Since a prearranged shipper offering the maximum rate places the highest possible value on the capacity for purposes of capacity allocation, it is not unduly discriminatory for the released capacity to be allocated to that shipper. This approach is consistent with previous orders holding that releasing shippers, including LDCs, may prearrange maximum rate releases with shippers of their own choice, despite the recognition that LDCs might prefer shippers on their own systems.[22]

41. In the April 15, 2004 Order, the Commission noted that section 13.6 of Atlanta's GPSC Tariff required releases to be made pursuant to prearranged deals at the pipeline's maximum rate. However, the tariff also provided an exception that the rate "will not exceed the rate charged [Atlanta] as of the date of the [release]." [23] The Commission expressed concern that if the rate in effect was a discounted rate, this provision would appear to violate the Commission's policy that capacity released at less than the maximum rate must be made available to the interstate market through posting and bidding. Further, Atlanta's tariff provided for the allocation of short-term (31 days or less) capacity and it was unclear whether the Commission's regulation prohibiting the rollover of monthly releases without posting and bidding by the interstate market would be violated.

42. In response, Atlanta has revised section 13.6 of its GPSC Tariff to state that all assignments (capacity releases) to marketers will be in pre-arranged deals at the maximum rate of the relevant interstate pipeline. Atlanta has also removed the provision

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[20] 18 C.F.R. §§ 284.8(b), (e), and (h)(1).

[21] *UDC*, 88 F.3d at 1159.

[22] *El Paso Natural Gas Co.,* 62 FERC ¶ 61,311 at 62,999-5—62,999-6 (1993).

[23] 107 FERC ¶ 61,024 at P 43.

in section 13.6 which provided that the rate would not exceed the rate charged Atlanta as of the date of the release, in response to the Commission's concern that Atlanta has discount rates on Southern.

43. While we find that Atlanta's filed tariff language complies with the April 15, 2004 Order, we seek assurance that Atlanta's practice of crediting the difference between its discount rates and the maximum rates does not circumvent the requirement to charge the pipeline's maximum rate for pre-arranged deals rather than through the pipeline's posting and bidding process. Although, in the instant compliance filing, Atlanta describes the recipient of the credits as its own "retail customers," which we interpret as the end users to which it delivers the marketers' gas,[24] it previously indicated that the marketers themselves would receive the credits.[25] Crediting these revenues (the difference between the maximum rate and its discounted rate) directly or indirectly back to the marketers from whom it originally charged the maximum rate, would have the net effect of charging the marketers a discounted rate. We interpret Atlanta's statement in the instant compliance filing to mean that the marketers do not receive the credits or any equivalent benefit thereof (whether monetary or otherwise), and it is the end users on Atlanta's system who receive the credits. Based on that understanding, the Commission finds that Atlanta's practice is in compliance with our regulations. Atlanta is directed to clarify in its Statement of Operating Conditions that marketers do not receive credits.

3. Capacity Recall

44. In the April 15, 2004 Order, the Commission found that, through certain provisions in section 13 of Atlanta's GPSC Tariff, the GPSC's regulation of access to, use

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[24] Atlanta Transmittal at 3, note 9.

[25] *Id.*, *citing* Atlanta's Request for Rehearing, Stay, and Clarification, Docket No. RP98-206-006, filed August 30, 1999, at note 21 (alleging that the Commission ruled that Atlanta may achieve the same result as a waiver of what is now section 284.8(h)(1) of the Commission's Regulations "at the state level by charging marketers the maximum applicable pipeline rate and crediting *marketers* with the difference between the maximum rate and the discounted rate." (emphasis added)). The Commission order cited by Atlanta in that pleading did not, in fact, say that. *See Atlanta Gas Light Co.*, 88 FERC ¶ 61,150 at p. 61,508 (1999) ("[W]e note that the flowthrough of discounted savings could also be accomplished without the waiver [of what is now section 284.8(h)(1)] at the state level, by crediting *Atlanta's customers* the difference between the maximum rate and the discounted rate." (emphasis added.)).

of, and recall or reversion of interstate pipeline capacity appeared to intrude on the Commission's exclusive jurisdiction over such matters. The Commission also found that capacity recall provisions in Atlanta's GPSC Tariff gave too much discretion to Atlanta or the GPSC because that capacity may be recalled by order of the GPSC, but did not include any description of the standards or circumstances attendant to such recalls.[26] The Commission acknowledged that the GPSC has authority to mandate how much interstate pipeline capacity Atlanta or a Georgia marketer should hold. However, the Commission found that the GPSC, through its regulation of Atlanta and Georgia marketers, appeared to be essentially regulating who interstate pipelines may serve, where such service may be provided, and the levels of that service.[27] In its filing, Atlanta acknowledges the Commission's exclusive jurisdiction over the release of Atlanta's interstate transportation capacity and revised section 13.6 of its GPSC Tariff to specifically clarify that all capacity release transactions are executed in accordance with the Commission's regulations and policies. Atlanta added provisions defining conditions for the recall of capacity based on operational needs. Additionally, it added a provision requiring marketers to include recall provisions in their release transactions to third parties in the event the capacity is needed by Atlanta. The Commission finds that the proposed language complies with the directives of the April 15, 2004 Order. We now address Scana's protest on the issue of recalls.

45. First, Scana objects to language in section 13.15.1 that permits Atlanta to recall capacity "when the Released Capacity is needed by the Company [Atlanta] for operational reasons or needed to maintain the reliability of the Company's upstream interstate pipeline capacity to serve its customers under the Georgia retailing unbundling initiative." Scana states that Atlanta repeats nearly the same standard in sections 13.15.8 and 13.17.1. It argues that this standard is incompatible with the Commission's policies, including, most significantly, the policy that interruptible capacity is subordinate to firm. It asserts that Atlanta's proposal is so broad that Atlanta (which no longer serves firm retail customers) could protect its own interruptible customers by recalling capacity that a marketer is using to serve the firm retail customers. Scana requests that Atlanta should be required to first interrupt interruptible customers then post a "Mismatch Order" under section 17 of its GPSC Tariff (equivalent to an Operational Flow Order) before recalling capacity. In its Answer, Atlanta argues that this language pertains to appropriate

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[26] Atlanta GPSC Tariff prior to the May 17, 2004 compliance filing, sections 13.17.7 and 13.17.11.

[27] 107 FERC ¶ 61,024 at P 42.

scheduling priority and behind-the-city-gate distribution services over which the Commission has no jurisdiction.

46. We see no need to further refine the conditions under which a releasing shipper can recall its capacity under Atlanta's program. Atlanta is free to add such further refinements as it chooses. Further, it is within Atlanta's discretion to determine when to recall capacity. Under our capacity release program, releasing shippers have the discretion to determine recall conditions. For example, in Transco, we stated "we agree with Transco that the releasing shipper, not Transco, should be responsible for determining if recall criteria have been met."[28] In Order No. 637, we reiterated that view:

> Recall rights add capacity to the release market by enabling shippers to release capacity when they do not need it, and then recall the capacity when necessary for their needs. Without the ability to impose recall rights, releasing shippers may be reluctant to release capacity out of concern that weather patterns will change.[29]

47. The Commission's concern with recall rights from the point of view of the replacement shipper is to ensure that the replacement shipper know upfront that the released capacity is subject to recall at the discretion of the releasing shipper. The replacement shipper can then make the decision whether to contract for released capacity subject to recall. This approach has worked very well in the past. Further, the price of recallable release capacity will reflect the lesser quality of service because released capacity competes in the secondary capacity market with pipeline firm service that is not recallable and with pipeline interruptible capacity. The market disciplines those that choose to play in the secondary capacity market. Therefore, we do not need to second guess a shipper's need to recall capacity, lest this leads to regulatory uncertainty, a more cumbersome process and, in the end, less capacity on the market.

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[28] *Transcontinental Gas Pipe Line Corp*., 63 FERC ¶ 61,194, at 62,507 (1993). *See Tennessee Gas Pipeline Company*, 102 FERC ¶ 61,075, at P 74 (2003), *reh'g denied*, 103 FERC ¶ 61,275 (2003) (recalls at the releasing shipper's discretion).

[29] Regulation of Short-Term Natural Gas Transportation Services, Order No. 637-A, FERC Stats. & Regs. Regulations Preambles ¶ 31,099, at 31,560-70 (2000). *See also* Standards For Business Practices Of Interstate Natural Gas Pipelines, Order No. 587-N, FERC Stats. & Regs. Regulations Preambles ¶ 31,125 (March 11, 2002), at P 25 (2002) (LDCs can use recall rights to ensure they have adequate peak day capacity).

48. In this case, Scana need not participate in the Georgia program if it finds Atlanta's recall conditions unduly onerous to the marketers. By the same token, Georgia and Atlanta have every incentive to establish reasonable recall conditions to attract the entry of marketers into their program. For us to second guess these determinations by adding more restrictive conditions to release, such as Scana's proposal for Operational Flow Order type conditions, would only lead to greater uncertainty, increase administrative burdens, and less incentive for marketers to acquire capacity from Atlanta.

49. Scana also objects that the disposition of capacity recalled for such "operational" reasons makes no sense. Scana states that if capacity is recalled pursuant to section 13.15.8, section 13.16.2 provides that such capacity will promptly be released to the replacement marketers (designated as Interim Poolers) unless otherwise directed by an order of the GPSC. Scana argues that it makes no sense to release to the Interim Poolers capacity that has been recalled for operational reasons or to maintain reliability. As stated above, we see no need to further regulate Atlanta's right to recall capacity and what Atlanta does with that capacity after the recall. Scana is fully aware of recall risk when it takes a release of Atlanta's capacity. The Commission regulations permit releases to include "reput rights" which would enable replacement shippers to obtain capacity back after a recall.[30] Scana is certainly free to try to negotiate such rights with Atlanta with respect to its releases.

50. Scana argues that section 13.15.1's authorization for Atlanta to recall capacity to protect "the reliability of the Company's upstream interstate capacity" is a matter placed in the hands of the upstream pipelines and that "adding a second pair of hands would invite chaos." We disagree. Such a provision allows Atlanta to recall capacity to protect the reliability of its service to its customers

51. Scana requests that the Commission direct Atlanta to revise the tariff to specifically state that recalls will be performed on a non-discriminatory basis and be tied to identifiable events. It states that such terms concerning Atlanta's recalls are already in the tariffs of Southern[31] and Transco.[32] The GPSC states that this concern is adequately

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[30] 18 C.F.R. § 284.12(a)(1)(v) (Capacity Release Related Standards 5.3.7 & 5.3.8).

[31] Section 22.3 (b) (3) of Southern's General Terms and Conditions provide that: "[T]he recall conditions specified by the releasing shipper must be non-discriminatory and identifiable events."

[32] Section 42.2(c) of Transco's General Terms and Conditions: "Such recall conditions must be objectively stated, non-discriminatory and applicable to all potential

(continued…)

addressed by existing Georgia law which safeguards marketers from discrimination.[33] As stated above, we see no need for releasing shippers to list all identifiable events that may trigger a recall in their release conditions. It would be difficult, if not impossible, to foresee and describe with particularity all possible events that might necessitate a recall, or to make such conditions specific enough for the pipeline to be able to determine whether they were met. Any effort to make the recall conditions broad enough to cover all possible eventualities would result in relatively meaningless conditions and result in an overly burdensome process. We think the better approach is the one articulated in *Transco, supra:* to allow the releasing shipper to determine when to recall capacity under the broad conditions it may establish for recalls (here, to determine when the capacity is needed for operational or reliability needs). If Scana, however, believes that Atlanta is exercising its recall authority in an unduly discriminatory manner, or otherwise in a manner violating Commission regulations and policies or the tariffs of the respective interstate pipelines, it may file a complaint with the Commission. We also find no need for Atlanta to provide specified notice of recalls. The Commission's regulations, and the standards of the North American Energy Standards Board (NAESB), which are incorporated into the respective pipeline tariffs, already address recall notification and establish just and reasonable notification procedures with which Atlanta must comply.[34]

52. Scana also asks the Commission to require Atlanta to use park and loan services on Southern and Transco before recalling capacity. Atlanta responds that it already provides imbalance management services through its Marketer Accessible Retained Storage program, over which the Commission does not have jurisdiction. The Commission will not grant Scana's request as it is beyond the scope of this proceeding.

53. Scana also urges revisions to section 13.15.9, which gives Atlanta the option to recall capacity when, due to significant fluctuations in market share, the marketer's monthly and long-term capacity are insufficient to meet the marketer's Designated Design Day Capability (DDDC) (which is the basis for the allocation of both interstate and Atlanta's own capacity among Georgia marketers). First, Scana asserts that the proposed language does not permit a marketer to substitute its own interstate pipeline capacity for the capacity released by Atlanta. Second, it asserts that the DDDC is a peak day value that that is expected to be met by a combination of year-round and peaking services, but, as drafted, a marketer can have its capacity recalled if its year-round capacity is less than

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Replacement Shippers."

[33] Comments of the Georgia Public Service Commission at 5.

[34] 18 C.F.R. § 284.12 (b)(1)(ii)(B); Standard 5.3.44.

Atlanta's forecast of its peak day needs. Scana asserts that this will lead to Atlanta recalling capacity when a marketer lacks sufficient capacity because of sudden growth in market share. Scana argues that actual capacity recalls should be specifically limited to capacity released by Atlanta to marketers.

54. Once again, we see no need to second-guess Atlanta's determination as to when to recall capacity in order to ensure adequate and reliable service to its customers.

4. Restrictions on Receipt Points

55. In the April 15, 2004 Order the Commission expressed concern about provisions under which Atlanta continued to buy gas at the wellhead and then resold excess gas supplies at cost to the marketers at the wellhead. Atlanta has deleted provisions relative to the sale of supply assets (wellhead gas for resale) which Atlanta says are now irrelevant because Atlanta no longer has such supply assets. Atlanta believes deletion of this provision satisfies concerns about Atlanta choosing receipt points for marketers. We agree and find that Atlanta has complied with the April 15, 2004 Order in this respect.

56. Scana disagrees with Atlanta's assertion in its compliance filing that there is no provision in its GPSC Tariff that prevents a marketer from acquiring interstate transportation capacity. Scana argues that Atlanta restricts marketer use of capacity not released by Atlanta. First, Scana states that Atlanta continues to bill each marketer each month to recover the costs Atlanta pays for interstate pipeline demand charges in proportion to the marketer's share of the Georgia firm market without regard to whether the marketer has made its own alternative interstate capacity arrangements. Second, Scana points to section 15.3 of Atlanta's GPSC Tariff, not included in the instant filing, which it states gives Atlanta the right to make day-by-day judgments, in its sole discretion, as to whether the marketer's use of the capacity is operationally feasible. Scana contends that it is unclear to which capacity - that released by Atlanta or that acquired by marketers elsewhere - this limitation of "operationally feasible" could apply. Scana asserts that the problem stems from Atlanta's overly narrow definition for "PCA," defined in section 1.71 of the Terms and Conditions of GPSC Tariff as the total firm capacity allocated to a marketer by Atlanta less the marketer's allocated share of pipeline peaking service. Scana states that because capacity obtained from sources other than Atlanta's capacity release program is not included in the "PCA," no matter how much interstate capacity a marketer may acquire from sources other than Atlanta, that capacity does not technically count in meeting the marketer's daily gas delivery obligations." Accordingly, Scana asserts that Atlanta should be required to refile the tariff to affirmatively include marketer-acquired firm transportation and storage within the definition of PCA and should provide for the full interchangeability of marketer-acquired interstate capacity with the capacity released by Atlanta.

57. In its reply, Atlanta asserts that the Commission does not have jurisdiction over the billing of Atlanta's capacity costs to marketers. The GPSC replied, stating that Scana wrongly assumes that the intent of the Georgia legislature was to relieve Atlanta of its capacity planning role, but rather the intent of the legislation was to promote competition in the natural gas industry. The GPSC states that the Georgia legislature must act to remove any impediments to full competition and that the present structure is mandated by Georgia law and cannot be circumvented by resolution in a federal regulatory forum.[35]

58. We agree with Atlanta that nothing prohibits the GPSC from adjusting the allocation of costs in rates solely within the GPSC's jurisdiction to implement its policies.

III. Miscellaneous

59. Scana expresses its concerns about section 13.12, addressing FINSS - Firm and Interruptible Nominated Sales Service, and section 13.13 concerning BPPSS - Bundled Pipeline Peaking Sales Service. Scana asserts that these sections include allocation formulas that allow marketers to take these services in proportion to their market shares, but Atlanta does not provide for alternative capacity sources in these calculations. Sections 13.12 and section 13.13 apply to Atlanta's local operations and therefore do not conflict with Commission capacity release requirements

60. Scana also requests that Atlanta incorporate NAESB standards on the timing of capacity recalls. Atlanta replies that Scana is suggesting that the Commission should impose a requirement on Atlanta that it imposes only on interstate pipelines, and the Commission does not have the authority to impose NAESB standards on local distribution companies. As stated above, the timing of capacity recalls is governed by Commission regulations and the pipeline tariffs which incorporate the NAESB standards.

61. Scana requests that Atlanta coordinate the interstate capacity release mechanism with other interstate pipeline capacity release mechanisms and the intrastate capacity trading provisions in section 16 of Atlanta's tariff and, to that end, provide for "contingent release" of capacity. We find that Scana's concerns regarding section 16 of its GPSC Tariff - Atlanta's provisions for capacity trading behind the city gate - are beyond the scope of this proceeding and our jurisdiction. We also find that changes to local distribution capacity release and recall procedures in order to coordinate with interstate capacity release and recall procedures, as suggested by Scana, are beyond the scope of this proceeding and our jurisdiction.

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[35] *Id.* at 3-4.

62. Scana states that Order No. 637-A allows replacement shippers to receive all rights of the releasing shippers, including the no-notice flexibility when no-notice transportation is released.[36] The rules for capacity release are governed by the Commission's regulations, and that would include all rights accorded by the contract and the relevant interstate transportation tariff of the pipeline.

63. Scana argues that Atlanta's releases, and the mechanisms for such releases, to Atlanta's unregulated marketing affiliate, Sequent Energy Management L.P. (Sequent), should be covered specifically by provisions in any Atlanta capacity release tariff. Scana claims that marketers other than Sequent are billed for the demand charges associated with capacity releases to Sequent. The GPSC states that it has ruled on this issue and that Atlanta or its agent must deposit 50 percent of any sales from other transactions into the Universal Service Fund. We find that this specific issue is a local matter beyond the scope of this proceeding. However, Atlanta is reminded that it may not unduly discriminate in favor of any party, including its affiliate, in releasing interstate capacity.

IV. Request for Technical Conference

64. Scana requests that the Commission convene a technical conference on the issue of Atlanta's capacity allocation and release policies and to better understand Atlanta's tariff. Atlanta responds that a technical conference is not needed because the narrow issue of jurisdiction has been resolved. Atlanta asserts that in requiring Atlanta to file a "concrete proposal," the Commission did not intend to broaden the scope of this proceeding to second-guess the GPSC and reconsider the operational elements of Atlanta's unbundling plan. Atlanta argues, inter alia, that a technical conference is not necessary because the Commission did not order Atlanta to state an "event-specific standard" for capacity.

65. While we believe that the disposition of the issues raised by the compliance filing may eventually benefit from a technical conference, we will not direct that a technical conference be established at this time. The Statement of Operating Conditions Atlanta must file to comply with this order may reflect extensive changes from the instant compliance filing and the parties and the Commission should have the benefit of a review of the new filing before further procedures are established. The request for technical conference on the issues raised by the instant compliance filing is, therefore, denied.

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[36] *Citing* Order No. 637-A [1996-2000 Preambles] FERC Stats. and Regs. ¶ 31,099 at 31,588 (2000).

<u>The Commission orders</u>:

(A) Scana's request for rehearing of the April 15, 2004 Order is denied in part and granted in part as discussed herein.

(B) Atlanta is hereby directed to file a Statement of Operating Conditions within 30 days of the date of this order as discussed herein.

(C) Atlanta is hereby directed to file additional information explaining the purpose of section 17.2 of its GPSC Tariff within 30 days of the date of this order as discussed herein.

By the Commission. Commissioner Brownell dissenting in part with a separate statement attached.
(S E A L) Commissioner Kelliher dissenting in part with a separate statement attached.

Linda Mitry,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Georgia Public Service Commission | Docket Nos. RP04-92-001
RP04-92-002

(Issued January 24, 2005)

BROWNELL, Commissioner, dissenting in part

The April 15 Order required Atlanta Gas to file a FERC rate schedule establishing the conditions under which its interstate pipeline capacity will be released and recalled. Upon further consideration, I am persuaded to grant rehearing of the April 15 Order on this issue. However, the majority imposes a requirement that Atlanta Gas file a Statement of Operating Conditions concerning prearranged releases and the conditions for recall of capacity. Based on the particular facts of this case and a proven regulatory policy that enhances competition, I do not believe such a requirement is wise.

The Commission's capacity release regulations were crafted in an attempt to balance the need to create a robust program in which shippers' ability to release capacity is not unduly hampered with the federal interest in assuring that interstate capacity is fairly and reasonably allocated among potential shippers. Since Order No. 636, the Commission has recognized that placing too many restrictions on the ability to release capacity will only serve to diminish the incentive for shippers to release capacity, which will reduce competition with the sale of capacity by pipelines.[1] I am concerned that some of the implications of this order raise unnecessary concerns for states and distribution companies attempting to craft viable retail access programs in the public interest.

The majority asserts that a filed Statement of Operating Conditions is needed to allow the Commission the opportunity to assure that Atlanta Gas' "extensive, highly detailed capacity recall program" complies with our regulations. On the contrary, by requiring Atlanta Gas to file a Statement of Operating Conditions, we are creating a level of complexity that is unnecessary to ensure that the interstate capacity release program operates in a non-discriminatory manner. We have never required a releasing shipper to file such a quasi-tariff. The Commission has exclusive jurisdiction under the NGA, regarding access to and use of interstate pipeline transportation capacity, including the

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[1] For example, the Commission exempted short-term capacity release transactions from the bidding requirement recognizing that such transactions need to take place quickly, and that the bidding requirement would create administrative delays. Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation, Order No. 636-A, FERC Stats. & Regs. Regulations Preambles (1991-1996] ¶ 30,950, at 30,553-54 (1992).

release and assignment of Atlanta Gas' contractual rights to firm transportation service on Southern Natural and Transcontinental Gas pipelines. If Atlanta Gas elects to release its capacity subject to conditions, it must do so solely under the rules and regulations governing the release of capacity on interstate pipelines. In that way, we have sufficient ability and authority to prevent undue discrimination. For example, the Commission did not allow releasing shippers to impose creditworthiness conditions on a replacement shipper independent of the creditworthiness conditions imposed by the pipeline.[2] Moreover, with the additional guidance provided in this order, there should be no confusion over what Atlanta Gas needs to do to comply with our release and recall regulations and policies. Consequently, all capacity release tariff requirements, including recall provisions, belong in the Commission approved tariff of the interstate pipelines, not in a newly devised Statement of Operating Conditions filed by a releasing shipper.

For these reasons, I respectfully dissent in part.

Nora Mead Brownell
Commissioner

[2] 102 FERC 61,075 at 61,198 (2003), *reh'g denied*, 103 FERC 61,275 (2003).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Georgia Public Service Commission — Docket Nos. RP04-92-001, RP04-92-002

(Issued January 24, 2005)

Joseph T. KELLIHER, Commissioner *dissenting in part*:

I disagree with the Commission's decision to the extent it determines that a state can restrict an LDC's release of its capacity on interstate pipelines solely to marketers participating in the state's retail unbundling program without giving other shippers an opportunity to obtain the capacity.

Section 284.8 of the Commission's regulations permits a shipper to prearrange releases of its capacity to replacement shippers, and if the prearranged release is at the maximum rate, it need not be posted to give others a chance to bid on the capacity.[1] While the Commission's capacity release program recognizes the general right of a shipper to release capacity to replacement shippers of its choosing at the maximum rate and the right to recall such capacity when the releasing shipper needs it, here, it is the state, not the shipper, that dictates the terms of release and recall of the capacity. As we stated in our prior order, "the GPSC cannot bar access to interstate pipeline capacity."[2] Yet by allowing a state to require an LDC to direct its capacity releases solely to marketers in the state's retail unbundling program who bid at the maximum rate without giving others the opportunity to obtain capacity through bidding, that seems to be precisely what the Commission is permitting.

In my view, allowing a state commission to impose such restrictions unduly discriminates by restricting access to and use of interstate pipeline released capacity. I agree with the view expressed in our prior order that "[a]llowing the LDC the discretion to voluntarily tailor release programs to their own needs appears to be preferable to more direct command and control oversight by the State or, indeed, by the Commission."[3]

To the extent the Commission's ruling in this order departs from these principles, I

[1] 18 C.F.R. § 284.8 (2004).

[2] *Georgia Public Service Commission*, 107 FERC ¶ 61,024 at 61,106 (2004).

[3] *Id.*

dissent in part.

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Joseph T. Kelliher