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. RP04-92-003
RP04-92-004

ORDER DENYING REHEARING AND GRANTING CLARIFICATION IN PART AND ACCEPTING COMPLIANCE FILING SUBJECT TO CONDITION

(Issued May 6, 2005)

1. On February 22, 2005, Atlanta Gas Light Company (Atlanta) filed a request for rehearing of the Commission's rehearing order in this proceeding issued on January 24, 2005.[1] On the same day, Atlanta filed a proposed Statement of Operating Conditions to comply with the January 24, 2005 Order. As discussed below, this order denies Atlanta's request for rehearing and grants clarification in part. This order also accepts Atlanta's compliance filing subject to condition. 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. Background

2. In November 2003, the Georgia Public Service Commission (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. The GPSC Petition was prompted by Scana Energy Marketing, Inc.'s (Scana) proposed plan before the GPSC for the release of interstate capacity held by Atlanta.

[1] *Georgia Public Service Commission*, 110 FERC ¶ 61,048 (2005) (January 24, 2005 Order).

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 Gas Light Company to certificated natural gas marketers and placed conditions upon that assignment of the interstate capacity assets.

On April 15, 2004, 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.[2]

3. The April 15, 2004 Order found that Atlanta's release of its capacity on interstate pipelines is subject to the Commission's exclusive Natural Gas Act (NGA) jurisdiction pursuant to a blanket NGA capacity release certificate issued under section 7 of the NGA.[3] The Commission accordingly held that consistent with our previous findings involving interstate capacity that serves the Georgia retail market,[4] adoption of Scana's plan would require Commission authorization because the plan would allow the GPSC to regulate access to capacity on interstate pipelines.[5] Further, as such authorization would be contrary to Commission policy and precedent, the Commission found that it must be rejected.

4. In addition, the Commission believed that Scana's proposal was headed in the right direction insofar as it appeared to be intended to provide added flexibility to Georgia marketers to obtain efficiencies and flexibility unobtainable under the GPSC-approved plan. Accordingly, the Commission provided guidance to Scana, as well as Atlanta and the GPSC, as to how to achieve operational flexibility while, at the same time, acting in a manner that is consistent with both appropriate state retail unbundling initiatives and the Commission's policies. In providing guidance on these issues, the Commission included general observations about Atlanta's revised GPSC tariff which

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

[3] *See* 18 C.F.R. § 284.8(g) (2004) and *United Distribution Companies v. FERC*, 88 F.3d 1105, 1152-1157 (D.C. Cir. 1996) (*UDC)*.

[4] *See, inter alia*, *Atlanta Gas Light Co.*, 85 FERC ¶ 61,102 at 61,381-82 (1998); *Atlanta Gas Light Co.*, 100 FERC ¶ 61,071 at P 21 (2002).

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

reflects the new capacity allocation procedures approved by the GPSC. To help ensure that this guidance would lead to a resolution of these long-standing issues, and to permit the Commission to review a concrete proposed resolution first hand, the Commission directed Atlanta to file a capacity release rate schedule that reflects this guidance.

5. On May 17, 2004, Scana filed a request for rehearing of the April 15, 2004 Order. On the same day, Atlanta filed proposed capacity release tariff provisions in response to the April 15, 2004 Order.

6. In the January 24, 2005 Order, we reaffirmed our previous conclusion that the reassignment of interstate capacity is subject to the Commission's exclusive jurisdiction under the NGA. Therefore, any reassignment of a local distribution company's (LDC), *e.g.*, Atlanta'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. We also denied Scana's rehearing request in part and granted rehearing in part and directed Atlanta to file a Statement of Operating Conditions. The Commission granted rehearing in part, to clarify that a state may be able to develop a retail access program in which marketers obtain their own capacity, but enter into advanced prearranged deals that would require the release of that capacity back to the LDC at the maximum rates to the extent that the LDCs need the capacity for operational or reliability reasons. In addition, the Commission reconsidered its directive in the April 15, 2004 Order that Atlanta file a FERC rate schedule and directed Atlanta instead to file a Statement of Operating Conditions containing only provisions related to the release and recall of interstate capacity.

7. The January 24, 2005 Order emphasized that 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 file with the Commission. The Commission noted, however, that 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 chose to review Atlanta's proposed method for allocating jurisdictional, interstate capacity among Georgia marketers so that the Commission can determine whether Atlanta's program is consistent with our capacity release regulations.

II. Atlanta's Request for Rehearing

8. The only issue Atlanta raises on rehearing concerns the requirement in the January 24, 2005 Order that it file a Statement of Operating Conditions governing its release of interstate capacity. Atlanta argues that such a requirement is unnecessary and

exceeds the Commission's rules and regulations governing interstate capacity releases. Atlanta argues that there is no authority in the NGA or in the Commission's regulations for the Commission to require a shipper to file a Statement of Operating Conditions for capacity release. It states that the Commission has never required a shipper to make such a filing, and the requirement is unnecessary to ensure a shipper's compliance with interstate capacity release regulations. Atlanta further states that requiring it to file a Statement of Operating Conditions will do nothing to enhance the Commission's exclusive jurisdiction over interstate capacity. Additionally, Atlanta states that the Commission granted all shippers a limited-jurisdiction blanket certificate to release firm capacity under section 7 of the NGA and has established a system of regulations to govern capacity release. It argues that the Commission's regulations granting these blanket certificates did not require shippers to file a Statement of Operating Conditions.

9. In the alternative, Atlanta seeks clarification that any shipper that releases interstate capacity in conjunction with a state retail unbundling program must file a Statement of Operating Conditions.

Discussion

10. We will deny Atlanta's request for rehearing and find that the Commission's directive in the January 24, 2005 Order requiring Atlanta to file a Statement of Operating Conditions is necessary and consistent with the Commission's authority to oversee the terms and conditions governing interstate capacity releases.

11. The NGA gives the Commission exclusive jurisdiction over the allocation of interstate pipeline capacity, including any releases by LDCs of their interstate capacity to marketers.[6] Pursuant to section 7 of the NGA, the Commission has issued to firm shippers on interstate pipelines limited jurisdiction blanket certificates of public convenience and necessity solely for the purpose of releasing firm capacity.[7] Thus, when Atlanta releases its capacity on interstate pipelines to another shipper, it is performing a jurisdictional service pursuant to a certificate issued under NGA section 7. Section 4 of the NGA authorizes the Commission to require companies performing such a service to file schedules, "in such form as the Commission may designate," setting forth terms and conditions governing their performance of jurisdictional service.

[6] *UDC*, 88 F.3d at 1152-57.

[7] *See* 18 C.F.R. § 284.8(g) (2004).

12. Pursuant to the authority in sections 4 and 7, the Commission has determined to require Atlanta to file its capacity release provisions in a form similar to the Statement of Operating Conditions filed by Hinshaw pipelines performing jurisdictional service pursuant to a blanket certificate issued pursuant to NGA section 7 and section 284.224(b) of the Commission's regulations. Hinshaw pipelines do not file actual tariffs and rate schedules with the Commission, although they perform interstate service. Rather, they need only file Statements of Operating Conditions in forms they choose.[8] To minimize burdens on Atlanta, the Commission found that it is not necessary for Atlanta to 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.[9] Thus, the Commission did not require Atlanta to file actual tariff sheets or rate schedules, but authorized Atlanta to use a format of its choice.

13. The Commission recognized in the January 24, 2005 Order that it does not generally require firm shippers to file Statements of Operating Conditions governing how they will release their interstate capacity. However, in this case, Atlanta and the GPSC have developed extensive, highly detailed rules 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, review of Atlanta's proposed method of allocating its jurisdictional, interstate capacity among Georgia marketers will allow the Commission to determine whether Atlanta's program is consistent with our capacity release regulations.[10]

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[8] *See* §§ 284.224(e)(2) and 284.123(c).

[9] 18 C.F.R. Part 154 (2004).

[10] We note that Atlanta's rehearing request does not argue that the Statement of Operating Conditions filing requirement is a disincentive for shippers to release capacity, or that the filing requirement will reduce competition with the sale of capacity by pipelines. In addition, neither Atlanta nor the GPSC, for that matter, have raised arguments that the requirement to file a Statement of Operating Conditions will have an adverse impact on Georgia's retail access program.

14. We will however, grant clarification in part. The January 24, 2005 Order did not intend that all shippers releasing capacity in conjunction with a state retail unbundling program would file Statements of Operating Conditions. However, the filing requirement does apply to LDCs that, similar to Atlanta, have developed extensive, highly detailed rules that govern how the LDCs release and recall interstate capacity on an ongoing basis, in conjunction with state retail unbundling programs.

III. Compliance Filing

Summary of Compliance Filing

15. On February 22, 2005, Atlanta filed a Statement of Operating Conditions in purported compliance with the Commission's January 24, 2005 Order. Atlanta submits proposed tariff sheets similar in format to its GPSC tariff. However, the tariff sheets are renumbered to eliminate reference to its GPSC tariff and are clearly marked "Statement of Operating Conditions." As directed by the January 24, 2005 Order, the Statement of Operating Conditions includes only provisions related to the prearranged release of interstate pipeline capacity to Georgia marketers and the recall of such capacity by shippers on interstate pipelines. In response to the January 24, 2005 Order's requirement that Atlanta explain the purpose of section 17.2 of its GPSC tariff allowing Atlanta to designate pipelines that certain poolers must use, Atlanta has eliminated the relevant provision. Atlanta states that this provision is unnecessary and has been removed from its GPSC tariff. Also, the January 24, 2005 Order directed Atlanta to clarify that its practice of crediting the difference between its discount rates and the maximum rates for capacity release does not circumvent the requirement to charge the pipeline's maximum rate for pre-arranged deals not posted for bidding. Atlanta clarifies in section 2.4 of the Statement of Operating Conditions that marketers do not receive credits for the difference between the maximum rate and the discounted rate for capacity release.

16. Atlanta generally includes in this filing the same list of conditions under which it may recall capacity as it had listed in its previous filing. However, it adds one provision not included in its last filing. This is section 2.5.12 which states that Atlanta may recall capacity when "An order of the GPSC under O.C.G.A. § 46-2-91 where recall would be necessary to comply with the GPSC's order."

Notice of Filing

17. Notice of Atlanta's compliance filing was published in the *Federal Register*,[11] with interventions and protests due on or before March 16, 2005. Scana filed a timely protest. Atlanta 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 assisted us in our decision-making process.

18. Scana protests that Atlanta's proposed Statement of Operating Conditions is silent on the point that Atlanta is not to discriminate between interstate capacity that Atlanta releases to a marketer, and interstate capacity that a marketer obtains from a different source. It recommends that the following provision be added to the Statement of Operating Conditions (at section 2.1):

> [Atlanta] shall not discriminate in any manner based on whether the capacity was released by [Atlanta] or obtained from another source.

19. Also, Scana argues that the proposed Statement of Operating Conditions assumes that only capacity released by Atlanta is available to serve the Georgia market. Scana suggests that the phrase "Unless otherwise established in a GPSC approved plan of assignment," be added to sections 2.3 and 2.4 of the Statement of Operating Conditions which concern the allocation and assignment of Atlanta's interstate transportation and storage services.

Discussion

20. The Commission accepts Atlanta's compliance filing, subject to one change discussed below.

21. In the April 15, 2004 Order, the Commission cited section 13.17.11 of Atlanta's GPSC tariff[12] as an example of a recall provision which should not be included in Atlanta's capacity release tariff, since it permitted the GPSC to order the recall of interstate capacity with no description of the standards or circumstances attendant with

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[11] 70 Fed. Reg. 12,664 (2005)

[12] That section of Atlanta's GPSC tariff provided that released capacity shall be recalled by "[a]n order of the [GPSC] under O.C.G.A. § 46-2-71 where recall would be necessary to comply with the [GPSC's] order."

such recalls. Atlanta's May 17, 2004 filing to comply with the April 15, 2004 Order removed that provision from its list of situations when it could recall capacity released to marketers. The Commission's January 24, 2005 Order approved Atlanta's proposed capacity recall provisions, rejecting various requests by Scana for modifications. Accordingly, the January 24 Order did not direct Atlanta to make any changes in its capacity recall provisions, when it refiled its capacity release provisions in the form of a Statement of Operating Conditions. However, in the instant compliance filing, Atlanta has proposed in section 2.5.12 of its Statement of Operating Conditions to add to its capacity recall provisions essentially the same language as was in the previously rejected section 13.17.11 of its GPSC tariff. We reject proposed section 2.5.12, since the sole purpose of this filing is to comply with the January 24, 2005 Order and that order did not direct or authorize Atlanta to make this change. Moreover, Atlanta has provided no support, or explanation of the reasons for its proposed addition to its capacity recall conditions. We therefore direct Atlanta to file a revised Statement of Operating Conditions within 30 days of the date of this order, eliminating section 2.5.12.[13]

22. With regard to Scana's proposed modifications to Atlanta's Statement of Operating Conditions, we find them unnecessary. Primarily, the Commission did not require such language in the January 24, 2005 Order. In addition, the Commission rejected similar language proposed by Scana with regard to the non-discriminatory performance of recalls in the January 24, 2005 Order. The Commission stated that the better approach is to allow the releasing shipper to determine when to recall capacity under the broad conditions it may establish for recalls, such as determining when the capacity is needed for operational or reliability needs. Finally, if Scana believes that Atlanta is acting in an unduly discriminatory manner, or otherwise violates Commission regulations and policies or the tariffs of the respective interstate pipelines, it may file a complaint with the Commission.

The Commission orders:

(A) Atlanta's request for rehearing of the January 24, 2005 Order is hereby denied as discussed herein.

(B) Atlanta's clarification of the January 24, 2005 Order is granted in part as discussed herein.

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[13] We also note that in an earlier filing Atlanta cited to O.C.G.A. section 46-2-71, while in this filing, particularly in section 2.5.8, it cites to O.C.G.A. section 46-2-91. We will direct Atlanta to confirm in its compliance filing whether both these citations are correct or whether it has made a typographical error.

(C) Atlanta's compliance filing is hereby accepted subject to condition.

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

By the Commission. Commissioner Brownell dissenting with a separate statement attached.

(S E A L)

Magalie R. Salas,
Secretary.

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Georgia Public Service Commission — Docket Nos. RP04-92-003
RP04-92-004

(Issued May 6, 2005)

BROWNELL, Commissioner, dissenting:

The majority fails to state with any specificity why there is a need for Atlanta Gas to file a Statement of Operating Conditions regarding the release and recall of its interstate capacity; how our policy on recall rights has changed, if at all; and why such a requirement is limited to LDCs with "extensive, highly detailed" rules developed in conjunction with state retail unbundling programs.

On rehearing and clarification, the majority provides no additional explanation for the need for a Statement of Operating Conditions and simply restates that the requirement is necessary "so that the Commission can determine whether Atlanta's program is consistent with our capacity release regulations." If Atlanta Gas elects to release its capacity subject to conditions, it must do so solely under the tariffs of the interstate pipelines on which it holds capacity. In the past, our existing regulations and pipeline tariffs have proven to be sufficient 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.[1] The majority fails to explain why our existing regulations and associated interstate pipeline tariffs are not sufficient.

The majority also fails to explain whether or not the Commission now intends to place limitations on the right to recall capacity other than the general obligation not to recall in an unduly discriminatory manner. In the past, the Commission has stated that the capacity release regulations permit a releasing shipper to release capacity subject to recall at the releasing shipper's discretion. [2] The Commission has also not permitted pipelines to impose any provisions relating to recall rights that operate to impede the

[1] 102 FERC 61,075 at 61,198 (2003), *reh'g denied*, 103 FERC 61,275 (2003).

[2] *Id.* At 61,200.

ability of releasing shippers to employ recall provisions as terms and conditions of their releases. [3] My earlier dissent fully explains why it is not good public policy to start second guessing a shipper's need to recall capacity. However, if the policy on recall rights is changing, fairness and good government requires that we detail the new rules of the road.

Finally, the majority fails to explain why LDCs with "extensive, highly detailed" rules developed in conjunction with state retail unbundling programs are more likely to unduly discriminate and, therefore, why the additional safeguard of requiring a Statement of Operating Conditions is necessary. There is no explanation regarding what constitutes "extensive and highly detailed" rules. If a subset of LDCs is singled out for more stringent regulation, the basis for that decision must also be clear.

For these reasons and the reasons set forth in my earlier dissent (see 110 FERC ¶ 61,048), I respectfully dissent.

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Nora Mead Brownell
Commissioner

[3] *Texas Eastern Transmission Corporation*, 62 FERC ¶ 61,015 at 61,104 (1993).