121 FERC ¶ 61,170
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 284

Docket No. RM08-1-000

Promotion of a More Efficient Capacity Release Market

(November 15, 2007)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Federal Energy Regulatory Commission is proposing revisions to its regulations governing interstate natural gas pipelines to reflect changes in the market for short-term transportation services on pipelines and to improve the efficiency of the Commission's capacity release mechanism. The Commission is proposing to permit market based pricing for short-term capacity releases and to facilitate asset management arrangements by relaxing the Commission's prohibition on tying and on its bidding requirements for certain capacity releases.

DATES: Comments are due **45 days after publication in the FEDERAL REGISTER**

ADDRESSES: You may submit comments, identified by docket number by any of the following methods:

Agency Web Site: http://ferc.gov. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format.

MAIL/HAND DELIVERY: Commenters unable to file comments electronically must mail or hand deliver an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, N.E., Washington, D.C. 20426.

INSTRUCTIONS: For detailed instructions on submitting comments and additional information on the rulemaking process, see the Comment Procedures section of this document

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NOTICE OF PROPOSED RULEMAKING

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NOTICE OF PROPOSED RULEMAKING

(November 15, 2007)

1. In this Notice of Proposed Rulemaking, the Commission proposes to revise its Part 284 regulations concerning the release of firm capacity by shippers on interstate natural gas pipelines. First, the Commission proposes to remove, on a permanent basis, the rate ceiling on capacity release transactions of one year or less. Second, the Commission proposes to modify its regulations to facilitate the use of asset management arrangements (AMAs), under which a capacity holder releases some or all of its pipeline capacity to an asset manager who agrees to supply the gas needs of the capacity holder. Specifically, the Commission proposes to exempt capacity releases made as part of AMAs from the prohibition on tying and from the bidding requirements of section 284.8. These proposals are designed to enhance competition in the secondary capacity release market and increase shipper options for how they obtain gas supplies.

I. Background

A. The Capacity Release Program

2. The Commission adopted its capacity release program as part of the restructuring of natural gas pipelines required by Order No. 636.[1] In Order No. 636, the Commission

[1] Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation and Regulation of Natural Gas Pipelines After Partial

(continued…)

sought to foster two primary goals. The first goal was 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. The second goal was to ensure consumers have "access to an adequate supply of gas at a reasonable price."[2]

3. To accomplish these goals, the Commission sought to maximize the availability of unbundled firm transportation service to all participants in the gas commodity market. The linchpin of Order No. 636 was the requirement that pipelines unbundle their transportation and storage services from their sales service, so that gas purchasers could obtain the same high quality firm transportation service whether they purchased from the pipeline or another gas seller. In order to create a transparent program for the reallocation of interstate pipeline capacity to complement the unbundled, open access environment created by Order No. 636, the Commission also adopted a comprehensive capacity release program to increase the availability of unbundled firm transportation

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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 (April 8, 1992); order on reh'g, Order No. 636-A., 57 Fed. Reg. 36,128 (August 12, 1002), 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 (Dec. 8, 1992), 61 FERC ¶ 61,272 (1992*);* notice of denial of reh'g, 62 FERC ¶ 61,007 (1993); aff'd in part, vacated and remanded in part, United Dist. Companies v. FERC, 88 F.3d 1105 (D.C. Cir. 1996); order on remand, Order No. 636-C, 78 FERC ¶ 61,186 (1997).

[2] Order No. 636 at 30,393 (citations omitted).

capacity by permitting firm shippers to release their capacity to others when they were not using it.[3]

4. The Commission reasoned that the capacity release program would promote efficient load management by the pipeline and its customers and would, therefore, result in the efficient use of firm pipeline capacity throughout the year. It further concluded that, “because more buyers will be able to reach more sellers through 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.”[4]

5. In Order No. 636, the Commission expressed concerns regarding its ability to ensure that firm shippers would reallocate their capacity in a non-discriminatory manner to those who placed the highest value on the capacity up to the maximum rate. The Commission noted that prior to Order No. 636, it authorized some pipelines to permit their shippers to “broker” their capacity to others. Under such capacity brokering, firm shippers were permitted to assign their capacity directly to a replacement shipper, without

[3] In brief, under the Commission’s capacity release program, a firm shipper (releasing shipper) sells its capacity by returning its capacity to the pipeline for reassignment to the buyer (replacement shipper). The pipeline contracts with, and receives payment from, the replacement shipper and then issues a credit to the releasing shipper. The replacement shipper may pay less than the pipeline’s maximum tariff rate, but not more. 18 CFR § 284.8(e) (2007). The results of all releases are posted by the pipeline on its Internet Web site and made available through standardized, downloadable files.

[4] Order No. 636 at 30,418.

any requirement that the brokering shipper post the availability of its capacity or allocate it to the highest bidder.[5] However, in Order No. 636, the Commission found “there [were] too many potential assignors of capacity and too many different programs for the Commission to oversee capacity brokering.”[6]

6. The Commission sought to ensure that the efficiencies of the secondary market were not frustrated by unduly discriminatory access to the market.[7] Therefore, the Commission replaced capacity brokering with the capacity release program designed to provide greater assurance that transfers of capacity from one shipper to another were transparent and not unduly discriminatory. This assurance took the form of several conditions that the Commission placed on the transfer of capacity under its new program.

7. First, the Commission prohibited private transfers of capacity between shippers and, instead, required that all release transactions be conducted through the pipeline. Therefore, when a releasing shipper releases its capacity, the replacement shipper must enter into a contract directly with the pipeline, and the pipeline must post information regarding the contract, including any special conditions.[8] In order to enforce the

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[5] See Algonquin Gas Transmission Corp., 59 FERC ¶ 61,032 (1992).

[6] Order No. 636 at 30,416.

[7] Order No. 636-A at 30,554.

[8] Order No. 636 emphasized:

> The main difference between capacity brokering as it now exists and the new capacity release program is that under capacity brokering, the brokering customer could enter into

(continued…)

prohibition on private transfers of capacity, the Commission required that a shipper must have title to any gas that it ships on the pipeline.[9]

8. Second, the Commission determined that the record of the proceeding that led to Order No. 636 did not reflect that the market for released capacity was competitive. The Commission reasoned that the extent of competition in the secondary market may not be sufficient to ensure that the rates for released capacity will be just and reasonable. Therefore, the Commission imposed a ceiling on the rate that the releasing shipper could charge for the released capacity.[10] This ceiling was derived from the Commission's estimate of the maximum rates necessary for the pipeline to recover its annual cost-of-

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> and execute its own deals without involving the pipeline. Under capacity releasing, all offers must be put on the pipeline's electronic bulletin board and contracting is done directly with the pipeline. Order No. 636 at 30, 420 (emphasis in original).

[9] As the Commission subsequently explained in Order No. 637, "the capacity release rules were designed with [the shipper-must-have-title] policy as their foundation," because, without this requirement, "capacity holders could simply transport gas over the pipeline for another entity." Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services, Order No. 637, FERC Stats. & Regs. ¶ 31,091 at 31,300, clarified, Order No. 637-A, FERC Stats. & Regs. ¶ 31,099, reh'g denied, Order No. 637-B, 92 FERC ¶ 61,062 (2000), aff'd in part and remanded in part sub nom. Interstate Natural Gas Ass'n of America v. FERC, 285 F.3d 18 (D.C. Cir. 2002), order on remand, 101 FERC ¶ 61,127 (2002), order on reh'g, 106 FERC ¶ 61,088 (2004), aff'd sub nom. American Gas Ass'n v. FERC, 428 F.3d 255 (D.C. Cir. 2005). See section V below for a further explanation of the shipper-must-have-title requirement.

[10] Order No. 636 at 30,418; Order No. 636-A at 30,560.

service revenue requirement, which the Commission prorated over the period of each release. [11]

9. Third, the Commission required that capacity offered for release at less than the maximum rate must be posted for bidding, and the pipeline must allocate the capacity "to the person offering the highest rate (not over the maximum rate)."[12] The Commission permitted the releasing shipper to choose a pre-arranged replacement shipper who can retain the capacity by matching the highest bid rate. The bidding requirement, however, does not apply to releases of 31 days or less or to any release at the maximum rate. But all releases, whether or not subject to bidding, must be posted.[13]

10. Finally, the Commission prohibited tying the release of capacity to any extraneous conditions so that the releasing shippers could not attempt to add additional terms or conditions to the release of capacity. The Commission articulated the prohibition against the tying of capacity in Order No. 636-A, where it stated:

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[11] Order No. 637 at 31,270 -71.

[12] 18 CFR § 284.8(e) (2007) provides in pertinent part that "[t]he pipeline must allocate released capacity to the person offering the highest rate (not over the maximum rate) and offering to meet any other terms or conditions of the release."

[13] 18 CFR §284.8(h)(1) provides that a release of capacity for less than 31 days, or for any term at the maximum rate, need not comply with certain notification and bidding requirements, but that such release may not exceed the maximum rate. Notice of the release "must be provided on the pipeline's electronic bulletin board as soon as possible, but not later than forty-eight hours, after the release transaction commences."

> The Commission reiterates that *all* terms and conditions for capacity release must be posted and non-discriminatory and must relate solely to the details of acquiring transportation on the interstate pipelines. Release of capacity cannot be tied to any other conditions. Moreover, the Commission will not tolerate deals undertaken to avoid the notice requirements of the regulations. Order No. 636-A at 30, 559 (emphasis in the original).

11. Subsequent to the Commission's adoption of its capacity release program in Order No. 636, the Commission conducted two experimental programs to provide more flexibility in the capacity release market. In 1996, the Commission sought to establish an experimental program inviting individual shipper and pipeline applications to remove price ceilings related to capacity release.[14] The Commission recognized that significant benefits could be realized through removal of the price ceiling in a competitive secondary market. Removal of the ceiling permits more efficient capacity utilization by permitting prices to rise to market clearing levels and by permitting those who place the highest value on the capacity to obtain it.[15]

12. In 2000, in Order No. 637, the Commission conducted a broader experiment in which the Commission removed the rate ceiling for short-term (less than one year) capacity release transactions for a two-year period ending September 30, 2002. In contrast to the experiment that it conducted in 1996, in the Order No. 637 experiment the

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[14] Secondary Market Transactions on Interstate Natural Gas Pipelines, Proposed Experimental Pilot Program to Relax the Price Cap for Secondary Market Transactions, 61 Fed. Reg. 41401 (Aug. 8, 1996), 76 FERC ¶ 61,120, order on reh'g, 77 FERC ¶ 61,183 (1996).

[15] 77 FERC ¶61,183 (1996) at 61,699.

Commission granted blanket authorization in order to permit all firm shippers on all open access pipelines to participate. The Commission stated that it undertook this experiment to improve shipper options and market efficiency during peak periods. The Commission reasoned that during peak periods, the maximum rate cap on capacity release transactions inhibits the creation of an effective transportation market by preventing capacity from going to those that value it the most and therefore the elimination of this rate ceiling would eliminate this inefficiency and enhance shipper options in the short-term marketplace.[16]

13. Upon an examination of pricing data on basis differentials between points,[17] the Commission found that the price ceiling on capacity release transactions limited the

[16] Order No. 637at 31,263. The Commission also explained why it was lifting the price cap on an experimental basis, instead of permanently, stating:

> While the removal of the price cap is justified based on the record in this rulemaking, the Commission recognizes that this is a significant regulatory change that should be subject to ongoing review by the Commission and the industry. No matter how good the data suggesting that a regulatory change should be made, there is no substitute for reviewing the actual results of a regulatory action. The two year waiver will provide an opportunity for such a review after sufficient information is obtained to validly assess the results. Due to the variation between years in winter temperatures, the waiver will provide the Commission and the industry with two winter's worth of data with which to examine the effects of this policy change and determine whether changes or modifications may be needed prior to the expiration of the waiver. Order No. 637 at 31,279.

[17] Among other things, the data showed that the value of pipeline capacity, as shown by basis differentials, was generally less than the pipelines' maximum interruptible transportation rates, except during the coldest days of the year, and capacity release prices also averaged somewhat less than pipelines' maximum interruptible rates.

capacity options of short-term shippers because firm capacity holders were able to avoid price ceilings on released capacity by substituting bundled sales transactions at market prices (where the market place value of transportation is an implicit component of the delivered price). As a consequence, the Commission determined that the price ceilings did not limit the prices paid by shippers in the short-term market as much as the ceilings limit transportation options for shippers. In short, the Commission found that the rate ceiling worked against the interests of short-term shippers, because with the rate ceilings in place, a shipper looking for short-term capacity on a peak day who was willing to offer a higher price in order to obtain it, could not legally do so; this reduced its options for procuring short-term transportation at the times that it needed it most.[18] Throughout this experiment, the Commission retained the rate ceiling for firm and interruptible capacity available from the pipeline as well as long-term capacity release transactions.

14. On April 5, 2002, the United States Court of Appeals for the District of Columbia Circuit, in Interstate Natural Gas Association of America v. FERC,[19] upheld the Commission's experimental price ceiling program for short-term capacity release transactions as set forth in Order No. 637.[20] The court found that the Commission's "light

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[18] Order No. 637 at 31,282.

[19] 285 F.3d 18 (D.C. Cir. 2002) (INGAA)

[20] Specifically, the court found that: "[g]iven the substantial showing that in this context competition has every reasonable prospect of preventing seriously monopolistic pricing, together with the non-cost advantages cited by the Commission and the experimental nature of this particular "lighthanded" regulation, we find the Commission's decision neither a violation of the NGA, nor arbitrary or capricious." INGAA at 35.

handed" approach to the regulation of capacity release prices was, given the safeguards that the Commission had imposed, consistent with the criteria set forth in Farmers Union Cent. Exch. v. FERC.[21] The court found that the Commission made a substantial record for the proposition that market rates would not materially exceed the "zone of reasonableness" required by Farmers Union. The court also found that the Commission's inference of competition in the capacity release market was well founded, that the price spikes shown in the Commission's data were consistent with competition and reflected scarcity of supply rather than monopoly power, and that outside of such price spikes, the rates were well below the estimated regulated price.[22]

B. Petitions and Industry Comments

15. In August 2006, Pacific Gas and Electric Co. (PG&E) and Southwest Gas Corp. (Southwest) filed a petition requesting the Commission to amend sections 284.8(e) and (h) (1) of its regulations to remove the maximum rate cap on capacity release transactions.[23] They stated that removing the price ceiling would improve the efficiency of the capacity market by giving releasing shippers a greater incentive to release their capacity during periods of constraint. They asserted that this would allow shippers who value the capacity the most to obtain it, provide more accurate price signals concerning

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[21] 734 F.2d 1486 (D.C. Cir. 1984) (Farmers Union).

[22] Id. at 33.

[23] Docket No. RM06-21-000. PG&E subsequently clarified that it only seeks removal of the price cap for capacity releases of less than a year.

the value of capacity, and provide greater potential cost mitigation to holders of long-term firm capacity. They also pointed out that the Commission now permits pipelines to negotiate rates with individual customers using basis differentials (i.e., the difference between natural gas commodity prices at two trading points, such as a supply basin and a city gate delivery point) and such negotiated rates may exceed the pipeline's recourse maximum rate. PG&E and Southwest assert that releasing shippers must have greater pricing flexibility in order to compete with such negotiated rate deals offered by the pipelines.

16. In October 2006, a group of large natural gas marketers[24] (Marketer Petitioners) requested clarification of the operation of the Commission's capacity release rules in the context of asset (or portfolio) management services.[25] An AMA is an agreement under which a capacity holder releases, on a pre-arranged basis, all or some of its pipeline capacity, along with associated gas purchase contracts, to an asset or portfolio manager. The asset manager uses the capacity to satisfy the gas supply needs of the releasing shipper, and, when the capacity is not needed to serve the releasing shipper, the asset manager uses it to make gas sales or re-releases the capacity to third parties.

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[24] Coral Energy Resources, LP; ConocoPhillips Co.; Chevron USA, Inc.; Constellation Energy Commodities Group, Inc.; Tenaska Marketing Ventures; Merrill Lynch Commodities, Inc.; Nexen Marketing USA, Inc.; and UBS Energy LLC.

[25] The Marketer Petitioners originally filed their petition in Docket Nos. RM91-11-009 and RM98-10-013. However, the Commission has re-docketed the petition in Docket No. RM07-4-000.

17. The Marketer Petitioners state that Order No. 636 adopted the capacity release program as a means for shippers to transfer unneeded capacity to other entities who desired it. However, the Marketer Petitioners state, today many local distribution companies (LDCs) and others desire to release their capacity to a replacement shipper (asset manager) with greater market expertise, who will continue to use the capacity to provide gas supplies to the releasing shipper and will be better able to maximize the value of the released capacity when it is not needed to serve the releasing shipper. The Marketer Petitioners state that the Commission's current capacity release rules may interfere with marketers providing efficient asset management services. They also assert that they are not seeking to remove the capacity release rate cap, but acknowledge that if the Commission took such action, it would eliminate some of their problems.

18. On January 3, 2007, the Commission issued a request for comments on the current operation of the Commission's capacity release program and whether changes in any of its capacity release policies would improve the efficiency of the natural gas market.[26] The Commission's request for comments was in part in response to the petitions discussed above. In addition to the issues raised by the petitions, the Commission also included in its request for comments a series of questions asking whether the Commission should lift the price ceiling, remove its capacity release bidding requirements, modify its prohibition on tying arrangements, and/or remove the shipper-must-have-title requirement.

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[26] Pacific Gas & Electric Co., 118 FERC ¶ 61,005 (2007).

19. In response to the price ceiling issues, commenting LDCs and pipelines both advocate lifting the ceiling, subject to different conditions. The LDCs favor lifting the ceiling only if it would still apply to the pipeline's direct sales of capacity because, among other things, the pipelines have negotiated rate authority that is not available to releasing shippers.[27] The pipelines advocate the removal of the cap only if the Commission removes the cap from the entire capacity marketplace; otherwise, they argue, it will create a bifurcated market and an uneven playing field.

20. Producers and industrial customers generally oppose lifting the price ceiling on a permanent basis, arguing that the Commission must first develop new data to support such action and that it cannot rely on the results of the Order No. 637 experiment that terminated five years ago. Certain producers, however, would countenance a new experiment conducted by the Commission to gather new data related to the lifting of the price ceiling. Additionally, certain marketers and the American Public Gas Association (APGA) argue that the Commission cannot remove the ceiling unless there is a finding of lack of market power.

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[27] Under the negotiated rate program, a pipeline may charge rates different from those set forth in its open access tariff, as long as the shipper has recourse to taking service at the maximum tariff rate. See, Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines, 74 FERC ¶ 61,076, reh'g denied, 75 FERC ¶ 61,024 (1996), petitions for review denied sub nom., Burlington Resources Oil & Gas Co. v. FERC, 172 F.3d 918 (D.C. Cir. 1998). See also Natural Gas Pipelines Negotiated Rate Policies and Practices; Modification of Negotiated Rate Policy, 104 FERC ¶ 61,134 (2003), order on reh'g and clarification, 114 FERC ¶ 61,042, dismissing reh'g and denying clarification, 114 FERC ¶ 61,304 (2006).

21. In response to the request for comments on whether the Commission should consider adjusting the capacity release regulations to foster AMAs, numerous commenters responded that AMAs are beneficial to the market place and that the Commission should do something to facilitate their use. A vast majority of the commenters assert that AMAs provide substantial benefits, including more load responsive use of gas supply, greater liquidity, increased use of transportation capacity, cost effective procurement vehicles for LDCs and other end users, and the enhancement of competition. They state that AMAs also relieve LDCs from management of their daily gas supply and capacity needs. Others comment that AMAs benefit all parties involved: the releasing shipper reduces its costs through use of its capacity entitlements to facilitate third party sales; the third parties benefit from receiving a bundled product at an acceptable price; and the asset manager receives whatever profits are not passed on to the releasing shipper.

22. In particular, the Marketer Petitioners and other commenters request that the Commission clarify that the different payments made between parties in an AMA do not constitute prohibited above maximum rate transactions or below maximum rate transactions that thus require posting and bidding. They also request that the Commission revisit its prohibition on tying to allow the packaging of gas supply contracts and pipeline or storage capacity, or multiple segments of capacity, as part of an AMA. Certain commenters also suggest changes to the Commission's notice and bidding requirements for capacity releases. A number of LDCs and marketers request that the

bidding requirement be eliminated altogether or that the regulations be revised to eliminate bidding for capacity releases made to implement an AMA.

II. Removal of Maximum Rate Ceiling for Short-Term Capacity Release

23. Based upon its review of the petitions, comments and available data, the Commission proposes to lift the price ceiling for short-term capacity release transactions of one year or less. The Commission's capacity release program has created a successful secondary market for capacity.[28] Commenters from disparate segments of the natural gas industry agree that the capacity release program has been beneficial to the industry in creating a competitive secondary market for natural gas transportation. [29]

24. As the comments point out, shippers and potential shippers are looking for greater flexibility in the use of capacity. They seek to better integrate capacity with the underlying gas transactions, and are looking for more flexible methods of pricing

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[28] As the Commission observed in 2005, the "capacity release program together with the Commission's policies on segmentation, and flexible point rights, has been successful in creating a robust secondary market where pipelines must compete on price." Policy for Selective Discounting by Natural Gas Pipelines, 111 FERC ¶ 61,309 at P 39-41)(2005), order on reh'g, 113 FERC ¶ 61,173 (2005).

[29] See e.g., PG&E and Southwest Gas Petition at 10 ("There is reason to believe that the secondary market is more competitive today than it was six years ago."); Market Petitioners at 3 ("The Commission's capacity release program has proven to be a critical initiative in opening U.S. natural gas markets to competition."); AGA Comments at 3 ("The Commission's regulations have permitted the development of an open and active secondary market for pipeline capacity that has provided significant benefits to natural gas consumers."); INGAA Comments at 12 ("The current market for short-term transportation capacity is large and highly competitive."); and NGSA Comments at 2 ("The basic structure of the Commission's policies is still providing the benefits intended of transparent, nondiscriminatory, efficient allocation of capacity.").

capacity to better reflect the value of that capacity as revealed by the market price of gas at different trading points. Pipelines, for example, have been using their negotiated rate authority to sell their own capacity based on market-derived basis differentials reflective of the difference in gas prices between two points. The Commission recently clarified that pipelines may use such basis differential pricing as a part of negotiated rate transactions even when those prices exceed maximum tariff rates.[30] Under the Commission's regulations, releasing shippers also may enter into capacity release transactions based on basis differentials, but such releases cannot exceed the maximum rate.[31] In their comments, releasing shippers request the ability to release at above the maximum rate so that they may offer potential buyers rates competitive with pipeline negotiated rate transactions.[32]

25. As the Commission recognized in Order No. 637,[33] the traditional cost-of-service price ceilings in pipeline tariffs, which are based on average yearly rates, are not well

[30] Natural Gas Pipelines Negotiated Rate Policies and Practices; Modification of Negotiated Rate Policy, 104 FERC ¶ 61,134 (2003), order on reh'g and clarification, 114 FERC ¶ 61,042, dismissing reh'g and denying clarification, 114 FERC ¶ 61,304 (2006).

[31] See Standards for Business Practices for Interstate Natural Gas Pipelines and for Public Utilities, Order No. 698, 72 FR 38757 (July 16, 2007), FERC Stats. & Regs. ¶ 31,251 (June 25, 2007).

[32] See, e.g., PG&E and Southwest Gas Petition at 10-11.

[33] Order No. 637 at 31,271-75.

suited to the short-term capacity release market.[34] Removal of the price ceiling will enable releasing shippers to offer competitively-priced alternatives to the pipelines' negotiated rate offerings. Removal of the ceiling also permits more efficient utilization of capacity by permitting prices to rise to market clearing levels, thereby permitting those who place the highest value on the capacity to obtain it. Removal of the price ceiling also will provide potential customers with additional opportunities to acquire capacity. The price ceiling reduces the firm capacity holders' incentive to release capacity during times of scarcity, because they cannot obtain the market value of the capacity.

26. Further, the elimination of the price ceiling for short-term capacity releases will provide more accurate price signals concerning the market value of pipeline capacity. More accurate price signals will promote the efficient construction of new capacity by highlighting the location, frequency, and severity of transportation constraints. Correct capacity pricing information will also provide transparent market values that will better enable pipelines and their lenders to calculate the potential profitability and associated risk of additional construction designed to alleviate transportation constraints.

27. Moreover, removing the price ceiling on short-term capacity releases should not harm, and may benefit, the "primary intended beneficiaries of the NGA – the 'captive'

[34] While the Commission offered pipelines the opportunity to propose other types of rate designs, such as seasonal and term-differentiated rates, only a very few pipelines have sought to make such rate design changes, although virtually all pipelines have taken advantage of negotiated rate authority.

shippers."[35] Those shippers typically have long-term firm contracts with the pipeline, and therefore will "continue to receive whatever benefits the rate ceilings generally provide," while also "reaping the benefits of [the] new rule, in the form of higher payments for their releases of surplus capacity."[36]

28. As the court stated in INGAA, the Commission may depart from cost of service ratemaking upon:

> a showing that ... the goals and purposes of the statute will be accomplished 'through the proposed changes.' To satisfy that standard, we demanded that the resulting rates be expected to fall within a 'zone of reasonableness, where [they] are neither less than compensatory nor excessive.'[citation omitted]. While the expected rates' proximity to cost was a starting point for this inquiry into reasonableness, [citation omitted], we were quite explicit that 'non-cost factors may legitimate a departure from a rigid cost-based approach,' [citation omitted]. Finally, we said that FERC must retain some general oversight over the system, to see if competition in fact drives rates into the zone of reasonableness 'or to check rates if it does not.'[37]

29. Many of the changes effected in Order Nos. 636 and 637 have enhanced competition between releasing shippers as well as between releasing shippers and the pipeline. As discussed below, the data obtained by the Commission both during the Order No. 637 experiment and more recently confirms the finding made in Order No. 637 that short-term release prices are reflective of market prices as revealed by basis

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[35] INGAA at 33.

[36] Id.

[37] Id. at 31.

differentials, rather than reflecting the exercise of market power. Moreover, shippers purchasing capacity will be adequately protected because the pipeline's firm and interruptible services will provide just and reasonable recourse rates limiting the ability of releasing shippers to exercise market power. Finally, the reporting requirements in Order No. 637 and the Commission's implementation of the Energy Policy Act of 2005, specifically with respect to market manipulation, provide the Commission with enhanced ability to monitor the market and detect and deter abuses.

A. <u>Policies Enhancing Competition</u>

30. In Order No. 636 and, as expanded in Order No. 637, the Commission instituted a number of policy revisions designed to enhance competition and improve efficiency across the pipeline grid. These revisions provide shippers with enhanced market mechanisms that will help ensure a more competitive market and mitigate the potential for the exercise of market power.

31. The Commission required pipelines to permit releasing shippers to use flexible point rights and to fully segment their pipeline capacity. Flexible point rights enable shippers to use any points within their capacity path on a secondary basis, which enables shippers to compete effectively on release transactions with other shippers. Segmentation further enhances the ability to compete because it enables the releasing shipper to retain the portion of the pipeline capacity it needs while releasing the unneeded portion. Effective segmentation will make more capacity available and enhance competition. As the Commission explained in Order No. 637:

> The combination of flexible point rights and segmentation increases the alternatives available to shippers looking for capacity. In the example,[38] a shipper in Atlanta looking for capacity has multiple choices. It can purchase available capacity from the pipeline. It can obtain capacity from a shipper with firm delivery rights at Atlanta or from any shipper with delivery point rights downstream of Atlanta. The ability to segment capacity enhances options further. The shipper in New York does not have to forgo deliveries of gas to New York in order to release capacity to the shipper seeking to deliver gas in Atlanta. The New York shipper can both sell capacity to the shipper in Atlanta and retain the right to inject gas downstream of Atlanta to serve its New York market.[39]

32. In addition to enhancing competition through expansion of flexible point rights and segmentation, the Commission in Order No. 637 also required pipelines to provide shippers with scheduling equal to that provided by the pipeline, so that replacement shippers can submit a nomination at the first available opportunity after consummation of the capacity release transaction. The change makes capacity release more competitive with pipeline services and increases competition between capacity releasers by enabling replacement shippers to schedule the use of capacity obtained through release transactions quickly rather than having to wait until the next day.

[38] In the example used in Order No. 636, a shipper holding firm capacity from a primary receipt point in the Gulf of Mexico to primary delivery points in New York could release that capacity to a replacement shipper moving gas from the Gulf to Atlanta while the New York releasing shipper could inject gas downstream of Atlanta and use the remainder of the capacity to deliver the gas to New York.

[39] Order No. 637 at 31,300.

B. Data on Capacity Release Transactions

33. The data accumulated by the Commission during the Order No. 637 experiment, as well as review of more recent data, show that capacity release prices reflect competitive conditions in the industry. On May 30, 2002, the Commission issued a notice of staff paper presenting data on capacity release transactions during the experimental period when the capacity release ceiling price was waived.[40] The staff paper provided analysis of capacity release transactions on 34 pipelines during the 22-month period from March 2000 to December 2001.[41]

34. In brief, the data gathered during the 33-month period show that without the price ceiling, prices exceeded the maximum rate only during short time periods and appear to be reflective of competitive conditions in the industry. The following table shows the distribution of above ceiling price releases among the pipelines studied.

Table I
Above Cap Releases by Pipeline
Releases Awarded Between March 26, 2000 and December 31, 2001

Pipeline	Releases Above Max Rate (Number of Transactions)	% of Total Releases	Release Quantity Above Max Rate (MMBtu/day)	% of Total Release Quantity
Algonquin	1	0.1	18,453	0.2
ANR Pipeline	1	0.1	30,000	0.2

[40] On May 30, 2002, a Staff Paper was posted on the Commission's web site presenting, and analyzing data on capacity release transactions relating to the experimental period when the rate ceiling on short-term released capacity was waived.

[41] Many of these release transactions would have occurred prior to completion of the pipeline's Order No. 637 compliance proceedings and the implementation of the changes to flexible point rights, segmentation and scheduling described above.

CIG	19	6.5	109,984	4.4
Dominion (CNGT)	21	1.0	65,789	0.7
Columbia Gas	101	4.4	374,727	2.7
Columbia Gulf	.	.	.	.
East Tennessee	.	.	.	.
El Paso	135	13.3	631,683	12.5
Florida Gas	25	1.7	43,526	1.4
Great Lakes	3	1.3	15,000	0.6
Iroquois	.	.	.	.
Kern River	2	3.9	55,000	2.5
KMI (KNEnergy)	3	1.0	1,409	0.0
Gulf South (Koch)	.	.	.	.
Midwestern	1	0.6	50,000	2.3
Mississippi River	.	.	.	.
Mojave Pipeline Co.	1	2.6	40,000	4.7
Natural Gas Pipeline Co.	16	3.2	270,489	2.3
Reliant (Noram)	.	.	.	.
Northern Border	.	.	.	.
Northern Natural	12	1.6	23,273	0.5
Northwest Pipeline	24	1.8	139,850	4.1
Paiute Pipeline	.	.	.	.
Panhandle Eastern	1	0.4	1,000	0.1
Southern Natural	7	0.3	24,101	0.2
Tennessee Gas	11	0.4	36,421	0.2
TETCO	122	3.8	645,856	3.3
Texas Gas	6	0.5	103,237	1.0
Trailblazer	3	25.0	15,000	10.0
Transco	183	3.3	1,540,885	4.1
Transwestern	11	4.5	64,058	6.5
Trunkline	.	.	.	.
Williams	4	0.4	16,500	0.3
Williston Basin	.	.	.	.
Total	713	2.2	4,316,241	2.1

35. These data show that during periods without capacity constraints, prices remained at or below the maximum rate. The staff paper does identify 713 releases above the ceiling price, representing an average total capacity release contract volume of 4.3 billion

cubic feet (Bcf) per day. However, the staff paper reflects that these above-ceiling price releases represented only a small portion of the total releases on these pipelines, comprising approximately two percent of total transactions on the pipelines studied for the entire period, and two percent of gas volumes. Further, above ceiling releases accounted for no more than six or seven percent of transactions during any given month of the period. As one would expect, the percentages of releases occurring above the ceiling increased during peak periods. However, average release rates were higher by only one cent per MMBtu per day or five and one-half percent higher than they would have been with the price ceiling in place. Of the 34 pipelines in the study, 10 reported no releases above the ceiling price, and 20 pipelines reported fewer than 25 above-ceiling price releases. The data gathered during this 22-month period reflects the Commission's expectations and affirms the Commission's findings in the Order No. 637 proceeding. As the court stated in INGAA:

> the data represented in the graph [] do support the Commission's view that the capacity release market enjoys considerable competition. The brief spikes in moments of extreme exigency are completely consistent with competition, reflecting scarcity rather than monopoly. … [citation omitted] A surge in the price of candles during a power outage is no evidence of monopoly in the candle market.[42]

36. Several commenters argue that the data gathered by the Commission is too stale to support the instant proposal to remove the price ceiling on short-term capacity releases. However, these commenters fail to produce any evidence to support specific concerns

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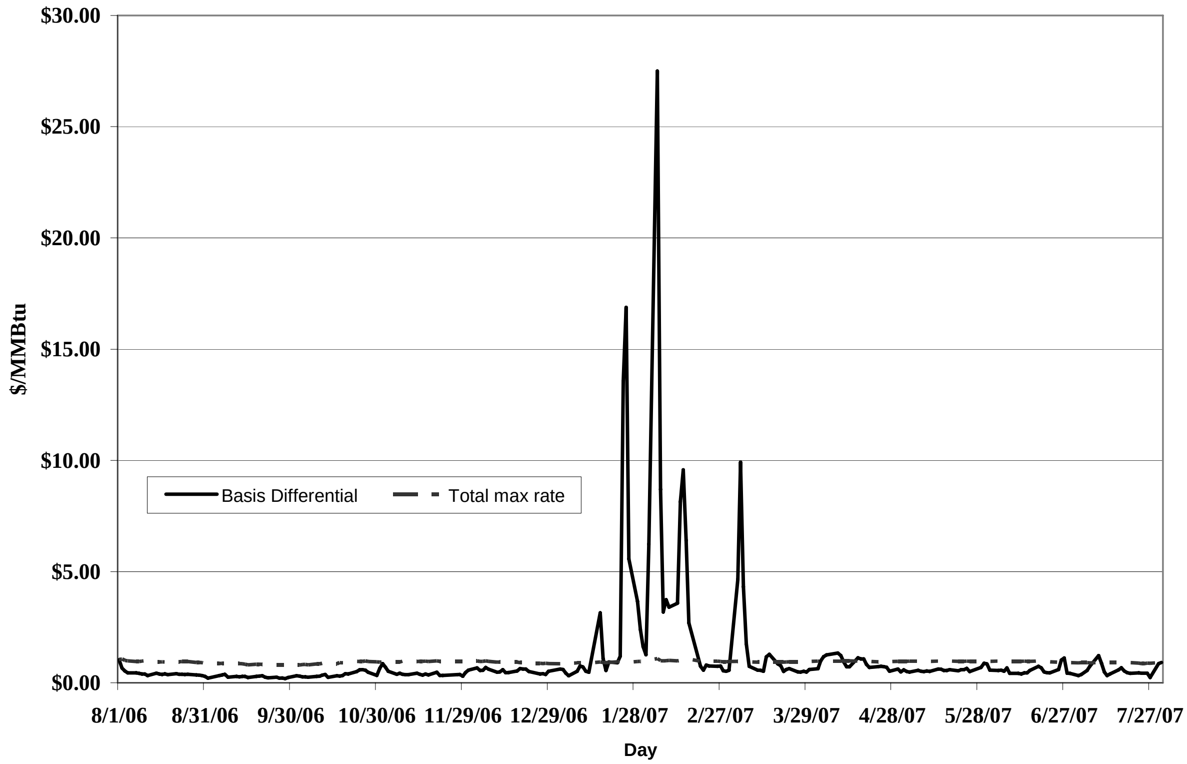
[42] INGAA at 32.

existing today that did not exist during the experimental period. Moreover, the Commission has gathered additional current data and has replicated the evidence presented in Order No. 637. The current data shows that the conditions that existed at the time of Order No. 637 and during the past experimental period continue in today's marketplace.

37. Figure 1 illustrates the fluctuations in the market value of transportation service, as shown by the basis differentials between Louisiana and New York City. This graph compares the daily difference in gas prices between Louisiana and New York City to Transcontinental Gas Pipe Line Corporation's maximum interruptible transportation rate, including fuel retainage, during the 12 months ending July 31, 2007. This graph shows that for most of the year, the value of transportation service, as indicated by the basis differentials, is less than the maximum transportation rate. However, during brief, peak demand periods, the value of transportation service is measurably greater than the maximum transportation rate. For example, on February 5, 2007, the basis differential between Louisiana and New York City was in excess of $27.00 per MMBtu, while the maximum tariff rate plus the cost of fuel was approximately $1.08 per MMBtu.[43]

[43] In Order No. 637, the Commission presented similar data in figure 6 showing the implicit transportation value between South Louisiana and Chicago. Order No. 637 at 31,274.

Figure 1 -- Daily Gas Price Differentials Louisiana to New York (12 Months Ending July 2007)



38. Figures 2 and 3 below reflect that a similar pattern of transportation value is evident in other areas of the country. Focusing on fluctuations in the market value of transportation service as shown by basis differentials between Louisiana and Chicago and between the Permian Basin and the California border, respectively, these figures show that for most of the year, the value of transportation service is less than the maximum transportation rate of Natural Gas Pipeline Company of America and El Paso Natural Gas Company, respectively. However, similar to figure 1, these figures also reflect that during brief, peak-demand periods, the value of transportation service is measurably greater than the maximum transportation rate.

Figure 2 -- Gas Price Differentials NGPL La. To Chicago

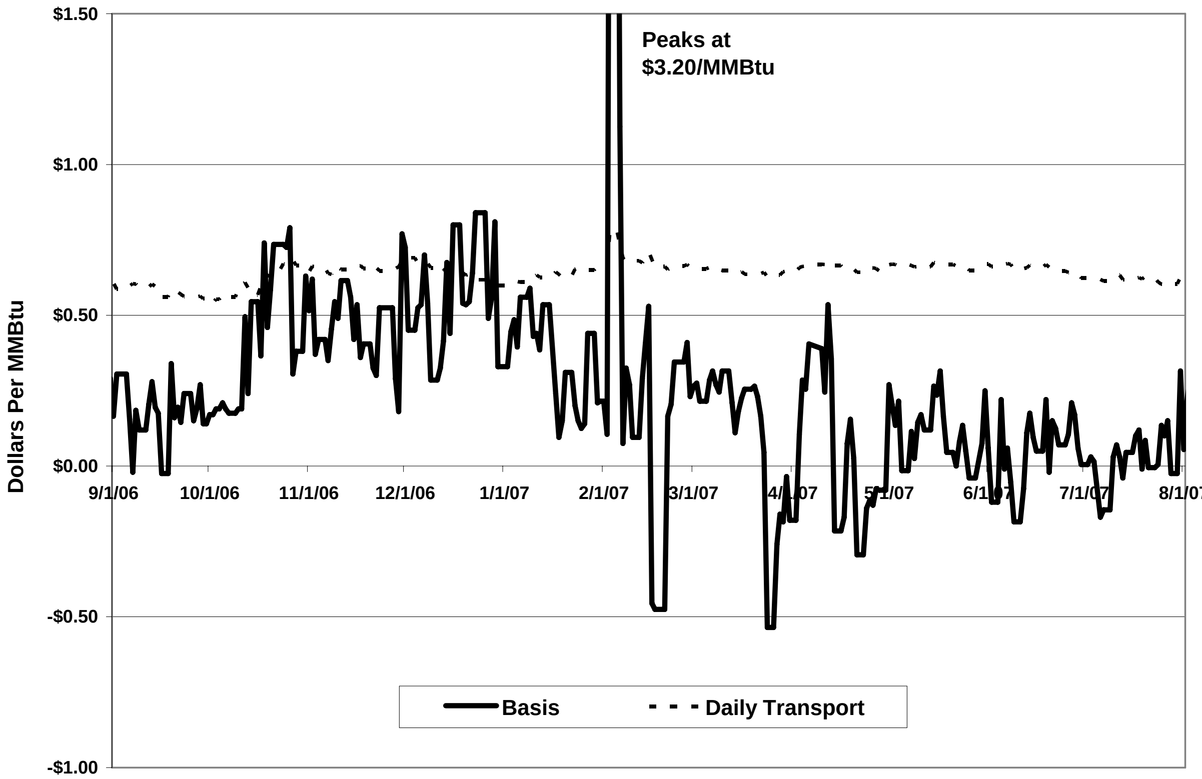
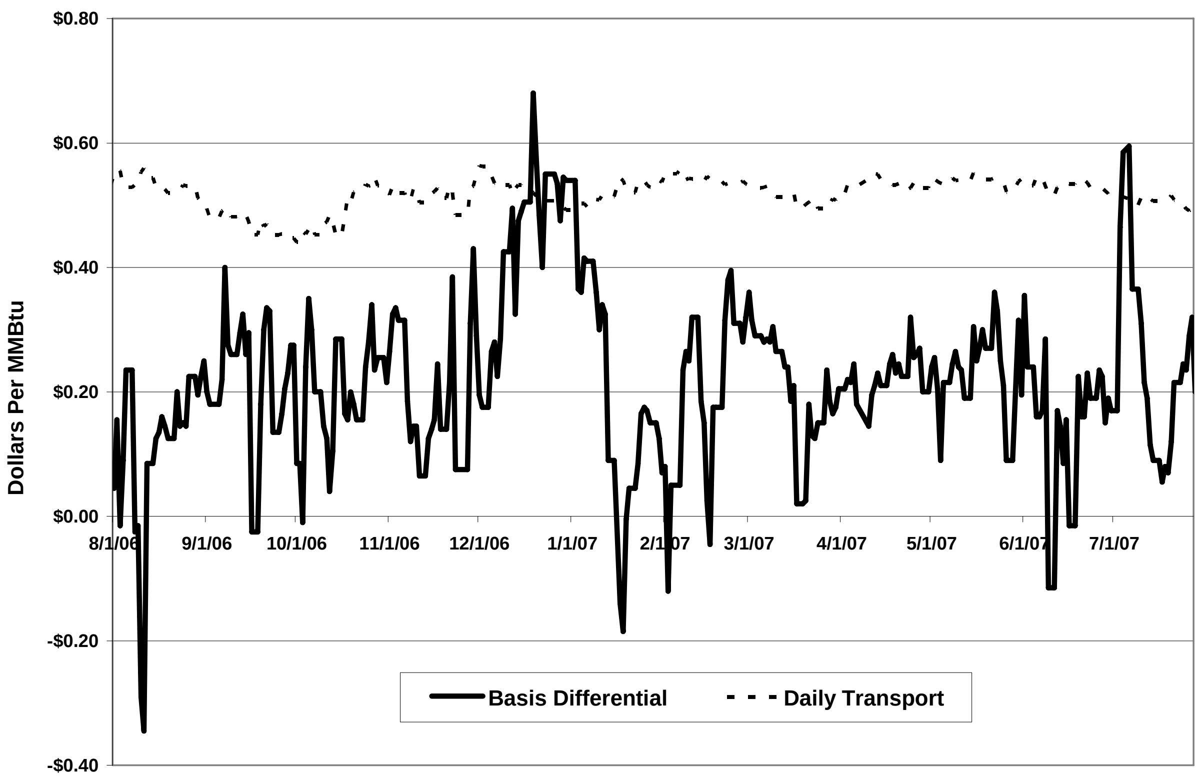


Figure 3 -- Gas Price Differentials for Permian Basin to California Border (SoCal Gas)



39. The data in all three of the above figures reflect similar market conditions to the data that the Commission relied upon in lifting the price ceiling for short-term capacity releases in Order No. 637, with the market value of capacity generally below the pipeline's maximum rate except for relatively brief price spikes.[44] In affirming the Commission's actions, the court in INGAA found that the data presented by the Commission constituted a substantial basis for the conclusion that a considerable amount of competition existed in the capacity release market. Further, the INGAA court

[44] Order No. 637 at 31,273-75.

concluded that the price spikes reflected in the data were consistent with competition and that such spikes reflected scarcity rather than monopoly.[45]

C. Available Pipeline Service Constrains Market Power Abuses

40. The Commission envisions that under the instant proposal the pipeline's open access transportation maximum tariff rates (recourse rates) will serve as additional protection against possible abuses of market power by releasing shippers. The Commission requires pipelines to sell all their available capacity to shippers willing to pay the pipeline's maximum recourse rate.[46] Under their negotiated rate authority, pipelines are free to negotiate individualized rates with particular shippers that may be above the maximum tariff rate, subject to several conditions including the availability of the maximum tariff rate as a recourse rate for potential firm shippers.[47] As the Commission explained in its negotiated rate policy statement, "[t]he availability of a recourse service would prevent pipelines from exercising market power by assuring that

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[45] INGAA at pp. 31- 32.

[46] Tennessee Gas Pipeline Co., 91 FERC ¶ 61,053 (2002), reh'g denied, 94 FERC ¶ 61,097 (2001), petitions for review denied sub nom., Process Gas Consumers Group v. FERC, 292 F.3d 831, 837 (D.C. Cir. 2002).

[47] See, Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines, 74 FERC ¶ 61,076, reh'g denied, 75 FERC ¶ 61,024 (1996), petitions for review denied sub nom., Burlington Resources Oil & Gas Co. v. FERC, 172 F.3d 918 (D.C. Cir. 1998). See also Natural Gas Pipelines Negotiated Rate Policies and Practices; Modification of Negotiated Rate Policy, 104 FERC ¶ 61,134 (2003), order on reh'g and clarification, 114 FERC ¶ 61,042, dismissing reh'g and denying clarification, 114 FERC ¶ 61,304 (2006).

the customer can fall back to traditional cost-based service if the pipeline unilaterally demands excessive prices or withholds service."[48]

41. The court in INGAA recognized the value of the pipeline's recourse rate protecting against possible abuses of market power by releasing shippers stating that,

> [i]f holders of firm capacity do not use or sell all of their entitlement, the pipelines are required to sell the idle capacity as interruptible service to any taker at no more than the maximum rate – which is still applicable to the pipelines.[49]

Removing the price ceiling for short-term capacity release transactions will enable releasing shippers to offer negotiated rate transactions similar to those offered by the pipelines. Moreover, the same pipeline open access service will protect against the possibility that a releasing shipper will attempt to exercise market power by withholding capacity. For example, should a releasing shipper attempt to charge a price above competitive levels, the potential purchaser could seek to negotiate a more acceptable rate with the pipeline. Even when the pipeline's firm service is not available, a cost based interruptible rate is always available as an alternative when a releasing shipper attempts to withhold capacity.

D. Monitoring

42. Order No. 637 improved the Commission's and the industry's ability to monitor capacity release transactions by requiring daily posting of these transactions on pipeline

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[48] Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines, 74 FERC ¶ 61,076 at 61,240 (1996).

[49] INGAA *at* 32.

web sites.[50] This has increased the information available to buyers while at the same time making it easier for the Commission to identify situations in which shippers are abusing their market power.[51] Further, the Commission will entertain complaints and respond to specific allegations of market power on a case-by-case basis if necessary. Furthermore, the Commission will direct staff to monitor the capacity release program and, using all available information , issue a report on the general performance of the capacity release program, within six months after two years of experience under the new rules.

E. Requests to Expand Market-Based Rate Authority

1. Removal of Price Ceiling for Long-Term Releases

43. Several commenters request that the Commission remove the price ceiling on long-term capacity releases in addition to eliminating the price ceiling on short-term capacity releases. The Commission declines to make such an adjustment to its policies at this time for several reasons. As discussed above, by lifting the price ceiling for short-term capacity releases, the Commission seeks to provide releasing shippers the flexibility to price their capacity in a manner consistent with the short-term price variations in transportation capacity market values. This action will ameliorate restrictions on the efficient allocation of capacity during the short-term periods when demand drives the value of transportation capacity above the current maximum rate.

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[50] 18 CFR §284.8 (2007).

[51] Order No. 637 at 31,283; Order No. 637-A at 31,558.

44. Limiting the removal of the release ceiling to short-term transactions will also serve as additional protection for potential replacement shippers. Such a limit will ensure that a replacement shipper cannot be locked into a transaction that is not protected by the maximum rate ceiling for more than one year. The expiration of such a short-term transaction would give the replacement shipper an opportunity to explore other options for satisfying its capacity needs. The replacement shipper could seek to negotiate a different price with its current releasing shipper or to obtain capacity from another releasing shipper or directly from the pipeline.[52] Any transaction in which the parties want to continue the release past one year would have to be re-posted for bidding to ensure that the capacity is allocated to the highest valued use. This bidding process could provide an opportunity for re-determining the current market value of the capacity.

45. Finally, because any such release of a year or less would have to be re-posted for bidding upon its expiration, the second release would be a new release separate from the first release, and thus such a second release of a year or less would also not be subject to the price ceiling. The Commission, however, requests comment on whether there should be any limit on the ability of releasing shippers to make multiple, consecutive short-term releases not subject to the price ceiling.

[52] Releasing and replacement shippers cannot simply roll over a short-term release transaction in order to extend the release beyond one year. The Commission's current regulations do not permit rollovers or extensions of capacity releases made at less than maximum rate or for less than 31 days without re-posting and bidding of that capacity. 18 CFR Section 284.8(h)(2007).

2. Removal of Price Ceiling for Pipeline Short-Term Transactions

46. Pipelines request that the Commission remove the price ceiling for primary pipeline capacity whether firm or interruptible. In sum, they argue that because the transportation of gas on pipelines has become sufficiently competitive, and because released capacity competes directly with primary short-term firm, interruptible transportation and storage services provided by interstate pipelines, the Commission should lift the rate ceiling on the entire short-term capacity market, not just on capacity releases. Further, they assert that because short-term firm and interruptible services compete directly with capacity release, the same market liquidity considerations that warrant lifting the ceiling on short-term releases support lifting the price ceiling in the primary market. The pipelines assert that the Commission should treat all holders of capacity equally, whether they are pipelines or releasing shippers.

47. The pipelines also assert that removing the price ceiling only on short-term capacity releases would bifurcate the single marketplace for natural gas transportation services. They argue that if prices for some of the capacity in the marketplace remain subject to a price ceiling while the price ceiling is removed for other forms of capacity, then once the capped capacity has been fully utilized, prices for the uncapped capacity will be higher than they would have been without any price ceiling at all. They assert that in affirming the Commission's experiment in removing the price ceiling for short-

term capacity releases, the court in INGAA recognized this economic cost and labeled it as a "cost of gradualism."[53]

48. The Commission is not proposing to remove the price ceiling for primary pipeline capacity. Pipelines already have significant ability to use market based pricing. Unlike capacity release transactions, pipelines, as discussed above, currently can enter into negotiated rate transactions above the maximum rate. Pipelines also may seek market based rates by making a filing with the Commission establishing that they lack market power in the markets they serve.[54] In addition, pipelines have the ability to propose seasonal rates for their systems, and therefore, recover more of their annual revenue requirement in peak seasons.[55]

49. Moreover, the Commission is concerned about removing rate ceilings for all pipeline transactions without the showings required above in order to protect against the possible exercise of market power. First, as discussed above, the price ceilings on pipeline capacity serve as an effective recourse rate for both pipeline negotiated rate transactions and capacity release transactions to prevent pipelines and releasing shippers

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[53] INGAA at 36.

[54] Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines and Regulation of Negotiated Transportation Services of Natural Gas Pipelines, 74 FERC ¶ 61,076 (1996).

[55] See Order No. 637 at 31,574 – 31, 581.

from withholding capacity.[56] Second, pipeline capacity is not identical to release capacity, because ownership of the pipeline capacity is likely to be more concentrated than capacity held by shippers for release. [57] Third, the Commission has found that it needs to regulate primary pipeline capacity to ensure that pipelines do not withhold capacity in the long-term by not constructing additional facilities. Because pipelines are in the best position to expand their own systems, cost-of-service rate ceilings help to ensure that pipelines have appropriate incentives to construct new facilities when needed. As the Commission found, "the only way a pipeline [can] create scarcity to force shippers to accept longer term contracts would be to refuse to build additional capacity when demand requires it."[58] As long as cost–of-service rate ceilings apply, however, "pipelines

[56] In Order No. 890, the Commission retained price ceilings on transportation capacity for transmission owners to provide similar recourse rate protection. Preventing Undue Discrimination and Preference in Transmission Service, Order No. 890, 72 Fed. Reg. 12, 266 (March 15, 2007), 12366, FERC Stats. & Regs. ¶ 31,241 at P 808-09 (2007).

[57] As the INGAA court stated:

> In fact the Commission's distinction is not unreasonable. Despite the absence of Herfindahl-Hirschman indices for non pipeline capacity holders, there seems every reason to suppose that their ownership of such capacity (in any given market) is not so concentrated as that of the pipelines themselves--the concentration that prompted Congress to impose rate regulation in the first place.

INGAA at 23-24, citing, FPC v. Texaco, 417 U.S. 380, 398 n.8 (1974).

[58] Regulation of Short-Term Natural Gas Transportation Services, 101 FERC ¶ 61,127, at P 12 (2002), aff'd, American Gas Ass'n v. FERC, 428 F.3d 255 (D.C. Cir. 2005). See also Tennessee Gas Pipeline Co., 91 FERC ¶ 61,053 (2000), reh'g denied, 94 FERC ¶ 61,097 (2001), aff'd, 292 F.3d 831 (D.C. Cir. 2002).

[will] have a greater incentive to build new capacity to serve all the demand for their service, than to withhold capacity, since the only way the pipeline could increase current revenues and profits would be to invest in additional facilities to serve the increased demand."[59] Similarly, as long as pipeline short-term services are subject to a cost of service rate, the pipelines will not limit their construction of new capacity to meet demand in order to create scarcity that increases short-term prices. Indeed, releases at above the maximum rate will indicate that pipeline capacity is constrained and demonstrate that constructing additional capacity could be profitable.

50. The pipelines also maintain that not removing the price ceiling for their capacity that competes with released capacity will bifurcate the market, resulting in possibly higher prices for the uncapped release market. They argue that where a portion of the supply of a good or service is subject to price controls, and demand exceeds (the price-controlled) supply at the fixed price, the market-clearing price in the uncontrolled segment will normally be higher than if no price controls were imposed on any of the supply. Purchasers placing a lower value on the good may nevertheless be able to purchase the price-controlled supply, thereby "using up" some of the aggregate supply that would otherwise be available to purchasers placing a higher value on the good. This alters the demand-supply ratio in the uncontrolled market, leading to a higher market clearing price in that market.

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[59] Id.

51. Because of the nature of the pipeline short-term capacity, we do not think that retaining the cost of service recourse rates for that capacity will create such pricing distortions. The premise of the pipelines' argument is that continued price controls on the pipeline's sales of short-term capacity will enable shippers placing a lower value on the capacity to "use up" some of the supply, thereby reducing the amount of capacity available for purchase by shippers placing a higher value on the capacity. This premise is incorrect. Short-term pipeline capacity is sold as interruptible transportation; therefore, firm capacity held by shippers will have scheduling priority over the pipeline's interruptible capacity. In essence, pipeline interruptible service is derived from existing shippers' decision not to use or release their firm capacity or from unsold pipeline capacity. Thus, even if a shipper placing a relatively low value on the capacity has a higher position on the pipeline's queue for price-controlled interruptible transportation, it is not guaranteed that it can acquire (or "use up") that capacity, leading to the supposed higher market clearing price. A firm shipper could always release its unused firm capacity to a replacement shipper who places a higher value on that capacity, thereby displacing the lower-value interruptible shipper.[60]

[60] For example, assume the maximum rate is $1.00 and there are several shippers. One shipper is willing to pay up to $1.00 for capacity, while the other shippers are willing to pay much higher rates. Even if the shipper placing the lowest value on the capacity was the highest on the pipeline' interruptible queue, it would not be able to acquire capacity at the $1.00 rate, because the other shippers could acquire released capacity by bidding above the maximum rate, thereby preventing the allocation of any interruptible service.

52. Moreover, even in the context of firm short-term pipeline capacity, the scenario posited by the pipelines would not result in higher market clearing prices as long as arbitrage exists. Any shipper with a higher queue position that acquires the pipeline capacity at the lower capped rate would have an incentive to resell that capacity to another shipper who places a higher value on the capacity, thus ensuring that the market clearing price will reflect all relevant demand.[61]

III. Asset Management Arrangements

A. Background

53. In general, AMAs are contractual relationships where a party agrees to manage gas supply and delivery arrangements, including transportation and storage capacity, for another party. Typically a shipper holding firm transportation and/or storage capacity on a pipeline or multiple pipelines temporarily releases all or a portion of that capacity along with associated gas production and gas purchase agreements to an asset manager (commonly a marketer). The asset manager uses that capacity to serve the gas supply requirements of the releasing shipper, and, when the capacity is not needed for that purpose, uses the capacity to make releases or bundled sales to third parties.

[61] The pipelines rely on an example in Order No. 637-B that was cited by the court in INGAA for the proposition that capping one part of the market will result in overall higher prices. But that example was in a very different context, a situation in which a releasing shipper in a retail access state provided released capacity at a preferential rate to one set of marketers that were obligated to serve retail load, while selling at an uncapped rate to other marketers. In the first place, this situation did not involve interruptible capacity. Moreover, unlike the case with pipeline capacity, the favored marketer could not arbitrage its lower price because it was committed to serving retail load.

54. While AMAs may be fashioned in a myriad of ways, there are several common components of these arrangements. First, the releasing shipper generally enters into a pre-arranged capacity release to an asset manager ostensibly at the maximum rate in order to avoid the bidding requirement. Second, the releasing shipper makes payments to the asset manager for the gas supply service performed by the asset manager for the releasing shipper. These payments may include the releasing shipper paying the asset manager: (1) the full cost of the released capacity (e.g., maximum rate) on the theory that the asset manager is using the released capacity to transport the releasing shipper's gas supplies, (2) a management fee for transportation-related tasks (e.g. nominations, scheduling, storage injections, etc.) associated with the asset manager's obligation to provide gas supplies to the releasing shipper, and (3) the asset manager's cost of purchasing gas supplies for the releasing shipper. Third, the asset manager generally shares with the releasing shipper the value it is able to obtain from the releasing shipper's capacity and supply contracts when those assets are not needed to supply the releasing shipper's gas needs. The asset manager obtains such value either by re-releasing the capacity or by using it to make bundled sales to third parties. The asset manager may share that value by: (1) paying a fixed "optimization" fee to the releasing shipper, (2) sharing profits pursuant to an agreed-upon formula, or (3) making its gas sales to the releasing shipper at a lower price.

55. In many instances the asset manager is chosen through a request for proposal (RFP) process. The RFP describes the details and terms and conditions of the proposed deal and seeks bids from service providers willing to provide the requested services.

The methodology for choosing a winning bidder under an RFP often reflects many different factors, including price, creditworthiness, experience, reliability, and flexibility, and it is clear that price is not always the determining factor. Some RFP procedures are state mandated, and thus, in those situations, the LDC must get approval from the state for the final agreement.

56. There are several ways in which the AMAs described above implicate the Commission's current regulations. The first relates to the Commission's prohibition against the "tying" of release capacity to any condition. As discussed above, the Commission instituted the prohibition against the tying of capacity in response to concerns that releasing shippers would attempt to add terms and conditions that would "tie the release of capacity to other compensation paid to the releasing shipper."[62] A critical component of many AMAs is that the releasing shipper wants to be able to require the replacement shipper (asset manager) to satisfy the supply needs of the releasing shipper and take assignment of the releasing shipper's gas supply agreements as a condition of obtaining the released capacity.

57. AMAs also have implications for the rate cap and bidding regulations. As noted, in an AMA, the releasing shipper typically enters into a prearranged deal to release all of its pipeline capacity at the maximum rate to the marketer. It is reasonable to surmise that the main reason for the maximum release rate is so the release will qualify for the

[62] Order No. 636-A at 30,559.

exemption from bidding of all maximum rate prearranged capacity releases.[63] By avoiding the requirement to post the release for bidding, the releasing shipper can ensure that the capacity will go to the asset manager whom the releasing shipper has determined will provide the most effective asset management services.

58. As described above, however, the releasing shipper may agree to rebate some or all of the demand charge to the marketer so that the marketer's actual cost of obtaining the capacity is something less than the maximum rate.[64] The Commission has held that

[63] 18 CFR §§284.8 (c) – (e). The Commission stated in Order No. 636-A that releasing shippers may include in their offers to release capacity reasonable and non-discriminatory terms and conditions to accommodate individual release situations, including provisions for evaluating bids. All such terms and conditions applicable to the release must be posted on the pipeline's electronic bulletin board and must be objectively stated, applicable to all potential bidders, and non-discriminatory. For example, the terms and conditions could not favor one set of buyers, such as end users of an LDC, or grant price preferences or credits to certain buyers. The pipeline's tariff also must require that all terms and conditions included in offers to release capacity be objectively stated, applicable to all potential bidders, and non-discriminatory. Order No. 636-A at 30,557.

[64] Typically, the releasing shipper first releases its upstream assets, including pipeline capacity, storage, and gas supply, to the asset manager at cost. During the remaining term of the deal the releasing shipper purchases delivered gas at the agreed upon rate, which is usually the transportation and storage costs plus the market price of gas, plus fees and less whatever sharing of efficiency gains the asset manager is able to achieve. Sometimes fees and shared efficiency gains are reflected in some agreed upon reduction in the price of delivered gas. (The details are subject to negotiation and vary tremendously.) Because the mechanics of capacity releases often require the releasing shipper to release pipeline capacity at the maximum rate, rather than a discounted rate that the releasing shipper may actually pay to the pipeline, some other consideration must be worked into the transaction to balance the difference between the discounted rate and the maximum rate at which the release is set.

such rebates render the release to be at less than the maximum rate, thereby requiring that the prearranged release be posted for bidding.[65]

59. Moreover, as described above, some AMAs may require the asset manager (replacement shipper) to pay fees to the releasing shipper. The Commission has ruled that if the prearranged release is at the maximum rate, such additional payments violate the maximum rate ceiling on capacity releases.[66]

60. Many commenters consider the applications of the Commission's policies and regulations described above as obstacles to fashioning AMAs. They request clarification of, or revisions to, the current policies and regulations to allow releasing shippers to

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[65] In Louis Dreyfus Energy Services, L.P, 114 FERC ¶ 61,246 (2006), the Commission stated that:

> [t]he Commission has held that any consideration paid by the releasing shipper to a prearranged replacement shipper must be taken into account in determining whether the prearranged release is at the maximum rate. For instance, where the replacement shipper agrees to pay the pipeline the maximum rate for the released capacity, but the releasing shipper agrees to make a payment to the replacement shipper, the release must be treated as a release at less than the maximum rate to which the posting and bidding requirements of sections 284.8(c) through (e) apply. Id. at P 15, citing, Pacific Gas Transmission Co. and Southern California Edison Co., 82 FERC ¶ 61,227 (1998).

[66] See Consumers Energy Co., 82 FERC ¶ 61,284, order approving, 84 FERC ¶ 61,240 (1998). See also Order No. 636-A at 30,561, where the Commission stated that capacity cannot be "resold at a rate including the pipeline marketing fee. The marketing fee is not part of the cost of transportation being released and the replacement shipper should not pay more than the maximum transportation rate for the capacity it is acquiring."

release a package of transportation or storage capacity and gas supply contracts to a willing party who will sell the gas to the releasing shipper and take assignment of the gas purchase contracts without running afoul of the prohibition against tying. Some commenters also request that the Commission clarify that packaging gas supply and pipeline capacity, or multiple segments of capacity, as part of an asset management arrangement, would not violate the Commission's prohibition against tying. Others suggest that the tying prohibition should be eliminated altogether or that bundling of pipeline capacity and gas commodity should be allowed as long as there is a legitimate business purpose.

61. A large number of commenters advocate elimination of the bidding requirement discussed above, particularly in the AMA context. These parties argue that there is no need for posting and bidding of capacity release transactions and state that it is unduly burdensome, makes it difficult to respond quickly to market opportunities to release, and no longer makes sense in terms of the arrangements being made in today's AMAs. Others contend that the bidding requirement is redundant in instances where states require that asset managers be selected in an RFP process, which results in a chosen asset manager and one or more pre-arranged capacity release transactions. They argue that a further bidding requirement compromises the integrity and efficiency of the RFP process at the state level. Commenters also argue that there should be no bidding in the AMA context because those transactions are not suited to a single auction methodology.

62. Below, we discuss the Commission's proposal to revise the Commission's capacity release policies to give releasing shippers greater flexibility to negotiate and

implement efficient AMAs. The proposal has two main parts: (1) modifications to the current prohibition against tying releases to other conditions; and, (2) modifications to current bidding requirements.

B. Discussion

63. The Commission proposes revisions to its prohibition on tying of release capacity and to section 284.8 of its regulations in order to facilitate the use of AMAs. Specifically, as discussed below, the Commission proposes two revisions to its capacity release policy and regulations to facilitate the use of AMAs. First, the Commission proposes to exempt AMAs from the prohibition against tying in order to permit a releasing shipper to require that the replacement shipper agree to supply the releasing shipper's gas requirements and to require the replacement shipper to take assignment of the releasing shipper's various gas supply arrangements, in addition to the released capacity. Second, the Commission proposes to eliminate the current bidding requirement for AMAs only, such that all releases to an asset manager, made in order to implement an AMA between the releasing shipper and the asset manager, are exempt from bidding. This would exempt from bidding all such releases, including those of less than one year for which we are proposing to remove the price ceiling and those of a year or more that are at rates below the continuing maximum rate for long-term capacity releases. Both of the exemptions above would also be limited to pre-arranged releases.

64. Gas markets in general, and the secondary release market in particular, have undergone significant development and change since the inception of the Commission's capacity release program. The Commission adopted the capacity release program in

Order No. 636 “so that shippers can reallocate unneeded firm capacity” to those who do need it.[67] The bidding requirement and the prohibition against tying the release to extraneous conditions were all part of the Commission’s fundamental goal of ensuring that such unneeded capacity would be reallocated to the person who values it the most. The Commission found that such “capacity reallocation will promote efficient load management by the pipeline and its customers and, therefore, efficient use of pipeline capacity on a firm basis throughout the year.”[68]

65. Thus, the Commission developed its capacity release policies and regulations based on the assumption that shippers would release their capacity only when they were not using the capacity to serve their own needs. For example, the Commission envisioned that LDCs with long-term contracts for firm transportation service up to the peak needs of their retail customers would, during off-peak periods, release that portion of capacity not needed to serve the lower off-peak demand of its retail customers. However, this basic assumption underlying the capacity release program does not hold true in the context of AMAs, a relatively recent development in the capacity release market that the Commission had not anticipated.

66. In the AMA context, the releasing shipper is not releasing unneeded capacity, but capacity that is needed to serve its own supply function and will be so used during the term of the release. Releasing shippers in the AMA context are releasing capacity for the

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[67] Order No. 636 at 30,418.

[68] Id.

primary purpose of transferring the capacity to entities that they perceive have greater skill and expertise both in purchasing low cost gas supplies, and in maximizing the value of the capacity when it is not needed to meet the releasing shipper's gas supply needs. In short, AMAs entail the releasing shipper transferring its capacity to another entity which will perform the functions the Commission expected releasing shippers would do for themselves – purchase their own gas supplies and release capacity or make bundled sales when the releasing shipper does not need the capacity to satisfy its own needs. The goal of the changes proposed by the Commission herein is to make the capacity release program more efficient by bringing it in line with the realities of today's secondary gas markets.

67. The Commission finds that AMAs provide significant benefits to many participants in the natural gas and electric marketplaces and to the secondary natural gas market itself. The American Gas Association (AGA), for example, notes that AMAs are an important mechanism used by LDCs to enhance their participation in the secondary market, and states that the growth and development of AMAs may represent the largest change since the Commission's market review in the Order No. 637 proceeding.[69] AMAs allow LDCs to increase the utilization of facilities and lower gas costs. They also provide the needed flexibility to customize arrangements to meet unique customer needs.[70] One important benefit of AMAs is that they allow for the maximization of the

[69] See Comments of AGA at 21.

[70] See e.g., Comments of New Jersey Natural Gas Company at 9.

value of capacity though the synergy of interstate capacity and natural gas as a commodity. As expressed by AGA:

> [AMAs] are widely utilized and provide considerable benefits, i.e. lower gas supply costs generated from offsets to pipeline capacity costs and gas supply arrangements more carefully tailored to the specific requirements of the market. These benefits are generated by assembling innovative arrangements in which the unbundled components – capacity, gas supply and other services – are combined in a manner such that the total value created by the arrangement exceeds the value of the individual parts.[71]

68. AMAs are also beneficial because they provide a mechanism for capacity holders to use third party experts to manage their gas supply arrangements, an opportunity the LDCs did not have prior to Order No. 636. The time, expense and expertise involved with managing gas supply arrangements is considerable and thus many capacity holders, and LDCs in particular, have come to rely on more sophisticated marketers to take on their requirements.[72] This results in benefits to the LDCs by allowing an entity with more expertise to manage their gas supply. The ability of LDCs to use AMAs as a means of relieving the burdens of administering their capacity or supply needs on a daily basis also works to the benefit of the entire market because that burden may at times result in LDCs not releasing unused capacity. [73]

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[71] AGA Comments at 14.

[72] See, e.g., Comments of BG Energy Merchants, LLC at 3-4; APGA Comments at 2-3; Comments of BG Energy Merchants, LLC at 8; Comments of the Marketer Petitioners at 11; and Comments of FPL Energy LLC at 10.

[73] See Comments of Marketer Petitioners at 11.

69. AMAs also provide LDCs and their customers a mechanism for offsetting their upstream transportation costs. AMAs often allow an LDC to reduce reservation costs that it normally passes on to its customers. They also foster market efficiency by allowing the releasing shipper to reduce its costs to the extent that its capacity is used to facilitate a third party sale that also benefits that third party (who gets a bundled product at a price acceptable to it).

70. LDCs are not the only entities that benefit from AMAs. Many other large gas purchasers, including electric generators and industrial users may desire to enter into such arrangements.[74] For example, AMAs increase the ability of wholesale electric generators to provide customer benefits through superior management of fuel supply risk, allow generators to focus their attention on the electric market, and eliminate administrative burdens relating to multiple suppliers, overheads, capital requirements and the risks associated with marketing excess gas and pipeline imbalances.[75]

71. More importantly, AMAs provide broad benefits to the marketplace in general. They bring diversity to the mix of capacity holders and customers that are served through the capacity release program, thus enhancing liquidity and diversity for natural gas

[74] As noted by New Jersey Natural Gas Company (NJNG), "in addition to LDCs, there are many other types of large natural gas purchasers, such as electric generation facilities and large gas process industrial users, who face the same challenges with managing and optimizing their natural gas portfolios. These customers, whose core business lies outside the natural gas industry – are also likely consumers of third party portfolio management services." NJNG Comments at 9, n. 9.

[75] EPSA Comments at 4-5.

products and services. AMAs result in an overall increase in the use of interstate pipeline capacity, as well as facilitating the use of capacity by different types of customers in addition to LDCs.[76] AMAs benefit the natural gas market by creating efficiencies as a result of more load responsive gas supply, and an increased utilization of transportation capacity.

72. AMAs further bring benefits to consumers, mostly through reductions in consumer costs. AMAs provide in general for lower gas supply costs, resulting in ultimate savings for end use customers. The overall market benefits described above also inure to consumers. These benefits have been recognized by state commissions and the National Regulatory Research Institute. [77]

73. The Interstate Natural Gas Association of America (INGAA) agrees with the Marketer Petitioners and others that the Commission "should adapt its regulations to facilitate efficient and innovative marketing of capacity that have developed since Order No. 636," provided the Commission remains guided by the "principle of full transparency of the terms of such capacity release arrangements."[78]

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[76] With regard to the advantages of diversity among shippers, the EPSA provides as an example the situation where an LDC looking to shed underutilized summer capacity may not have the capability to identify and contract with an electric generator that needs summer gas, whereas an asset manager would likely be much better equipped to handling the logistics and risks associated with such an off system sale by the LDC.

[77] See Comments of BG Energy Merchants, LLC at 8-9.

[78] INGAA Comments at 3.

74. Based on this industry-wide support, the Commission believes that AMAs are in the public interest because they are beneficial to numerous market participants and the market in general. Accordingly, the Commission is proposing changes to its policies and regulations to facilitate the utilization and implementation of AMAs.

1. Tying

75. As noted above, in Order No. 636-A, the Commission established a prohibition against the tying of capacity release to conditions unrelated to acquiring transportation capacity, where it stated that:

> [t]he Commission reiterates that *all* terms and conditions for capacity release must be posted and non-discriminatory and must relate solely to the details of acquiring transportation on the interstate pipelines. Release of capacity cannot be tied to any other conditions. Moreover, the Commission will not tolerate deals undertaken to avoid the notice requirements of the regulations. Order No. 636-A at 30, 559.

76. The Commission established the prohibition against tying in response to commenters' concerns that releasing shippers would attempt to add terms and conditions that would "tie the release of capacity to other compensation paid to the releasing shipper." The examples of illicit tying given by the commenters included an LDC requiring a potential replacement shipper to pay a certain price for local gas transportation service or a producer conditioning the release of capacity on the purchase of the producer's gas.[79] Since then, the Commission has granted several waivers of the

[79] Order No. 636-A at 30,559.

prohibition against tying,[80] but only where an entity sought the waiver to exit the natural gas transportation business.[81]

77. Some commenting parties claim that the Commission's recent orders waiving certain of its capacity release requirements in specific situations have increased uncertainty regarding the use of pre-arranged capacity release transactions to implement portfolio management services. They state that the language in these orders suggests that combining gas supply and pipeline capacity, or packaging multiple segments of capacity together, violates the prohibition against tying, absent a prior waiver of the Commission's capacity release rules.

78. The Commission recognizes that the broad language in Order No. 636-A setting forth the prohibition against tying, as well as the Commission's subsequent rulings in individual cases, have raised a concern that the types of transactions proponents of AMAs want to implement may run afoul of the current policy. For example, capacity releases made for the purpose of implementing an AMA generally include a condition that the asset manager taking the release will supply the gas requirements of the releasing shipper. The release may also require the asset manager to take assignment of the releasing shipper's gas supply contracts. However, such conditions could be considered to go

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[80] Tennessee Gas Pipeline Co., 113 FERC ¶ 61,106 (2005); Northwest Pipeline Corp. and Duke Energy Trading and Marketing, 109 FERC ¶ 61,044 (2004).

[81] See Louis Dreyfus Energy Services, L.P., 114 FERC ¶ 61,246 at 61,780 (2006), denying a waiver request.

beyond "the details of acquiring transportation on the interstate pipelines," because these conditions relate to the purchase and sale of the gas commodity.

79. The Commission thus proposes a partial exemption of AMAs from the prohibition against tying in order to permit a releasing shipper in a pre-arranged release to require that the replacement shipper (1) agree to supply the releasing shipper's gas requirements and (2) take assignment of the releasing shipper's gas supply contracts, as well as released transportation capacity on one or more pipelines[82] and storage capacity with the gas currently in storage. This exemption would allow firm shippers to pre-arrange releases of capacity to an asset manager (replacement shipper) along with upstream assets and gas purchase agreements in a bundled transaction where the capacity being released will be used to meet that party's gas supply requirements. In addition, the proposed exemption would be limited to releases to an asset manager as part of establishing an AMA. Thus, the asset manager would be subject to the policy against tying when it makes subsequent re-releases to third parties during the term of the AMA. For purposes of this exemption and the proposed exemption from bidding discussed in the next section, a release transaction made in the context of implementing an AMA will be any pre-arranged capacity release that includes a condition that the releasing shipper may, on any day, call upon the replacement shipper to deliver a volume of gas equal to the daily

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[82] Commission policy already permits a releasing shipper to require a replacement shipper to take a release of aggregated capacity contracts on one or more pipelines, at least in some circumstances. See Order No. 636-A at 30,558 and n. 144.

contract demand of the released capacity. This proposed definition is discussed further below.

80. As discussed above, AMAs provide recognizable benefits to market participants and the marketplace overall in terms of more load-responsive use of gas supply, greater liquidity, increased utilization of transportation capacity and the overall efficiencies these arrangements bring to the marketplace. However, AMAs require that the releasing shipper be able to release both its capacity and its natural gas supply arrangements in a single package. The very purpose of the transaction is frustrated if the releasing shipper cannot combine the supply and capacity components of the deal. This tying is meant to ensure that the released capacity will continue to be used to support the releasing shipper's acquisition of needed gas supplies. Based on the fact that AMAs provide benefits to the market, and that tying of capacity and supply is necessary to implement beneficial AMAs, it seems reasonable to allow the tying conditions discussed above in the AMA context in order to foster and facilitate the use and implementation of such arrangements. The partial exemption of AMAs proposed here will foster maximization of the interstate pipeline grid and enhance competition.

81. While the Commission is proposing changes to its prohibition against tying in order to facilitate AMAs, the Commission is not adopting the proposals of some commenters that the restriction against tying be eliminated altogether.[83] The

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[83] See e.g., Comments of Nstar at 7 (LDCs should be allowed to link capacity to whatever it wants to make an "effective" package); Comments of Direct Energy Services,

(continued…)

Commission's primary goal in establishing the capacity release program was to ensure that transfers of interstate pipeline capacity from one shipper to another are made in a not unduly discriminatory or preferential manner to the person placing the highest value on the pipeline capacity. If a shipper ties a release of unneeded capacity to matters that are unrelated to the details of acquiring that transportation capacity, the capacity may not go to the person who values it the most. The comments on this issue have not persuaded the Commission that, outside the AMA context, release conditions unrelated to the details of acquiring transportation service provide significant benefits to the natural gas market as a whole similar to those provided by AMAs. Therefore, when a shipper releases excess capacity that it does not need for the purpose for which it was originally acquired, the Commission's original concerns underlying the prohibition against tying still apply. The Commission continues to believe that such excess capacity should be allocated to the shipper who values it the most, regardless of whether the releasing shipper has some private business reason why it might prefer the replacement shipper to use its unneeded capacity in some particular manner. Thus, based on the distinguishing and mitigating factors of AMAs as related to the reasons underlying the prohibition against tying, the Commission is only proposing to modify its prohibition against tying with respect to pre-arranged releases to implement AMAs, and not all capacity releases.

LLC at 6 (Commission should permit market participants to offer whatever bundled transactions they perceive to be in their best interests).

82. However, the Commission requests comment on whether it should clarify its prohibition concerning tying in one additional circumstance, which is not related to the AMA context. Some commenters assert that the Commission should facilitate the release of storage capacity by permitting a releasing shipper to (1) require a replacement shipper to take assignment of any gas that remains in the released storage capacity at the time the release takes effect and/or (2) require a replacement shipper to return the storage capacity to the releasing shipper at the end of the release with a specified amount of gas in storage.[84] For example, some LDC commenters point out that they rely on having a certain level of gas in storage by the end of the off-peak summer injection season in order to be able to serve their customers during the peak winter season.[85] Therefore, while they may desire to release storage capacity at times during the off-peak summer period, gas must be injected into the storage capacity at a rate that will permit the LDC to have its required amount of gas in storage by the end of the injection period. If an LDC could require the replacement shipper to return the storage capacity with the required amount of gas in storage at the end of the release, it would be able to release more storage capacity than it can currently. The Commission requests comment on whether it should clarify its prohibition on tying to allow a releasing shipper to include conditions in a storage release concerning the sale and/or repurchase of gas in storage inventory.

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[84] See e.g. Comments of AGA at 24.

[85] Id. See also Comments of Keyspan at 36.

2. **The Bidding Requirement**

83. The Commission's current regulations require capacity release transactions to be posted for competitive bidding, unless the transactions are at the maximum rate or are for 31 days or less.[86] The Commission's principal goal in requiring release transactions to be posted for bidding was to ensure that interstate transportation capacity would be allocated to those placing the highest value on obtaining that capacity and to prevent discriminatory allocation of interstate capacity at prices below the market price. The regulations also allow the releasing shipper to enter into a "pre-arranged" release with a designated replacement shipper before any posting for bidding.[87] Prearranged releases are subject to the same bidding requirements as other releases; however, the prearranged replacement shipper will receive the capacity if it matches the highest bid submitted by any other bidder.[88] In Order 636-A, the Commission rejected requests for a general exception to the bidding process for all pre-arranged deals.[89]

84. As noted, the Commission has received a number of comments suggesting that it eliminate the requirement for competitive bidding for capacity releases, especially in the AMA context. LDCs in particular comment that bidding is unduly burdensome and often results in time consuming procedures that have little practical benefit. They maintain that

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[86] 18 CFR § 284.8(h).

[87] 18 CFR § 284.8(b).

[88] 18 CFR § 284.8(e).

[89] Order No. 636-A at 30, 555.

bidding adds uncertainty to the process because it creates a risk for the replacement shipper that it will be unable to acquire capacity at the price it expected, and thus bidding can prevent parties from negotiating mutually beneficial transactions. Others comment that the delay caused by bidding makes it difficult to respond to market opportunities to release, and thus bidding no longer makes sense in today's marketplace. Some claim that given the development of the natural gas market and the natural economic incentive to release at the highest price, the competitive bidding requirement is no longer necessary to achieve allocative efficiency.

85. Commenters assert that the inefficiencies of the bidding process pose substantial obstacles to successful releases to implement AMAs. Bidding and matching often prevent timely closing of AMA transactions involving aggregation of capacity and supply or aggregation of capacity on multiple pipelines. This can result in preventing willing buyers and sellers attempting to reach agreements that are in their respective best interests from consummating deals. Commenters also note that AMAs usually involve complex contractual structures with a variety of valued pieces. These deals are often negotiated at arms' length, and thus, requiring that they be made subject to bidding creates a risk that one aspect of the deal could be lost thus dooming the entire transaction. Because AMAs often involve extensive negotiations that lead to pre-arranged deals, the releasing party wants to be sure that the replacement shipper with whom it struck the deal is the one to get it, on the terms discussed during negotiations. Again, a bidding requirement puts that goal at risk.

86. Proponents of eliminating bidding for AMAs also point out that when an entity wishes to use a asset manager in the interest of efficient use of gas supply and pipeline capacity assets, it is often required by state regulation to select the asset manager though a competitive RFP process. This process allows entities that are interested in managing the assets to submit a bid to do so, subject to the terms and conditions of the RFP. This process results in a chosen asset manager for one or more pre-arranged capacity releases. The commenters state that, if this same pre-arranged deal is subject to a further bidding process under the Commission's regulations, then that second process is redundant, and compromises the integrity and efficiency of the state mandated competitive process that has already been completed.

87. The Commission proposes to exempt pre-arranged releases to implement AMAs from the bidding requirements of section 284.8 of its regulations, such that pre-arranged releases made to asset managers in order to implement AMAs will not be subject to competitive bidding. [90] In light of its experience with capacity releases and the comments discussed above, the Commission has reconsidered the need for bidding in the AMA context. It appears that at least in the AMA context, the bidding requirement creates an unwarranted obstacle to the efficient management of pipeline capacity and supply assets.

[90] For the purposes of this exemption the Commission will use the same definition as discussed in the tying section above, and explained more fully below, for identifying releases eligible for the exemption.

88. All capacity releases made to implement AMAs are pre-arranged because it is important that a releasing shipper be able to use the asset manager of its choice to effectuate the components of the agreement. Unlike a normal capacity release where the releasing shipper is often shedding excess capacity and has no intention of an ongoing relationship with the replacement shipper, in the AMA context the identity of the replacement shipper is often critical because it will manage the releasing shipper's portfolio for some time into the future. During the process of choosing an asset manager (often an RFP process), the releasing shipper considers a number of factors, including experience in managing capacity and gas sales, experience with a particular pipeline or area of the country, flexibility, creditworthiness and price. Because the asset manager will manage the releasing shipper's gas supply operations on an ongoing basis, it is critical that the releasing shipper be able to release the capacity to its chosen asset manager. Requiring releases made in order to implement an AMA to be posted for bidding would thus interfere with the negotiation of beneficial AMAs, by potentially preventing the releasing shipper from releasing the capacity to its chosen asset manager. The Commission concludes that the benefits of facilitating AMAs outweigh any disadvantages in exempting such releases from bidding.

89. While the Commission is proposing to exempt AMAs from the capacity release bidding requirements, AMAs will remain subject to all existing posting and reporting requirements. Pipelines will still be obligated to provide notice of the release pursuant to 18 CFR § 284.8(d). The details of the release transaction must also be posted on the pipeline's Internet web site under 18 CFR § 284.13(b), including any special terms and

conditions applicable to the capacity release transaction. Moreover, the pipeline's index of customers must include the name of any agent or asset manager managing a shipper's transportation service and whether that agent or asset manager is an affiliate of the releasing shipper.[91] Therefore, the Commission's goals of disclosure and transparency will still be met.

90. The Commission is not proposing at this time to modify its existing bidding requirements with respect to capacity releases made outside the AMA context (including releases the asset manager makes to third parties). As discussed, the Commission originally adopted the bidding requirements in order to ensure that releases are made in a non-discriminatory manner to the person placing the highest value on the capacity. The comments received by the Commission show broad support from all segments of the industry for modifying the bidding requirements in order to facilitate AMAs, which most commenters believe provide significant benefits to the natural gas market. However, the comments do not reflect a similar level of support for removing the bidding requirements altogether. In addition, there has been no showing that non-AMA prearranged releases provide benefits of the type we have found justify exempting AMA releases from bidding. Moreover, in the typical non-AMA pre-arranged release, price is the primary factor, and therefore the releasing shipper should generally be indifferent as to the identity of the replacement shipper so long as it receives the highest possible price for its release. Therefore, the Commission does not presently have information showing that,

[91] 18 CFR §§ 284.13(c)(2)(viii) and 284.13(c)(2)(ix).

outside the AMA context, the existing bidding requirements hinder beneficial developments in the market or no longer serve their original purpose.

3. **Definition of AMAs**

91. In light of the proposed exemptions for AMAs discussed above, the Commission proposes to define a capacity release that is made as part of an AMA, and thus would qualify for the exemptions, to be: any pre-arranged release that contains a condition that the releasing shipper may, on any day, call upon the replacement shipper to deliver to the releasing shipper a volume of gas equal to the daily contract demand of the released transportation capacity.[92] If the capacity release is a release of storage capacity, the asset manager's delivery obligation need only equal the daily contract demand under the release for storage withdrawals.

92. In developing a definition of AMA releases, the Commission seeks to balance two concerns. First, because the Commission is proposing that the exemptions from bidding and the prohibition against tying apply only in the context of AMAs, the Commission seeks a definition of the eligible releases that is limited to those releases that are made as part of a bona fide AMA. On the other hand, because the purpose of the proposed exemption is to facilitate AMAs, the Commission wants to avoid a definition that is so

[92] It is the Commission's intention that with regard to an AMA involving several separate releases to the asset manager, the delivery obligation would be applied separately to each release, not on cumulative basis to the whole AMA. For example if an LDC has capacity of 100,000 Dth on both upstream Pipeline A and downstream Pipeline B, the asset manager could comply with the proposed delivery condition by shipping the same 100,000 Dth over both Pipeline A and Pipeline B.

narrow it would limit the types of AMAs which shippers and asset managers may negotiate and thus discourage efficient and innovative arrangements.

93. The proposed definition focuses on what the Commission understands to be the fundamental purpose of AMAs: that the asset manager will use the released capacity to deliver gas supplies to the releasing shipper. The Commission believes that the requirement that the replacement shipper contractually commit itself to deliver to the releasing shipper, on any day, gas supplies equal to the daily contract demand of the released capacity should achieve the goal of exempting only AMA transactions from bidding and the prohibition against tying. Further, because all AMAs are done as pre-arranged deals, the proposed definition requires that the release be pre-arranged. The Commission requests comment on whether other conditions should be imposed on the eligible releases in order to ensure that the proposed exemptions are limited to AMAs.

94. The Commission also believes that the proposed definition is sufficiently flexible that it should not interfere with the development of efficient and beneficial AMAs. The Commission recognizes that a shipper may desire to enter into an AMA for the purpose of obtaining only a portion of its required gas supplies. Or it may desire to enter into multiple AMAs with different asset managers. The proposed definition does not prevent such arrangements, since it contains no requirement that the releasing shipper obtain any particular percentage of its gas supplies pursuant to a particular AMA. The only requirement is that the asset manager commits itself to providing gas supplies up to the contract demand of the released contract. In addition, while the Commission expects that the released capacity will be used by the asset manager to ship gas supplies to the

releasing shipper, the proposed definition does not require that the asset manager make all its deliveries to the releasing shipper over the released capacity.

95. The Commission also is not proposing to limit the types of entities that can use AMAs and take advantage of the exemptions from bidding and the prohibition against tying, provided the criteria stated above are met. The Commission recognizes that electric generators and industrial end-users may make use of AMAs, and thus the exemption is not limited to LDCs utilizing AMAs.

96. Finally, the Marketer Petitioners, in their original request for clarification, suggested that gas sellers may desire to use AMAs. However, as proposed, the definition of AMA does not include such arrangements, unless the replacement shipper has an obligation to re-sell to the releasing shipper equivalent quantities of natural gas. The Commission requests comments on whether it should expand the definition of AMAs eligible for the partial exemptions from the prohibition on tying and bidding to include gas marketing AMAs. Commenters should also address the question of how the Commission would distinguish a gas marketing AMA eligible for such an exemption from other release transactions.

IV. State Mandated Retail Choice Programs

97. Section 284.8(h)(1) of the Commission's current capacity release regulations exempt prearranged releases of more than 31 days from bidding only if they are at the "maximum tariff rate applicable to the release." States with retail open access gas programs (in which customers can buy gas from marketers rather than LDCs) have relied on this "safe harbor" exemption from bidding in structuring their programs. Specifically,

a key component of most such programs is a provision for the LDC to make periodic releases, at the maximum rate, of its interstate pipeline capacity to the marketers participating in the program. The marketers then use the released capacity to transport the gas supplies that they sell to their retail customers. The exemption from bidding ensures that the LDC's capacity is transferred only to the marketers participating in the state retail unbundling program and is not obtained by non-participating third parties.

98. However, the Commission's proposal to lift the price ceiling for releases of one year or less would have the effect of eliminating the bidding exemption for releases with terms of between 31 days and one year. That is because there would no longer be a maximum tariff rate applicable to such releases. Moreover, in this NOPR, the Commission is proposing an additional exemption from bidding only for releases made in the context of an AMA, and releases made as part of a retail unbundling program would not qualify for that exemption as it is currently proposed. As a result, absent some additional modification of the regulations concerning bidding, LDCs would have to post for bidding all releases of between 31 days and one year that are made as part of a state retail unbundling program. This would mean that the marketers participating in the program could only obtain the capacity if they matched any third party bid for the capacity.

99. In Order Nos. 637-A and 637-B,[93] the Commission denied the request by LDCs for a blanket exemption from bidding of all capacity releases made as part of state retail

[93] Order No. 637-A at 31,569; Order No. 637-B, 92 FERC at 61,163.

unbundling program. The Commission explained that, with the price ceiling removed, posting and bidding was necessary to protect against undue discrimination and ensure that the capacity is properly allocated to the shipper placing the greatest value on the capacity. The Commission nevertheless sought to accommodate the state retail access programs by providing that, if an LDC considered an exemption from bidding essential to further a state retail unbundling program, the LDC, together with its state regulatory agency, could request a waiver of the bidding regulation to allow the LDC to consummate pre-arranged capacity release deals at the maximum rate. However, the Commission stated that, if the LDC made such a request, it had to be prepared to have all its capacity release transactions, including those not made as part of the state retail unbundling program, subject to the maximum rate.

100. On appeal of Order No. 637, the court in INGAA affirmed the Commission's refusal to grant a blanket waiver of the bidding requirement for releases made as part of a state retail unbundling program. The court stated that, absent a showing that the retail unbundling programs are structured as largely to moot the Commission's concern about discrimination, the Commission's caution in granting a blanket waiver was reasonable. However, the court remanded the issue of the reasonableness of the condition that an LDC seeking a waiver must agree to subject all its releases to the maximum rate. The court stated that the requirement of state regulatory endorsement of the requested waiver seemed to give the Commission an avenue to verify the discrimination risk. The Commission did not address this issue in its order on remand, because the price ceiling had been re-imposed by the time of the remand order, thus rendering the issue moot.

101. Several commenters in the instant proceeding again assert that, if the Commission removes the price ceiling on capacity release, the Commission should exempt all capacity releases to retail choice providers, that is, releases that are part of a state approved unbundling program, from the Commission's bidding requirements. AGA and several individual member LDCs, for example, contend that the Commission recognized the value of retail choice programs to the development of a competitive natural gas market by providing a waiver procedure for such releases in Order No. 637-A. AGA argues that the Commission should now take the next step to allow an LDC to release capacity to a retail choice provider at the rate paid by the LDC without bidding and without the need to seek a waiver from the Commission, particularly if the Commission removes the price ceiling on capacity release.[94] It reasons that releases to retail choice providers are not releases of excess capacity but of capacity needed to better serve their core markets or to comply with state requirements. The capacity is still being used for the purpose it was purchased and the intention is to allow the LDC's retail customers to obtain the benefit of the LDCs firm pipeline entitlements and rates. AGA and other LDC commenters assert that requiring the LDCs to seek a waiver, as the Commission did in Order No. 637, adds a cumbersome layer of regulation.

102. Because the state programs generally allow choice providers to step into the shoes of the LDC, commenters suggest that there is little chance for undue discrimination or exercise of market power. Moreover, in order for retail customers to benefit from the

[94] See AGA Comments at 47.

discounted or negotiated rates that the LDC may have been able to obtain from the pipeline, the LDC needs to be able to release it to the retail choice provider at that rate. According to the AGA, if a shipper obtained capacity in the primary market under conditions that do not support the pipeline's maximum rate, the Commission's goal of maximizing allocative efficiency is hampered by requiring LDC's to sell at maximum rate to retail choice providers.

103. The Commission proposes to address the issue of bidding on releases of a year or less by LDCs participating in a state retail unbundling program in a manner consistent with its actions in Order No. 637, that is, the Commission will permit such LDCs to request a waiver of the bidding regulation to allow the LDC to consummate short-term pre-arranged capacity release deals necessary to implement retail access at the maximum rate without bidding. Allowing this limited waiver of the bidding requirement for capacity releases made as part of a state unbundling program would enable retail access programs to continue to operate with the same exemption from bidding which they now have. Adopting the more cautious approach of case-by-case waivers, rather than granting a blanket waiver, is reasonable in light of the court's finding that even with state unbundling programs the potential for discrimination still exists.

104. As part of this proposal, however, the Commission will not require that an LDC seeking such a waiver agree to subject all of its short-term capacity releases to the applicable maximum rate. Any of an LDC's capacity releases that are outside of its state-approved retail choice program (and not made as part of an AMA as discussed in the previous section) will remain subject to bidding, which should provide adequate

protection against discrimination. Further, it is reasonable to allow different treatment of releases made to an approved retail choice provider, because the capacity released for that purpose will continue to be used to serve the LDC's customers for whom the capacity was originally contracted to serve. The Commission's proposal here would also remedy the court's concern in INGAA with the requirement that LDCs seeking waivers agree to subject all of their releases to the maximum rate.

105. While the Commission is not proposing a blanket exemption from bidding for releases made by LDCs under state retail choice programs, the Commission requests comment on whether such releases should be treated as similar to releases made as part of an AMA and thus accorded the same full exemption from bidding. As with releases in the AMA context, LDC releases in the retail unbundling context are not releases of excess capacity to the open market but of capacity needed to serve the original customers for whom the LDC purchased the capacity. In the state unbundling context, the LDC must release and allocate capacity to a marketer that an end use customer may choose as its supplier. Thus, the capacity may be treated as still being used for the purpose it was purchased and as it was originally intended. However, the Commission seeks comment on whether such releases should be exempt from the bidding requirement. Should the Commission find that such releases provide similar benefits to the market as releases which are made as part of establishing an AMA? Do such releases entail a greater potential for undue discrimination than releases made as part of establishing an AMA?

V. Shipper Must-Have-Title Requirement

106. The Commission will retain its shipper-must-have-title requirement. While the shipper-must-have-title requirement had its original roots in individual pipeline proceedings to implement Order No. 436 non-discriminatory open-access transportation, it has become the foundation for the Commission's capacity release program.[95] The purpose of the shipper-must-have-title requirement is to require that all transfers of capacity from one shipper to another take place through the capacity release program. Without the shipper-must-have-title requirement, "capacity holders could simply transport gas over the pipeline for another entity,"[96] without complying with any of the requirements of the capacity release program. Thus, the capacity holder could charge the other entity any rate it desired for this service, and the capacity holder would not need to post the arrangement with the other entity for bidding to permit others to obtain the service at a higher rate.

107. By contrast, under the shipper-must-have-title requirement, an assignment of capacity from one shipper to another may only be accomplished through the capacity release program. As discussed above, under the capacity release program, any release must comply with any applicable price ceiling and bidding requirements. In addition, the

[95] As the Commission explained in Order No. 637-A, "the capacity release rules were designed with [the shipper-must-have-title] policy as their foundation," because without this requirement "capacity holders could simply transport gas over the pipeline for another entity." Order No. 637 at 31,300.

[96] Order No. 637, at 31,300.

replacement shipper must contract with the pipeline, and section 284.8(d) of the Commission's regulations requires the pipeline to post information regarding the replacement shipper's contract, including any special terms and conditions. This provides transparency in the secondary market by enabling the Commission and all interested parties to monitor the capacity release market.

108. The shipper-must-have-title requirement remains an important transparency tool given the proposals discussed above and the Commission's decision to maintain the price ceiling for long-term capacity releases and to require bidding for capacity releases outside the context of AMAs. If the Commission were to eliminate the shipper-must-have-title-requirement, shippers could easily evade the continuing requirements of the capacity release program in the manner discussed above. In essence, participation in the capacity release program would become voluntary and shippers desiring to make long-term releases at more than the maximum rate or to make prearranged non-maximum rate deals without bidding could simply make private arrangements outside of the capacity release program.

109. The shipper-must-have-title requirement ensures transparency in the capacity market. Because replacement shippers must in all instances enter into contracts with the pipeline, the Commission can ensure transparency by requiring the pipelines to report the essential terms of the replacement shippers' contracts. Without the rule, the Commission would have to develop separate reporting requirements for shippers who make private arrangements to ship gas for other entities. It is more efficient for the Commission and

the market place to monitor and enforce the reporting requirements on the one hundred or so interstate pipelines rather than to enforce them on thousands of shippers.

110. Finally, in the Commission's opinion, the shipper-must-have-title requirement does not cause undue administrative burdens. Through the Commission's adoption of the North American Energy Standards Board's (NAESB) standards, all pipelines must provide a title transfer tracking service at no charge as part of their nomination process, so that any title transfers required by the shipper-must-have-title requirement are easily accomplished.[97]

VI. Regulatory Requirements

A. Information Collection Statement

111. Office of Management and Budget (OMB) regulations require OMB to approve certain information collection requirements imposed by agency rule.[98] Comments are solicited on the Commission's need for this information, whether the information will have practical utility, the accuracy of provided burden estimates, ways to enhance the quality, utility and clarity of the information to be collection, and any suggested methods for minimizing respondents' burden, including the use of automated information techniques.

Title: FERC-549B, Gas Pipeline Rates: Capacity Information

[97] In this context the shipper-must-have-title requirement accomplishes on the gas side much the same purpose as "e-tagging" title transfers on the electric side.

[98] 5 CFR §1320.11.

Action: Proposed Information Collection

OMB Control No.: 1902-0169B

112. The applicant shall not be penalized for failure to respond to this collection of information unless the collection of information displays a valid OMB control number.

Respondents: Business or other for profit.

Frequency of Responses: On Occasion.

Necessity of Information: The proposed rule would permit market based pricing for short-term capacity releases and facilitate AMAs by relaxing the Commission's prohibition on tying and its bidding requirements for certain capacity releases. As noted earlier in the NOPR, elimination of the price ceiling for short-term capacity releases will provide more accurate price signals concerning the market value of pipeline capacity. Further, implementation of AMAs will make the capacity release program more efficient as releasing shippers can transfer their capacity to entities with greater expertise both in purchasing low cost gas supplies, and in maximizing the value of the capacity when it is not needed to meet the releasing shipper's gas supply needs. Such arrangements free up the time, expense and expertise involved with managing gas supply arrangements and serve as a means of relieving the burdens of administering their capacity or supply needs.

113. Although the Commission is taking the steps to enhance competition in the secondary capacity release market and increase shipper options, it is not modifying its existing reporting requirements in section 284.13 of its regulations. The current burden estimates for FERC-549B will be unaffected by this rule and for that reason, the

Commission will send a copy of this proposed rule to OMB for informational purposes only.

B. Environmental Analysis

114. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[99] The Commission has categorically excluded certain actions from these requirements as not having a significant effect on the human environment.[100] The actions proposed to be taken here fall within categorical exclusions in the Commission's regulations for rules that are corrective, clarifying or procedural, for information gathering, analysis, and dissemination, and for sales, exchange, and transportation of natural gas that requires no construction of facilities.[101] Therefore an environmental review is unnecessary and has not been prepared in this rulemaking.

C. Regulatory Flexibility Act

115. The Regulatory Flexibility Act of 1980 (RFA)[102] generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. The Commission is not required to make such an analysis if

[99] Order No. 486, Regulations Implementing the National Environmental Policy Act, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs., Regulation Preambles 1986-1990 ¶ 30,783 (1987).

[100] 18 CFR § 380.4 (2007).

[101] See 18 CFR §§ 380.4(a)(2)(ii), 380.4(a)(5) and 380.4(a)(27)(2007).

[102] 5 U.S.C. §§ 601-612

proposed regulations would not have such an effect.[103] Under the industry standards used for purposes of the RFA, a natural gas pipeline company qualifies as “a small entity” if it has annual revenues of $6.5 million or less. Most companies regulated by the Commission do not fall within the RFA’s definition of a small entity.[104]

116. The procedural modifications proposed herein should have no significant negative impact on those entities, be they large or small, subject to the Commission’s regulatory jurisdiction under the NGA. As previously noted in the NOPR, removal of the price ceiling will enable releasing shippers to offer competitively-priced alternatives to the pipelines’ negotiated rate offerings. A small entity that participates in the market will no longer be constrained by a ceiling price for its unused capacity. Further, removal of the ceiling also permits more efficient utilization of capacity by permitting prices to rise to market clearing levels, allowing those entities that place the highest value on the capacity to obtain it. Accordingly, the Commission certifies that this notice’s proposed regulations, if promulgated, will not have a significant economic impact on a substantial number of small entities.

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[103] 5 U.S.C. § 605(b)(2000).

[104] 5 U.S.C. § 601(3), citing to Section 3 of the Small Business Act, 15 U.S.C. § 623 (2000). Section 3 defines a “small-business concern” as a business which is independently owned and operated and which is not dominant in its field of operation.

D. Comment Procedures

117. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due 45 days from publication in the Federal Register. Comments must refer to Docket No. RM08-1-000, and must include the commenter's name, the organization they represent, if applicable, and their address in their comments.

118. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's web site at http://www.ferc.gov. The Commission accepts most standard word processing formats. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

119. Commenters that are not able to file comments electronically must send an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, N.E., Washington, DC, 20426.

120. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

E. Document Availability

121. In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (http://www.ferc.gov) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, N.E., Room 2A, Washington D.C. 20426.

122. From FERC's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

123. User assistance is available for eLibrary and the FERC's web site during normal business hours from FERC Online Support at 202-502-6652 (toll free at 1-866-208-3676) or email at ferconlinesupport@ferc.gov, or the Public Reference Room at (202) 502-8371, TTY (202)502-8659. E-mail the Public Reference Room at public.referenceroom@ferc.gov.

List of subjects in 18 CFR Part 284

Incorporation by reference, Natural gas, Reporting and recordkeeping requirements.

By direction of the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

In consideration of the foregoing, the Commission proposes to amend part 284, Chapter I, Title 18, Code of Federal Regulations, to read as follows:

PART 284 – CERTAIN SALES AND TRANSPORTATION OF NATURAL GAS UNDER THE NATURAL GAS POLICY ACT OF 1978 AND RELATED AUTHORITIES

1. The authority citation for part 284 continues to read as follows:

Authority: 15 U.S.C. 717-717w, 3301-3432; 42 U.S.C. 7101-7352; 43 U.S.C. 1331-1356.

2. Amend § 284.8 as follows:

a. In paragraph (e), remove the words "(not over the maximum rate)".

b. Remove paragraph (i).

c. Add two sentences to the end of paragraph (b) and revise paragraph (h) to read as follows.

§ 284.8 Release of firm capacity on interstate pipelines.

* * * * * *

(b) * * * The rate charged the replacement shipper for a release of capacity for more than one year may not exceed the applicable maximum rate. No rate limitation applies to the release of capacity for a period of one year or less.

* * * * *

(h)(1) A release of capacity by a firm shipper to a replacement shipper for any period of 31 days or less, a release of capacity for more than one year at the maximum tariff rate, or a release to an asset manager as defined in (h)(3) of this section need not comply with the notification and bidding requirements of paragraphs (c) through (e) of this section. Notice of a firm release under this paragraph must be provided on the pipeline's electronic bulletin board as soon as possible, but not later than forty-eight hours, after the release transaction commences.

(2) When a release of capacity for 31 days or less is exempt from bidding requirements under paragraph (h)(1) of this section, a firm shipper may not roll-over, extend, or in any way continue the release without complying with the requirements of paragraphs (c) through (e) of this section, and may not re-release to the same replacement shipper under this paragraph at less than the maximum tariff rate until 28 days after the first release period has ended.

(3) A release to an asset manager exempt from bidding requirements under paragraph (h)(1) of this section is any prearranged capacity release that contains a condition that the releasing shipper may, on any day, call upon the replacement shipper to deliver to the releasing shipper a volume of gas equal to the daily contract demand of the released transportation capacity or the daily contract demand for storage withdrawals.