

Supporting Statement for
FERC-549B, Gas Pipeline Rates: Capacity Information
FERC-545, Gas Pipeline Rates: Rate Change (Non-Formal)

As Proposed In Docket No. RM08-1-000
(Promotion of a More Efficient Release Market)
(Final Rule Issued June 19, 2008,
Published June 30, 2008, 73 FR 65916)

The Federal Energy Regulatory Commission (Commission) requests Office of Management and Budget (OMB) review and approval of **FERC-549B, Gas Pipeline Rates: Capacity Information and FERC-545, Gas Pipeline Rates: Rate Change (Non Formal)** are existing data collections that implements part 284 of FERC's regulations. These revisions are intended 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.

FERC-549B (OMB Control No. 1902-0169) was approved by OMB through November 30, 2010. In the NOPR the Commission announced that it was taking the steps to enhance competition in the secondary capacity release market and increase shipper options. However, these steps would not include modifying the existing reporting requirements in section 284.13 of its regulations. Therefore, the current burden estimates for FERC-549B would not be affected by the proposed rule and for that reason; the Commission sent a copy of the NOPR to OMB for informational purposes only.

However, in this Final Rule, the Commission is modifying policies and regulations concerning capacity releases by shippers on interstate pipelines in order to enhance the efficiency and effectiveness of the secondary capacity release market. The Commission is responding to industry's request for greater flexibility in the capacity release market and to reflect changes and developments in the marketplace. The Final Rule modifies the NOPR to reflect the addition of what must be included in the posting of any capacity release to implement an asset management agreement or a release made as part of a state retail access program and to make the required tariff filings (FERC-545 (OMB Control No. 1902-0154)). For the most part, the burden on respondents to comply with the existing reporting requirements in section 284.13 of the Commission's regulations will not be changed by this proposed rule as was stated in the NOPR. On average, the Commission expects the burden of making the corresponding changes under this Final Rule to be 35 hours. This estimate is based on the modification of websites to account for the posting of the delivery and /or purchase obligation and whether a release is to a marketer serving as an asset manager or a shipper who is participating in a state unbundling program, as well as to make the required tariff changes. The burden estimates for complying with additional filing requirements of this rule in accordance with the procedures in proposed new sections 284.13(b)(1) are explained in item no. 12 below.

All of the proposed changes in both the NOPR and the subject Final Rule are provided for under sections 4, 5 and 16 of the Natural Gas Act (NGA).

Background

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 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

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

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

¹ Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, Order No. 636, 57 Fed. Reg. 13,267 (April 16, 1992), FERC Stats. and Regs., Regulations Preambles January 1991 - June 1996 ¶ 30,939 (April 8, 1992); order on reh’g, Order No. 636-A., 57 Fed. Reg. 36,128 (August 12, 1992), FERC Stats. and Regs., Regulations Preambles January 1991 - June 1996 ¶ 30,950 (August 3, 1992); order on reh’g, Order No. 636-B, 57 Fed. Reg. 57,911 (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).

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.

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

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 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

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.

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 prohibition on private transfers of

⁴ Order No. 636 at 30,418.

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 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).

capacity, the Commission required that a shipper must have title to any gas that it ships on the pipeline.⁹

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

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

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

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).

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

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."

to the release of capacity. The Commission articulated the prohibition against the tying of capacity in Order No. 636-A, where it stated:

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).

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

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 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

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.

¹⁶ Order No. 637 at 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

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 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.

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 handed" approach to the regulation of capacity release prices was, given the safeguards that the Commission had

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.

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 "lightheaded" regulation, we find the Commission's decision neither a violation of the NGA, nor arbitrary or capricious." INGAA at 35.

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

NOPR (Docket No. RM08-1-000)

On November 15, 2007 in Docket No. RM08-1-000, FERC issued a Notice of Proposed Rulemaking that would permit market based pricing for short-term capacity releases and facilitate Asset Management Agreements or AMAs by relaxing the Commission's prohibition on tying and its bidding requirements for certain capacity releases. As noted in the NOPR, elimination of the price ceiling for short-term capacity releases would provide more accurate price signals concerning the market value of pipeline capacity. Further, implementation of AMAs would 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.

Subject Final Rule (Docket No. RM08-1-000)

On June 19, 2008 in Docket No. RM08-1-000, FERC issued a Final Rule where the Commission is modifying its policies and regulations concerning the release of capacity by firm shippers on interstate pipelines in order to enhance the efficiency and effectiveness of the secondary capacity release market. The Commission's capacity release program has created a successful secondary market for capacity.²³ As a result, natural gas markets in general, and the secondary release market in particular, have undergone significant development and change in the sixteen years since Order No. 636 and the inception of the capacity release program. As this

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

²² Id. at 33.

²³ 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, order on reh'g, 113 FERC ¶ 61,173 (2005).

market has developed, shippers and potential shippers have sought 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 capacity to better reflect the value of that capacity as revealed by the market price of gas at different trading points. They also seek to implement Asset Management Agreements (AMAs)²⁴, in which capacity holders release their capacity to asset managers (generally marketers) that have greater expertise in maximizing the value of pipeline capacity and negotiating beneficial transactions in the gas commodity markets.

The first major revision is the removal of the price ceiling on short term capacity releases. The permanent elimination of the price ceiling for short term releases will enable shippers to offer competitively-priced alternatives to pipelines' negotiated rate offerings and will permit short-term capacity release prices to rise to market clearing levels, thereby allocating capacity to those that value it the most. It will also provide more accurate price signals concerning the market value of pipeline capacity.

FERC is also revising its regulations and policies to accommodate and facilitate AMAs, a relatively recent development in the industry. AMAs provide significant benefits to many participants in the natural gas and electric marketplaces and to the secondary marketplace itself. They maximize the utilization and value of capacity by creating a mechanism for capacity holders to use third party experts to both (1) manage their gas supply arrangements and (2) use that capacity to make gas sales or re-releases of the capacity to others when the capacity is not needed to serve the releasing shipper. AMAs result in ultimate savings for end-use customers by providing for lower gas supply costs and more efficient use of the pipeline grid.²⁵ The Commission's goal in facilitating AMAs in this rule is to make the capacity release program more efficient by bringing it into line with the realities of today's secondary gas marketplace.

To that end, the Commission in the Final Rule is adopting its NOPR proposal to exempt capacity releases made to implement AMAs from the prohibition on tying and the bidding requirements of section 284.8. The Commission is also making several revisions to the definition of AMAs as proposed in the NOPR. The Final Rule modifies the definition of AMAs

²⁴ 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. 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.

²⁵ See Comments of BGEM at 2, Comments of BP at 5, Comments of Nstar at 8, Comments of Piedmont at 4-5, Comments of PUCO at 7, Comments of WDG at 3.

proposed in the NOPR to relax the delivery obligation of the replacement shipper to the releasing shipper and to permit supply side AMAs. The Final Rule also clarifies that short term AMAs may be rolled over without bidding. Further, the Final Rule clarifies that the price ceiling does not apply to any consideration provided by an asset manager to the releasing shipper as part of an AMA. These steps, requested by many industry commenters that support the Commission's efforts in the NOPR to facilitate AMA's, will further enhance the efficiency of AMAs by allowing greater flexibility for parties to customize arrangements to meet unique customer needs while at the same time ensuring that capacity releases that qualify for the exemptions from tying and bidding granted in the Final Rule are bona fide AMAs. The rule also extends the benefits of AMAs to sellers of natural gas, creating an even greater diversity of potential suppliers and participants in the secondary market.

FERC is also revising its policies to reflect the realities of today's marketplace by allowing a releasing shipper to include conditions in a release concerning the sale/and repurchase of gas in storage inventory, even outside the AMA context. Allowing such arrangements reflects the fact that in the storage context, storage capacity is inextricably linked to storage inventory. By permitting the tying of releases of storage capacity to conditions on storage inventory, the Commission will enhance the efficient use of storage capacity while at the same time ensuring that releasing shippers will have adequate storage inventories for the winter.

The Final Rule also extends the blanket exemptions from the prohibition against tying and from bidding granted to AMAs to capacity releases made to a marketer participating in a state approved retail access program, finding that such programs provide benefits similar to AMAs.

A. Justification

1. CIRCUMSTANCES THAT MAKE THE COLLECTION OF INFORMATION NECESSARY

Pursuant to sections 4, 5, and 16 of the NGA, (15 USC 717c - 717o, P.L. 75-688, 52 Stat. 822 and 830), and Title III of the NGPA, (15 USC 3301-3432, P.L. 95-621), a natural gas company must obtain Commission authorization for all rates and charges made, demanded, or received in connection with the transportation or sale of natural gas in interstate commerce. The Commission is authorized to investigate the rates charged by natural gas pipeline companies subject to its jurisdiction. If, after the investigation, the Commission is of the opinion that the rates are "unjust or unreasonable or unjustly discriminatory or unduly preferential," it is authorized to determine and prescribe just and reasonable rates. The NGA also provides the

Commission with a means for considering the reasonableness of rates through settlement conferences or hearings.

FERC-549B

The information collected under the requirements of FERC-549B "Gas Pipeline Rates: Capacity Information" includes both the Index of Customers (IOC) report under 18 CFR 284.13(c) and capacity reporting requirements under 18 CFR 284.13(b) and 284.13(d).

Under Section 4, of the NGA, rates are established by the pipeline filing for rate changes. The rate thus established continues in effect until the pipeline makes a subsequent rate case filing or the Commission takes action under Section 5 of the NGA and determines that the existing rates are not just and reasonable. Section 16 authorizes the Commission to prescribe the rules and regulations necessary to administer its rates mandates.

CAPACITY REPORTS

On April 4, 1992, in Order No. 636, (RM91-11-000) as noted above, the Commission established a capacity release mechanism under which shippers could release firm transportation and storage capacity on either a short or long term basis to other shippers wanting to obtain capacity. Pipelines posted available firm and interruptible capacity information on their electronic bulletin boards (EBBs) to inform potential shippers.

On August 3, 1992, in Order No. 636-A (RM91-11-002), the Commission determined through staff audits, that the efficiency of the capacity release mechanism could be enhanced by standardizing the content and format of capacity release information and the methods by which shippers accessed this information, which pipelines posted to their EBBs

On March 29, 1995, through Order 577 (RM95-5-000), the Commission amended §284.243(h) of its regulations to allow shippers the ability to release capacity without having to comply with the Commission's advance posting and bidding requirements.

On February 9, 2000, in Order No. 637, (RM98-10-000), to create greater substitution between different forms of capacity and to enhance competition across the pipeline grid, the Commission revised its capacity release regulations regarding scheduling, segmentation and flexible point rights, penalties, and reporting requirements. This resulted in more reliable capacity information availability and price data that shippers needed to make informed decisions

in a competitive market as well as to improve shipper's and the Commission's ability to monitor the market for potential abuses.

INDEX OF CUSTOMERS

In Orders 581 and 582, issued September 28, 1995 (RM95-4-000 and RM95-3-000), the Commission established the IOC quarterly information requirement. The IOC had two functions, first, for analyzing capacity held on pipelines and second, for providing capacity information to the market. The IOC information aides the capacity release system by enabling shippers to identify and locate those holding capacity rights that the shippers may want to acquire. The information was posted on pipeline EBBs and filed on electronic media (media and format not specifically addressed in this Order) with the Commission. This Order required the reporting of five data elements in the IOC filing: the customer name, the rate schedule under which service is rendered, the contract effective date, the contract termination date, and the maximum daily contract quantity, for either transportation or storage service, as appropriate.

In RM95-4-000, issued February 29, 1996, the Commission, through technical conferences with industry, determined that the IOC data reported should be in tab delimited format on diskette and in a form as proscribed in Appendix A of the rulemaking. In a departure from past practice, a three-digit code, instead of a six-digit code, was established to identify the respondent.

In Order 637, February 9, 2000 (RM98-10-000 and RM98-12-000) the Commission required the following additional information: the receipt and delivery points held under contract and the zones or segments in which the capacity is held, the common transaction point codes, the contract number, a shipper identification number, an indication whether the contract includes negotiated rates, the names of any agents or asset managers that control capacity in a pipeline rate zone, and any affiliate relationship between the pipeline and the holder of capacity. It was stated in the Order that the changes to the Commission's reporting requirements would enhance the reliability of information about capacity availability and price that shippers need to make informed decisions in a competitive market as well as improve shippers' and the Commission's ability to monitor marketplace behavior to detect, and remedy anti-competitive behavior. In this Order, pipelines were required to post the information quarterly on the pipelines' Internet websites in lieu of on the outdated EBBs.

In the subject Final Rule, the Commission is proposing to revise its regulations based upon its review of petitions, comments and available data, in order 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.²⁶ Commenters from disparate segments of the natural gas industry agreed that the capacity release program has been beneficial to the industry in creating a competitive secondary market for natural gas transportation.²⁷

As the comments pointed 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 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.²⁸ 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.²⁹ In their comments, releasing shippers requested the ability to release at above the maximum rate so that they may offer potential buyers rates competitive with pipeline negotiated rate transactions.³⁰

²⁶ 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).

²⁷ 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.").

²⁸ 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).

²⁹ 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).

³⁰ See, e.g., PG&E and Southwest Gas Petition at 10-11.

As the Commission recognized in Order No. 637,³¹ the traditional cost-of-service price ceilings in pipeline tariffs, which are based on average yearly rates, are not well suited to the short-term capacity release market.³² 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.

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.

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' shippers."³³ 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."³⁴

FERC-545

The information collected under the requirements of FERC-545 "Gas Pipeline Rates: Rate Change (Non-Formal)" applies to general rate change applications filed by natural gas companies under section 4(e) of the NGA to reflect changes in rates based generally upon the

³¹ Order No. 637 at 31,271-75.

³² 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.

³³ INGAA at 33.

³⁴ Id.

pipeline company's overall costs for all rates, and charges made, demanded, or received in connection with the transportation of natural gas. Setting just and reasonable rates require a balancing of equities between the interests of the pipeline and its ratepayers. The Commission sets rates for interstate pipeline services in a number of proceedings. For example, when a pipeline files to increase its rates, it makes a filing with FERC under Section 4 of the NGA. These types of filings are referred to as general Section 4 rate cases. In the proceedings, FERC reviews all of a pipeline's rates and services. A pipeline can file a general Section 4 rate case anytime it wishes, provided the pipeline did not agree otherwise in a settlement. A pipeline must demonstrate that the new rates it proposes to charge are just and reasonable. When a rate increase filing is made pursuant to Section 4, the application (tariff) is typically suspended and set for hearing by FERC Order. Once the application (tariff) is set for hearing, it is processed by FERC staff. The issues in the application can be settled if parties can reach a consensus. However, if the issues cannot be resolved, they will proceed to a hearing before an Administrative Law Judge (ALJ). Whether the case is settled or proceeds to hearing, FERC will eventually need to act upon the settlement, or upon the record in the hearing.

The information is used to establish a basis for determining just and reasonable rates that should be charged, and the rate of return which can be earned. Based on staff analysis, the Commission determines whether the filing should be accepted or suspended and set for hearing and investigation.

2. HOW, BY WHOM, AND FOR WHAT PURPOSE THE INFORMATION IS TO BE USED AND THE CONSEQUENCES OF NOT COLLECTING THE INFORMATION

The Commission uses the information collected in these filings to analyze capacity held on pipelines in order to better monitor marketplace behavior, and to detect, and remedy anti-competitive behavior.

The implementation of these reporting requirements improves competition in the market by expanding shippers' information about potential capacity alternatives. Difficulty in obtaining information can reduce competition because buyers may not be aware of potential alternatives and cannot compare prices between those alternatives. The reporting requirements expand shippers' knowledge of alternative capacity offerings by providing more information about the capacity available from the pipeline as well as those shippers holding capacity that is potentially available for release. The reporting requirements further provide shippers with more accurate information about the value of capacity over particular pipeline corridors so that shippers can make more informed choices about the prices of capacity they may wish to purchase.

Further, by collecting this information, the Commission in carrying out its responsibilities under the Natural Gas Act, to monitor the activities and evaluate transactions of the natural gas industry to ensure competitiveness and to assure the improved efficiency of the industry's operations. Under the section 4(f) of the NGA as created by the Energy Policy Act of 2005, FERC is authorized to ensure adequate customer protections. The Commission's Office of Energy Markets and the Office of the General Counsel will use the data in rate proceedings to review rate and tariff changes by natural gas companies for the transportation of gas, for general industry oversight, and to supplement the documentation used during the Commission's audit process.

Failure by the Commission to collect this information would mean that it is unable to monitor and evaluate transactions and operations of interstate pipelines and perform its regulatory functions.

3. DESCRIBE ANY CONSIDERATION OF THE USE OF IMPROVED INFORMATION TECHNOLOGY TO REDUCE BURDEN AND TECHNICAL OR LEGAL OBSTACLES TO REDUCING BURDEN

There is an ongoing effort to determine the potential and value of improved information technology to reduce burden. In Order No. 636, the Commission required pipeline companies to establish EBBs to provide shippers with equal and timely access to the information requested under FERC-549B. Shippers were required to post their available capacity on the EBBs for bidding by potential purchasers. In Order No. 581, the Commission required the establishment of the electronic IOC, that it be posted to shippers' EBBs and submitted on diskette, in tab-delimited format to the Commission. The tab-delimited files are available for download from the Commission's website:

<http://www.ferc.gov/docs-filing/eforms/form-549b/data.asp>; hardcopy IOC filings are generated by Commission staff from the tab-delimited data and are available in eLibrary:

<http://elibrary.ferc.gov/idmws/search/fercgensearch.asp> (choose Index of Customer under Class/Type Info).

As noted above, in Order No. 637, the Commission recognized that the majority of pipelines had transferred their information to Internet sites and so to ensure uniformity and efficiency, required that information be posted there, in lieu of to EBBs.

In a RM01-5-000, a Supplemental Notice of Proposed Rulemaking issued on April 17, 2008 the Commission proposed to revise its previous Notice of Proposed Rulemaking for

electronic tariff filing. The revised proposal would require that all tariffs and tariff revisions and rate change applications for the public utility, natural gas pipeline, and oil pipeline industries be filed electronically according to a set of standards developed in conjunction with the North American Energy Standards Board. These standards will enable the Commission to develop a tariff database for use by the Commission staff, the industry, and the public to view and research tariffs, and also provides companies the flexibility to design or purchase software for making tariff filings that best fits their business needs. Upon the effective date of a final rule in this proceeding, the Commission will no longer accept tariff filings submitted in paper format.

Electronically filed tariffs and rate change applications should improve the efficiency and administrative convenience and improve the overall management of the tariff and tariff change filing process, facilitate public access to tariff information, and reduce the burden and expense associated with paper tariffs and tariff changes. In addition, electronically filed tariffs should improve access and research capabilities with and among applicant's tariffs. This feature should help facilitate the Commission's monitoring of the energy markets, to the benefit of the customers and all involved. It should also enhance competition within industries by providing the customers with an electronic means of comparing the rates, terms and conditions, and other provisions applicable to the regulated entities.

4. DESCRIBE EFFORTS TO IDENTIFY DUPLICATION AND SHOW SPECIFICALLY WHY ANY SIMILAR INFORMATION ALREADY AVAILABLE CANNOT BE USED OR MODIFIED FOR USE FOR THE PURPOSE(S) DESCRIBED IN INSTRUCTION NO. 2

Commission filings and data requirements are periodically reviewed in conjunction with OMB clearance expiration dates. This includes a review of the Commission's regulations and data requirements to identify any duplication. To date, no duplication of the proposed data requirements has been found. The Commission staff is continuously reviewing its various filings in an effort to alleviate duplication. There are no similar sources of information available that can be used or modified for use for the purpose described in Item A (1.).

5. METHODS USED TO MINIMIZE BURDEN IN COLLECTION OF INFORMATION INVOLVING SMALL ENTITIES

These filings impact the day-to-day operations of both major and non-major natural gas pipeline companies. Specific efforts have been made by the Commission to minimize the burden imposed on pipeline companies by requiring only information that is on-hand to them. This is in an effort to impact, as little as possible, normal daily pipeline operations, in order to report this information. 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 this submission, 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.

6. CONSEQUENCE TO FEDERAL PROGRAM IF COLLECTION WERE CONDUCTED LESS FREQUENTLY

The Commission and the industry would be placed at a disadvantage by not having available the most current data for competitive and regulatory purposes. Both need access to up-to-date information to monitor the self-implementing pipeline transportation and storage activities that are being carried out in a nondiscriminatory manner.

7. EXPLAIN ANY SPECIAL CIRCUMSTANCES RELATING TO THE INFORMATION COLLECTION

This proposed program meets all of OMB's section 1320.5 requirements for FERC-549B Capacity Information. All of the capacity and IOC information is made available on the pipelines' Internet websites. The IOC data is filed with the Commission on diskette. None of this information is filed in hard copy with the Commission. For FERC-545 Gas tariffs, the current program meets all of OMB's section 1320.5 requirements with the exception of part "d" thereof. Section 1320.5(d) limits the collection of data to an original and two copies of any document. The current requirements for data provided under FERC-545 calls for the submission of paper copies. In particular, FERC-545 includes informal and formal rate changes and would be filed by the respondents to comply with the provisions as indicated in Item A (1.). An electronic filing (diskette) and five paper (hard) copies of any rate schedule or any change in rate schedule or tariff related filing (see Section 154.4 of the Commission's regulations) are required by the Commission to conduct its regulatory review. However, once the final rule is issued, the Commission will eliminate the submission of paper filings. The Commission also proposes to standardize the process for withdrawals and amendments to tariff filings.

8. DESCRIBE EFFORTS TO CONSULT OUTSIDE THE AGENCY: SUMMARIZE PUBLIC COMMENTS AND THE AGENCY'S RESPONSE TO THESE COMMENTS

The Commission's procedures require that rulemaking notices be published in the Federal Register, thereby allowing all electric utilities, natural gas pipeline companies, state commissions, Federal agencies, and other interested parties an opportunity to submit views,

comments or suggestions concerning the proposal. These rulemaking procedures allow for public conferences to be held as required.

Over 60 entities from all segments of the natural gas industry filed comments on the NOPR. The vast majority of those who filed comments regarding the Commission's proposal to permanently remove the price cap for short-term capacity releases of one year or less supported the proposal, generally agreeing with the Commission's reasoning in support of removing the cap. Many of the local distribution companies (LDC), marketers, producers, and end-users who supported lifting the price cap on short-term capacity releases also support retaining the price cap on long-term capacity releases³⁵ and/or primary pipeline capacity.³⁶ These parties generally view retention of these price caps as providing valuable safeguards in preventing the exercise of market power in the uncapped short-term capacity release market.

Two commenters opposed the Commission's proposal to lift the price cap for the short-term capacity release market, arguing that the Commission has not supported its proposed rule and that the proposed rule would fail a cost-benefit test.³⁷ Other commenters expressed concern over the potential for capacity owners to exercise market power under the proposed rule.³⁸ For example, some end-users of gas expressed concerns about the concentration of capacity ownership on lateral pipelines and therefore argued that the Commission should either not remove the price cap for laterals or do so on a case-by-case basis.³⁹ Other parties generally urged the Commission to carefully monitor markets to ensure that they are functioning properly. Some suggested a final test period before permanently removing the cap, periodic reassessments

³⁵ These commenters include Direct Energy Services LLC (Direct Energy), New Jersey Natural Gas Company (NJNG), Oklahoma Independent Petroleum Association (OIPA), Reliant Energy Inc. (Reliant), Statoil Natural Gas, LLC (Statoil), and Weyerhaeuser Company (Weyerhaeuser).

³⁶ Such commenters include Edison Electric Institute (EEI), NJNG, NJR Energy Services Company (NJR), Nstar Gas Company (Nstar), OIPA, Piedmont Natural Gas Company, Inc. (Piedmont), Statoil, Weyerhaeuser, and the Wisconsin Distributor Group (WDG). American Gas Association (AGA), American Public Gas Association (APGA), and Independent Petroleum Producers of America (IPAA) oppose lifting the price cap for primary capacity, arguing that doing so would undercut a major premise for lifting the price cap in the short-term secondary market, namely, that the availability of recourse rates from the pipeline will constrain the exercise of market power in the secondary market.

³⁷ Tenaska Marketing Ventures (Tenaska) and National Energy Marketers Association (NEM).

³⁸ See Comments of NEM.

³⁹ Weyerhaeuser, Northwest Industrial Gas Users (NWIGU), and Process Gas Consumers (PGC).

of the uncapped market, or a process to revisit the determination if the market becomes dysfunctional.⁴⁰

In general, commenters also overwhelmingly supported the Commission's efforts to facilitate the development of AMAs.⁴¹ Those commenters agreed with the Commission's assessment that AMAs provide value and benefits to market participants and to natural gas markets overall. Virtually all who commented support the steps proposed by the Commission to facilitate AMAs, though many of those that support the Commission's proposal regarding AMAs requested that the Commission modify or clarify the proposal in various ways in order to permit broader use of AMAs and greater flexibility in the terms of permitted AMAs. They requested, for example, that the Commission permit uncapped AMA releases of a year or less to be rolled over without bidding, clarify that profit sharing arrangements in an AMA do not violate any applicable price cap, relax the requirements concerning the replacement shipper's obligation to deliver gas to the releasing shipper, exempt AMAs from the Commission's prohibition against buy/sell arrangements, and allow supply side AMAs. Williston Basin commented that exempting AMAs from the tying prohibition and bidding requirements would encourage discrimination against pipelines and provide preferential treatment to asset managers.

The Commission also received favorable comments on whether it should clarify its prohibition against tying agreements to allow a releasing shipper to include conditions in a storage release concerning the sale and/or repurchase of gas in storage inventory outside the AMA context. All comments that addressed this issue supported removing this prohibition for storage services. They asserted that a shipper releasing storage capacity should be permitted to require the replacement shipper to take assignment of any gas that remains in the released storage capacity at the time the release takes effect; and/or to return the storage capacity to

⁴⁰ Direct Energy, OIPA, Honeywell International, Inc. (Honeywell), Arizona Public Service Company (APS) (arguing that the market currently served by El Paso Natural Gas Pipeline east of California is not competitive). Commerce Energy Group, Inc. (Commerce Energy) suggests including a contingency for replacing the price cap in "exceptional capacity situations."

⁴¹ See e.g., Comments of the AGA at 1-2, Comments of APGA at 2-4; Comments of Atmos Energy Corporation (Atmos) at 2-4, Comments of BG Energy Merchants (BGEM) at 1-2, Comments of BP Energy Company (BP) at 2, Comments of Direct Energy at 3-4, Comments of Duke Energy Corporation (Duke Energy) at 3, Comments of the EEI at 6, Comments of the Electric Power Supply Association (EPSA) at 2, Comments of Florida Cities at 2, Comments of the Interstate Natural Gas Association of America (INGAA) at 6, Comments of Marketer Petitioners at 2, Comments of National Grid Delivery Companies (National Grid) at 2, Comments of NJNG at 1, Comments of the Natural Gas Supply Association (NGSA) at 3, Comments of NJR at 1, Comments of NWIGU at 6, Comments of Nstar at 1-2, Comments of the Ohio Gas Marketers Group (OGMG) at 1, Comments of Piedmont at 1, Comments of PPM Energy, Inc., (PPM) at 1-3, Comments of PGC at 5, Comments of the Public Utilities Commission of Ohio (PUCO) at 5-7, Comments of Puget Sound Energy, Inc. (Puget Sound) at 8-9, Comments of Sequent Energy Management, L.P. (Sequent) at 5-6, Comments of the Financial Institutions Energy Group (FEIG) at 6-7, Comments of Turlock Irrigation District (Turlock) at 5, Comments of Ultra Petroleum Corporation (Ultra) at 4, Comments of the WDG at 3, and Comments of the Wyoming Pipeline Authority at 5.

releasing shipper at end of the release with a specified amount of gas in storage.⁴² Commenters noted that tying storage capacity with storage inventory will enable transactions to be consummated more readily and that the nature of the relationship between storage capacity and storage inventory calls out for a waiver of the tying rule. Others added that the ability of releasing shippers to “tie” storage capacity with storage inventory such that releasing shippers would be permitted to require that replacement shippers take inventory as a condition of release, even in circumstances outside the AMA context, will provide benefits to the marketplace similar to those provided by AMAs.⁴³

The Commission also received numerous comments on its inquiry whether pre-arranged capacity release deals necessary to implement retail access programs should be treated as similar to releases made as part of an AMA, and thus accorded the same exemptions. The majority of comments on this issue advocated affording capacity releases under state retail choice programs the same blanket exemptions from the tying prohibition⁴⁴ and bidding requirements as those granted to asset managers.⁴⁵ AGA, for example, recommends that the Commission add an exemption from the bidding requirements for any prearranged, recallable capacity release from an LDC to a natural gas marketer in accordance with the terms of a retail choice program approved by a State commission. AGA also asked that the Commission clarify that LDC releases to retail choice marketers would be entitled to the same partial exemption from the tying prohibition as would be releases under AMAs. The SPSCNY would extend the AMA exemption from the tying prohibition to releases of storage capacity conducted according to state retail access programs.

Benefits from Removing the Price Ceiling

Tenaska contested some of the benefits the Commission has cited for removing the price ceiling. It argued there will be no overall increase in allocative efficiency from removal of the short term release price cap. It asserted that capacity that is in excess to the current capacity

⁴² Public Service Commission of New York (PSCNY) comments at 20–21.

⁴³ Comments of Marketer Petitioners.

⁴⁴ Those commenters include AGA, Commerce Energy, Duke Energy, Hess Corporation (Hess), Interstate Gas Supply (IGS), NJNG, New York State Electric and Gas Corporation (NYSEG), Rochester Gas & Electric Corporation (RG&E), OGMG, the Public Service Commission of North Carolina (PSNC), South Carolina Electric and Gas Company (SCE&G), SCANA Energy Marketing (SEMI), PSCNY, and Sequent.

⁴⁵ Those commenters include the AGA, Boardwalk Pipeline Partners (Boardwalk), BP, Commerce Energy, Direct Energy, Duke Energy, FPL Energy, LLC (FPL Energy), Hess, IGS, NJNG, NYSEG, RG&E, Nstar, OGMG, Peoples Gas System, a Division of Tampa Electric Company (Peoples), PG&E, PSCNY, PUCO, SEMI, Sequent, and the WDG.

holder's needs already finds its way to those who value it more by a variety of means, including bundled downstream sales, short and long term capacity releases, and pipeline sales of short-term firm and interruptible service. It also argued that releasing shippers with excess capacity are more likely to release that capacity over a longer term, perhaps multiple years, rather than speculate that it could profit by making very short-term releases during peak period price spikes. It stated that releases over relatively long term with few exceptions allow the releasing shipper to realize its full market value without being constrained by maximum pipeline rates.⁴⁶

Commission's Response:

Rather than undercutting the removal of the price cap, Tenaska's argument that releasing shippers can now avoid the price ceiling by making gas sales (in effect bundled sales of gas and transportation) supports the Commission's determination. Shippers may well find that releasing transportation alone is far more efficient than making a bundled sales transaction, and therefore, removal of the price ceiling will serve only to promote efficiency with negligible effect, if any, on price levels. Similarly, requiring shippers to execute long-term contracts in order to effectuate short-term transactions is inefficient, and would mask more accurate short-term price signals. Moreover, releasing and replacement shippers want to contract based on price differentials between markets even when such differentials exceed the maximum rate, and executing long term contracts at some approximate capped rate would not achieve that goal.

Tenaska also argued that holders of long term pipeline contracts, that are "net long" compared to their actual capacity needs will be the only shippers to benefit. Market participants that are "net short" hold less capacity than they need and choose to match some portion of their demand with short term services and delivered gas purchases rather than to rely exclusively on long term pipeline contracts. Tenaska argues that the effect of the removal of the short term release rate cap, if there is any effect on reallocation of capacity at all, will be a transfer of value from net short companies to net long companies and states that there will be no net market benefit of the type the Commission must show to justify the proposed removal of the cap.

Tenaska ignores the fact that "net short" holders of capacity under its scenario will benefit from the removal of the price cap from short term capacity release because they may be able to gain access to capacity in a constrained market that they could not if the price cap remained. A releasing shipper, subject to a rate ceiling, may well hold onto capacity if the maximum rate is less than its opportunity cost, such as using an alternative fuel, using expensive

⁴⁶ Tenaska explained, "[c]apacity that basis markets show to be worth more than the applicable pipeline maximum rate in the prompt month will almost always drop in value to a level below that maximum rate at some future point. Such capacity can be sold for its full value within the pipeline maximum rate cap simply by extending the term." Tenaska comments at 4-5.

storage, or conservation of gas.⁴⁷ Moreover, the fact low load factor “net long” holders of capacity of the type described by Tenaska can profit from above-cap short term releases is one of the benefits of removing the short-term price cap.

Posting and Reporting Requirements

In the NOPR, the Commission stated that, while it proposed to exempt capacity releases implementing AMAs from bidding, such releases would remain subject to all existing posting and reporting requirements. Accordingly, the Commission stated, pipelines would still be obligated to provide notice of the release pursuant to 18 CFR section 284.8(d). In addition, the details of the release transaction would have to be posted on the pipeline’s Internet web site under 18 CFR section 284.13(b)(1)(viii), which requires the posting of “special terms and conditions applicable to a capacity release transaction.” The Commission also stated that sections 284.13(c)(2)(viii) and (ix) require that the pipeline’s index of customers 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.

Several parties filed comments regarding the posting and reporting requirements for AMAs.⁴⁸ While most support the Commission’s goals of transparency and disclosure, they sought clarification as to what exactly must be posted. Essentially these comments request clarification that commercially sensitive details of an AMA, such as the structure, assets available for use by the asset manager, and the compensation to be paid, do not need to be posted as “special terms and conditions” of the release pursuant to section 284.13(b)(1)(viii). They asserted that only the fact that the release is an AMA needs to be disclosed. FPL requested that the Commission specifically define the facts that must be reported for there to be a valid AMA. Hess made a similar request, and emphasized that releasing shippers should not be required to post an RFP or any other details of the AMA because they are proprietary, confidential and commercially sensitive. Hess also requested the Commission confirm that it is not expanding the details that it expects to be disclosed as special terms and conditions. Hess and Integrys asserted that posting and reporting on AMAs should be limited to the fact that the release is part of an AMA and describing the terms and conditions of the release associated with the AMA.⁴⁹ NGSa also requested clarification that the posting of a capacity release in the context of an AMA should require only the information normally posted for a typical release of

⁴⁷ Order No. 637 at 31,554.

⁴⁸ See e.g., Comments of AGA; Comments of FPL, Comments of Hess; Comments of Integrys, and NGSa comments.

⁴⁹ Integrys comments at 6-7.

capacity (receipt and delivery points, term); along with a statement that acknowledges that it is part of an AMA.

Commission's Response

In response to these comments, the Commission clarifies in the Final Rule the posting and reporting requirements that will be applicable to release transactions implementing AMAs. By stating in the NOPR that existing section 284.13(b)(1)(viii) requires that any "special terms and conditions" of such releases must be posted, the Commission did not intend to require that commercially sensitive details of an AMA be disclosed, particularly information concerning the gas commodity aspects of the AMA.⁵⁰ The Commission recognizes that in order to promote competition certain details of the AMA are commercially sensitive and thus should remain confidential.

However, the Commission finds that any posting under section 284.13(b) that relates to a release to implement an AMA should include (1) the fact that the release is to an asset manager and (2) the delivery or purchase obligation of the AMA, in addition to the information required to be posted for all capacity releases. The requirement that the asset manager delivers or purchase gas to fulfill the releasing shipper's supply or marketing obligations is the cornerstone for differentiating AMAs from standard capacity releases. In order to ensure that capacity releases posited as AMAs eligible for the exemptions from tying and bidding are bona fide AMAs, the Commission must have a means to monitor this critical component of the arrangement. Other information specifically related to the AMA, however, such as the pricing of any sales of gas commodity and any profit sharing arrangements between the releasing and replacement shipper need not be posted pursuant to section 284.13(b). Consistent with this discussion, the Commission is revising section 284.13(b)(1) of its regulations to add a new subsection (x) specifying the information concerning an AMA that must be included in the posting of any capacity release meant to implement an AMA. The required posting concerning the delivery or purchase obligation that qualifies the release as an AMA under the definition discussed above should specify the volumetric level of the replacement shipper's delivery or purchase obligation and the time periods during which that obligation is in effect.

INGAA and other pipeline commenters stated that as pipelines already have a substantial role in administering the Commission's capacity release program, pipelines should not be overburdened by the proposed changes nor should they be responsible for policing asset managers' compliance therewith. They assert that pipelines' obligations should be limited to

⁵⁰ The Commission retains the right, however, to require a releasing shipper to make all relevant agreements and supporting documents available to the Commission for review if questions arise as to whether a purported AMA satisfies the Commission's regulations.

posting offers submitted by releasing shippers using the terms and conditions provided to the pipeline.⁵¹

In the Final Rule, the Commission clarifies that pipelines are responsible for posting offers submitted by releasing shippers that are meant to implement AMAs using the terms and conditions provided by the releasing shipper to the pipeline. It is incumbent upon the releasing shipper to include the details discussed above to qualify the release as an AMA. FERC also clarifies that the pipeline has no obligation to act on any information other than is provided to it by its customers. The pipeline must of course, comply with all applicable elements of section 284.13 of the Commission's regulations.

Implementation Schedule

The regulatory changes in the Final Rule will become effective as of the effective date of the Final Rule, at which time parties may act in accordance with the revised regulations adopted by the Final Rule. Pipelines must file within 180 days of the effective date of the Final Rule to remove any inconsistent tariff provisions and can incorporate this filing into any other tariff filing made by the pipeline within the 180 day period.

9. EXPLAIN ANY PAYMENTS OR GIFTS TO RESPONDENTS

There are no payments or gifts to respondents in the proposed rule.

10 and 11. DESCRIBE ANY ASSURANCE OF CONFIDENTIALITY PROVIDED TO RESPONDENTS & PROVIDE ADDITIONAL JUSTIFICATION FOR ANY QUESTIONS OF A SENSITIVE NATURE THAT ARE CONSIDERED PRIVATE

The Commission generally does not consider the data filed to be confidential. There are no questions of a sensitive nature associated with the provisions proposed in the subject Final Rule. Specific requests for confidential treatment to the extent permitted by law will be entertained pursuant to 18 C.F.R. Section 388.110. See additional discussion above under item no. 8 "Posting and Reporting Requirements".

12. ESTIMATED BURDEN COLLECTION OF INFORMATION

As mentioned above, natural gas pipelines must also amend their tariffs to remove

⁵¹ INGAA comments at 21; Spectra comments at 29.

inconsistent language and to incorporate the provisions from this rule into another tariff filing as covered under FERC-545 and file with the Commission.

With respect to FERC-549B, the Commission did not receive specific comments concerning its burden estimates in the NOPR but modifies them here in the Final Rule. These changes are to reflect the addition of what must be included in the posting of any capacity release to implement an asset management agreement or a release made as part of a state retail access program and to make the require tariff filings. The burden estimates for complying with additional filing requirements of this rule pursuant to the procedures in proposed new sections 284.13(b)(1) are set forth below. For the most part, the burden on respondents to comply with the existing reporting requirements in section 284.13 of the Commission’s regulations will not be changed by this proposed rule. In 1992 in Order No. 636 the Commission established a capacity release mechanism under which shippers could release firm transportation and storage capacity on either a short or long term basis to other shippers wanting to obtain capacity. This Final Rule modifies policies and regulations concerning capacity releases by shippers on interstate pipelines in order to enhance the efficiency and effectiveness of the secondary capacity release market. On average, the Commission expects the burden of making the corresponding changes in the Final Rule to be 35 hours. This estimate is based on the modification of websites to account for the posting of the delivery and /or purchase obligation and whether a release is to a marketer serving as an asset manager or a shipper who is participating in a state unbundling program, as well as to make the required tariff changes.

Data	No. of Respondents	No. of Responses Per Respondent	Hours Per Response	Total Annual Hours
FERC-549B	102	1	10	1,020
FERC-545	102	1	25	2,550

13. ESTIMATE OF THE TOTAL ANNUAL COST BURDEN TO RESPONDENTS

The Commission sought comments on the cost to comply with these requirements. No

comments were received. The Commission has projected the average annualized cost for all respondents to be \$145,350. This takes into account IT technical support 5 hours @\$125 an hour, legal review 3 hours @\$250 an hour and administrative support 22 hours @\$25 an hour (using market rates for these particular occupations).

14. ESTIMATED ANNUALIZED COST TO THE FEDERAL GOVERNMENT

The estimated annualized cost to the Federal government related as proposed in the subject Final Rule are shown below:

Data Requirement of Data Number	Analysis (FTEs)#	Estimated Salary * Per Year	Total Cost One Year's Operation
FERC-549B	3.0	\$126,384	\$ 379,152
FERC-545	2.0	\$126,384	\$ 252,768
			\$ 631,920

15. REASONS FOR CHANGES IN BURDEN INCLUDING THE NEED FOR ANY INCREASE

The changes in this Final Rule are as noted above, to reflect the addition of the information that must be included in the posting of any capacity release to implement an asset management agreement or a release made as part of a state retail access program. In addition, natural gas pipelines will be responsible for making a tariff filing to remove any inconsistent tariff provisions and can incorporate this filing into any other tariff filing made by the pipeline. These program changes are for complying with additional filing requirements of the Final Rule in accordance with the procedures contained in proposed sections 284.13(b)(1).

16. TIME SCHEDULE FOR PUBLICATION OF DATA

The results of this information collection are not published by the Commission. However, the capacity and IOC information is posted on the pipelines' Internet websites for public disclosure.

17. DISPLAY OF EXPIRATION DATE

It is not possible to display the OMB approval expiration date for this information collection because the information is not collected on a standard, preprinted form which would

avail itself to this display. However, the electronic filing instruction manual and the instructions for posting the IOC information on the pipelines' Internet websites does contain both the OMB control number and expiration date. With respect to FERC-545, once the Commission issues a final rule in the electronic tariff initiative, the instruction manual for the proposed requirements for electronic filing of tariffs (already posted at the NOPR stage) will contain the appropriate OMB control nos.

18. EXCEPTIONS TO THE CERTIFICATION STATEMENT

Not applicable. The Commission does not use the capacity reports, the IOC information or tariff filings for statistical purposes.

B. COLLECTION OF INFORMATION EMPLOYING STATISTICAL METHODS

This is not an information collection employing statistical methods.

FERC-549B, FERC-545

Final Rule (Docket No. RM08-1-000)
Issued: June 19, 2008

