REPORT OF THE NATURAL GAS REGULATION COMMITTEE

This report summarizes policy developments and legal decisions that have occurred at the Federal Energy Regulatory Commission (FERC or Commission) and the U.S. Courts of Appeals in the area of natural gas regulation. The time frame covered by this report is the period between July 1, 2009, and June 30, 2010.*

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I. RULEMAKING PROCEEDING

A. *Affiliate Rules*

On October 15, 2009, the Federal Energy Regulatory Commission (FERC) issued Order No. 717-A,[1] clarifying the final rules governing the relationship between a transmission provider and its marketing function employees and the marketing function employees of its affiliates. The FERC clarified that the term marketing function employee, as defined in 18 C.F.R. § 358.3(d), "does not include an employee of an affiliate that does not engage in transmission transactions on the affiliated transmission provider's transmission system."[2] The FERC denied rehearing that the marketing function definition be amended to include purchases as well as sales, finding that restricting the definition to include only sales more closely matches the FERC's statutory prohibitions against undue discrimination in section 206 of the Federal Power Act (FPA) and section 5 of the Natural Gas Act (NGA).[3]

The FERC clarified that a natural gas local distribution company (LDC) "making off-system sales of gas that has been transported on non-affiliated pipelines is not subject to the Standards of Conduct if it conducts transmission transactions with an affiliated interstate pipeline for the purpose of making bundled retail sales or on-system sales."[4] Also, the FERC clarified that it intended to exempt all on-system sales by an intrastate pipeline, by a Hinshaw pipeline exempt from the Natural Gas Act (NGA), or by an LDC.[5] The FERC denied a request for rehearing regarding the exclusion from the definition of marketing function the sale of natural gas from a seller's own production and from a seller's own gathering and processing facilities.[6]

The FERC clarified that the exemption regarding the seller's own production encompasses foreign sourced gas regardless of whether the seller owns the mineral rights at the foreign wellhead or acquires ownership onboard a liquefied natural gas (LNG) vessel, so long as it owns the gas before it enters the transmission provider's transmission facilities and the gas is the only gas the transmission provider is transporting.[7] The FERC clarified that a releasing shipper is not performing a marketing function when it assigns gas supply to an asset manager under an asset management agreement (AMA). However, the FERC stated that if the AMA "leaves the releasing shipper any ability to conduct sales for resale or provides that the releasing shipper is to retain control of the

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1. Order No. 717-A, *Standards of Conduct for Transmission Providers*, F.E.R.C. STATS & REGS. ¶ 31,297, 74 Fed. Reg. 54,463 (2009) (to be codified at 18 C.F.R. pt. 358) [hereinafter *Order No.717-A*].
2. *Id.* at P 16.
3. *Id.* at P 35.
4. *Id.* at P 48.
5. *Id.* at P 49.
6. *Id.* at P 55.
7. *Id.* at P 59.

transactions entered into by the asset manager, the releasing shipper would remain subject to the Independent Functioning Rule with regard to that specific agreement."[8]

The FERC clarified that an affiliate of an interstate pipeline is not engaged in marketing functions to the extent that such affiliate makes incidental purchases or sales of natural gas to remain in balance under applicable pipeline tariffs.[9] The FERC also clarified that de minimis off-system sales that are related to an LDC's balancing requirements are not included in the definition of marketing function.

The FERC also denied a request to remove "submission of offers to sell in interstate commerce" from the definition of natural gas marketing function activities.[10] The FERC clarified that the exclusion in 18 C.F.R. § 358.3(c)(2)(iii) for sales of natural gas solely from a seller's own production is consistent with the exclusion in Order No. 497-A that includes situations in which a producer sells gas that it owns, or sells gas of other interest owners in the same well and reservoir to the extent that the producer has contractual authority to sell such gas.[11]

The FERC clarified that marketing function employees include employees in the legal, finance, or regulatory division of a jurisdictional entity, whose intermittent day-to-day duties include the drafting and redrafting of non-price terms and conditions of, or exemptions to, umbrella agreements. The FERC declined to make a generic finding to limit marketing functions to only price terms and conditions, but will consider waiver requests concerning an employee whose intermittent duties involve drafting non-price terms and conditions.[12]

The FERC clarified that the no-conduit rule prohibits disclosure of non-public transmission function information to any of the marketing function employees of the transmission provider or its affiliate, including employees, contractors, consultants, or agents of the transmission provider and any affiliates of the transmission provider.[13] The FERC also clarified that transmission providers may allow their transmission function employees to exchange non-public transmission function information to non-marketing function employees without the need for disclosure, but such employees remain obligated to abide by the no-conduit rule.[14]

The FERC denied a request to adopt the discount posting provisions as proposed in the notice of proposed rulemaking (NOPR), stating that requiring pipelines to post no later than the first nomination is consistent with how all other shippers are treated and provides the necessary transparency.[15] The FERC also denied a request to require that the waiver posting requirement apply to all waivers granted and not only those granted to an affiliate.[16] Finally, the FERC

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8. *Id.* at P 63.
9. *Id.* at P 67.
10. *Id.* at P 75.
11. *Id.* at P 76.
12. *Id.* at P 80.
13. *Id.* at P 97.
14. *Id.* at P 113.
15. *Id.* at P 118.
16. *Id.* at P 119.

granted the clarification request to include NGA section 7(f) companies within the LDC exemption.

On November 16, 2009, the FERC issued Order No. 717-B,[17] granting limited rehearing and clarification regarding the Standards of Conduct. The FERC clarified that an employee making business decisions about non-price terms and conditions can be considered a "marketing function employee" because that employee is actively and personally engaged in marketing functions.[18] The FERC added that an employee that simply drafts or redrafts a contract, including non-price terms and conditions, without making business decisions is not a "marketing function employee."[19]

On April 16, 2010, the FERC issued Order No. 717-C, granting further rehearing and clarification regarding the Standards of Conduct.[20] The FERC reiterated its clarification in Order No. 717-B regarding employees making business decisions about non-price terms and conditions.[21] The FERC also reiterated that a risk management employee may develop risk guidelines for both transmission and marketing function employees.[22]

B. Business Practice Standards

On March 24, 2010, the FERC issued Order No. 587-U,[23] amending Part 284 of its regulations to incorporate the Version 1.9 standards for interstate natural gas pipeline business practices and electronic communications developed by the Wholesale Gas Quadrant of the North American Energy Standards Board (NAESB). The FERC required interstate pipelines to incorporate by reference the Version 1.9 business practice standards adopted by the NAESB, except two standards that conflict with the FERC's record retention requirements. The NAESB Version 1.9 standards include the communications standards and protocols related to index-based capacity releases and flow day redirects in response to Order No. 698, as well as the standards adopted in response to FERC orders involving capacity release (Order No. 712),[24] standards of conduct (Order No. 717),[25] and pipeline damage reporting (Order No. 682).[26] The FERC

17. Order No. 717-B, *Standards of Conduct for Transmission Providers*, 129 F.E.R.C. ¶ 61,123, 74 Fed. Reg. 60,153 (2009) (to be codified 18 C.F.R. pt. 358.) [hereinafter *Order No. 717-B*].

18. *Id.*

19. *Id.*

20. Order No. 717-C, *Standards of Conduct for Transmission Providers,* 131 F.E.R.C. ¶ 61,045, 75 Fed. Reg. 20,909 (2010) (to be codified at 18 C.F.R. pt. 358).

21. *Id.* at P 23.

22. *Id.* at P 25.

23. Order No. 587-U, *Standards for Business Practices for Interstate Natural Gas Pipelines,* F.E.R.C. STATS & REGS. ¶ 31,307, 75 Fed. Reg. 16,337 (2010) (to be codified at 18 C.F.R. pt 284) [hereinafter *Order No. 587-U*].

24. Order No. 712, *Promotion of a More Efficient Capacity Release Market,* F.E.R.C. STATS & REGS. ¶ 31,271 (2008), 73 Fed. Reg. 37,058 (2008) (to be codified at 18 C.F.R. pt. 284), *order on reh'g,* F.E.R.C. STATS. & REGS. ¶ 31, 284 (2008), 73 Fed. Reg. 72,692 (2008), *order on reh'g,* 127 F.E.R.C ¶ 61,051 (2009), 74 Fed. Reg. 18,127 (2009), *appeal pending sub nom.* Interstate Natural Gas Ass'n of Am. v. FERC, No. 09-1016, 2010 WL 3190791 (D.C. Cir. Aug. 13, 2010).

25. Order No. 717, *Standards of Conduct for Transmission Providers,* F.E.R.C. STATS. & REGS. ¶ 31,280 (2008), 73 Fed. Reg. 63,796 (2008) (to be codified at 18 C.F.R pt. 358).

required pipelines to file tariff sheets to reflect the changed standards by September 1, 2010, to take effect on November 1, 2010.[27]

C. *Electronic Tariff Filing*

In Order No. 714,[28] the FERC issued final rules requiring that all tariff, tariff revisions, and rate change applications be filed electronically with the FERC according to a set of standards that were developed in conjunction with the NAESB. In Order No. 714, the FERC required each regulated entity to make an electronic filing to establish their baseline tariffs. On March 19, 2010, the FERC issued an Order that established a six-month implementation schedule for the filing of baseline electronic tariffs beginning April 1, 2010.[29]

D. *Financial Reporting Requirements*

In Order No. 710,[30] the FERC promulgated final rules revising the financial reporting requirements to increase the data to be included on FERC Form No. 2, 2-A, and 3-Q filed by interstate pipelines. Among the changes in the final rules, the FERC added a new schedule to the forms requiring interstate pipelines to provide additional information regarding the cost of fuel used in pipeline operations. In comments, the American Gas Association (AGA) recommended that the new fuel schedule be revised to break out the fuel data by the different pipeline functions (i.e., transportation, storage, gathering, and exploration/production), and to include, by function, the amount of fuel that is waived or reduced as part of a discounted or negotiated rate contract. The FERC did not adopt these recommendations, and the AGA sought judicial review before the U.S. Court of Appeals for the District of Columbia Circuit.

On January 22, 2010, the court held the FERC failed to respond to the reasonable concerns raised by a dissenting Commissioner.[31] The court held that while the FERC is not required to agree with arguments raised by a dissenting Commissioner, it must, at a minimum, acknowledge and consider them, which the FERC failed to do.[32]

With regard to the AGA's recommendation that the new fuel data be broken out by function, the court noted that in his dissent, then-Commissioner

26. Order No. 682, *Revision of Regulations to Require Reporting of Damage to Natural Gas Pipeline Facilities,* F.E.R.C. STATS. & REGS. ¶ 31,227 (2006), 71 Fed. Reg. 51,098 (2006) (to be codified at 18 C.F.R. pt. 260).

27. *Order No. 587-U*, *supra* note 23, at P 12.

28. Order No. 714, *Electronic Tariff Filings*, F.E.R.C. STATS & REGS. ¶ 31,276 (2008), 73 Fed. Reg. 57,515 (2008) (to be codified at 18 C.F.R. pts. 35, 131, 154, 157, 250, 281, 284, 300, 341, 344, 346, 347, 348, 375, 385).

29. *Electronic Tariff Filings*, 130 F.E.R.C. ¶ 61,228 (2010).

30. Order No. 710, *Revisions to Forms, Statements, and Reporting Requirements for Natural Gas Pipelines,* F.E.R.C. STATS. & REGS. ¶ 31,267 (2008), 73 Fed. Reg. 19,389 (2008), *reh'g denied* Order No. 710-A, 123 F.E.R.C. ¶ 61,278 (2008), 73 Fed. Reg. 36,414 (2008), *remanded sub nom.* Am. Gas Ass'n v. FERC, 593 F.3d 14 (D.C. Cir. 2010).

31. *Am. Gas Ass'n*, 593 F.3d 14.

32. *Id.* at 20.

Wellinghoff argued that unless the data is broken out by function, a shipper cannot match the revenues generated by the sale of excess fuel with the functionalized costs.[33] The court criticized the FERC for not addressing this concern: "Nowhere in the Orders did the Commission claim either that customers do not need to be able to match excess fuel revenues with functionalized costs or that customers already have enough information to do so."[34]

With regard to the AGA's recommendation that the new fuel schedule include the amount of fuel that was waived or discounted, the court noted that then-Commissioner Wellinghoff argued that this information was important to protect against "cross-subsidization."[35] The court found that "[w]hile the Commission proffered several justifications for its decision to reject petitioner's request for the additional discounted and negotiated rate data, the Commission never mentioned cross-subsidization."[36] The court emphasized this point later, concluding that the FERC recognized that providing customers with additional information was necessary to protect customers not only from fuel cost over-recovery, but also from cross-subsidization: "The dissent raised several concerns related to cross-subsidization, yet the Commission responded to none of them." The court held that "[w]here a dissenting Commissioner raises a reasonable alternative, the majority is obligated to consider it."[37] The court granted the AGA's petition for review and remanded the case back to the FERC.

E. Market Transparency

1. Annual Transactions Reports

In Order No. 704, the FERC required natural gas market participants to report annual information regarding their wholesale physical natural gas purchase and sales transactions on a new Form No. 552.[38] Following the first Form No. 552's filed by July 1, 2009, for transactions occurring in calendar year 2008, several parties filed additional requests for clarification of the reporting requirements.[39] On February 22, 2010, the FERC announced that it would hold a technical conference to consider specific issues identified by staff including:

> (1) inconsistencies in reporting upstream transactions in the natural gas supply chain on Form No. 552, and whether these transactions contribute to wholesale price formation; (2) whether transactions involving balancing, cash-out, operational, and in-kind transactions should be reported on Form No. 552; and (3)

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33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 21.

37. *Id.*

38. Order No. 704, *Transparency Provisions of Section 23 of the Natural Gas Act*, F.E.R.C. STATS. & REGS. ¶ 31,260, 73 Fed. Reg. 1,014 (2008) (to be codified at 18 C.F.R. 260, 284, 385).

39. Order No. 704-A, *Transparency Provisions of Section 23 of the Natural Gas Act*, F.E.R.C. STATS. & REGS. ¶ 31,275, 73 Fed. Reg. 55,726-01 (2008) (to be codified at 18 C.F.R. 260, 284, 385); *Transparency Provisions of Section 23 of the Natural Gas Act*, 125 F.E.R.C. ¶ 61,302 (2008).

> whether the units of measurement (TBtu) currently used for reporting volumes in the form are appropriate.[40]

The FERC then granted market participants an extension of time until July 1, 2010 to file their Form No. 552 for calendar year 2009.[41] Following the conference, the FERC extended the deadline until September 1, 2010.[42]

2. Pipeline Posting Requirements

On January 21, 2010, the FERC issued Order No. 720-A, affirming with certain modifications the final rules "requiring major non-interstate pipelines to post daily scheduled volume information" and design capacity at certain receipt and delivery points and requiring interstate pipelines to post no-notice volumes.[43] The FERC stated that "NGA section 23 provides the Commission limited jurisdiction over major non-interstate pipelines for the purpose of requiring public disclosure of information to enhance market transparency."[44] The FERC emphasized that "its transparency jurisdiction is limited to the dissemination of information that will aid in market transparency," and the "regulations do not govern the rates, terms, and conditions of service of major non-interstate pipeline[s]."[45]

With regard to the delivery threshold for determining when a pipeline is a "major" non-interstate pipeline, the FERC stated that the regulatory definition ("pipelines that deliver annually more than fifty (50) million MMBtus (million British thermal units) . . . measured in average deliveries for the three previous calendar years")[46] is unambiguous and requires the aggregation of pipeline deliveries over the previous three calendar years and division by three.[47] The FERC added that a new pipeline must use maximum delivery capacity to determine whether it meets the delivery threshold.[48]

The FERC "clarifie[d] that the phrase 'facility-by-facility' as used in Order No. 720 applies both to determine whether a pipeline is a major non-interstate pipeline . . . and also whether [it] is nevertheless exempt from the posting requirements," and that the phrase was intended to denote "a common sense grouping of related facilities."[49] The FERC held that "a major non-interstate pipeline is composed of a set of facilities that is both physically interconnected and operationally integrated."[50] The FERC explained that "[w]hether pipelines

40. Transparency Provisions of Section 23 of the Natural Gas Act; Notice of Form No. 552 Technical Conference, 75 Fed. Reg. 9202, 9203 (2010).

41. *Id.*

42. Transparency Provisions of Section 23 of the Natural Gas Act; Notice of Extension of Time, 75 Fed. Reg. 30392 (2010).

43. Order No. 720-A, *Pipeline Posting Requirements Under Section 23 of the Natural Gas Act*, F.E.R.C. STATS. & REGS. ¶ 31,302, 75 Fed. Reg. 5178 (2010) (to be codified at 18 C.F.R. 284).

44. *Id*. at P 25.

45. *Id*. at 31.

46. *Id.* at P 66 (internal quotations omitted).

47. *Id*.

48. *Id.* at P 67.

49. *Id*. at P 76.

50. *Id.* at P 77.

are organized into separate corporate divisions or formal operating systems is not relevant to [the] analysis."[51]

The FERC held that "major non-interstate pipelines must post scheduled flow data for points where design capacity is unknown or does not exist with scheduled maximum natural gas volumes equal to or greater than 15,000 MMBtu on any day within the prior three calendar years."[52] "For purposes of determining whether a point with no known design capacity must be posted," the FERC stated that "major non-interstate pipelines shall use the largest scheduled natural gas flow over the past three calendar years," and that "[i]f the largest daily scheduled flow is equal to or greater than 15,000 MMBtu, then the point is subject to posting."[53]

With regard to points where the design capacity is known, "market observers may estimate availability by subtracting scheduled volumes from design capacity."[54] The final rule exempted from posting receipt points with actual flows less than 5,000 MMBtus per day on each day within the prior three years. In Order No. 720-A, the FERC clarified that this "exemption shall apply to receipt points with scheduled natural gas volumes of less than 5,000 MMBtu per day on each day within the prior three calendar years."[55]

The FERC held that if a pipeline "schedules natural gas transportation using a timeframe different from daily scheduling . . . postings must nevertheless occur on a daily basis utilizing the most recent scheduling data."[56] Pipelines must use "reasonable efforts to estimate daily natural gas scheduled flows" and "must explain the basis for such estimates."[57]

For bi-directional points, the FERC clarified that "bi-directional scheduled volumes should not be netted against each other prior to posting."[58] The FERC added that "[t]o the extent that a major non-interstate pipeline believes that such posting would provide misleading data regarding available capacity at the point, it may post a narrative explaining how such scheduled volumes affect available capacity."[59]

The FERC held that "a major non-interstate pipeline with a stub line incidental to a processing plant and that delivers all of its transported gas directly into a single pipeline should not be required to comply with the posting requirements," but that if the "stub line delivers gas to multiple pipelines or to end-users, then the . . . pipeline will not be exempt."[60]

The FERC clarified that the exemption for pipelines that deliver primarily to end-users applies with regard to deliveries to all end-users and not just retail end-users.[61] The FERC also clarified that deliveries to on-system storage

51. *Id.* at P 78.
52. *Id.* at P 90.
53. *Id.* at P 92.
54. *Id.* at P 104 (internal quotations omitted).
55. *Id.* at P 108.
56. *Id.* at P 131.
57. *Id.*
58. *Id.* at P 134.
59. *Id.*
60. *Id.* at P 146.
61. *Id.* at P 162.

facilities (including deliveries to on-system LNG storage) are included within the exemption.[62] The FERC denied a "request to include deliveries from one LDC to another" and to "limit posting by LDCs only to citygates."[63] The FERC also denied a request to "broadly exempt Hinshaw pipelines that supply natural gas to end-users and other pipelines within a state."[64]

The FERC denied a request for rehearing regarding the obligation of interstate pipelines to post no-notice volumes.[65] The FERC also denied requests to "establish a de minimis standard for posting of information about no-notice service."[66] The FERC, however, stated that "[i]f a pipeline believes that its no-notice service is so insubstantial so as to not influence price formation, [it] may submit a detailed . . . request [for] a waiver" and FERC will consider it "on a case-by-case basis."[67] The FERC clarified that "[t]o the extent that receipt point data is available for no-notice service, pipelines must post that information," and that if "a pipeline does not have receipt point data, then [it] may indicate that the required data field is left intentionally blank."[68]

The FERC revised the regulations "to provide that pipelines with a [FERC]-approved service area determination" under NGA section 7(f) "may be major non-interstate pipelines if they exceed the delivery threshold and otherwise do not qualify for an exemption."[69] The FERC clarified that "[w]here a pipeline delivers all of its transported natural gas directly to an end-user that owns or operates the pipeline," the pipeline is exempt from the posting requirements.[70]

3. Contract Reporting Requirements

On May 20, 2010, the FERC issued Order No. 735, a final rule requiring intrastate and Hinshaw pipelines that provide interstate service to report quarterly storage and transportation transaction information in a standard electronic format on a non-confidential basis.[71] The FERC stated that "the revised reporting requirements are intended to increase market transparency without imposing unduly burdensome requirements on [intrastate and Hinshaw] pipelines."[72] In the final rules, the FERC determined to:

> (1) increase the reporting frequency from annual to quarterly[;] (2) include certain additional types of information and cover storage transactions as well as transportation transactions[;] (3) establish a procedure for [new] Form No. 549D to be filed [electronically;] . . . and (4) hold that [the] reports must be public and may not be filed with information redacted as privileged.[73]

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62. *Id.* at P 163.
63. *Id.* at P 164.
64. *Id.* at P 165.
65. *Id.* at P 186.
66. *Id.* at P 187.
67. *Id.* at P 188.
68. *Id.* at P 189.
69. *Id.* at P 194.
70. *Id.* at P 196.
71. Contract Reporting Requirements of Intrastate Natural Gas Companies, 75 Fed. Reg. 29,404 (2010).
72. *Id.* at 29,405.
73. *Id.*

Also, the FERC modified its policy concerning periodic rate review for intrastate and Hinshaw pipelines to extend the cycle for such reviews from three to five years.[74]

According to the FERC, the reports filed by intrastate and Hinshaw pipelines will permit the FERC, shippers, and others to monitor for undue discrimination, and that the requirements remain lighter than those imposed on interstate pipelines.[75] The FERC declined to exempt storage services provided at market-based rates from the reporting requirements.[76] The FERC stated that it was minimizing the burden by: (1) "not imposing a daily posting requirement;" (2) not requiring intrastate and Hinshaw pipelines to maintain internet websites; and (3) clarifying the requirements as requested in order to reduce the burden.[77]

The final rules require intrastate and Hinshaw pipelines to file new Form No. 549D on a quarterly basis that includes additional information, and require the form to be filed in a uniform electronic format without redaction.[78] The FERC "clarifie[d] that pipelines are [required] to file [the] . . . transactional reports on a contract-by-contract basis for each shipper, rather than on a transaction-by-transaction basis."[79] The FERC "clarifie[d] that pipelines should continue to only report on their jurisdictional activities."[80]

The FERC did not provide an exemption from the requirements for pipelines based on size or type of activity.[81] The FERC clarified "that Hinshaw pipelines are required to report only those contracts authorized by their limited jurisdictional certificates and are not required to report on retail or intrastate activities that are not regulated by the [FERC]."[82] The FERC added that intrastate pipelines are only required to report contracts for interstate service provided under section 311 of the Natural Gas Policy Act of 1978 (NGPA).[83]

The FERC held that requiring all intrastate and Hinshaw pipelines to make rate filings every three years imposes an unnecessary burden when compared to the public benefits.[84] The FERC determined "to modify its triennial rate review policy . . . to decrease the frequency of review from three to five years."[85] The FERC stated that it will in future orders approve rates for intrastate and Hinshaw pipelines that include a condition requiring a review every five years, and that any pipeline subject to a triennial rate requirement "may file a request for an extension of time consistent with the revised policy."[86]

The FERC stated that it "will focus [its] enforcement efforts on instances of intentional submission of false, incomplete, or misleading information . . . [on]

74. *Id.*
75. *Id.* at 29,407.
76. *Id.* at 29,409.
77. *Id.*
78. *Id.* at 29,410.
79. *Id.*
80. *Id.*
81. *Id.* at 29,412-413.
82. *Id.* at 29,413.
83. *Id.*
84. *Id.* at 29,416.
85. *Id.*
86. *Id.*

failure to report in the first instance, [and on] failure to exercise due diligence in compiling and reporting data."[87]

III. ENFORCEMENT PROCEEDINGS

A. Policy Statements

1. Policy Statement on Disclosure of Exculpatory Materials, 129 F.E.R.C. ¶ 61,248 (Dec. 17, 2009)

The FERC issued a policy statement clarifying its policy on disclosure of exculpatory materials by FERC Enforcement staff during investigations under section 1b, and administrative enforcement actions under part 385 of the FERC's regulations, and setting a framework within which such disclosures are made.[88] The FERC explained that the policy statement articulates its current practice of disclosing exculpatory materials that is consistent with *Brady v. Maryland*, in which the Supreme Court held that Fifth Amendment's Due Process Clause requires disclosure of exculpatory material evidence known to the government but unknown to the defendant.[89] Recognizing that courts have held that administrative proceedings are not bound by *Brady*, the FERC nonetheless believes that *Brady* "should apply [during investigations under] [s]ection 1b and administrative enforcement actions under [p]art 385 of the [FERC's] regulations."[90] The FERC also noted that, because *Brady* only applies to evidentiary material, a respondent is not entitled to "[e]nforcement staff's strategies, legal theories, evaluations of evidence," or other opinions.[91]

2. Staff of the Office of Enforcement's 2009 Report on Enforcement, Docket No. AD07-13-002 (Dec. 17, 2009)

On December 17, 2009, in Docket No. AD07-13-002, the Staff of the Office of Enforcement published its annual Report on Enforcement.[92] In fiscal year 2009 (FY2009), Enforcement staff entered into twenty-two settlement agreements for civil penalty payments totaling $38,290,000, and disgorgement totaling $38,694,188, plus interest.[93] Fifteen of these settlements concerned violations of the FERC's natural gas pipeline open access transportation requirements, while six settlements related to violations of part 1c of the FERC's regulations or natural gas Market Behavior Rule 2, and one settlement pertained to a violation of a parking and lending rate schedule in a FERC-approved tariff.[94] Many of the fifteen settlements for open access violations addressed more than

87. *Id.* at 29,417.

88. *Policy Statement On Disclosure of Exculpatory Materials*, 129 F.E.R.C. ¶ 61,248 at P 1 (2009).

89. *Id.* at P 2; *see also* Brady v. Maryland, 373 U.S. 83 (1963).

90. 129 F.E.R.C. ¶ 61,248 at P 7.

91. *Id.* at P 14.

92. OFFICE OF ENFORCEMENT, FERC, 2009 REPORT ON ENFORCEMENT, DOCKET NO. AD07-13-002 (2009).

93. *Id.* at 6.

94. *Id.*

one violation, including failure to adhere to the shipper-must-have-title requirement, flipping, and prohibited buy/sell transactions.[95]

"Total settlements for FY2009 exceeded the number of settlements in FY2007 and FY2008 combined."[96] Similarly, the total number of reports for FY2009 exceeded the number of reports in fiscal years 2007 and 2008 combined.[97] Staff noted that "self-reports related to the [FERC]'s natural gas pipeline open access requirements continue to represent a significant portion of all self-reports received by Enforcement."[98] Staff received self-reports for the first time related to possible violations of the following: the FERC's market behavior rules, NGPA section 311 transportation requirements, and material deviations from FERC approved tariffs.[99]

3. Questar Pipeline Co., Letter Order, Docket No. PA09-4-000, Audit of Contracts, FERC Form No. 2 (Mar. 18, 2010)

The Office of Enforcement's Division of Audits "audite[d] Questar Pipeline Company (Questar) for the period of July 1, 2006[,] through September 11, 2009."[100] The audit evaluated Questar's compliance with:

> (1) FERC . . . regulations under . . . 154.1(d) . . . requiring the filing of any contract or executed service agreement that deviates in any material aspect from [Questar's] form of service agreement[;] (2) certain information in FERC Form No. 2[;] (3) . . . NAESB standards for pipeline business operations and communications . . . [;] and (4) selected portions of Questar's FERC Gas Tariff, including those governing penalties, and balancing and tracking mechanisms.[101]

"Audit staff's review identified . . . twelve compliance issues,"[102] including violations of (i) FERC filing requirements related to contracts, reports, and FERC Form No. 2; (ii) accounting practices; (iii) allocation of non-recoverable working gas; and (iv) NAESB Standards.[103] In response to these issues, Audit staff recommended that Questar: (i) file, or re-file, all indicated contracts, reports, and customer indices; (ii) "modify its tariff to include a provision indicating the circumstances in which it may exceed its maximum rate by including charges for off-system capacity;"[104] (iii) resubmit a corrected page 520

95. *Id.*

96. *Id.*

97. *Id.* at 8.

98. *Id.*

99. *Id.*

100. *Questar Pipeline Co.*, Letter Order, Docket No. PA09-4-000 (Mar. 18, 2010) (unpublished Letter Order) *available at* http://elibrary.ferc.gov/idmws/search/fercgensearch.asp (search date "8/18/2010" and "Questar" in text box) [hereinafter *Questar Letter Order*]; AUDIT OF CONTRACT, FERC FORM NO. 2, STANDARDS FOR PIPELINE BUSINESS OPERATIONS AND COMMUNICATIONS, REPORTING REQUIREMENTS IDENTIFIED IN § 284.13, REVENUES CREDITED THROUGH PENALTY OR BALANCING MECHANISMS, AND THE FUEL TRACKER AT QUESTAR PIPELINE COMPANY, DOCKET NO. PA09-4-000 (Mar. 18, 2010) (this report was included as an enclosure to the Letter Order) [hereinafter *Questar Audit Report*].

101. *Questar Audit Report, supra* note 100, at 2.

102. *Id.* at 3.

103. *Id.* at 3-4.

104. *Id.* at 5.

of FERC Form No. 2, modify its reporting procedures to ensure accuracy, and conduct a review of its 2008 FERC Form No. 2 to ensure its accuracy; and (iv) file, or re-file, Semi-Annual Storage Reports including all injection and withdrawal activity.[105] Audit staff further recommended that Questar submit for staff review Questar's implementation plans for staff's recommendations, quarterly reports describing Questar's progress, and copies of any written policies and procedures developed in response to recommendations in the final audit report.[106]

4. Enforcement Actions Policy Statements, Docket No. PL10-2-000 (Dec. 17, 2009)

On December 17, 2009, in Docket No. PL10-2-000, the FERC issued its *Order Authorizing Secretary to Issue Staff's Preliminary Notice of Violations*[107] (the Order). In the Order, the FERC authorized issuance of a Preliminary Notice of Violations with the stated intention of "increas[ing] the transparency of staff's nonpublic investigations conducted under Part 1b of our regulations."[108] To achieve this goal the FERC will issue a "Preliminary Notice of Violations," which "will identify the entity or entities that are the subject of the investigation, the time and place of the alleged conduct, and the rules, regulations, statutes or orders that staff alleges were violated, and also will contain a concise description of the alleged wrongful conduct."[109] The Order also provides that "[t]he Notice will not confer a right on third parties to intervene in the investigation or any other right with regard to the noticed investigation."[110]

Several parties filed a request for rehearing (Rehearing Request),[111] asking that the FERC "revise the Preliminary Notice described in the December 17 Order to remove from that notice the identity of the subject of an investigation."[112] To date the FERC has not responded to the proposed revision.

B. Flipping

1. Enserco Energy, Inc.; Piedmont Natural Gas Company, Inc.;Sequent Energy Management, L.P. and Sequent Energy Marketing, L.P.; *In re* ProLiance Energy, L.L.C.; and Wasatch Oil & Gas Corp. and Wasatch Energy, L.L.C.

Following a self report by Enserco Energy, Inc. (Enserco) of potential flipping, serial release, shipper-must-have-title (SMHT), buy-sell, and tying

105. *Id.*

106. *Id.*

107. *Order Authorizing Secretary to Issue Staff's Preliminary Notice of Violations*, 129 F.E.R.C. ¶ 61,247 (2009).

108. *Id.* at P 1 (referencing 18 C.F.R. part 1b (2009)).

109. *Id.*

110. *Id*.

111. Request for Rehearing and Clarification of the Edison Electric Institute, *et al.*, Docket No. PL10-2-000 (Jan. 19, 2010).

112. *Id*. at P 10.

transactions, the FERC Enforcement Staff opened an investigation pursuant to 18 C.F.R. part 1b for "possible violations of [its] open access transportation program between January 2005 and June . . . 2008."[113] The FERC found "that Enserco improperly transported 13.9 Bcf of gas on 20.6 Bcf of discounted pipeline capacity acquired through flipping transactions."[114] In addition, Enforcement Staff determined that Enserco violated the SMHT rule "by improperly transporting approximately 7.6 Bcf of gas owned by Enserco on capacity held by others and delivered" 166,334 Dth of gas to the end-customer holding the capacity, for a total of 7.8 Bcf of SMHT violations.[115] The FERC approved a settlement agreement between Enserco and Enforcement Staff requiring Enserco to pay $1.4 million in civil penalties, and file semi-annual reports over the course of the next year detailing whether additional violations have occurred and what steps the company has taken to enhance compliance.[116]

The Enforcement Staff opened an investigation against Piedmont Natural Gas Company, Inc. (Piedmont) pursuant to 18 C.F.R. Part 1b for possible flipping transactions.[117] Unlike Enserco, Piedmont did not self report. "Enforcement [Staff] concluded that Piedmont improperly released 20.33 Bcf of discounted rate capacity through flipping transactions between August 2005 and October 2007, and that Piedmont did not comply with the posting and competitive bidding requirements in 18 C.F.R. § 284.8."[118] The FERC approved a settlement agreement between Piedmont and Enforcement Staff requiring Piedmont to pay $1.25 million in civil penalties, and to file semi-annual reports over the course of the next year detailing whether additional violations have occurred and what steps the company has taken to enhance compliance.[119]

The Enforcement Staff opened an investigation against Sequent Energy Management, L.P. (Sequent Management), and Sequent Energy Marketing, L.P. (collectively Sequent), pursuant to 18 C.F.R. part 1b for possible flipping transactions.[120] During the pendency of the investigation, Sequent filed a self report on Sequent's potential flipping transactions as well as an investigation of potential capacity release violations.[121] Enforcement Staff concluded that Sequent improperly released or acquired 30.49 Bcf of discounted rate capacity through flipping transactions between August 2005 and November 2007, earning an unjust profit of $53,728.18 as a result of such transactions.[122] In addition, Enforcement Staff concluded that Sequent violated the FERC's SMHT rule, resulting in 14.37 Bcf of gas being improperly transported, and that Sequent Management violated the FERC's prohibition against buy-sell transactions, resulting in 1.06 Bcf of gas being improperly transported.[123] The FERC

113. *Enserco Energy, Inc.*, 128 F.E.R.C. ¶ 61,173 at P 3 (2009).
114. *Id*. at P 6.
115. *Id*. at P 8.
116. *Id*. at P 9-11.
117. *Piedmont Natural Gas Co.*, 127 F.E.R.C. ¶ 61,319 at P 3 (2009).
118. *Id*. at P 6.
119. *Id*. at P 8-10.
120. *Sequent Energy Mgmt., L.P.,* 127 F.E.R.C. ¶ 61,320 at P 3 (2009).
121. *Id*.
122. *Id*. at P 6.
123. *Id*. at P 10, 13.

approved a settlement agreement between Sequent and Enforcement Staff requiring Sequent to disgorge $53,728.18 in unjust profits, to pay $5 million in civil penalties, and to file semi-annual reports over the course of the next year detailing whether additional violations have occurred, and what steps the company has taken to enhance compliance.[124]

Following a self report by ProLiance Energy, L.L.C. (ProLiance), of potential flipping, SMHT, and buy-sell transactions, the FERC Enforcement Staff opened an investigation pursuant to 18 C.F.R. part 1b for possible violations of its "open access transportation program between January 2005 and October 2007."[125] Enforcement Staff found that ProLiance improperly obtained 21.5 Bcf of discounted rate capacity through flipping transactions and transported 34.2 Bcf of natural gas on that capacity.[126] Enforcement Staff further found that ProLiance's affiliate, Relius Energy, released 14.6 Bcf of discounted rate capacity through flipping transactions, "which was used by the replacement shipper to transport 8.8 Bcf of natural gas."[127] In addition, Enforcement Staff concluded that ProLiance violated the SMHT rule by improperly transporting approximately 6.7 Bcf of gas, and thus received $195,959.44 in unjust profits.[128] "Enforcement Staff [also] confirmed that ProLiance entered into three transactions that violate[d] the buy-sell prohibition" and resulted in the improper transportation of 325,977 Dth of natural gas.[129] The FERC approved a settlement agreement between ProLiance and Enforcement Staff requiring ProLiance to disgorge $195,959.44 in unjust profits, to pay $3 million in civil penalties, and to file semi-annual reports over the course of the next year detailing whether additional violations have occurred and what steps the company has taken to enhance compliance.[130]

The Enforcement Staff opened an investigation against Wasatch Oil & Gas Corporation (Wasatch) and its affiliate, Wasatch Energy, L.L.C. (Wasatch Energy), pursuant to 18 C.F.R. part 1b for possible violations of the FERC's capacity release program.[131] Following its investigation, Enforcement Staff concluded that Wasatch and Wasatch Energy improperly "acquired 6.06 Bcf of discounted rate capacity through flipping transactions . . . between August 2005 and October 2006."[132] The FERC approved a settlement agreement between Wasatch, Wasatch Energy, and Enforcement Staff requiring Wasatch and Wasatch Energy to pay $320,000 in civil penalties.[133]

C. Capacity Release

In February 2008, Southern Company Services, Inc. (SCS), filed a self-report to Enforcement Staff and cooperated with the resulting Enforcement Staff

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124. *Id*. at P 15-17.
125. *In re ProLiance Energy, L.L.C.,* 127 F.E.R.C. ¶ 61,321 at P 3 (2009).
126. *Id*. at P 6.
127. *Id*.
128. *Id*. at P 8.
129. *Id*. at P 10.
130. *Id*. at P 12-14.
131. *Wasatch Oil & Gas Corp.*, 127 F.E.R.C. ¶ 61,322, at P 3 (2009).
132. *Id*. at P 6.
133. *Id*. at P 8-11.

investigation opened pursuant to 18 C.F.R. part 1b (2008).[134] Pursuant to this investigation, SCS and Enforcement Staff entered into a Stipulation and Consent Agreement (Settlement). The FERC approved the Settlement, effective July 8, 2009, under which SCS will pay $350,000 in civil penalties and will make semi-annual reports to Enforcement Staff for one year detailing whether additional buy-sell transactions and violations of the FERC's SMHT Rule have occurred.[135]

In the settlement, Enforcement Staff and SCS stipulated that between January 1, 2005 and December 31, 2007, SCS entered into 128 transactions totaling 7.3 Bcf in which SCS transported gas on behalf of a counterparty in violation of the FERC's prohibition against buy-sell transactions.[136] SCS netted $1.6 million from these transactions.[137] On 571 occasions during the same time period, SCS cumulatively shipped 8 Bcf of natural gas owned by affiliated operating companies using transportation capacity held either by SCS, itself, or SCS's affiliated marketing company.[138] In addition, SCS shipped 0.004 Bcf of gas owned by Southern Power Company to an electric wholesale generator using affiliated operating companies' transportation capacity. "SCS did not receive unjust profits from these transactions."[139]

D. Market Manipulation

1. Amaranth Settlements with the FERC, the CFTC, and the Brian Hunter Litigation

Amaranth L.L.C., was a hedge fund that traded in natural gas futures contracts on NYMEX. Amaranth also traded derivative financial instruments such as fixed-for-float swaps that settle on the Intercontinental Exchange, Inc. (ICE), at prices based on the NYMEX settlement price. Brian Hunter was the head energy trader for the Amaranth Entities.[140] On July 26, 2007, the FERC issued an Order to Show Cause why the Amaranth Respondents did not violate regulations prohibiting manipulation of natural gas markets.[141] The Show Cause Order alleged that the Amaranth Respondents, led by Hunter, engaged in a scheme to reduce the NYMEX natural gas contract settlement prices for March, April, and May 2006.

On August 12, 2009, the FERC accepted an uncontested settlement with all Amaranth Respondents except Brian Hunter.[142] The settlement called for Amaranth Advisors, L.L.C., to pay a civil penalty of $7.5 million and settled all claims with respect to the alleged activities in the Show Cause Order.[143] The settlement was coordinated with the Commodity Futures Trading Commission

134. *In re Southern Co. Services, Inc.*, 128 F.E.R.C. ¶ 61,013 at Stipulation and Consent Agreement at P 3 (2009).

135. *Id.* at P 1.

136. *Id*. at P 5.

137. *Id*.

138. *Id*. at P 7.

139. *Id*.

140. *Amaranth Advisors, L.L.C.*, 120 F.E.R.C. ¶ 61,085 at P 5 (2007).

141. *Id.* at P 1.

142. *Amaranth Advisors, L.L.C.*, 128 F.E.R.C. ¶ 61,154 at P1 (2009) [hereinafter *Amaranth Settlement*].

143. *Id.* at PP 7-8.

and settled all claims in *CFTC v. Amaranth Advisors, L.L.C.*[144] Because Hunter did not participate in the settlement with the other Amaranth Respondents,[145] hearings were held in August and September 2009 to address Hunter's involvement in the allegations against Amaranth.

On January 22, 2010, Presiding Administrative Law Judge Carmen A. Cintron issued an Initial Decision (ID) in the case that concluded that Hunter had violated the FERC's Anti-Manipulation Rule.[146]

The ID concluded that the FERC had personal jurisdiction over Hunter. Although Hunter is a Canadian citizen, Hunter directed natural gas trading on U.S. exchanges and worked for Amaranth Advisors, L.L.C., in Connecticut while commuting from New York in 2004 and 2005.[147] Even though Hunter moved back to Canada, he continued to direct Amaranth trading, attend meetings in Connecticut, and maintained a United States mailing address.[148]

The ID also concluded that Amaranth's trades were fraudulent or deceptive. The ID reasoned that offers by sellers are greater than the bids by buyers. Aggressive selling is accomplished by sellers "hitting" the bids of buyers rather than waiting for buyers to lift higher-priced seller offers.[149] The ID found that the massive sell orders placed by Amaranth resulted in the brokers hitting bids and resulted in prices lower than they would have been but for Amaranth's sell orders.[150] "Amaranth traded at prices below those of other traders and was in a position to benefit" from lower prices because of its large short swap position.[151] Amaranth profited from the trades at issue, and Hunter personally would benefit from the trades because his compensation was based in part on the profitability of his book.[152] The ID follows standards in the Hearing Order that "intentional manipulation of market prices for the purpose of benefiting other instruments in the actor's portfolio is actionable, even in the absence of evidence that specific false statements were made."[153] Hunter and Amaranth benefited from the trades at issue, and Hunter took actions to effectuate a scheme to benefit other instruments by selling large quantities of NYMEX contracts during the settlement period, selling at bids instead of at offers, and forming a large short position in derivative swap instruments.[154] The ID concluded that Hunter had the requisite scienter because the "trading was specifically designed to lower the NYMEX price in order to benefit his swap positions on other exchanges."[155]

144. *Id.*; United States Commodity Futures Trading Commission v. Amaranth Advisors, L.L.C., 554 F. Supp. 2d 523 (S.D.N.Y. 2008).

145. *Amaranth Advisors, L.L.C.*, 120 F.E.R.C. ¶ 61,085 at P 1 (2007).

146. *Brian Hunter*, 130 F.E.R.C., ¶ 63,004 at P 1 (2010).

147. *Id.* at P 21.

148. *Id.* at PP 21, 23.

149. *Id.* at P 56.

150. *Id.* at P 70.

151. *Id.* at P 73.

152. *Id.* at P 80.

153. *Id.* at P 83.

154. *Id.* at P 84.

155. *Id.* at P 143.

Finally, the ID found that the Amaranth trades were "in connection with the purchase or sale of jurisdictional natural gas."[156] This was an important issue because NYMEX futures contracts are directly regulated by the Commodity Futures Trading Commission (CFTC) and not by the FERC. The ID found the "in connection with" standard was satisfied for two reasons. First, the small percentage of NYMEX contracts that are not financially settled actually call for delivery of gas, and such transactions may be subject to jurisdiction by the FERC.[157] Second, many physical basis contracts have prices tied to the settlement price of the NYMEX contract.[158] Because it was found that Amaranth's trades resulted in lower NYMEX settlement prices, Amaranth's trades also resulted in lower prices in jurisdictional trades with prices based on the NYMEX contracts. Moreover, Hunter knew of these linkages when he traded.[159] Hence, the ID "found that Hunter acted recklessly with regard to the effect his trades would have on jurisdictional transactions."[160]

Hunter has filed a Brief on Exceptions and Enforcement Staff have filed a Brief Opposing Exceptions before the FERC.[161]

III. RATES, TERMS, AND CONDITIONS OF SERVICE

A. *AFUDC Policy*

An allowance for funds used during construction (AFUDC) is a component of the cost of constructing facilities. Under the FERC's accounting regulations, a company may begin accruing AFUDC on project costs when construction costs are continuously incurred on a planned progressive basis, but for a company constructing a natural gas pipeline, interest should not be accrued for the period of time before the certificate application is filed with the FERC unless specifically justified.

The establishment of the pre-filing process and other developments led to proposals by applicants to begin accruing AFUDC prior to filing a certificate application. In response to these proposals, the FERC convened a technical conference seeking comments about its then-current AFUDC policy.[162] Thereafter, the FERC revised its AFUDC policy in subsequent case-specific orders.[163] The FERC found it "unnecessary to establish a bright line for when natural gas pipelines may begin to accrue AFUDC."[164] However, the FERC will allow AFUDC accruals under the following conditions: (1) capital expenditures

156. *Id.* at 205.

157. *Id.* at P 206.

158. *Id.* at PP 207-208.

159. *Id.* at P 209.

160. *Id.* at P 210.

161. Brief on Exceptions of Brian Hunter, *Brian Hunter*, F.E.R.C. Docket No. IN07-26-004 (Mar. 4, 2010); *see also* Trial Staff's Brief Opposing Exceptions, *Brian Hunter*, F.E.R.C. Docket No. IN07-26-004 (Mar. 24, 2010).

162. *S. Natural Gas Co.*, 130 F.E.R.C. ¶ 61,193 at P 24 (2010).

163. *Id.* at P 36; *see also Fla. Gas Transmission Co.,* 130 F.E.R.C. ¶ 61,194 at P 28 (2010).

164. *Fla. Gas Transmission Co.,* 130 F.E.R.C. ¶ 61,194 at P 28 (2010).

for the project have been incurred; and (2) activities necessary to get the construction project ready for its intended use are in progress.[165]

B. Base Gas Costs

The FERC approved Transcontinental Gas Pipe Line Corporation's (Transco) proposal to allocate the costs of purchasing new base gas solely to new shippers, and to establish bifurcated rates for new and historic shippers at the Washington Storage Field.[166]

In an old settlement, shippers agreed to provide the base gas volumes necessary for the storage field operation and received the right to purchase their respective share of the base gas at historical cost when the historic shippers terminated service. When Transco implemented open access service at the field, Transco supplied the base gas needed to serve the new shippers.[167]

Transco proposed to include the costs of newly purchased base gas solely in the rate base used to calculate the rates of new shippers, while the rate base used to calculate the historic shippers' rates included only the lower cost base gas they had previously supplied to Transco before their conversion to open access service. The FERC found that it was reasonable for the cost responsibility to be assigned to new shippers under the principle of cost causation because Transco's obligation to inject base gas into the storage field only arises when Transco resells the top gas capacity entitlement to new storage customers.[168] The FERC determined that the bifurcated rates were reasonable because historic shippers provided the base gas and they have been paying rates to Transco that reflect a return on the cost of that base gas, together with associated taxes, since it was injected into the field.[169] By contrast, the new shippers did nothing to help Transco obtain the lower cost base previously injected into the field.[170]

C. Capacity Release: Pass-through of Usage and Fuel Discounts

The FERC determined that its existing selective discounting policy should be applied on a case-by-case basis by pipelines deciding whether to grant a discounted or negotiated usage or fuel charge to an asset manager replacement shipper.[171] Under the selective discounting policy, "pipelines may give discounts [or negotiated rates] to some shippers but not others, including at the same point, if the shippers have differing demand characteristics."[172] This policy is subject to the requirement that a pipeline cannot unduly discriminate among similarly situated shippers in granting selective discounts or negotiated rates.[173] The FERC also provided guidance on when asset management replacement shippers might be considered similarly situated to releasing shippers, in which

165. *Id*.
166. *Transcon. Gas Pipe Line Corp.*, 130 F.E.R.C. ¶ 61,043 (2010).
167. *Id*. at PP 33-34, 51.
168. *Id.*
169. *Id.* at PP 33-34.
170. *Id.* at P 34.
171. *Tex. E. Transmission, L.P.*, 129 F.E.R.C. ¶ 61,031 (2009).
172. *Id.* at P 20.
173. *Id.*

case the pipeline would be required to pass through the discounted or negotiated rate.[174]

D. *Conversion of Part 157 Contracts to Open Access*

In an order on remand from the U.S. Court of Appeals for the D.C. Circuit, the FERC affirmed its prior decision to require the conversion of a Part 157 transportation service agreement to an open access contract pursuant to Part 284 of the FERC's regulations.[175]

A shipper requested that the FERC permit conversion of a Part 157 contract to a Part 284 contract, and the FERC ultimately approved the request, finding that the Part 157 contract was no longer just and reasonable because it denied the shipper the ability to obtain the benefits of open access transportation.[176] The D.C. Circuit court approved the FERC's use of the just and reasonable standard for evaluating the shipper's request, but remanded the case to the Commission to further support its previous findings.[177] On remand, the FERC found that special circumstances supported the conversion, including (1) the lack of competition for released capacity; (2) a finding that the pipeline has and will continue to collect costs allocated to interruptible service; and (3) that the Part 157 contract expressly allowed the shipper or pipeline to seek a change in the arrangement from the Commission.[178] Because the conversion was not voluntary, the Commission permitted the pipeline to propose a different rate for the open access service agreement.[179]

E. *Fuel*

1. El Paso Natural Gas Co.

In a proceeding initiated by El Paso to revise its fuel retention percentages, the FERC asserted its authority under section 5 of the NGA to direct El Paso to remove all non-fuel costs and deemed costs from its fuel tracker mechanism.[180] The FERC also mandated that El Paso's next annual fuel tracker filing include a true-up to reconcile the difference in costs recovered under the prior fuel tracker mechanism and the mechanism established in this order.[181] On rehearing, El Paso highlighted the difficulty of including in its next annual fuel tracker filing the difference between the costs recovered under the prior fuel tracker mechanism and the costs that would have been recovered under the revised fuel tracker mechanism mandated by the Commission.[182] The Commission approved El Paso's proposal of a transitional approach that would avoid disruption to customers' nomination practices but still achieve the Commission's goal of

174. *Id.* at 19-27.
175. *Williston Basin Interstate Pipeline Co*., 129 F.E.R.C. ¶ 61,084 (2009).
176. *Id.* at P 5.
177. *Id*. at P 10.
178. *Id*. at P 37.
179. *Id.* at P 50.
180. *El Paso Natural Gas Co.*, 129 F.E.R.C. ¶ 61,170 at P 4 (2009).
181. *Id.*
182. *Id.* at PP 14-21.

removing the cost/revenue true-up mechanism, and the Commission approved this approach.[183]

2. Columbia Gulf Transmission Co.

The FERC clarified that pipelines can implement, through limited NGA section 4 filings, an incentive fuel mechanism that charges customers fixed fuel rates below the cost-based level, in exchange for the pipeline receiving a share of the savings that result from the capital improvements made under the pipeline's incentive mechanism.[184] The Commission also addressed the specifics of Columbia Gulf's incentive fuel mechanism, accepting it subject to certain modifications.[185]

F. Gas Quality & Interchangeability

1. Texas Eastern Transmission, L.P.

The gas quality and interchangeability specifications that Texas Eastern proposed were suspended until April 1, 2010.[186] In the interim, the FERC staff held a technical conference and, at the end, the interested parties agreed to submit a list of stipulated issues requiring resolution by the FERC. Texas Eastern filed the list of stipulated issues, and the FERC set the matter for hearing.[187]

In order to allow a transition period for the parties to adjust to the new specifications, Texas Eastern issued, and the FERC approved, a limited six-month waiver of the specifications for receipt point gas, subject to the provision that the commingled gas stream in Texas Eastern's system meets the gas quality specifications at delivery points.[188]

2. WGL v. FERC

The U.S. Court of Appeals for the D.C. Circuit rejected WGL's petition for review of a Commission order approving the Dominion Cove Point LNG, LP and Dominion Transmission, Inc. expansion project (Expansion).[189] WGL claimed that increased amounts of regasified liquefied natural gas (LNG) would pass through its system, but the D.C. Circuit accepted the FERC's explanation "that the amount of regasified [LNG] that could be delivered *post*-Expansion was identical to the amount that could be delivered *pre*-Expansion."[190]

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183. *Id.* at PP 25-26.

184. *Columbia Gulf Transmission Co.,* 131 F.E.R.C. ¶ 61,156 (2010).

185. *Id.*

186. *Tex. E. Transmission, L.P.*, 130 F.E.R.C. ¶ 61,190 at P 1 (2010).

187. *Id*.

188. *Id.* at 14-20.

189. Wash. Gas Light Co. v. FERC, 603 F.3d 55 (D.C. Cir. 2010).

190. *Id*. at 57; *see also Transcon. Gas Pipe Line Co.,* 128 F.E.R.C. ¶ 61,255 (2009) (denying WGL's protest that regasified LNG transported in a mixed gas stream on another pipeline might cause damage to WGL's system).

G. Mobile-Sierra

In *NRG Power Marketing, L.L.C. v. Maine Public Utilities Commission*,[191] the Supreme Court held that the *Mobile-Sierra* doctrine applies not only to the review of challenges brought by contracting parties but also to those brought by non-contracting parties.

The dispute arose out of efforts to maintain the reliability of the New England energy grid.[192] Eventually most of the negotiating parties agreed to a settlement which provided, among other things, that challenges would be reviewed under the *Mobile-Sierra* standard regardless of whether the challenge came from a party to the agreement or a non-party *(Mobile-Sierra Provision)*.[193] The FERC approved the agreement, and on appeal, the D.C. Circuit rejected the FERC's view and held that the *Mobile-Sierra* doctrine did not apply to non-contracting parties.[194]

On appeal, the Supreme Court reversed and reasoned that applying the *Mobile-Sierra* presumption to challenges brought by contracting parties and the FERC itself, while exempting challenges brought by non-contracting parties from the same presumption, would "scarcely provide the stability *Mobile-Sierra* aimed to secure."[195] Therefore, the Supreme Court held that "[t]he [*Mobile-Sierra*] presumption is not limited to challenges to contract rates brought by contracting parties. It applies, as well, to challenges initiated by third parties."[196] Finally, the Supreme Court determined that the D.C. Circuit had not addressed whether the Settlement Agreement qualifies as a "contractually negotiated rate," or otherwise merits application of the *Mobile-Sierra* presumption.[197] The Court remanded the case to the D.C. Circuit to make this determination.

H. Negotiated Rates

The U.S. Court of Appeals for the D.C. Circuit upheld the FERC's rejection of a challenge to a negotiated rate increase proposed by Alliance Pipeline L.P. (Alliance).[198]

The shipper argued that the FERC should approve a rate change in a negotiated contract.[199] According to the shipper, without FERC review, Alliance could unilaterally increase its operation and maintenance (O&M) costs (a component of the negotiated rate) and, as a result, its resulting negotiated rates without any check to verify the actual costs underlying those rates.[200] The D.C. Circuit affirmed the FERC's decision to accept Alliance's proposed rate increase, determining that the plain terms of the parties' negotiated rate

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191. NRG Power Mktg., L.L.C. v. Me. Pub. Util. Comm'n, 558 U.S. ---, 130 S. Ct. 693 (2010).
192. *Id.* at 696.
193. *Id.* at 697-98.
194. *Id.* at 698.
195. *Id.* at 701.
196. *Id.*
197. *Id.*
198. Iberdrola Renewables, Inc. v. FERC, 597 F.3d 1299 (D.C. Cir. 2010).
199. *Id.* at 1302.
200. *Id.*

agreement did not require FERC review of Alliance's O&M costs.[201] The D.C. Circuit held that a negotiated rate that intentionally avoids NGA section 4 review should not be presumed just and reasonable.[202] Finally, the court rejected the argument that the negotiated rate did not meet the requirement that a pipeline's tariff either include a clearly-specified rate formula or the actual rate being charged, explaining that because the tariff states the rate being charged, any shipper could view this stated rated to determine price discrimination.[203]

I. No-Notice Service

Texas Gas Transmission, L.L.C., proposed an experimental winter no-notice service, similar to its summer no-notice service.[204] To address potential concerns, the pipeline proposed that the winter no-notice service be approved on an experimental basis to provide it with operational experience before permanently incorporating the service into its tariff.[205] The FERC accepted the proposed service as being just and reasonable on an experimental basis.[206]

J. Open Seasons

1. Rockies Express Shippers v. Northern Natural Gas Co.

In a complaint proceeding alleging that the open season conducted by Northern Natural Gas Company (Northern) for capacity at a new interconnection point (Receipt Point) was unjust, unreasonable, and unduly discriminatory, the FERC issued an order affirming the Initial Decision which found that Northern's open season did not violate the pipeline's tariff or any FERC policy, and was not unjust, unreasonable, or unduly discriminatory.[207]

The shippers claimed that the backhaul capacity obtained in the open season was being scheduled as a forward haul on a secondary basis, which degrades the service for the existing forward haul shippers.[208] The FERC rejected these claims and stated that "when the tariff makes no distinction between forward or backhaul service, as is true for Northern's tariff, the backhaul service has secondary rights to alternate points" that effectuate a forward haul because secondary forward haul service is permitted under the backhaul service contract.[209] The FERC stated that an increase in the number of secondary shippers does not degrade the rights of firm shippers.[210]

The shippers also argued that new *point* capacity was created by the addition of the Receipt Point, but no new *transportation* capacity was created.[211] The FERC disagreed. The FERC determined that the addition of the Receipt

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201. *Id.* at 1303.
202. *Id.* at 1304-05.
203. *Id.* at 1305.
204. *Tex. Gas Transmission, L.L.C.*, 130 F.E.R.C. ¶ 61,158 (2010).
205. *Id*. at P 14.
206. *Id*. at P 22.
207. *Rockies Express Shippers v. N. Natural Gas Co.,* 130 F.E.R.C. ¶ 61,018 (2010).
208. *Id.* at P 104.
209. *Id*. at P 104.
210. *Id.*
211. *Id*. at PP 35, 102.

Point created new backhaul capacity because the injection of gas at the Receipt Point meant that it would no longer be necessary to transport the same quantity of gas to the Receipt Point and that gas could be removed from the pipeline upstream of the Receipt Point via a backhaul transaction.[212]

K. Rate Cases

1. Florida Gas Transmission

On October 30, 2009, the FERC issued an order suspending until April 1, 2010, and setting for hearing Florida Gas Transmission Company, L.L.C.'s (FGT) filing under section 4 of the NGA to increase its rates and modify certain terms and conditions of service.[213] In its October 30, 2009 suspension order, the FERC, among other things, sought further information about FGT's waste heat recovery proposal[214] and the proposed gas quality changes.[215] The FERC also ruled that FGT must remove greenhouse gas monitoring costs from its rates if the Environmental Protection Agency's (EPA) proposed rule that would impose such costs on FGT does not go into effect prior to the end of the test period on April 1, 2010.[216]

On March 26, 2010, the FERC issued an order on rehearing, clarification, and FGT's filing in compliance with the October 30th order, finding that FGT had properly removed greenhouse gas monitoring costs in its compliance filing because the EPA's final rule ultimately did not apply to oil and gas.[217] The FERC also rejected FGT's waste heat ownership proposal as premature, without prejudice to a future proposal when FGT has more specific facts with respect to waste heat.[218] The FERC accepted the proposed C5+ standard as consistent with the gas quality policy statement.[219]

The FERC also granted a protest challenging FGT's inclusion of costs of facilities subject to blanket certificate authority that were not in service as of the end of the test period. The FERC ruled that its regulations require the removal from rates of the cost of all facilities not in service at the close of the test period, including facilities to be constructed under blanket certificate authorization.[220]

Finally, the FERC established a settlement judge procedure to resolve the dispute between FGT and the parties regarding the pipeline's proposal to post gas quality standards.[221] On June 8, 2010, FGT filed an offer of settlement under which FGT would remove from its tariff the provisions regarding the posting of gas quality standards.

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212. *Id*. at PP 15, 102.
213. *Fla. Gas Transmission Co.,* 129 F.E.R.C. ¶ 61,092 (2009), *reh'g,* 130 F.E.R.C. ¶ 61,250 (2010).
214. 129 F.E.R.C. ¶ 61,092 at P 29.
215. *Id.* at P 30.
216. *Id.* at P 27.
217. 130 F.E.R.C. ¶ 61,250 at P 15.
218. *Id.* at P 25.
219. *Id*. at PP 35-37.
220. *Id.* at P 44.
221. *Id.* at P 38.

3. Kern River Rate Case

The Kern River Gas Transmission Company (Kern River) 2004 NGA section 4 rate case remains unresolved[222] and is proceeding toward a hearing addressing Kern River's Period Two rates.[223] On December 17, 2009, the FERC issued Opinion No. 486-C in which it denied requests for rehearing regarding the discounted cash flow (DCF) model the FERC uses to evaluate a pipeline's equity return. With respect to Kern River's Period One rates for the locked-in period from November 1, 2004, through the effective date of prospective rates (Locked-In Period), the FERC ruled that such rates must be designed on the basis of projected units of service, as required by Opinion No. 486, subject only to the refund floor.[224] The FERC further directed Kern River to use its actual reservation charge billing determinants both for allocating costs between the 10-year and 15-year Rolled-In System shippers and for calculating the per-unit rates for those shippers.[225]

The FERC addressed the applicability of the last clean rate doctrine[226] to its determination of a refund floor for the Locked-in Period. The FERC recognized that refunds will be limited to the difference between the revenues Kern River actually collected during the Locked-in Period and the greater of the revenues it would have collected under (1) the just and reasonable rate determined in accordance with the FERC's orders; or (2) the last clean rate (i.e., the rate in effect prior to November 1, 2004).[227] The FERC further found that Kern River improperly designed rates for the Locked-in Period. The FERC ruled that:

> [W]hen determining the refunds for a locked-in period, it is improper to apply the last clean rate doctrine on a component by component basis. Reservation and usage components of the rate for a particular service should be considered together as one filed rate charge for one service for purposes of calculating refunds.[228]

In Opinion No. 486-C, the FERC determined that Kern River must maintain the levelized rate methodology for Period Two rates.[229] The FERC rejected Kern River's argument that a traditional rate design was appropriate for Period Two rates because no current Kern River shippers have contracts for service during Period Two.[230] It also disagreed with Kern River's contention that FERC policy only permits levelized rates if shippers have contracts for the entire levelization

222. *Kern River Gas Transmission Co*., 114 F.E.R.C. ¶ 63,031 (2006), *modified by* 117 F.E.R.C. ¶ 61,077 (2006), *order on reh'g*, 123 F.E.R.C. ¶ 61,056 (2008); *order on reh'g*, 126 F.E.R.C. ¶ 61,034; *order on reh'g*, 129 F.E.R.C. ¶ 61,240 (2009), *appeal pending*, *Kern River Gas Transmission Co. v. FERC*, No. 10-1032 (D.C. Cir. Feb. 12, 2010).

223. *Kern River Gas Transmission Co.,* 50 F.E.R.C. ¶ 61,069, at pp. 61,150-51 (1990) (accepting separate levelized rates for three periods: Period One – the 15-year term of the firm shippers' initial contracts; Period Two – the period from the expiration of such contracts through the end of Kern River's depreciable life; and Period Three – the period thereafter).

224. 129 F.E.R.C. ¶ 61,240 at P 158.

225. *Id*. at P 171.

226. FPC v. Sunray DX Oil Co., 391 U.S. 9 (1968).

227. 129 F.E.R.C. ¶ 61,240 at P 192.

228. *Id*. at P 195.

229. Opinion No. 486-C, *Kern River Gas Transmission Co.,* 129 F.E.R.C. ¶ 61,240 (1992).

230. 129 F.E.R.C. ¶ 61,240 at P 254.

period.[231] However, the FERC recognized that Kern River may be permitted under its risk sharing agreements to establish a method of determining eligibility for Period Two levelized rates such as a minimum contract length. Accordingly, the FERC set Period Two levelized rate eligibility issues for hearing.[232]

L. Rate Investigations

In November 2009, the Commission initiated an investigation under Section 5 of the Natural Gas Act (NGA)[233] against Natural Gas Pipeline Company of America, L.L.C. (Natural), Northern Natural Gas Company (Northern Natural), and Great Lakes Gas Transmission Limited Partnership (Great Lakes). The specific investigations for each of the three companies are discussed in turn.

1. Natural Gas Pipeline Co. of America, L.L.C.

Using the cost and revenue information provided by Natural in its 2008 FERC Form No. 2, the Commission calculated that Natural's cost of service should be approximately $506 million with an estimated 12% return on equity (ROE).[234] In contrast, Natural reported total adjusted revenue of approximately $656 million, resulting in an estimated return on equity, net of income taxes, of about 24.50 percent.[235] The Commission also noted that Natural appeared to be substantially over recovering fuel and lost and unaccounted for gas from its customers.[236] Accordingly, the Commission initiated an investigation to examine the justness and reasonableness of Natural's rates.[237]

As a preliminary step in the investigation, the Commission directed Natural to file a cost and revenue study showing actual data for the latest 12-month period.[238] The Commission further directed the filing to include almost all schedules required for submission of a NGA section 4[239] rate proceeding as set forth in section 154.312 of the Commission's regulations.[240] On rehearing, the Commission rejected Natural's argument that the Commission's order was tantamount to requiring Natural to file a section 4 rate case, thus shifting the burden to produce substantial evidence from the Commission to Natural.[241] The Commission held that NGA section 10(a)[242] "permits the Commission to require any and all reports that are necessary or appropriate to assist the Commission in the proper administration of [the NGA]" and to "prescribe the manner and form in which such reports shall be made, and require from such natural gas companies specific answers to all questions upon which the Commission may

231. *Id*. at PP 255-256.

232. *Id*. at PP 254, 263.

233. Natural Gas Act, 15 U.S.C. §§ 717-717z, 717d (2006).

234. *Natural Gas Pipeline Co. of Am.*, 129 F.E.R.C. ¶ 61,158 at P 5 (2009), order on reh'g, 130 F.E.R.C. ¶ 61,133 (2010).

235. *Id.* at P 5.

236. *Id*. at P 6.

237. *Id*. at P 7.

238. *Id*. at P 8.

239. 15 U.S.C. § 717c.

240. 18 C.F.R. § 154.312 (2009).

241. 130 F.E.R.C. ¶ 61,133 at PP 7-8.

242. 15 U.S.C. § 717i(a).

need information."[243] Natural subsequently filed a Stipulation and Agreement of Settlement that reduced its transportation rates.

2. Northern Natural Gas Co.

Using the cost and revenue information provided by Northern Natural in its 2008 FERC Form No. 2, the Commission calculated that Northern Natural's cost of service should be approximately $559 million with an estimated 12% ROE.[244] In contrast, Northern Natural reported total adjusted revenue of approximately $726 million, resulting in an estimated return on equity, net of income taxes, of about 24.36%.[245] Accordingly, the Commission initiated an investigation to examine the justness and reasonableness of Northern Natural's rates.[246]

A group consisting of the majority of firm transportation and storage capacity customers on the pipeline filed a motion to terminate the investigation.[247] In its motion, the group indicated that settlement discussions had reached an impasse, and Northern Natural had stated that it would file a general NGA section 4 rate case proposing a substantial rate increase if the Commission's proceeding was not promptly terminated.[248] If the proceeding were to be terminated, Northern Natural committed to not filing a NGA section 4 rate increase until at least May 1, 2011, and not to move those rates into effect until November 1, 2011.[249] Northern Natural filed in support of the Customer Group's motion to terminate, stating that a forthcoming NGA section 4 filing would request a rate increase of more than 30%.[250]

While several shippers, industrial companies, and Commission Trial Staff opposed the motion to terminate, the Commission granted the motion.[251] Noting that customers representing 96% of the entitlements on Northern Natural's system did not oppose the group's motion to terminate, the Commission concluded that the immediate benefit of rate certainty outweighed the potential benefits of proceeding with the NGA section 5 investigation.[252]

3. Great Lakes Gas Transmission, L.P.

Using the cost and revenue information provided by Great Lakes in its 2008 FERC Form No. 2, the Commission calculated that Great Lakes's cost of service should be approximately $234 million with an estimated 12% ROE.[253] In contrast, Great Lakes reported total adjusted revenue of approximately $290 million, resulting in an estimated return on equity, net of income taxes, of about

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243. 130 F.E.R.C. ¶ 61,133 at P 16 (internal quotations omitted).

244. *N. Natural Gas Co.*, 129 F.E.R.C. ¶ 61,159 at P 5 (2009), *order on reh'g*, 130 F.E.R.C. ¶ 61,134 (2010).

245. *Id.*

246. *Id*. at PP 6-7.

247. *N. Natural Gas Co.*, 131 F.E.R.C. ¶ 61,178 at P 1 (2010).

248. *Id.* at P 4.

249. *Id*. at P 6.

250. *Id*. at P 7-8.

251. *Id*. at PP 9-11, 14-16.

252. *Id*. at P 16.

253. *Great Lakes Gas Transmission L.P.*, 129 F.E.R.C. ¶ 61,160 at P 5 (2009), reconsideration denied, 130 F.E.R.C. ¶ 61,132 (2010).

20.83%.[254] Accordingly, the Commission initiated an investigation to examine the justness and reasonableness of Great Lakes' rates.[255]

On May 21, 2010, Great Lakes filed a Stipulation and Agreement that included new rates for firm transportation service, interruptible transportation service, park-and-loan services, and a revision to certain surcharges. For shippers that have been supporting or non-contesting participants to the settlement proceedings, and that have paid or are paying rates for jurisdictional service at some point from November 1, 2010, to October 31, 2012 (RSS Period), the Stipulation and Agreement provided that such shippers will receive 50% of all reservation and utilization revenues, both from firm and interruptible service, in excess of $500 million that Great Lakes receives during the RSS Period. The Stipulation and Agreement further provided that Great Lakes will not file a NGA section 4 general rate case prior to June 1, 2011, and any such rate would not become effective before December 1, 2011. The Presiding Administrative Law Judge certified the uncontested Stipulation and Agreement on June 17, 2010.[256]

M. Reservation Charge Credits for Curtailment

The FERC exercised its authority under section 5 of the NGA to require Wyoming Interstate Company, Ltd. (WIC), to revise its tariff to comply with the Commission's policy on granting shippers reservation charge credits when firm service is curtailed.[257] The Commission took this action in a section 4 proceeding initiated by WIC that was unrelated to its tariff provisions on reservation charge crediting.

Commission policy requires that a pipeline provide its shippers with full reservation charge credits when a curtailment of firm service is in the control of the pipeline, and partial reservation charge credits if the curtailment is due to a force majeure event.[258] WIC's tariff did not include provisions reflecting this Commission policy. In a NGA section 4 proceeding wherein WIC proposed tariff revisions related to its use of and cost-recovery for off-system capacity, certain shippers requested that the Commission require WIC to incorporate new tariff provisions that would provide reservation charge credits for curtailment of firm service.[259] Initially, the Commission did not address this request because it was unrelated to WIC's tariff proposal under consideration in that proceeding.[260]

On rehearing, however, the Commission acknowledged that WIC's tariff provisions on reservation charge credits were inconsistent with Commission policy.[261] Using its section 5 authority, the Commission directed WIC to provide reservation charge credits in accordance with Commission policy when firm

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254. *Id.* at P 5.

255. *Id*. at P 6.

256. *Great Lakes Gas Transmission L.P.*, 131 F.E.R.C. ¶ 63,023 (2010).

257. *Wyo. Interstate Co.*, 129 F.E.R.C. ¶ 61,022 (2009).

258. *Id.* at P 13, n.13 (citing as example *Tenn. Gas Pipeline Co.*, 76 F.E.R.C. ¶ 61,022, at p. 61,089 (1996), *order on reh'g*, 80 F.E.R.C. ¶ 61,070, at p. 61,200 (1997)).

259. *Wyo. Interstate Co.*, 127 F.E.R.C. ¶ 61,236 at P 11 (2009).

260. *Id*.

261. 129 F.E.R.C. ¶ 61,022, at P 11.

service is curtailed.[262] The Commission explained that its decision would "have the benefit of avoiding the elevation of form over substance by obviating the need for a complaint before moving to correct the inconsistency with Commission policy in WIC's tariff."[263] The Commission accepted WIC's final compliance filing on the reservation charge credit matter on May 21, 2010.[264]

N. Non-conforming Contracts

The FERC continued addressing nonconforming service agreement filing and the FERC's Office of Enforcement posted on FERC's website a Frequently Asked Questions guidance document.[265] Many pipelines have undertaken internal reviews of their service agreements to determine compliance with the Commission's filing requirements. The results of such reviews have been reported in pipeline filings of individual service agreements deemed to contain actual or potential material deviations, as well as tariff change filings to update forms of service agreement or other tariff provisions relating to service terms to address or resolve material deviation issues. A number of these service agreement filings remain pending.[266]

The FERC provided the following guidance:

A pipeline may not unilaterally force shipper to execute a new service agreement in all contract extension situations.[267] The pipeline filed new tariff provisions that would have required shippers to execute a new service agreement in the event of any contract extension, rollover, or ROFR renewal. The pipeline explained that the purpose of this new rule was to utilize the most updated pro forma agreement terms and thereby reduce the number of nonconforming agreements. The Commission rejected the proposed language, reasoning that the pipeline did not have the authority to unilaterally require a change to preexisting service terms in the case of a contract that automatically rolled over (unlike the mutual extension or ROFR scenarios).

A pipeline may "reasonably" interpret its Memphis Clause as modifying a preexisting, conforming service agreement to reflect an update to the applicable pro forma agreement.[268]

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262. *Id.*

263. *Id*.

264. *Wyo. Interstate Co.,* Letter Order, Docket No. RP09-148-004 (May 21, 2010) (unpublished Letter Order).

265. Material Deviations, Frequently Asked Questions, *available* at http://www.ferc.gov/legal/acct-matts/material-deviations-FAQ.pdf.

266. *See, e.g., Algonquin Gas Transmission*, *LLC*, 129 F.E.R.C. ¶ 61,263 (2009) (accepting seventy-four individually filed non-conforming agreements following company review of its service agreements, following previous order accepting thirty-three non-conforming agreements, all pending further review of the company's submission); *N. Border Pipeline Co.*, 130 F.E.R.C. ¶ 61,252 (2010) (accepting of ninety-five deviating service agreements pending further review of the company's submission); *Transcon. Gas Pipe Line Corp.*, 131 F.E.R.C. ¶ 61,135 (2010) (accepting several deviating service agreements, pending further review, following the pipeline's review of service agreements and submission of report to the Office of Enforcement).

267. *Tex. Gas Transmission, L.L.C.,* 129 F.E.R.C. ¶ 61,176 (2009).

268. *Tex. Gas Transmission, L.L.C.*, 130 F.E.R.C. ¶ 61,114 at P 16 (2010).

Some material deviations entered into prior to the Commission's 2001 clarification of its policy are permitted to continue.[269] The Commission accepted a deviation in the choice of law clause of the agreement because it was entered into prior to the Commission's clarification of its material deviation policy and the parties had relied upon it for a substantial period of time.

Pipelines should reduce nonconforming contract filings by updating their pro forma agreements and adding blanks and general tariff language for frequently negotiated terms.[270] The FERC advised the pipeline to update its *pro formas* to add appropriate blanks or optional provisions so that the agreements would become conforming.[271]

Pipelines cannot use a previously approved nonconforming service agreement as a template to avoid future individual contract filings.[272] The Commission rejected the pipeline's request for prior approval to use an approved nonconforming agreement as a template for other service agreements, stating that the pipeline should update its *pro forma* service agreement, and that until it did so, any individual agreements with those same terms would need to be filed for approval.

Pipelines cannot unilaterally decide to eliminate a rejected deviating term.[273] The pipeline proposed a tariff section to address the circumstances following Commission rejection of a materially deviating service agreement term. The pipeline proposed that it have authority, after good faith negotiations with the customer, to either amend its tariff to make the deviating term generally available or to amend or restate the service agreement without the offending term. The Commission rejected this as too one-sided, affording the pipeline too much discretion "without providing a shipper the right to refuse the agreement as amended."[274]

The LDC "Regulatory Out" provision was rejected. The Commission ruled on a deviating term that would have afforded the shipper, a state-regulated local distribution company (LDC), an opportunity to terminate the agreement in the event that its state commission disallowed some or all of the costs associated with the agreement, and the pipeline declined to accept a modified rate term.[275] The Commission stated that early termination rights are valuable rights afforded to the shipper and that the provision must be rejected unless it is memorialized in the tariff as available to similarly situated shippers.

269. *Id*.
270. *Equitrans, L.P.,* 131 F.E.R.C. ¶ 61,090 (2010).
271. *Id.* at P 11.
272. *Equitrans, L.P.*, 128 F.E.R.C. ¶ 61,193 (2009).
273. *Kern River Gas Transmission Co*., 129 F.E.R.C. ¶ 61,262 at P 11 (2009).
274. *Id*. at P 13.
275. *Steckman Ridge, L.P.*, 131 F.E.R.C. ¶ 61,026 (2010).

Waiver of right to jury trial was rejected. The Commission rejected language confirming both parties' waiver of their rights to trial by jury in the event of a dispute.[276] The Commission stated that shippers should not be required to give up these rights as a condition of obtaining basic service.

A Mobile Sierra clause was accepted, but a "clarification" of tariff assignment clause was rejected. The Commission found various language modifications to be not material, including a clause that specified "that the negotiated rate shall be subject to the Mobile Sierra Doctrine's Public Interest Standard."[277] However, a provision that purported to "clarify" existing tariff language was rejected. The Commission explained that the pipeline should either modify its tariff to make the language more clear or, if it does not change the rights of the shipper, not include the language in the contract.[278]

IV. INFRASTRUCTURE

A. *Storage Projects with Market Based Rate Authority*

In the following orders, the FERC granted applications for certificates to construct and operate interstate and intrastate natural gas storage facilities, including requests to charge market-based rates for storage and storage-related services.

1. Atmos Pipeline and Storage, L.L.C.

The Commission granted Atmos Pipeline and Storage, L.L.C. (Atmos), a certificate of public convenience and necessity authorizing the construction and operation of the Fort Necessity Gas Storage Project (Fort Necessity Project) near Fort Necessity, Franklin Parish, Louisiana.[279] The Fort Necessity Project will have 24.75 Bcf of storage in three natural gas storage caverns with approximately 1,500 MMcf per day deliverability, interconnected with Tennessee Gas Pipeline Company, Columbia Gulf Transmission, ANR Pipeline Company, and Regency Energy Partners L.P. The Commission granted Atmos' request to charge market-based rates for all firm and interruptible storage, hub, and wheeling services. The Commission found that Atmos is unable to exercise market power with its small market share, and Atmos does not have market power in the relevant market area.

2. Pine Prairie Energy Center, L.L.C.

The Commission granted Pine Prairie Energy Center, L.L.C. (Pine Prairie), a high-deliverability, salt-dome natural gas storage facility in Evangeline Parish,

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276. *Monroe Gas Storage Co.,* 130 F.E.R.C. ¶ 61,113 at P 24 (2010).
277. *N. Baja Pipeline, L.L.C.*, 131 F.E.R.C. ¶ 61,092 at P 4 (2010) (internal quotations omitted).
278. *Id*. at P 14.
279. *Atmos Pipeline & Storage, L.L.C.*, 127 F.E.R.C. ¶ 61,260 (2009).

Louisiana, an amendment to its existing certificate of public convenience and necessity.[280] In this order, the Commission granted Pine Prairie authority to:

> [(1)] to develop two additional natural gas storage caverns, increasing the working gas capacity of two of the three authorized storage caverns[; (2)] to construct and operate an additional water withdrawal well and a saltwater disposal well[; (3)] to construct and operate 5.3 miles of 24-inch diameter natural gas pipeline loop[;] and [(4) to] install six incremental compression units.[281]

When complete, the facility "will include five storage caverns having total working gas capacity . . . of 60.8 Bcf" with approximately 3.2 Bcf per day of deliverability to six interstate gas pipelines.[282] The Commission reaffirmed Pine Prairie's authorization to charge market-based rates for storage and hub and wheeling services.[283]

3. Williston Basin Interstate Pipeline Co.

The Commission granted Williston Basin Interstate Pipeline Company (Williston) the authority to acquire up to 13.4 Bcf of natural gas to be used as cushion gas for its Elk Basin Storage Reservoir in Park County, Wyoming, and Carbon County, Montana (Elk Basin).[284] Williston requested the cushion gas to "ensure that Williston could fulfill its firm storage contractual obligations to its customers."[285] "Williston [did] not propose to change any previously certified parameters of Elk Basin, or [to] change the previously certificated level of cushion gas in Elk Basin."[286] The Commission found that increasing cushion gas would result in no adverse effects on existing customers, other pipelines, nearby landowners, and communities, and therefore, "the public convenience and necessity require the approval of the cushion gas acquisition."[287]

4. Chestnut Ridge Storage, L.L.C.

The Commission granted Chestnut Ridge Storage, L.L.C. (Chestnut), a certificate of public convenience and necessity authorizing the construction and operation of its proposed Junction Natural Gas Storage Project, a natural gas storage facility to be located in Fayette County, Pennsylvania, and Monongalia and Preston Counties, West Virginia.[288] The Junction Natural Gas Storage Project will include up to twenty-six storage injection/withdrawal wells interconnected to Dominion Transmission, Inc., Columbia Gas Transmission Corporation, and Texas Eastern Transmission, L.P.'s natural gas pipelines

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280. *Pine Prairie Energy Ctr., L.L.C.*, 128 F.E.R.C. ¶ 61,136 at PP 1-2 (2009).
281. *Id.* at P 1.
282. *Id.* at P 5, 7.
283. *Id.* at P 25.
284. *Williston Basin Interstate Pipeline Co.*, 128 F.E.R.C. ¶ 61,152 at P 1 (2009).
285. *Id.* at P 5.
286. *Id.* at P 6.
287. *Id.* at P 11.
288. *Chestnut Ridge Storage, L.L.C.*, 128 F.E.R.C. ¶ 61,210 at PP 1-2 (2009).

through new, 24-inch diameter lateral pipelines.[289] In addition, the Commission granted Chestnut Ridge's proposal to charge market-based rates for open-access firm and interruptible storage services, firm and interruptible parking and loan services, and interruptible wheeling services.[290]

5. Mississippi Hub, L.L.C.

The Commission approved the application of Mississippi Hub, L.L.C. (Mississippi Hub), to expand each of its two storage caverns, add compression facilities, and add new pipeline facilities.[291] The project would increase Mississippi Hub's authorized gas storage capacity for each cavern from 8.67 Bcf to 10.05 Bcf, each with 7.5 Bcf of working gas and 3.55 Bcf of cushion gas, and increase the storage field's maximum deliverability to 1.4 Bcf per day.[292] Mississippi Hub also proposed to construct two additional pipeline interconnections with bi-directional gas metering stations. One of the pipelines will be 14.2 miles of 24-inch diameter pipeline and interconnection with the Southeast Supply Header System, while the other is 22.6 miles of 30-inch pipeline that will interconnect with the Transcontinental Gas Pipe Line Company, L.L.C.[293] Mississippi Hub is also permitted to interconnect with Southern Natural Gas Company and CrossTex Energy.[294] The Commission also approved Mississippi Hub's continuing authority to charge market-based rates for its storage, hub, and wheeling services.[295]

6. Blue Sky Gas Storage, L.L.C.

The Commission approved the application of Blue Sky Gas Storage, L.L.C. (Blue Sky), for a certificate of public convenience and necessity to construct and operate a natural gas storage facility, a blanket construction certificate and a blanket transportation certificate to be located in the nearly depleted Armstrong Gas Field reservoir in Logan County, Colorado with a total capacity of 6.5 Bcf, with 4.4 Bcf working capacity and 2.1 Bcf of cushion gas.[296] In addition, Blue Sky proposed to construct a 5.3 mile, 16-inch pipeline to interconnect with Rockies Express Pipeline, L.L.C., Trailblazer Pipeline Company, and a 9.8 mile, 16-inch pipeline to interconnect with Kinder Morgan Interstate Gas Transmission, L.L.C.[297] The Commission authorized Blue Sky to charge market-based rates for storage and storage-related services, including wheeling.[298] Citing financial reasons, Blue Sky declined to accept the certificates issued by the Commission.

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289. *Id*. at PP 7-8.
290. *Id*. at P 39.
291. *Miss. Hub, L.L.C.*, 128 F.E.R.C. ¶ 61,254 at P 1 (2009).
292. *Id.* at P 4.
293. *Id.* at P 5.
294. *Id.* at P 3.
295. *Id*. at P 30.
296. *Blue Sky Gas Storage, L.L.C.*, 129 F.E.R.C. ¶ 61,210 at PP 1-2, 4 (2009).
297. *Id.* at P 5.
298. *Id.* at P 32.

7. Port Barre Investments, L.L.C.

The Commission granted Port Barre Investments, L.L.C.'s (d/b/a Bobcat Gas Storage) (Bobcat) application to amend its certificate of public convenience and necessity to construct and operate the Bobcat Gas Storage Project in St. Landry Parish, Louisiana, to increase the working gas capacity of the facility by 9.3 Bcf.[299] The Commission also reaffirmed Bobcat's market-based rate authority, finding that the expansion in working capacity does not change its prior findings with regard to Bobcat's authorization to charge market-based rates for storage services.[300]

8. PetroLogistics Natural Gas Storage, L.L.C.

The Commission granted PetroLogisitics Natural Gas Storage, L.L.C.'s (PetroLogisitics) request to amend its certificate of public convenience and necessity for its salt dome natural gas storage facility in Iberville, Louisiana, authorizing PetroLogisitics to install an electric driven submersible pump to increase the certificated storage capacity by 8 Bcf for a total capacity of 17 Bcf.[301] After considering the impacts of the expansion of the storage capacity, the Commission reaffirmed PetroLogistics' market-based rate authority.[302]

9. Perryville Gas Storage, L.L.C.

The Commission issued Perryville Gas Storage, L.L.C. (Perryville), a certificate of public convenience and necessity to construct and operate a natural gas storage facility in Franklin and Richland Parishes, Louisiana.[303] The storage facility will be composed of two salt caverns, providing a total of 15 Bcf of working gas storage capacity and will initially provide 600 MMcf per day of maximum withdrawal capability.[304] Perryville will also contract and operate a 2.56-mile, 24-inch pipeline to interconnect with Columbia Gulf Transmission Company and an 11.8-mile, 36-inch pipeline to interconnect with CenterPoint Energy Gas Transmission Company.[305] The Commission also authorized Perryville to charge market-based rates for storage, storage-related, and wheeling services.[306]

10. MoBay Storage Hub, L.L.C.

The Commission granted the request of MoBay Storage Hub, L.L.C.'s (MoBay) to amend its certificate of public convenience and necessity to increase

299. *Port Barre Investments, L.L.C.*, 130 F.E.R.C. ¶ 62,272 (2010).

300. *Id.* at p. 64,736.

301. *PetroLogisitics Natural Gas Storage, L.L.C.*, 130 F.E.R.C. ¶ 62,273 (2010).

302. *Id.* at p. 64,739.

303. *Perryville Gas Storage, L.L.C.*, 130 F.E.R.C. ¶ 61,065 at PP 1-2 (2010).

304. *Id.* at P 4.

305. *Id.* at P 8.

306. *Id.* at P 37.

the total capacity and working capacity of one its three storage reservoirs, the North Dauphin Island reservoir, located offshore in Alabama state waters.[307] MoBay sought to increase the North Dauphin Island reservoir capacity for gas-in-place from 69.3 Bcf to 73.0 Bcf and for working gas from 44.08 Bcf to 53.2 Bcf.[308] As part of its proposal, MoBay sought to add two offshore well caisson structures and to add nine new injection/withdrawal wells, bringing the total number of wells servicing the facility to 30.[309] The Commission also reaffirmed its approval of market-based rate for the storage, hub, and wheeling services provided by MoBay.[310]

11. Southern Star Central Gas Pipeline, Inc.

The Commission issued a certificate of public convenience and necessity to Southern Star Central Gas Pipeline, Inc. (Southern Star), to construct certain facilities to expand storage capabilities at its Elk City Storage field in Kansas.[311] Southern Star proposed to increase the total and working gas storage capacity and the maximum deliverability of the Elk City field, because a recent gas storage study concluded that the total capacity of Elk City field is 33.3 Bcf, which is 2.6 Bcf greater than the currently-certificated maximum capacity.[312] The Commission granted Southern Star market-based rate authority pursuant to section 4(f) of the NGA,[313] conditioned upon Southern Star maintaining separate books and records to ensure that existing customers will not subsidize costs associated with the expansion.[314] Because the Elk City field contains approximately 1.9 Bcf more gas than Southern Star's inventory records reflect, Southern Star proposed to credit its existing firm storage customers' pro rata share of the 1.9 Bcf based on each customer's firm storage Maximum Storage Quantity compared to the total firm Maximum Storage Quantity.[315] The Commission found this proposal to be reasonable.[316] The Commission denied Southern Star's request to convert 1.4 Bcf of base gas to working gas because it may result in a loss of capacity and adversely impact existing customers.[317]

B. *Storage Cavern Integrity and Other Technical Considerations*

1. Columbia Gas Transmission Corp.

Columbia Gas Transmission Corporation (Columbia) requested to extend the western boundaries of the existing Weaver storage field (Weaver Field) located in Ashland, Knox, and Richland Counties, Ohio, to protect the integrity

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307. *MoBay Storage Hub, L.L.C.*, 131 F.E.R.C. ¶ 61,152 PP 1, 4 (2010).
308. *Id.* at P 7.
309. *Id.* at P 4.
310. *Id.* at P 17.
311. *S. Star Cent. Gas Pipeline, Inc.*, 131 F.E.R.C. ¶ 61,154 (2010).
312. *Id.* at P 4.
313. *Id.* at P 39.
314. *Id.* at P 46.
315. Southern Star asserted that the 1.9 Bcf is a portion of the 2.6 Bcf additional capacity. *Id.* at P 49.
316. *Id.* at P 54.
317. *Id.* at PP 17, 27.

of the field in light of evidence that its storage gas is migrating to third-party production wells.[318] Specifically, Columbia requested authorization to extend the boundary to approximately 3,056 additional acres and for a one-mile buffer zone extending from the new storage reservoir boundary. The Commission balanced the interests of all the intervenors against the public benefits of a secure Weaver Field,[319] and found that Columbia's proposal to extend the reservoir boundary "is reasonable because it includes an area only where gas is known to have migrated," and the proposal to extend the buffer zone is reasonable because "it extends beyond the area where the storage formation is known to exist, and provides a cushion of distance to where geologic data indicates the storage formation has discontinued."[320]

2. Northern Natural Gas Co.

The Commission granted Northern Natural Gas Company (Northern Natural) a certificate of public convenience and necessity to expand the certificated protected boundary, or buffer zone, by 14,240 acres around its Cunningham Storage Field in Kansas.[321] Northern Natural stated that third-party operators in the proposed extension area are producing Northern Natural's storage gas and expansion of the buffer zone, in conjunction with implementation of a four-step management plan, will allow it to protect the integrity of the storage field.[322] The Commission agreed, in part, authorizing Northern Natural to expand its buffer zone by 12,320 acres, but rejected certification of the remaining acreage, finding that record evidence demonstrated that native gas is being produced in that area.[323] The Commission required Northern Natural to design and implement a comprehensive and specific containment and management plan to prevent storage gas migration beyond the newly authorized boundary and to submit quarterly reports on all actions taken.[324]

C. LNG Projects

1. Jordan Cove

The Commission granted authorization under section 3 of the NGA to Jordan Cove Energy Project, L.P. (Jordan Cove), to construct, own, and operate an LNG terminal to be located on Coos Bay in Coos County, Oregon and a related certificate of public convenience and necessity under section 7(c) of the NGA to Pacific Connector Gas Pipeline, L.P., to construct, own, and operate a 234-mile, 36-inch interstate natural gas pipeline extending from the tailgate of

318. *Columbia Gas Transmission Co.*, 128 F.E.R.C. ¶ 61,050 (2009).

319. *Id.* at P 53.

320. *Id.* at P 100.

321. *N. Natural Gas Co.*, 131 F.E.R.C. ¶ 61,209 (2010).

322. *Id.* at P 5.

323. *Id.* at PP 76-77.

324. *Id.* at P 28.

the terminal to a point near Malin, in Klamath County, Oregon.[325] In response to protests that domestic and Canadian supplies could adequately meet the energy needs of the region, the FERC noted that "that increasing internal demand for gas in Canada has resulted in exports from Canada declining by roughly one-third since 1997."[326] Further, no proposal to construct a pipeline from Alaska was currently pending.[327] Finally, the potential reduction in Canadian imports would increase the extent to which West Coast markets were reliant upon Rocky Mountain natural gas production, "placing those markets in increased competition with Northeast and Midwest markets for the Rocky Mountain gas supplies."[328] The FERC found that the project "will help assure an adequate supply of reasonably priced natural gas and therefore is not inconsistent with the public interest."[329] The LNG terminal and pipeline facilities peak send-out capacity is 1.0 Bcf per day to serve markets in the Pacific Northwest, northern California, and northern Nevada.[330] Chairman Wellinghoff dissented, citing similar concerns to those in his dissent in *Bradwood Landing, L.L.C.*[331]

2. Dominion Cove Point LNG, L.P.

The Commission granted authorization under section 3 of the NGA to Dominion Cove Point LNG, L.P., to modify and expand the existing offshore pier at Cove Point's LNG terminal in Calvert County, Maryland, to permit larger LNG vessels to dock at the terminal.[332] Upon completion of the project, the Cove Point LNG terminal will be capable of receiving ships carrying cargoes of up to 267,000 cubic meters of LNG. The Washington Gas Light Company (WGL) protested the project, raising arguments similar to those advanced in a separate proceeding involving an expansion of the Cove Point LNG terminal.[333] In rejecting WGL's request, the FERC found the project not inconsistent with the public interest and emphasized that "the . . . [p]roject does not involve an increase in Cove Point's authorized amount of storage capacity, or the authorized amount of vaporized LNG that may be sent out from the terminal at any given

325. *Pac. Connector Gas Pipeline, L.P.*, 129 F.E.R.C. ¶ 61,234 (2009).

326. *Id*. at P 22.

327. *Id*. at P 23.

328. *Id*. at P 24.

329. *Id*. at P 28.

330. *Id*. at P 2.

331. *Bradwood Landing, L.L.C.*, 124 F.E.R.C. ¶ 61,257 (2008), *reh'g denied*, 126 F.E.R.C. ¶ 61,035 (2009).

332. *Dominion Cove Point LNG, L.P.*, 128 F.E.R.C. ¶ 61,037, *reh'g denied*, 129 F.E.R.C. ¶ 61,137 (2009).

333. *Dominion Cove Point LNG, L.P.*, 115 F.E.R.C. ¶ 61,337 (2006), *order on reh'g*, 118 F.E.R.C. ¶ 61,007 (2007), *vacated and remanded*, Wash. Gas Co. v. FERC, 532 F.3d 928 (D.C. Cir. 2008), *order on remand*, 125 F.E.R.C. ¶ 61,018 (2008), *order on reh'g and clarification*, 126 F.E.R.C. ¶ 61,036 (2009), *petition for review denied*, Wash. Gas Light Co. v. FERC (D.C. Cir. Apr. 27, 2010). In these proceedings, the FERC addressed, among other things, WGL's claim that the increased flow of regasified LNG resulting from the project would lead to a high number of gas leaks on a portion of its system. The Commission found that the leaks on WGL's system were primarily attributable to the deteriorated condition of WGL's pipeline couplings, but limited deliveries of LNG on WGL's system to no more than 530,000 Dth a day, the same level of delivery of regasified LNG that existed on WGL's system prior to the expansion, thereby mitigating concerns regarding increased send-out of LNG attributable to the expansion.

time."[334] The FERC denied WGL's request for rehearing on similar grounds. The FERC also noted that "the responsibility for the safety of WGL's system ultimately rests with WGL" and "it is generally unreasonable for the [FERC] to impose restrictions on the operations of its jurisdictional entities in an effort to accommodate the idiosyncratic gas quality needs of individual shippers."[335]

V. CAPACITY RELEASE WAIVERS

In the past year, the FERC issued numerous orders granting and denying waiver requests of its Part 284 capacity release regulations and related policies, including: (i) the shipper-must-have-title requirement; (ii) the buy-sell prohibition; (iii) the capacity tying prohibition; (iv) posting and bidding requirements;[336] and (v) restrictions on capacity releases above the applicable maximum rate,[337] as well as certain -related pipeline tariff provisions. Generally speaking, the time taken by the Commission to process such requests decreased, while the number of waivers granted increased over prior years. Selected cases as follows:

A. LNG-Related Transactions

1. North Baja Pipeline, L.L.C.

The Commission granted a waiver to allow permanent release of North Baja Pipeline, L.L.C. (North Baja), capacity by Shell North America (US), L.P. (Shell), to Gazprom Marketing & Trading USA, Inc. (Gazprom), and denied a request for waiver from posting and bidding requirements for an associated temporary release, [338] thereby further "defin[ing] the scope of the Commission's policy on capacity release waivers."[339] In granting the waiver to allow the permanent release, the Commission noted that the release, which is at a negotiated, levelized rate, is currently less than the maximum rate but could be above the maximum rate later; thus, "continuation of the existing negotiated rate is necessary for [North Baja] to be financially indifferent to a permanent release of [Shell's] capacity."[340] In denying the waiver for the associated temporary release, the Commission stated that "it is clear that Shell North America is not transferring capacity that it no longer needs. The Petitioners have not explained why the capacity cannot be submitted for posting and bidding, and awarded to the bidder who values it most."[341]

2. Statoil Natural Gas, L.L.C. (Sonatrach)

Statoil Natural Gas, L.L.C. (Statoil), and La Société Nationale pour la Recherche, la Production, le Transport, la Transformation et la Commercialisation des Hydrocarbures s.p.a. (Sonatrach), requested a waiver of the Commission's tying

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334. *Id*. at P 19.
335. 129 F.E.R.C. ¶ 61,137 at P 16.
336. 18 C.F.R. §§ 284.8(d)-(e) (2009).
337. 18 C.F.R. § 284.8(b)(2).
338. *N. Baja Pipeline, L.L.C.*, 128 F.E.R.C. ¶ 61,082 at P 14 (2009).
339. *Id*. at P 18.
340. *Id*. at P 14.
341. *Id*. at P 15.

prohibition and bidding requirements to allow the parties to link an agreement to purchase and sell liquefied natural gas (LNG) with a prearranged pipeline capacity release agreement for expansion terminal capacity at the Dominion Cove Point LNG, L.P., terminal.[342] The Commission granted the request to waive the tying prohibition based on its finding that the proposed transaction would not have an adverse effect on open access competition and there were no undue restrictions on Sonatrach's use of the acquired capacity.[343] Further, the Commission noted the "significant benefits in terms of bringing new supplies to the United States."[344] The Commission denied the request for waiver of the bidding requirement as moot, noting "[l]ong term capacity releases at the maximum rate are not subject to the Commission's capacity release bidding requirements."[345]

3. Statoil Natural Gas, L.L.C. (Gazprom)

The Commission granted a waiver of its tying prohibition to allow a transaction between Statoil and Gazprom Marketing and Trading USA, Inc. (Gazprom), linking certain mid-term and long-term capacity release agreements with LNG supply agreements related to Statoil's terminal and transportation expansion entitlements at the Dominion Cove Point LNG terminal.[346] The Petitioners explained that the transaction is a key part of securing the value chain and continued development of the Shtokman LNG project in the Barents Sea.[347] The Commission found that granting the waiver would bring new supplies to the United States[348] and noted that:

> [N]othing in the record . . . indicate[s] that granting the waiver in this situation will adversely impact open access competition on the interstate grid and no party filed to object to the waiver. Moreover, it does not appear that existing shippers on the Cove Point and Dominion pipeline systems will be disadvantaged relative to LNG importers.[349]

The Commission found the requested waiver of bidding requirements unnecessary because the releases would take place at the maximum rate.[350]

B. Mergers or Sales of Entire Business Units

1. Nexen Marketing U.S.A., Inc.

The Commission granted a petition by Nexen Marketing U.S.A., Inc. (Nexen), and J. Aron & Company (J. Aron) for temporary waivers of the shipper-must-have-title requirement, the buy-sell prohibition, the tying prohibition, the posting and bidding requirements and restrictions on capacity releases above the applicable maximum rate, as well as certain related tariff provisions on affected pipelines, in order to allow Nexen to permanently release

342. *Statoil Natural Gas, L.L.C.*, 128 F.E.R.C. ¶ 61,240 at P 1 (2009).
343. *Id*. at PP 16-17.
344. *Id*. at P 18.
345. *Id*. at P 19.
346. *Statoil Natural Gas, L.L.C.*, 130 F.E.R.C. ¶ 61,110 at P 25 (2010).
347. *Id.* at P 30.
348. *Id.* at P 28.
349. *Id*. at P 27.
350. *Id.* at P 31.

transportation and storage service agreements to J. Aron to facilitate Nexen's complete exit from the natural gas marketing and trading business.[351] The Commission noted that it "did not contemplate that the capacity release posting and bidding requirements would necessarily apply in cases of the merger or sale of entire business units as part of a corporate restructuring,"[352] and found the request to be "consistent with previous waivers that the Commission has granted under similar circumstances."[353] Regarding waivers of capacity release-related interstate pipeline tariff provisions, the Commission held that:

> [W]aivers of these tariff provisions applies *only to the extent necessary* to effectuate the permanent releases of capacity amounts specified in the Petition for the relevant agreements, and not for any other permanent or temporary releases. Petitioners remain obligated to comply with any other applicable provisions of the pipelines' tariffs.[354]

2. Calpine Energy Services, L.P.

The Commission granted a petition by Calpine Energy Services, L.P. (Calpine), and Conectiv Energy Supply, Inc. (Conectiv), for temporary waiver of the shipper-must-have-title policy, the prohibition on buy-sell arrangements, the prohibition on tying, the posting and bidding requirements, and the restrictions on capacity releases above or below the maximum rate, in order to facilitate the prearranged permanent release of certain long-term firm natural gas transportation and storage agreements from Conectiv to Calpine as part of a transaction whereby Calpine would acquire "substantially all of Conectiv's wholesale power generation business."[355] Noting the petitioner's claim that the waivers are necessary to "ensuring that the gas-fired generators continue to have uninterrupted access to natural gas fuel supplies," the Commission found the request "consistent with previous waivers that the Commission has granted under similar circumstances."[356]

3. Wisconsin Electric Power Co.

At the request of Wisconsin Electric Power Company (Wisconsin Electric) and Wisconsin Gas, L.L.C. (Wisconsin Gas), the Commission granted temporary waivers of its shipper must have title policy, the prohibition against buy/sell transactions, and tying prohibition in order to allow subsidiary Wisconsin Electric to assume affiliate Wisconsin Gas' portfolio of natural gas transportation, storage, and purchase and sales agreements as part of an internal corporate consolidation in which Wisconsin Gas would merge into Wisconsin Electric and exit the natural gas business.[357] The Commission found the waiver request consistent

351. *Nexen Mktg. U.S.A., Inc.*, 131 F.E.R.C. ¶ 61,282 at P 1 (2010).

352. *Id.* at P 6 (citing *Request for Clarification of Policy regarding Waivers of Applicable Requirements to Facilitate Integrated Transfers of Marketing Businesses*, 127 F.E.R.C. ¶ 61,106, at P 8 (2009)).

353. *Id.* at PP 4, n.3, P 7 (citing *Macquarie Cook Energy, L.L.C.,* 126 F.E.R.C. ¶ 61,160 (2009); *Sempra Energy Trading Corp*., 121 F.E.R.C. ¶ 61,005 (2007); *Bear Energy L.P.*, 123 F.E.R.C. ¶ 61,219 (2008); *Barclays Bank, P.L.C.*, 125 F.E.R.C. ¶ 61,383 (2008)).

354. *Id*. at P 8 (emphasis added).

355. *Calpine Energy Services, L.P.*, 131 F.E.R.C. ¶ 61,261 at PP 1, 6 (2010).

356. *Id*. at PP 6, 8.

357. *Wis. Elec. Power Co*., 131 F.E.R.C. ¶ 61,104 at P 5 (2010).

with previous Commission orders facilitating the transfer of assets as a result of corporate restructurings, including mergers and sales of business units.[358]

4. Energy Mark, L.L.C.

The Commission granted[359] waivers of the shipper-must-have-title policy, the prohibitions on buy-sell arrangements and tying arrangements, bidding requirements, and restrictions on capacity releases below or above the maximum rate in order to facilitate the sale to Energy Mark, L.L.C. (Energy Mark), by Constellation New Energy – Gas Division, L.L.C. (Constellation), of the New York retail book of Constellation, thereby facilitating "Constellation's comprehensive and orderly exit from the New York retail natural gas business."[360] "The Commission found the request consistent with previous waivers that the Commission has granted under similar circumstances."[361]

5. Sequent Energy Management, L.P.

The Commission granted waivers of the shipper-must-have title policy, the prohibition on buy-sell arrangements, the prohibition on tying, bidding requirements, and the restrictions on capacity releases below or above the applicable maximum tariff rate in order to facilitate the acquisition, by Sequent Energy Management, L.P. (Sequent), of the wholesale U.S. gas trading portfolio of Integrys Energy Services, Inc. (Integrys), which seeks to make an "orderly exit" from the wholesale gas business in the U.S.[362] The Commission found that "the request is adequately supported and consistent with previous waivers that the Commission has granted under similar circumstances."[363]

6. Tidal Energy Marketing (US), L.L.C.

The Commission granted waivers of the shipper-must-have title policy, the prohibition on buy-sell arrangements, and the tying prohibition in order to facilitate the merger of Enbridge Gas Services (Enbridge) into Tidal Energy Marketing (US), L.L.C. (Tidal), and Tidal's assumption of Enbridge's natural gas marketing business, including its portfolio of natural gas transportation, storage, purchase and sales agreements.[364] After the merger Enbridge will cease to exist and will exit the natural gas business. The Commission granted the waivers as consistent with prior waivers granted under similar circumstances and "[f]or good cause shown and to allow an orderly and rational merger."[365]

358. *Id*. (citing *Sequent Energy Mgmt., L.P.*, 129 F.E.R.C. ¶ 61,188 (2009); *Tidal Energy Mktg. (U.S.), L.L.C.,* 128 F.E.R.C. ¶ 61,277 (2009); *Macquarie Cook Energy, L.L.C.*, 126 F.E.R.C. ¶ 61,160 (2009)).

359. *EnergyMark, L.L.C.*, 130 F.E.R.C. ¶ 61,059 at P 6 (2010).

360. *Id*. at P 1.

361. *Id*. at P 6, n.3 (internal citations omitted).

362. *Sequent Energy Mgmt., L.P.*, 129 F.E.R.C. ¶ 61,188 at P 8 (2009).

363. *Id*. (citing *Macquarie Cook Energy, L.L.C.*, 126 F.E.R.C. ¶ 61,160 (2009); *Bear Energy, L.P.*, 123 F.E.R.C. ¶ 61,219 (2008); *Sempra Energy Trading Corp.,* 121 F.E.R.C. ¶ 61,005 (2007)).

364. *Tidal Energy Mktg. (U.S.), L.L.C.,* 128 F.E.R.C. ¶ 61,277 at P 6 (2009).

365. *Id*.

7. Total Gas & Power North America, Inc.

The Commission granted temporary waivers of capacity release policies and regulations governing the applicable maximum rate, posting and bidding requirements, the shipper-must-have-title policy, the prohibition against buy-sell transactions and the prohibition against tying arrangements in order to facilitate a transaction in which Total Gas & Power North America, Inc. (Total) would acquire 25% of Chesapeake Energy Marketing Inc.'s (Chesapeake) interests in the Barnett Shale and move that gas using capacity acquired from Chesapeake in a prearranged release of Chesapeake's negotiated rate agreements on certain pipelines.[366]

> In the present case, as in *North Baja*, the negotiated rates at which the Petitioners seek to release the subject capacity are below the current maximum rates of the respective pipelines but could be above the maximum rates at a later date. Thus the pipelines here can reasonably conclude that they are financially indifferent to the releases, and none of them has objected to the proposed releases. Moreover, if we were to require that the proposed long-term permanent releases be posted for bidding subject to the maximum recourse rate as required by the capacity release regulations, bidders could not offer to pay the existing negotiated rate for the entire term of the release because such a rate could violate the maximum rate ceiling in the future.[367]

C. The Alaska Gas Pipeline Project

The Commission granted the State of Alaska a permanent waiver of the Commission's buy-sell and tying prohibitions in connection with the Alaska Gas Pipeline Project.[368] As a result, Alaska may enter into a pre-arranged release to move any royalty gas and may then sell the royalty gas back to the producer. "Due to the unique circumstances of the Alaska Gas Pipeline Project, the State's royalty switching rights, and local consumption needs within Alaska,"[369] the Commission granted the requested waivers and permitted the State of Alaska to obtain pre-arranged capacity releases for transporting its royalty gas without posting the releases for bidding.[370] The waiver is:

> [S]ubject to the following conditions: (i) if the State uses the waiver to take a capacity release from one producer, then it must offer to do the same with other similarly-situated producers on any Alaska Gas Pipeline Project; and (ii) the waiver must apply to all firm capacity held by producer-shippers and is not limited to firm capacity acquired by a producer-shipper during the initial open season.[371]

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366. *Total Gas & Power N. Am., Inc.,* 131 F.E.R.C. ¶ 61,023 at PP 12, 13 (2010).
367. *Id.* at P 11 (citing *N. Baja Pipeline, L.L.C.*, 128 F.E.R.C. ¶ 61,082 (2009)).
368. *The State of Alaska*, 130 F.E.R.C. ¶ 61,070 at P 1 (2010).
369. *Id.* at P 21.
370. *Id.*
371. *Id.*

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