GEORGIA'S NATURAL GAS COMPETITION AND DEREGULATION ACT: A MODEL FOR RESTRUCTURING RETAIL NATURAL GAS MARKETS?

*Linda S. Portasik**

The Natural Gas Competition and Deregulation Act (Deregulation Act or Act),[1] passed by the Georgia legislature in the spring of 1997, envisions a fundamental change in the state's regulatory infrastructure through the introduction of a competitive market for retail sales of natural gas to all ratepayers heretofore served by Georgia's regulated gas companies.[2] Touted as the first legislative initiative aimed at achieving fully competitive firm retail natural gas markets, the Act establishes a comprehensive set of rules designed to promote "an orderly and expeditious transition"[3] from regulation to competition, while at the same time preserving the high reliability of natural gas service characteristic of the old regulatory regime.[4]

Part One of this article summarizes the major elements of the Deregulation Act as well as the regulatory filing of Atlanta Gas Light Company (AGL) that triggered the Act's provisions and set into motion the wheels of regulatory change before the Georgia Public Service Commission (GPSC or Commission). Part Two describes the more contentious issues raised by AGL's filing, particularly to the extent such issues uncovered perceived deficiencies in the Act, and summarizes the findings of the GPSC with respect to these issues. Finally, Part Three discusses the extent to which AGL's restructuring initiatives, as approved by the GPSC, comport with the Federal Energy Regulatory Commission's (FERC) objective of "ensur[ing] an environment in which natural gas users can reap the benefits of both the restructured interstate natural gas market created by Order No. 636 and retail unbundling . . . ."[5]

---

* Counsel to the law firm of King & Spalding in its Atlanta office. Ms. Portasik's practice concerns virtually all aspects of energy law involving natural gas and electricity, including the representation of energy suppliers and end-users in both commercial transactions and regulatory matters before state and federal commissions.

1. GA. CODE ANN. §§ 46-4-150-165 (Supp. 1998).

2. The Act does not apply to gas companies owned by municipalities or otherwise affect the existing franchise or taxing powers of municipalities or political subdivisions. GA. CODE ANN. § 46-4-164 (Supp. 1998). Moreover, the Act does not deregulate distribution service, which, as a natural monopoly, will continue to be regulated by the Georgia Public Service Commission. GA. CODE ANN. § 46-4-155(a) (Supp. 1998).

3. GA. CODE ANN. § 46-4-151(b)(6) (Supp. 1998).

4. Interruptible (as opposed to firm) sales of natural gas to retail end-users in Georgia have long been subject to competitive market forces, affording end-users the option of purchasing gas on an interruptible basis directly from third-party suppliers (and purchasing only transportation service from their incumbent utility). However, the Act promises to affect the interests of interruptible as well as firm end-users. *See* discussion *infra*, Part One I.B.

5. Notice of Conference, *Federal and State Regulation of Natural Gas Services*, Docket No. PL99-1-

PART ONE: THE DEREGULATION ACT AS IMPLEMENTED

Resembling an administrative rulemaking in its regulatory detail,[6] the Deregulation Act was triggered by AGL's "election" and related restructuring filing in November 1997.[7] The Act can be broken down into essentially three major components, each of which deals with an integral piece of the restructuring puzzle.[8]

I. MARKETER-SPECIFIC ISSUES

A. *Obtaining and Keeping the Right to Serve Firm Customers*

In light of the crucial role marketers will play in determining the success of Georgia's restructuring initiatives, much of the Act is devoted to marketer-specific issues, including marketer qualifications and the procedures governing the Commission's review of applications for "certificate authority" to market natural gas in intrastate commerce. Aimed at preserving service reliability within a competitive market structure, the Act mandates that every marketer doing business in Georgia: (1) "[p]ossess satisfactory financial and technical capability" to render firm sales service; (2) have a "sufficient gas supply to meet the requirements of such service;" and (3) offer service "pursuant to rules and contract terms which the [C]ommission finds economically viable for the territory" the marketer wishes to serve.[9] Likewise, the Act prohibits any marketer from refusing "to sell gas to a potential firm retail customer within the territory covered by the marketer's certificate."[10]

---

000 (Oct. 28, 1998).

6. *See, e.g.,* GA. CODE ANN. § 46-4-151(b), (b)(7) (Supp. 1998) ("It is the intent of this article to . . . [p]rovide for rate-making methods which the General Assembly finds appropriate for the provision of natural gas services, including without limitation the use of the straight fixed variable rate design . . . and the use of alternative forms of rate regulation").

7. GA. CODE ANN. § 46-4-154(a) (Supp. 1998) ("A gas company may elect to become subject to the provisions of this article [becoming an Electing Distribution Company or EDC] by filing a notice of election with the commission and . . . an application to establish just and reasonable rates . . . .") *Id.* AGL's revised rates went into effect on July 1, 1998, and marketers began "signing up" customers in the fall of 1998. *See infra* Part One I.B.

8. The Act has been referred to by some as Senate Bill 215 or SB215, the legislative bill giving rise to and incorporating the Act. However, the two are not one in the same. Senate Bill 215 includes two major components—the Deregulation Act and specific provisions governing alternative forms of regulation (or performance-based ratemaking). Although AGL took the position in the proceeding initiated by its regulatory filing (which filing included a comprehensive performance-based ratemaking proposal) that the two components were inextricably related—and that the GPSC must adopt some form of alternative rate regulation in acting on AGL's election filing—the GPSC ultimately refused to do so. *Partial Order on Motions to Reconsider,* GPSC Docket No. 8390-U (Sept. 15, 1998), at 6 ("[t]he Commission finds as a matter of law that it is not required to approve an Alternative Form of Regulation for an [EDC] if the [EDC's] plan is not in the public interest, produces rates which are not just and reasonable, or is otherwise not in compliance with the requirements of [the relevant provisions of Senate Bill 215"]).

9. GA. CODE ANN. § 46-4-153(a)(2)(A)-(C) (Supp. 1998). Consistent with the Act, AGL has divided its service territory into nine primary pools or delivery groups. Although marketers may apply to serve one or only some of these territories, only one marketer-applicant to date has applied to serve less than all pools.

10. GA. CODE ANN. § 46-4-160(c) (Supp. 1998).

In accordance with its statutory directive to "[a]dopt reasonable rules and regulations" incorporating these mandates, the GPSC has promulgated an extensive set of regulations detailing not only the precise financial and technical information that must accompany any certificate application, but also other requirements aimed at protecting ratepayer interests, including specific "rules for contracting with firm customers."[11] The required financial information includes, among other things:

(1) "a demonstration that the applicant's capital base or other financial resources can withstand the business and financial risk and absorb losses that might occur" in providing firm retail service (e.g., the applicant's ability to protect against price fluctuations);

(2) "an explanation as to how the applicant's financial plans and resources will provide the means to implement its business/marketing plans;"

(3) audited financial statements for the most recent three years;

(4) a third-party credit and/or bond rating or, alternatively, financial support agreements between the applicant and its parent; and

(5) the details of any unconditional purchase obligations, long-term debt arrangements and joint venture agreements between the applicant and other parties.[12]

The technical information required of each applicant includes, but is not limited to:

(1) the applicant's "estimated or anticipated gas supply and capacity, as well as limitations, if any, to gas supply;"

(2) "a contingency plan to provide gas to firm customers in the event that a supply disruption occurs" (e.g., the availability of multiple supply sources);

(3) proof that the applicant has met or has the ability to meet the creditworthiness standards of both the upstream interstate pipelines serving Georgia and the affected "electing distribution company" (AGL);

(4) a statement describing the operating experience and qualifications of the applicant's "principal management employees;" and

(5) a description of the applicant's gas marketing activities in other states, including a "quantification of annual sales, volumes or other measures of activity" and full disclosure of any prior sanctions or penalties related to such marketing efforts.[13]

The GPSC's "rules for contracting with firm customers" resemble consumer safeguards afforded under longstanding consumer protection acts. For example, the GPSC's regulations require that marketers' bills and contracts: (1) be written in understandable language; (2) contain sufficient information to allow customers to verify the accuracy of their bills and the basis for any charges included therein; and (3) specify the contract term (if any) and customers' termination rights. Likewise, the marketer's customers must be permitted to

---

11. GA. COMP. R. & REGS. r. 515-7-3-.03(2)(f)(i) (1998).
12. GA. COMP. R. & REGS. r. 515-7-3-.03 (2)(g)(i), (g)(ii).
13. GA. COMP. R. & REGS. r. 515-7-3-.03 (2)(h)(iii), (h)(iv), (h)(ix).

cancel contracts without penalty within forty-eight hours after execution or upon relocation outside a delivery group.[14]

Relying on the above-described statutory and regulatory requirements, the GPSC conducted a series of hearings in the fall of 1998 to evaluate the merits of nineteen applications filed to that point.[15] Based on the testimony of the marketer-applicants and the recommendations of its hearing officers and advisory staff, the GPSC approved all nineteen applications. However, the GPSC granted only "interim" authorization to each marketer (extending one year) to afford the Commission the opportunity to observe how the market develops over the next several months.[16]

The Deregulation Act further provides that the GPSC, upon complaint by any person or on its own initiative, may initiate an investigation of a marketer's conduct for purposes of determining whether that marketer should be allowed to continue to operate in Georgia. More specifically, the GPSC may revoke, suspend or modify a marketer's certificate if it finds (after notice and a hearing) that the marketer: (1) has failed repeatedly or willfully to meet its obligations to firm retail customers; (2) has failed to comply with the GPSC's rules or AGL's Commission-approved tariff; (3) has engaged in unfair competition or deceptive trade practices; (4) has proffered fraudulent information to the GPSC; or (5) has otherwise engaged in activities that "are serving or could serve to mislead, deceive, or work a fraud on the members of the public."[17] Activities falling into the latter category include "slamming," or switching a customer to another supplier without its consent.[18] As a final deterrent measure, the GPSC may, apart from or in addition to revoking or suspending a marketer's certificate,[19] assess

14. GA. COMP. R. & REGS. r. 515-7-3-.03(2)(f)(i).

15. The Act required the GPSC to consider and rule on simultaneously by October 16, 1998, all certificate applications filed on or before July 15, 1998 (July 15 being fifteen days after the effective date of AGL's unbundled rates). GA. CODE ANN. § 46-4-153(c) (Supp. 1998); GA. COMP. R. & REGS. r. 515-7-3-.05 (1998). This "first wave" of applicants totaled nineteen (excluding those that had withdrawn their applications prior to hearing). With respect to any application filed after July 15, 1998, the GPSC must rule within ninety days of filing, unless a good faith allegation of wrongdoing is raised against the applicant. *Id.* § 46-4-153(c)(4)-(5). *See* discussion *infra* Part One I.A.

16. *See, e.g., Initial Order Issuing Interim Certificate*, GPSC Docket No. 9494-U (Oct. 6, 1998) ("all certificates should be issued on an interim basis for a minimum time necessary for the Applicant to demonstrate twelve months of actual firm gas supply operations . . . .")

17. GA. CODE ANN. § 46-4-153(e); GA. COMP. R. & REGS. r. 515-7-3-.07 (1998).

18. Matthew Quinn, *PSC Approves Gas Marketers, Warns Against Slamming*, THE ATLANTA JOURNAL-CONSTITUTION, Oct. 7, 1998, at F1. Other activities that "could serve to mislead the public" likely include attempts to sell natural gas under a "doing business as" or trade name substantially similar to that of an actual or potential competitor already well known and reputable in the industry. *See, e.g.*, Initial Decision, *PanCanadian Energy Serv. Inc., v. Atlanta Gas Light Co.*, GPSC Docket No. 9156-U, (June 23, 1998). (Although this proceeding was initiated upon a complaint alleging a violation of Section GA. CODE ANN. § 46-4-159(7) (Supp. 1998) (the Act's code of conduct rules), the Initial Decision clearly suggests that such conduct would not only violate the Act's code of conduct directives, but would also give rise to an investigation under the statutory provisions discussed above.)

19. Upon revocation of a marketer's certificate, the customers served by that marketer would be reassigned to other marketers *via* a random assignment process (*see* below), pursuant to a schedule established by the GPSC (unless such customers elect service from a specific replacement marketer). *See* Notice of Proposed Rulemaking, *Consideration of Amendments to Commission Utility Rule 515-7-4, Random Customer Assignment*, Docket No. 8053-U (Feb. 16, 1999).

monetary penalties of up to $15,000 against any marketer that willfully violates any regulation or otherwise fails to comply therewith after notice.[20]

B. Taking Over Atlanta Gas Light's Role as Bundled Service Provider to Retail Consumers

By late November 1998, several certificated marketers had begun soliciting firm customers throughout AGL's service territory, initiating the process of customer migration by which marketers will eventually take over entirely AGL's historical role as a bundled service provider.[21] How fast this "changing of the guard" will occur, however, is a function of the marketers' success in securing firm load.[22] In short, the Deregulation Act requires that AGL continue to offer firm sales service to all retail end-users in a particular geographic delivery group or pool until marketers have signed up and are serving in the aggregate at least one-third of the existing firm market in that geographic pool. More specifically, when (and only when) at least five marketers unaffiliated with AGL begin serving a particular delivery group, and at least thirty-three percent of the peak day requirements of that group is being met by marketers (at least eighteen percent of which is being provided by marketers unaffiliated with AGL), the natural gas market within that territorial area will be deemed "adequate" for deregulation.[23] At that juncture—i.e., upon a finding by the GPSC that "adequate" market conditions exist in a particular delivery group—AGL (with GPSC oversight) will initiate the "random assignment" of AGL's remaining sales customers among all eligible marketers, based on the firm market share (in this context only, the number of firm customers)[24] each marketer has compiled to that point.[25]

---

20. GA. COMP. R. & REGS. r. 515-7-3-.07(3) (1998). The $15,000 penalty applies to each violation, and is coupled with an additional $10,000 penalty for each day the violation is found to have occurred.

21. Although each customer will receive one bill from its marketer for delivered natural gas service, the charges assessed to that customer will, at least during the transition period, be broken down into separate components—i.e., regulated distribution service (passed through from AGL) and deregulated sales commodity service—to assist the customer in distinguishing among marketer offerings. *Partial Order on Motions to Reconsider*, *supra* note 8, at 7.

22. As of the end of December 1998, marketers had began serving almost 186,000 of AGL's nearly 1.5 million customers. Matthew C. Quinn, *Regulators To Investigate Outcry Over AGL's Latest Bills*, THE ATLANTA JOURNAL-CONSTITUTION, Jan. 6, 1999, at D-1.

23. GA. CODE ANN. § 46-4-156 (Supp. 1998). Under the Act, any person may file a petition requesting that the GPSC determine that adequate market conditions exist for a particular delivery group. GA. COMP. R. & REGS. r. 515-7-4(.01)-(.05) (1998). Notably, the Georgia Legislature passed a bill in April 1999 which amended § 46-4-156 of the Act. The amendment, among other things, eliminated the so-called "five marketer/thirty-three percent" rule. Under the amendment, the GPSC is afforded significant flexibility in determining whether to deregulate gas sales in a particular territory, based on a consideration of (1) the number and size of alternative service providers; (2) the extent to which service was available from alternative service providers; (3) the ability of alternative providers to make functionally equivalent services available at competitive prices; and (4) other indicators of market power, including market share and ease of entry. Ga. House of Rep., HB 822, 145th Leg., (Ga. 1999). (Enacted April 8, 1999)

24. Although some marketers have taken the position that a marketer's "market share" for purposes of random assignment should be measured volumetrically in regards to commercial and industrial customers (as opposed to considering solely the number of customers), the GPSC has not yet adopted that proposal. *Notice of Proposed Rulemaking*, Docket No. 8053-U (Feb. 16, 1999), *supra* note 19 (defining "market share" as the

Purportedly to ensure that all marketers would adhere to their statutory obligation to offer sales service to any "potential firm retail customer" within the territory covered by their certificates,[26] the Commission's regulations as initially drafted expressly prohibited marketers from "trad[ing] *any* customer that has been randomly assigned with another marketer."[27] However, in response to various marketers' concerns that such a prohibition could inhibit, instead of promote, achievement of the Act's objectives,[28] the GPSC's regulations as currently drafted include no mention of customer trading.[29] The completion of the random assignment process signals the end of the "transition" period—and, in turn, AGL's merchant obligation—as marketers become the "suppliers of last resort" on AGL's system.

The above-described statutory provisions reflect an effort on the part of the Georgia legislature to prevent what some have called customer "cherry picking"—offering service only to the most lucrative (i.e., large commercial and industrial) customers. That is, marketers *must* serve firm loads to the extent they intend to market supplies to large, high load factor interruptible customers,[30] and together must serve all firm customers—including relatively less profitable small residential customers and so-called "high risk" customers—by virtue of the Act's random assignment directive. In conjunction with (and in exchange for) this "universal service" obligation, however, the Act provides for the establishment of a universal service fund from which marketers may draw to recover losses associated with uncollectible customer accounts.[31] Initially funded in large part by revenues generated by AGL's sales of interruptible

---

"number of firm customers" within a delivery group). *See also* GA. CODE ANN. § 46-4-156(a) ("the percentage of such firm retail customers assigned to a given marketer shall be based upon the percentage at the time of such assignment *of all firm retail customers within the delivery group* served by such market") (emphasis added).

25. GA. CODE ANN. § 46-4-156.

26. *See supra* note 10 and accompanying text.

27. GA. COMP. R. & REGS. r. 515-7-4-.11(1) (1998) (emphasis in text), as set forth in Notice of Proposed Rulemaking, Docket No. 8053-U, *Consideration of Amendments to Commission Utility Rule 515-7-4, Random Customer Assignment* (Nov. 17, 1998).

28. In particular, these marketers alleged that a marketer's statutory obligation to offer sales service to any potential firm retail customer "is not inconsistent with" the establishment of a trading period: "[a] trading period . . . minimizes transaction costs and customer confusion by allowing marketers to trade accounts before customers leav[e] [AGL's] service. Because customers who have not chosen a marketer will not yet be served by a marketer, there would be no formal relationship with the customer to consider." *Comments of the Energy Service Providers Association In Support of a Trading Period as Part of the Random Assignment Process*, GPSC Docket No. 8053-U (Jan. 11, 1999).

29. *Notice of Proposed Rulemaking*, Docket No. 8053-U (Feb. 16, 1999), *supra* note 19.

30. Once firm customers begin migrating, or are assigned, to marketers, AGL is required under the Act to allocate to such marketers sufficient distribution capacity to serve the latter's firm customers' needs. *See infra*. Because large interruptible load is, by definition, served with distribution capacity reserved for, but not being used by, firm customers, the more firm load a marketer has, the greater its opportunity to market interruptible supplies to more profitable large industrials. By contrast, a marketer with little firm load will lack the intrastate capacity needed to penetrate large interruptible markets (unless it purchases or otherwise enters into an arrangement to use another marketer's "excess" capacity).

31. GA. CODE ANN. § 46-4-161 (Supp. 1998). The universal service fund's other purpose is discussed *infra* Part One III.C.

distribution service during the transition period,[32] the universal service fund will eventually be funded by all firm ratepayers through an appropriate surcharge, as determined by the GPSC on an annual basis.[33]

C. Assuring Efficiency and Reliability in a Competitive Market

1. Operational Capability/Flexibility

As indicated above, at the close of the transition period, AGL's firm customers will consist only of marketers, who will be solely responsible for providing "delivered" firm service to end-users.[34] To ensure that marketers enjoy the same operational capability as that historically enjoyed by AGL in serving bundled firm loads, the Deregulation Act contemplates both (1) an equitable allocation of AGL's interstate capacity among all affected marketers, and (2) an efficient means by which marketers can electronically coordinate receipts and deliveries and otherwise communicate with AGL as system operator. To this end, the Act requires that AGL file with the GPSC:

> [1] A description of the method by which [AGL] . . . proposes to allocate its intrastate capacity for firm distribution service to a marketer based upon the peak requirements of the firm retail customers served by the marketer . . . [2] a description of the method by which [AGL] . . . proposes to allocate its rights to interstate pipeline and underground storage [capacity] to a marketer based on the peak requirements of the firm retail customers served by the marketer; and [3]. . . [a] plan by which [AGL] will provide marketers with equal and timely access to information relevant to the availability of firm distribution service.[35]

By the same token, however, to ensure that marketers endeavor to preserve system integrity and reliability with the same commitment as that historically shown by AGL in its regulated capacity, the Act authorizes AGL to "impose reasonable operational conditions on any firm distribution service provided to marketers."[36] To this end, AGL, by its restructuring filing, implemented both daily and monthly balancing requirements on marketers/poolers (governing receipts into and deliveries out of the distribution system), and proposed various charges and penalties to the extent marketers failed to meet such requirements.[37]

---

32. *See infra* Part One III.C.

33. GA. CODE ANN. § 46-4-161(c). *See also Prepared Direct Testimony of E. Overcast, C. Waters, J. Kissel*, GPSC Docket No. 8390-U (Nov. 26, 1997), at 34 (noting that [u]timately the contributions to the fund will require a surcharge to [firm] rates . . ."). [hereinafter *Testimony of E. Overcast, C. Waters and J. Kissel*].

34. This is unlike other "pilot" unbundling/deregulation programs implemented by various state commissions, pursuant to which the LDC continues to provide unbundled transportation service to individual *end-users*, who, in turn, contract separately with marketers for sales commodity service.

35. GA. CODE ANN. § 46-4-154(d)(3)-(5) (Supp. 1998). In addition, as a means of enhancing marketers' operational flexibility, AGL is required to offer the latter liquefied natural gas peaking service at GPSC-approved cost-based rates unless and until marketers obtain peaking services from a third party. At that point, AGL's rates for peaking service are capped by statute at 120 percent of its preexisting cost-based rate. GA. CODE ANN. § 46-4-155(b) (Supp. 1998).

36. GA. CODE ANN. § 46-4-158(b) (Supp. 1998).

37. *Prepared Direct Testimony of S. Moore, E. Stanek, M. Wingo*, GPSC Docket No. 8390-U (Nov. 26, 1997), at 29-33 [hereinafter *Testimony of S. Moore, E. Stanek and M. Wingo*]

a. Intrastate Capacity Allocation

In its restructuring filing, AGL proposed to allocate to each certified marketer an amount of intrastate capacity equal to the sum of the "design day capacities" of the firm customers served by such marketer.[38] Capacity would be reallocated among marketers on a monthly basis as necessary to accommodate customers' decisions to switch suppliers.[39] The GPSC adopted AGL's proposed intrastate allocation methodology without elaboration, and further adopted AGL's proposal to allow marketers to "trade" among themselves any intrastate capacity not needed to meet their firm obligations.[40]

b. "Part 284" Upstream Capacity Allocation

The GPSC likewise adopted AGL's proposed methodology for assigning its "Part 284" upstream capacity rights (i.e., transportation services provided by AGL's upstream pipelines under part 284 of the FERC's regulations) among marketers.[41] Pursuant to this methodology, by which assignment is mandatory, AGL assigns its upstream capacity rights (with the exception of storage capacity and associated transportation rights retained for system operations) to marketers on a monthly basis, based on the latter's market shares in each delivery group.[42]

---

38. *Id.* at 7. Design day capacity is a measure of a customer's peak-day usage (the basis of allocation required under the Act). To determine the design day capacity of existing premises within a particular delivery group or pool, AGL first estimated each premises' daily fixed baseload usage and variable weather-sensitive usage. After summing these estimates and adjusting the same to ensure that the "sum of the individual calculations [would match] the pool group value," estimates were grouped into usage ranges, and all premises within a particular range were assigned the mean value of that range as their design day capacity. For new residential and small commercial customers, AGL developed a construction matrix of design day capacity requirements (reflecting the size of the dwelling and the number and type of gas appliances used therein); and for new large commercial and all industrial customers, developed design day requirements based on these customers' gas-fired equipment and space heating requirements. *Testimony of E. Overcast, C. Waters and J. Kissel*, *supra* note 33, at 8-11. The GPSC has required that AGL recalculate each customer's design day capacity on an annual basis.

39. Although firm customers may change marketers as often as one a month (unless otherwise agreed in their marketer contracts), switching more than once in any 12-month period carries with it a cost to the customer of $7.50 (per change). *Order*, GPSC Docket No. 8390-U, slip op. at 84 (June 30, 1998) [hereinafter *June 30 Order*].

40. AGL's capacity trading proposal—which prohibited re-trades of firm capacity (i.e., by the recipient marketer to a third marketer)—was criticized by marketers as unnecessarily limiting marketers' flexibility. *See infra* Part Two II.B. However, the Commission rejected these arguments out of concern for system integrity, agreeing with AGL that "on colder days when firm market demand is high, marketers must be in a position to promptly regain control over the [firm] capacity that they have traded away," which the Commission believed capacity re-trading would prevent. *Id.* at 86.

41. *Id.* at 85. Since the passage of Order 636, the provision of interstate transportation service has been effectuated largely under the auspices of Part 284 of the FERC's regulations, which allows jurisdictional entities to provide such service on an unbundled basis under "blanket certificates" without case-by-case scrutiny by the FERC. Prior to Order 636, however, the FERC evaluated the reasonableness of proposed jurisdictional service(s) on a case-by-case basis under part 157 of its regulations. Unlike part 284 services, part 157 services cannot be assigned or "released" without prior FERC approval. So, too, part 157 services rendered to downstream entities (such as AGL) cannot be converted to part 284 services (and thus become assignable) absent agreement by the affected upstream pipeline or direction by the FERC under section 5 of the Natural Gas Act. *See, e.g.*, *Tennessee Gas Pipeline Co.*, 80 F.E.R.C. ¶ 61,070, at 61,219 (1997).

42. *Testimony of S. Moore, E. Stanek and M. Wingo*, *supra* note 37, at 10. Unassigned upstream

To this end, AGL takes into account both the delivery group's total design day capacity and the available receipt point capacity into AGL's system from the relevant upstream pipeline(s).[43] Assigned capacity is recallable by AGL "on a non-discriminatory basis" to the extent AGL determines that there are insufficient flowing supplies to meet firm customer requirements.[44]

Effectuated pursuant to the FERC's capacity release regulations,[45] assignments are made on a pipeline-by-pipeline basis, and require the marketer-assignee to deal directly with the pipeline regarding daily nominations, billing and payment.[46] Concerning payment, each marketer is subject to the same charges that would have applied to AGL prior to the assignment.[47] However, in keeping with Georgia common law, AGL, as assignor, remains liable for all pipeline charges to the extent the marketer defaults.[48]

The Deregulation Act further provides that, until AGL is no longer obligated to provide commodity sales service (i.e., until completion of the random assignment process), and the GPSC determines that marketers can and will secure needed upstream capacity on behalf of firm retail customers, AGL shall "continue to be responsible for acquiring and contracting for the interstate capacity assets necessary for gas to be made available on its system."[49] To this

---

pipeline capacity is used by AGL to fulfill its firm merchant role during the transition period.

43. *Testimony of S. Moore, E. Stanek and M. Wingo, supra* note 37, at 10. AGL proposed to retain interstate pipeline receipt point capacity associated with gas supply used to meet its firm merchant obligations during the transition period, as identified in AGL's wellhead supply contracts. *See infra* note 51. Remaining receipt point capacity would be allocated among marketers on a *pro rata* basis, based on the latter's market shares in the relevant delivery group. Relying on assurances by AGL that it would not favor its affiliate or any marketer in the allocation of receipt point capacity (as shown in periodic reporting requirements), the GPSC accepted AGL's proposal. *Partial Order on Motions to Reconsider, supra* note 8, at 8.

44. AGL GPSC Tariff, Terms of Service, Revised Sheet No. 13.5, Section 13.5, effective November 1, 1998.

45. Although AGL may "roll over" short-term releases of upstream capacity (i.e., assign its rights to upstream capacity) at the upstream pipeline's maximum rate without having to adhere to the FERC's capacity release posting/bidding requirements, it must either adhere to such requirements or obtain a waiver thereof to the extent it elects to release such capacity at discounted rates. Because AGL proposed in its restructuring proceeding to assign its capacity rights on Southern Natural Gas Company's interstate system at discounted rates, AGL filed for, and received, a one-year waiver of the FERC regulations. *Atlanta Gas Light Co.*, 84 F.E.R.C. ¶ 61,119, at 61,638 (1998).

46. *Testimony of S. Moore, E. Stanek and M. Wingo, supra* note 37, at 11. As assignor, however, AGL will remain liable for payment to the interstate pipeline should the marketer default in its payment obligations.

47. AGL initially proposed that the cost of capacity allocated to marketers be equal to the weighted average cost of AGL's upstream capacity. Recognizing that the direct assignment methodology proffered by AGL precluded such pricing, the GPSC ruled that "the cost of upstream capacity allocated to Marketers shall be [AGL's] *actual* capacity cost and not its *weighted average* capacity cost . . . ." *Partial Order on Motions to Reconsider, supra* note 8, at 8 (emphasis in text).

48. *Partial Order on Motions to Reconsider, supra* note 8, at 8.

49. GA. CODE ANN. § 46-4-155(e)(2) (Supp. 1998). The GPSC has clarified that "migrating" customers may return to AGL for firm sales service at any time during the transition period, confirming that AGL's firm sales obligation will be extinguished only after completion of the random customer assignment process. *June 30 Order, supra* note 39, slip op. at 85. At that time, the GPSC may issue an order relieving AGL of the obligation to acquire and contract for interstate capacity if the Commission determines, *inter alia*, that marketers

> can and will secure adequate and reliable interstate capacity assets necessary to make gas available on [AGL's] system for service to retail customers; [that] [a]dequate, reliable and

end, AGL must file a capacity supply plan every third year, for review by the GPSC as well as any interested parties in the context of a public hearing, "which designates the array of available interstate capacity assets selected by [AGL] for the purpose of making gas available on its system for distribution service to retail customers . . . ."[50] Once the GPSC approves a capacity supply plan, marketers must assume all of the costs associated with the interstate capacity assets included therein to the extent AGL allocates such capacity to them as discussed above.[51]

c. "Part 157" Upstream Capacity Allocation

In addition to Part 284 services, AGL historically has purchased various storage/transportation services from a number of upstream pipelines under Part 157 of the FERC's regulations. In its restructuring filing, AGL proposed to bundle these services together for the purpose of providing a managed storage service (Incremental Bundled Storage Service or IBSS) to certificated marketers. Mirroring the allocation of Part 284 upstream capacity, AGL proposed to allocate IBSS rights, along with the cost of IBSS service (the weighted average cost of all affected upstream pipelines' Part 157 services) to marketers based on the latter's market share within the relevant delivery group.[52] The GPSC adopted AGL's proposal without comment.

d. Electronic Bulletin Board Implementation

As of the date AGL submitted its restructuring filing, the company had not established—nor even tested—an EBB to govern communications between AGL and marketers.[53] Instead, the company proffered a "plan" outlining the types of

---

> economical interstate capacity assets will not be diverted from use for service to retail customers in Georgia; [and that] [t]here is a competitive, highly flexible, and reasonably assessable market for interstate capacity assets for service to retail customers in Georgia . . . .

GA. CODE ANN. § 46-4-155(e)(12).

50. GA. CODE ANN. § 46-4-155(e)(3).

51. GA. CODE ANN. § 46-4-155(e)(7). Although not addressed separately in the Act, the disposition of AGL's wellhead supply contracts was also at issue in AGL's restructuring proceeding. In its filing, AGL proposed to: (1) aggregate such contracts into three separate pools (one for each of the interstate pipelines on which the gas was contacted to flow); (2) meet its remaining firm supply obligations from the aggregated supply; and, to the extent of any excess supply in any pool, (3) allocate the same among marketers based on their respective market shares in the delivery group(s) served by the relevant pipeline. The GPSC adopted this proposal in the absence of any strong criticism.

52. Because AGL's provision of this managed storage service would violate the FERC's "shipper must have title" policy (inasmuch as AGL would not have title to the gas it was injecting into and out of storage on behalf of marketers), AGL filed for, and received, a one-year waiver from the FERC. *Atlanta Gas Light Co., supra* note 45, at 61,638.

53. The importance of an EBB was succinctly stated by witnesses on behalf of Sonat Marketing Company, one of the marketer-intervenors in AGL's restructuring proceeding:

> without timely information such as can only be provided by an EBB, marketers will be unable to avoid the [operational penalties] proposed by AGL's tariff. . . . Without the opportunity to avoid such charges and to make a profit in the Georgia market, marketers will not be attracted to do business in Georgia.

Prefiled Testimony of B. Henderson, K. Tolleson, D. Hendley on behalf of Sonat Marketing Company, L.P., GPSC Docket No. 8390-U (Mar. 31, 1998), at 15.

information it planned to post on the EBB for the benefit of marketers.[54] AGL declined to specify in its restructuring filing when the EBB would be fully functional, an omission that caused noted concern on the part of marketers. These and other concerns raised by AGL's EBB proposal, and the manner in which they were ultimately resolved by the GPSC, are discussed in Part Two below.

e. Balancing Provisions

In its restructuring filing, AGL proposed to include in its tariff three separate sections governing AGL's provision of balancing service to shippers (marketers and/or poolers)[55] and the charges associated therewith. Presumably in effect until completion of the random customer assignment process,[56] these provisions, as proposed, would have:

(1) authorized a daily balancing charge that increased commensurately with a shipper's daily imbalance (i.e., the difference between receipts into and out of AGL's distribution system at day's end), up to $.13 per Dth;

(2) authorized a $110 and $55 per Dth "mismatch" penalty to the extent a shipper failed to comply with an operational flow order issued in anticipation of a supply deficiency or surplus, respectively; and

(3) implemented a monthly "cash-out" mechanism pursuant to which a shipper's net negative imbalance or net positive imbalance at month's end would be charged the highest daily index price or the lowest daily index price, respectively, that occurred during the month.

Various marketers and end-users challenged both the need for all three charges as well as the related pricing structures proposed by AGL.[57] The specifics of these challenges, and their resolution, are discussed in Part Two below.

---

54. *Testimony of S. Moore, E. Stanek and M. Wingo, supra* note 37, at 22. The Deregulation Act requires that AGL "[p]rovide all marketers with equal and timely access to information relevant to the availability of such service, including without limitation the availability of capacity at delivery points, through the use of an [EBB]." GA. CODE ANN. § 46-4-158(a)(3) (Supp. 1998). Guided by that directive, AGL proposed to post on the EBB information necessary for marketers to nominate supplies on interstate pipelines and on AGL's distribution system, as well as information "necessary to enable marketers . . . to manage their firm and interruptible loads." *Testimony of S. Moore, E. Stanek and M. Wingo, supra* note 37, at 22.

55. Under the terms of AGL's tariff, a pooler need not be a marketer. Indeed, poolers may consist primarily of large interruptible-only end-users electing to pool their supplies at AGL's city gate.

56. GA. CODE ANN. § 46-4-156(c)(1) (Supp. 1998) (providing that, once the GPSC determines that "adequate market conditions" exist in a particular pool, the rates and terms of an EDC's balancing service "shall not be subject to approval by the commission, provided that all firm retail customers have contracted with or have been assigned to marketers . . . .") The reasoning behind this provision is unclear. Indeed, a fair reading of this provision indicates that, after the transition period, marketers will be placed in the untenable position of having either to balance "perfectly" their resources and loads (which meter error alone could prevent) or pay whatever penalties AGL wishes to impose.

57. Moreover, certain interruptible end-use customers of AGL alleged that applying any of these charges to them amounted to a violation of the Act, which required that the GPSC "[m]aintain rates for interruptible service at the levels set forth in the rate schedules approved by the commission and in effect on the day the gas company files a notice of election . . . ." GA. CODE ANN. § 46-4-154(a)(1), discussed *infra* p. 76 and note 129.

f. Meter Ownership

Reversing its initial determination, the GPSC in its order on reconsideration of AGL's filing rejected AGL's contentions that AGL must own customer meters to ensure system and customer safety, concluding instead that the Commission may (but is not required to) permit marketers to own and install their own natural gas meters.[58] In so ruling, the GPSC defined a broad jurisdictional reach: "the [GPSC] finds that it has the authority to regulate the safety of all natural [gas] distribution systems in this state . . . ."[59] Apparently, however, the GPSC has since questioned this ruling, and has initiated a separate proceeding to elicit comments on the issue of whether certificated marketers should be entitled to own meters.[60]

2. Marketer Access To Customer Information

A fair reading of the GPSC's disparate rulings on this issue suggests that the GPSC was not certain how best to balance "the privacy of customers" with the realization that marketer access to "customer-specific information is quite important in . . . establishing real competition."[61] Initially, the GPSC ruled that, only *after* a marketer could demonstrate that it had a customer's authorization (by presenting to AGL the customer's name, address, and telephone number or AGL account number), would AGL be required to provide that marketer with additional customer-specific information regarding, among other things, the customer's design day capacity, consumption history, and type of meter.[62] In subsequently ruling on motions to reconsider, however, the GPSC concluded that "in order to effectively market their product" and make accurate competitive offers, all marketers must have a thorough understanding of their potential customers' usage profiles and characteristics.[63] To this end, the GPSC required AGL to provide to each marketer, within fifteen days after the latter was certified, the following information for each AGL firm customer:

a. The name [under which AGL provides service . . .]
b. The service address with zip code . . .
c. The billing address with zip code . . .
d. The [customer's AGL] account number . . .
e. The date service was established;
f. The [customer's] design day [capacity and its consumption during] the last 12 months . . .
g. The customer's designated [delivery] group . . .
h. The customer's billing cycle; [and]
i. The type of meter and index device [at the customer's premises][64]

58. *Partial Order on Motions to Reconsider, supra* note 8, at 10.
59. *Partial Order on Motions to Reconsider, supra* note 8, at 10.
60. Proposed Notice of Inquiry, GPSC Docket No. 10006-U (Oct. 20, 1998).
61. *June 30 Order, supra* note 39, at 50.
62. *June 30 Order, supra* note 39, at 50.
63. *Partial Order on Motions to Reconsider, supra* note 8, at 9.
64. *Partial Order on Motions to Reconsider, supra* note 8, at 9. For commercial customers, AGL was

In yet another order issued thereafter, however, the GPSC retreated from this position, purportedly in the interest of consumer privacy, and directed AGL to include an insert in each customer's bill (for the next two billing cycles) which "shall inform the customers that if they do not want their customer information released to marketers, they must return the bill insert to [AGL]."[65] For those customers that did not return bill inserts to AGL, AGL was required to furnish the above-described information to marketers by February 1, 1999.[66] This directive spawned enormous protest, as discussed in Part Two below.

II. ELECTING DISTRIBUTION COMPANY ISSUES

A. Unbundling Services and Establishing Separate Rates

Recognizing that service unbundling is an essential prerequisite to introducing competition and enhanced service options into the retail natural gas market,[67] the Deregulation Act requires the EDC to unbundle its firm distribution and merchant services, and, in turn, to unbundle from those services ancillary services "that can be classified separately."[68] The rates for these unbundled services must comply with specific statutory criteria. In particular, the GPSC "shall":

> (1) Maintain rates for interruptible distribution service at the levels set forth in the rate schedules approved by the commission and in effect on the day the gas company files a notice of election . . . ;
>
> (2) Establish rates for firm distribution service using the straight fixed variable [SFV][69] method of rate design . . . ; [and]

---

also required to provide the customer's Standard Industry Classification Code.

65. Order, GPSC Docket No. 8390-U, slip op. at 2-3 (Oct. 9, 1998) (hereinafter referred to as *October 9 Order*).

66. *Id.* at 3.

67. *See, e.g.*, Kenneth W. Costello & J. Rodney Lemon, *Unbundling of Small-Customer Gas Services: New Challenges For State Public Utility Commissions*, 18 ENERGY L.J. 137 (1997).

68. As discussed below, although AGL unbundled and "classified separately" various ancillary services, it did not propose to unbundle from firm distribution rates those ancillary services it deemed essential "to ensure safe, reliable and efficient delivery service," i.e., customer services in response to reports of gas leaks, etc. "We did not want to discourage customers from reporting service-related problems such as gas leaks, stopped meters or other problems associated with system operations by imposing a charge for such calls or the associated service. Therefore, we have included the costs for these calls and the associated response costs in firm delivery rates." *See Testimony of E. Overcast, C. Waters and J. Kissel*, *supra* note 33, at 12.

69. The Deregulation Act defines SFV as "a rate form in which the fixed costs of providing distribution service are recovered through one or more fixed components and the variable costs are recovered through one or more variable components." GA. CODE ANN. § 46-4-152(16) (Supp. 1998). Like FERC Order No. 636, the Act provides for a "phase-in" of the SFV rate design if the firm distribution charges of one or more customer classes materially increase as a result of implementing that rate design. Specifically, the Act authorizes the GPSC to impose a 12-month phase-in if such material increase is "less than 10 percent" of the total gas charges for a group of retail customers, and a 24-month phase-in if such increase is "equal to or greater than 10 percent" of the total gas charges for a group of retail customers. *See* GA. CODE ANN. § 46-4-154(b) (Supp. 1998). Despite the relatively large rate increase shouldered by AGL's firm ratepayers as a result of AGL's implementation of SFV, the GPSC refused to apply the statute's phase-in protections in AGL's case, finding that the statutory thresholds were not reached when one compared firm customers' total charges (including gas commodity charges) before and after SFV implementation. As the Office of Consumers' Utility Counsel

> (3) Establish separate rates and charges, which may be based on market value, for each type of ancillary service which is classified separately . . . .[70]

Further, although AGL must continue to offer firm sales service in conjunction with firm distribution service through the transition period, the Act authorizes AGL to make unbundled gas commodity sales to its firm customers (including residential customers) at unregulated market rates as long as at least five marketers have been certified to serve in the relevant delivery group or pool.[71] This is true even if one or more of these marketers have elected initially to market supplies solely to larger commercial customers or are otherwise inactive. The concerns raised by this statutory provision are discussed in Part Two below.

1. Firm Distribution Charges Under Straight Fixed Variable[72]

The Act's adoption of the SFV rate design methodology as "appropriate for the provision of [firm distribution] natural gas services"[73] appears to have been predicated on the belief that the electing distribution company, as a "pipes only" company, will have no control over the level of throughput in its system and, therefore, should not be placed at risk for the recovery of any fixed costs by having to recover the same via a throughput-based commodity charge.[74]

---

pointed out, however, if the GPSC had compared firm customers' *base rates* before and after the implementation of SFV, the rate increase would have approached 20 percent. *June 30 Order, supra* note 39, at 32.

70. GA. CODE ANN. § 46-4-154(a)(1)-(3)(Supp. 1988).

71. GA. CODE ANN. § 46-4-155(d)(3).

72. AGL will initially assess charges for firm distribution (FT) service to all of its firm end-use customers directly, and as such customers migrate to marketers, to their marketer suppliers (who may or may not flow such costs through, depending on the latter's competitive strategy).

73. GA. CODE ANN. § 46-4-151(b)(7) (Supp. 1998).

74. The SFV methodology requires that all fixed costs be recovered through a fixed charge, regardless of how much gas actually flows. *See supra* note 69. Clearly the legislature's adoption of the SFV methodology in Georgia could not have been predicated on the same rationale underlying the FERC's embrace of the SFV method in the wholesale arena. In adopting the SFV rate design methodology in Order No. 636, the FERC emphasized the need to ensure fair competition among producer-sellers located in different producing regions who served the same downstream markets through various pipeline transporters. In particular, by requiring that fixed transmission and storage costs be removed from the pipelines' usage charges, the SFV methodology allowed the pipelines' customers to base their purchase decisions on the cost of gas itself (a function of the producer's efficiencies and competitiveness), as opposed to the embedded fixed costs of the transporting pipelines (which could vary significantly by virtue of different capitalization structures and rate bases.) Such reasoning applied equally to short and longer-term purchases, as "it will always be cheaper for [customers] with multiple pipeline connections to baseload the pipeline with the lower usage rate and swing on the pipeline with the higher usage rate," an incentive no longer present with the implementation of the SFV methodology. Order No. 636-A, *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of Commission's Regulations, Regulations of Natural Gas Pipelines After Partial Wellhead Decontrol,* F.E.R.C. STATS. & REGS., Reg. Preambles ¶ 30, 950, at 30,596 (1992). In the context of retail restructuring, however, there is obviously no concern that varying usage charges of different transporters will bias a customer's decision making as between two or more natural gas suppliers, inasmuch as there is only one distribution system (AGL's) that will be delivering supplies to retail end-users. Absent a direct pipeline hook-up, firm end-use customers do not have "multiple" systems from which to choose to effect delivery of gas supplies to their premises. Therefore, AGL's implementation of the SFV methodology logically cannot serve the purposes envisioned by Order No. 636.

Assuming, arguendo, the reasonableness of this predicate,[75] AGL's implementation of the SFV methodology—although it ensures AGL 100 percent cost recovery—clearly will not inure to the benefit of firm customers during off-peak and shoulder peak periods. Put simply, pursuant to the SFV methodology, AGL has shifted all of the fixed costs historically included in its firm and interruptible customers' usage rates (assessed only on dekatherms actually purchased)[76] to firm customer fixed rates assessed monthly regardless of usage, based on customer-specific and peak-day demand determinants.[77] Because much of AGL's firm load is temperature-sensitive and thus characterized by relatively low load factors, shifting fixed costs in this manner has necessarily increased the cost responsibility of many of AGL's firm customers during off-peak and shoulder periods, as evidenced by bills received in the summer and early fall of 1998.[78]

The impact of this statutory-mandated rate design change on firm customers is purportedly mitigated by the Act's directive that AGL implement an interruptible revenue crediting mechanism much like that adopted in FERC

---

75. The Act's universal service fund provisions, by imparting on AGL the task of economic expansion, clearly accords AGL at least some control over the level of throughput on its system in the long-term. GA. CODE ANN. § 46-4-161(a)(2) (Supp. 1998); *see infra* Part One III.C. *See also Prepared Direct Testimony of Thomas H. Benson, GPSC* Docket No. 8390-U (Nov. 26, 1997), at 10 ("[f]rom the perspective of a regulated provider of delivery service, we're committed to expanding and maintaining a distribution system with the utmost efficiency and integrity,") at 13 ("AGL, working with marketers, will continue to promote the use of natural gas rather than alternative energy sources.") Given such control, the Act arguably should have required AGL to recover at least a portion of its fixed costs *via* throughput-driven commodity charges, so as to enhance its incentive to pursue economic expansion as contemplated by the legislature. *See Prepared Rebuttal Testimony of E. Overcast, C. Waters, Horne*, GPSC Docket No. 8390-U (May 12, 1998), at 5 ("the legislature clearly contemplated that all economic expansion be undertaken").

76. Recovering such costs only to the extent customers actually purchased gas obviously subjected AGL to cost under-recovery to the extent actual sales failed to equal or exceed projections upon which rates were based. This potentiality does not exist under SFV, as indicated above.

77. Because according to AGL, all of AGL's non-gas costs associated with providing firm and interruptible service are fixed (i.e., AGL incurs no variable non-gas costs,) the SFV methodology requires AGL to recover its entire non-gas cost of service from firm ratepayers, the only customers assessed fixed charges. Conversely, no costs are allocated to interruptible services.

78. At the hearing conducted in its restructuring proceeding, AGL's witness testified that, prior to implementation of AGL's restructured rates, the company's typical residential customer's bill, excluding gas costs, was approximately $13 per month and $27 per month in the summer and winter periods, respectively. *See Transcript of Hearing*, GPSC Docket No. 8390-U, at 968. In its restructuring filing, AGL proposed a year-round monthly distribution charge of approximately $21, producing a sixty percent increase in residential customers' summer bills. A large part of this increase was attributable to AGL's implementation of the SFV rate design methodology. *See Prepared Testimony of William G. Foster on Behalf of the GPSC Staff*, Docket No. 8390-U (Mar. 31, 1998), at 9. Despite having earlier refused to implement the Act's "phase-in" protections, the GPSC, after fielding numerous ratepayer complaints in the early fall of 1998, unilaterally ordered credits to firm residential bills averaging $13.68 in an effort to help offset the rate increases caused largely by AGL's implementation of SFV. *See supra* note 69. In so doing, one commissioner criticized AGL for suggesting prior to the Act's passage that restructuring would carry with it rate decreases: "[t]he Legislature was duped, this [GPSC] staff was duped. I think the commission was duped . . . [AGL] bears primary responsibility for promising something they couldn't deliver." Peter Mantius, *Natural Gas Bills: Residential Customers Get 2-Month Break*, THE ATLANTA JOURNAL-CONSTITUTION, Sept. 2, 1998, at B-1. Notably the rate increases experienced by AGL's firm customers during the summer and fall of 1998 as a result of AGL's implementation of SFV were followed in the winter of 1998 with rate hikes attributable to AGL's newly deregulated gas prices.

Order 636. In particular, the Act requires that AGL credit to the USF ninety percent of the revenues generated by its sale of interruptible service.[79] This "rate shock" mitigation, however, if not illusory, will be short-lived, as discussed in Part Two below.

2. Ancillary Services/Charges

The Deregulation Act defines "Ancillary Service" as "a service that is ancillary to the receipt or delivery of natural gas, including without limitation storage, balancing, peaking and customer services."[80] "Customer service" is further defined as "a function related to serving a retail customer including without limitation billing, meter reading, turn-on service, and turn-off service."[81] In its restructuring filing, AGL categorized ancillary services into various groups, ranging from regulated/bundled services to unregulated services. Regulated/bundled ancillary services consisted of those particular customer services deemed integral to safe, efficient and reliable delivery service (i.e., meter setting, responses to gas leaks, etc.), for which separate pricing purportedly would have "discouraged efficient" use thereof and jeopardized customer safety.[82] Regulated/unbundled services included customer services integral to efficient service, but for which separate pricing was purportedly appropriate as a means of "assur[ing] that these services are used efficiently" and paid for by customers responsible for their underlying cost (e.g., meter turn-on, turn-off service).[83] Also included within the regulated/unbundled category were "balancing related" services such as peaking and storage service for which no competitive alternatives then existed. Finally, services which fell into AGL's unregulated category consisted of all remaining customer services: meter reading, billing and billing inquiry services, collection services and remittance processing.

AGL urged the GPSC to deregulate the latter category of services and to authorize—but not require—AGL to offer such services at market rates,[84] pointing to that section of the Act which provides that the rates for customer services "may be based on market value"[85] if the GPSC "determines that marketers have reasonably available alternatives to purchasing such service from [AGL]."[86] According to AGL, it had satisfied the requisite statutory criteria, as evidenced by its own market research.

79. GA. CODE ANN. § 46-4-154(c) (Supp. 1998).

80. GA. CODE ANN. § 46-4-152(3).

81. GA. CODE ANN. § 46-4-152(7).

82. *Testimony of E. Overcast, C. Waters and J. Kissel*, *supra* note 33, at 12 (stating that "we did not want to discourage customers from reporting service-related problems such as gas leaks, stopped meters or other problems associated with system operations by imposing a [separate] charge for such calls or the associated service").

83. *Testimony of E. Overcast, C. Waters and J. Kissel*, *supra* note 33, at 12.

84. *Testimony of E. Overcast, C. Waters and J. Kissel*, *supra* note 33, at 14-17.

85. GA. CODE ANN. § 46-4-154(a)(3)(Supp. 1998).

86. GA. CODE ANN. § 46-4-155(c) (Supp. 1998). To this end, the Act requires the GPSC to consider:

> (1) the number and size of alternative providers of the service; (2) the extent to which the service is available from alternative providers in the relevant market; (3) the ability of

Although the GPSC initially rejected AGL's argument, it subsequently reversed its decision and ruled that "[w]ith the exception of [m]eter [r]eading, . . . adequate competitive alternatives exist for ancillary [customer] services and [AGL] should not be required to provide such ancillary services at regulated rates."[87] With respect to meter reading and all other ancillary services, AGL was directed to offer the same on an unbundled basis at regulated, embedded cost rates, or otherwise subject to the terms of the Act.[88]

B. Cost Recovery Through The Transition Period

1. The Transition Rate Mechanism

AGL included in its restructuring filing a transition mechanism by which AGL would "track" its expenses and revenues during the transition period. For example, through its proposed System Transition Cost Tracker (STCT), AGL would automatically remove from its cost-of-service the "avoidable costs" associated with its jurisdictional service as customers migrated to marketers (and no longer required the services from AGL).[89] Under AGL's proposal, AGL would adjust its cost of service to remove such "avoidable costs" every three months.

In response to arguments that AGL's proposed STCT would not adequately (or quickly enough) reduce AGL's cost of service as customers migrated from AGL's services,[90] the GPSC adopted an alternative rate proposal proffered and supported by a group of end-use customers and marketers, respectively. Succinctly, the mechanism adopted by the GPSC calls for the development of a monthly transition rate applicable to all of AGL's firm end-use customers (dubbed the Transition Sales Service Rate or TSSR)[91] which reflects the "transitional" costs that AGL will incur with respect to each such customer until

---

alternative providers to . . . substitute services readily available at competitive prices . . . ; and (4) other indicators of market power, [such as affiliation and ease of market entry.] *Id.*

87. *Partial Order on Motions to Reconsider, supra* note 8, at 5-6. Although it did not so state, the GSPC could not have intended to include so-called safety-related customer services (e.g., responses to gas leaks) within the scope of unregulated services. Nor could it have intended to include peaking and storage services. *Id.* at 6.

88. With respect to peaking service, for example, the Act provides that if a marketer unaffiliated with AGL obtains peaking service in a delivery group from an entity other than AGL, then the rate for AGL's peaking service (specifically, needle peak capacity provided by on-system liquefied natural gas plants) shall not be subject to the GPSC's approval, but "shall be capped at 120 percent of the rate for such service previously established by" the GPSC. GA. CODE ANN. § 46-4-155(b)(1) (Supp. 1998). *See also Partial Order on Motions to Reconsider, supra* note 8, at 6.

89. *Testimony of E. Overcast, C. Waters and J. Kissel, supra* note 33, at 17-20. During the transition period, "avoidable costs" would be equivalent to short-run marginal costs. By contrast, all fixed costs would be "unavoidable," and thus recoverable from each firm customer (through its marketer) even after the latter migrated from AGL. To this end, firm delivery rates reflected AGL's fully embedded costs.

90. For example, certain marketers suggested that by proposing to file transitional cost changes only every three months, AGL intended to benefit from a lag time during which it would recover costs attributable to customers no longer on AGL's system.

91. The GPSC later changed the name of the TSSR to Transition Rate Mechanism. *October 9 Order, supra* note 65, at 2.

(*but not after*) the latter migrates from the system. Upon establishing a new service relationship with a marketer, the then former AGL sales customer will stop paying the TSSR, and its marketer will receive a per customer credit from AGL.[92] As described by its proponents, the TSSR "closely tracks the changes in [AGL's] costs during the transition period, reducing proportionately the amount paid by a marketer as [customers] no longer receive service from AGL."[93]

Although the GPSC subsequently refused to abandon its support for the TSSR, it did change significantly the balance of interests reflected therein. Specifically, in a *sua sponte* decision, the Commission shifted approximately $20 million from the cost of service underlying the TSSR to that underlying AGL's customers' firm base rates.[94] This decision, which some believe was prompted by a desire to avoid the creation of stranded costs, spawned enormous protest, as discussed in Part Two below.

2. Stranded Investment

The Deregulation Act requires that the GPSC "[p]rovide for recovery of costs found by the commission to be stranded and necessary to provide a reasonable return, provided that only prudently incurred stranded costs that cannot be mitigated may be recovered."[95] Having proposed to assign its upstream capacity and wellhead supply contracts to designated marketers, who would assume all of AGL's payment obligations, AGL was not burdened with quantifiable stranded costs as of the date of its filing. As a consequence, AGL did not seek to recover any stranded costs in its restructuring proceeding. Instead, it advised the GPSC that, to the extent AGL later incurred such costs, it would seek recovery thereof in a separate proceeding. The GPSC agreed.[96]

C. Code of Conduct Requirements

The Deregulation Act establishes extensive code of conduct requirements, much like those imposed on interstate pipelines at the federal level, designed to prevent AGL, in its capacity as system operator, from discriminating in favor of (or otherwise according any advantage to) AGL's marketing affiliate or other marketer(s).[97] Among other things, for example, AGL:

(1) cannot favor any marketer as regards the quality or duration of service, the allocation and scheduling of capacity, etc.;

(2) must provide all marketers with equal and timely access (through the EBB) to information relevant to the availability of service (e.g., available capacity at delivery points);

---

92. According to the GPSC, the TSSR will "provide for a smooth, complete, incremental transfer of service, along with revenues and costs, each time a service customer transitions from [AGL] to a given marketer." *June 30 Order, supra* note 39, at 57-58.

93. *Motion of Enron Capital and Trade Resources Corp., et al. for Reconsideration of October 9,1998 Order*, GPSC Docket No. 8390-U (Oct. 26, 1998) at 4 [hereinafter *Enron*].

94. *Id.* at 5.

95. GA. CODE ANN. § 46-4-154(a)(5) (Supp. 1998).

96. *June 30 Order, supra* note 39, at 58.

97. GA. CODE ANN. § 46-4-159 (Supp. 1998).

(3) cannot represent that any advantage will accrue to customers in the purchase of distribution services as a result of choosing any particular marketer supplier; and

(4) must separate its work force to ensure that employees involved in the day-to-day operations of AGL "are physically separated from" and operate independently of AGL's unregulated marketing affiliate.

Although at least one marketer has urged the GPSC to adopt additional standards and separate reporting requirements to bootstrap AGL's statutory obligations in this regard, the GPSC has refused to do so to date.[98]

III. CONSUMER/PUBLIC INTEREST ISSUES

A. *Unscrambling the Restructuring Egg*

The Deregulation Act authorizes the GPSC to undertake "emergency" measures to protect the public "on an interim basis" should the market fail to operate as contemplated by the state's new regulatory model. In particular, the Act provides that if, in an expedited hearing, the GPSC determines that the prices for natural gas paid by retail consumers either to marketers (after the completion of customer assignment) or to AGL (prior to completion of customer assignment) "are not constrained by market forces and are significantly higher than such prices would be if they were constrained by market forces,"[99] the GPSC may implement temporary emergency measures to protect ratepayer interests. Such measures could include, among other things, (1) price regulation, and (2) the imposition on AGL of the obligation to serve retail customers (provided that AGL is not "unreasonably burden[ed] by such directive.")[100] However, "[i]n no event [could these measures] extend beyond the first day of July immediately following the next full annual session of the General Assembly after the imposition of such [measures]."[101]

B. *Elderly and Low Income Assistance*

AGL commenced a Senior Citizens Discount Program in 1987. By this program, AGL was providing a monthly discount of approximately $9.00 to elderly and low-income bundled sales service customers as of the date of AGL's restructuring filing. As the Deregulation Act is silent on the issue of elderly/low income assistance, the GPSC, in response to concerns expressed by affected consumer advocates, conceded that it lacked authority to impose on marketers the obligation to provide similar discounts once the latter had taken over AGL's role as bundled service provider.[102] However, spurred by public interest considerations, the GPSC used its certification power to achieve indirectly what

98. *June 30 Order, supra* note 39, at 47-48. *See also Request of SCANA Energy Marketing, Inc. for the Commission to Implement a Data Collection and Monitoring Program Regarding Upstream Capacity*, GPSC Docket No. 10233-U (Dec. 7, 1998).

99. GA. CODE ANN. § 46-4-157(1) (Supp. 1998).

100. GA. CODE ANN. § 46-4-157(2).

101. *Id.*

102. *June 30 Order, supra* note 39, at 51.

the Act prevented it from achieving directly. Having received assurances from AGL that it would continue to provide elderly/low income discounts to its marketer-customers, the GPSC conditioned its grant of marketer certificates on the marketers' willingness to pass through to firm customers any such discounts received from AGL.

C. Facility Expansion: USF

The Deregulation Act requires the GPSC to create a universal service fund (USF) "for the purpose of: . . . [e]nabling [AGL] to expand its facilities and services in the public interest."[103] The Act limits AGL's annual disbursement from the USF to five percent of AGL's annual capital budget,[104] to which AGL is entitled only if it meets specific statutory criteria. In particular, the Act provides that, in determining whether to grant an application by AGL for distribution from the fund, the GPSC must consider:

> (A) the capital budget of [AGL] for the relevant fiscal year;
>
> (B) the estimated total overall applicable cost of the proposed extension, including construction costs, financing costs, working capital requirements, and engineering and contracting fees, as well as all other costs that are necessary and reasonable;
>
> (C) the projected initial in service date of the new facilities, the estimated revenues to [AGL] during the first five fiscal years following the initial service date, and the estimated rate of return to [AGL] produced by such revenues during each such fiscal year;
>
> (D) the amount of contribution in aid of construction required for the revenues from the proposed new facility to produce a just and reasonable return to [AGL]; and
>
> (E) whether the proposed new facility is in the public interest.[105]

The GPSC has adopted rules that implement the Act's directives and establish procedures governing the USF application/disbursement process.[106] Among other things, these rules require that AGL submit detailed cost and revenue information for GPSC review, establish hearing procedures to allow participation by all affected parties, and provide for a post-construction audit process to verify the accuracy of AGL's cost/revenue claims.[107]

---

103. GA. CODE ANN. § 46-4-161(a)(2) (Supp. 1998).

104. GA. CODE ANN. § 46-4-161(g)(2). "Capital budget" refers to AGL's "budgeted facilities construction level" and not AGL's total capital budget.

105. GA. CODE ANN. § 46-4-161(g)(1).

106. GA. COMP. R. & REGS. r. 515-7-5 (1998). These rules remain subject to comment and revision. *Notice of Proposed Rulemaking to Revise Existing Commission Rule 515-7-5; Universal Service Fund* (Dec. 9, 1998).

107. For example, a likely participant in such hearings is Georgia Power Company, an "alternative fuel" competitor of AGL for retail load throughout the companies' overlapping service territories. Georgia Power has maintained that AGL should not be permitted to rely on the USF – funded largely by AGL's ratepayers – to attract customers that otherwise would have selected electric service as the cheaper energy alternative. Put simply, according to Georgia Power, it is not in the "public interest" to afford AGL a ratepayer-financed subsidy to "beat out" its alternative fuel competitor(s). *See, e.g., Post-Argument Brief of Georgia Power*

D. Consumer Education

In its restructuring filing, AGL proposed to recover approximately $14 million in connection with a "customer education program" designed to inform AGL's customers about impending changes in the regulatory structure brought about by AGL's restructuring.[108] While no party disputed the need for a customer education program, some parties did oppose AGL's proposal as a potential means by which AGL could favor its marketing affiliate or otherwise influence consumers' decisions.

The GPSC refused to allow AGL any cost recovery associated with consumer education programs, and prohibited AGL from instituting any such program (regardless of whether AGL sought cost recovery in connection therewith) until the GPSC staff and all interested marketers had reviewed and approved the content thereof.[109] To this end, the GPSC directed AGL to "develop a specific education program and budget and submit this to the [GPSC] for an independent review with notice to all parties of record."[110]

PART TWO: MAJOR CONCERNS RAISED AT THE IMPLEMENTATION STAGE

I. LACK OF CONSUMER PROTECTIONS

A. Rate/Revenue Impacts On Residential Customers

As a means of mitigating the impact of rate increases borne by firm customers as a result of AGL's implementation of the SFV rate design methodology, the Act requires that AGL implement an interruptible revenue crediting mechanism pursuant to which it must credit to the USF ninety percent of the revenues generated by its sale of interruptible service.[111] This mitigation mechanism, however, clearly cannot offer the ratepayer relief apparently envisioned by the legislature, leaving the GPSC in the untenable position of having to implement the type of *ad hoc* interim relief measures discussed above.[112]

First, although AGL is expected to generate approximately $48 million in interruptible revenue credits for the twelve-month period ended May 31, 1999, firm ratepayers will not see a commensurate credit to their bills. Rather, all $48 million, pursuant to the Act, is earmarked to fund the USF.[113] Second, and more

Company, GPSC Docket No. 7604-U (June 25, 1998).

108. AGL proposed to recover these estimated costs over five years, collecting approximately $2.8 million each year.

109. *June 30 Order, supra* note 39, at 48; *Partial Order on Motions to 8, supra* note 8, at 10.

110. *June 30 Order, supra* note 39, at 48.

111. GA. CODE ANN. § 46-4-154(c) (Supp. 1998).

112. *See Testimony of William Foster, supra* note 78, and accompanying text.

113. While it is true that, to the extent the USF is over funded at the end of any fiscal year, excess amounts "shall be available for refund . . . in such manner" as the GPSC deems equitable, the mere possibility of recouping a fraction of one's costs in this manner is hardly tantamount to a direct customer credit in an amount equal to 90% of all of AGL's interruptible service revenue. GA. CODE ANN. § 46-4-161(d) (Supp.

importantly, AGL has confirmed that henceforth it will generate only a fraction of the interruptible service revenue that it has in the past, this fraction diminishing to zero after the transition period.[114] As a consequence, AGL's firm ratepayers stand to gain very little, if anything, from the Act's revenue sharing mitigation mechanism.

B. Liberal Deregulation Criteria

AGL is statutorily bound to continue to offer firm sales service in conjunction with firm distribution service through the transition period.[115] However, the Deregulation Act allows AGL to make such sales at unregulated market rates—i.e., the Act effectively deregulates AGL's purchased gas adjustment mechanism (PGA)—to the extent that at least five marketers have been certified to serve in the relevant delivery group or pool.[116] During the course of AGL's restructuring proceeding, certain parties expressed concern that because some or all of the "at least five marketers"[117] referenced in the Act could initially elect not to market directly to residential customers, AGL's firm ratepayers could be subject to the exercise of market power by AGL—and resultant price hikes—to the extent AGL's PGA were deregulated as authorized by statute.[118] As a safeguard against the exercise of such market power, these parties urged the GPSC to impose a six-month waiting period following certification of the "five marketers" prior to deregulating AGL's PGA, or otherwise require that such marketers be "active" in the relevant delivery group(s).[119]

The GPSC ruled that such safeguards, while reasonable, could not be implemented, as such action would run counter to the unequivocal language of the Act. Succinctly stated, "[w]hile the Commission is very concerned about the prospect of deregulation of the PGA prior to those five marketers establishing a market presence and actively offering and providing service to end-users, the statute does not give the Commission the authority to create such a waiting period."[120] However, after the GPSC's concerns were borne out in the winter of 1998—when it was forced to "respon[d] to hundreds of complaints about

1998).

114. *See Testimony of William Foster, supra* note 78, at 34. As marketers assume AGL's firm merchant role, AGL is obligated to allocate its intrastate capacity to such marketers, leaving AGL with less and less—and eventually no—capacity with which to make interruptible sales. *Supra* Part One, I.B. In addition, at least according to one GPSC staff witness, AGL may hereafter lack the incentive to provide interruptible service: "another reason that the interruptible revenues will likely disappear, to the detriment of firm ratepayers, is that AGL has a significant incentive to have its non-regulated affiliate make interruptible sales. AGL must share any interruptible revenues, while the non-regulated affiliate may retain all profits." *See Testimony of William Foster, supra* note 78, at 7. In other words, according to witness Foster, while AGL must relinquish ninety percent of its interruptible service revenues to the USF, its affiliate may keep all monies collected for such service, creating an obvious incentive to have the latter make interruptible sales.

115. GA. CODE ANN. § 46-4-155(d)(3) (Supp. 1998).

116. *Id.*

117. GA. CODE ANN. § 46-4-155(d)(3) (Supp. 1998).

118. *Testimony of William Foster, supra* note 78, at 3.

119. *June 30 Order, supra* note 39, at 47.

120. *Partial Order on Motions to Reconsider, supra* note 8, at 6.

soaring natural gas bills"[121]—the GPSC relied on its remedial authority under the Act to establish expedited hearing procedures for the purpose of investigating AGL's conduct.[122] The action ultimately resulted in customer refunds totaling approximately $14.5 million.[123]

II. UNDUE RESTRAINTS ON MARKET DEVELOPMENT

A. *Excessive Operational Penalties*

AGL proposed to include in its restructured tariff three separate sections governing AGL's provision of balancing service to marketers and poolers. As proposed, these provisions authorized AGL to implement:

(1) a daily balancing charge that would increase commensurately with a shipper's daily imbalance, up to $.13 per Dth;

(2) "mismatch" penalties of $110 and $55 per Dth to the extent a shipper failed to adhere to operational flow orders issued in response to anticipated supply deficiencies and surpluses, respectively; and

(3) a monthly "cash-out" mechanism pursuant to which a shipper's net negative imbalance or net positive imbalance at month's end would be charged the highest daily index price or the lowest daily index price, respectively, that occurred during the month.

As discussed below, the imbalance charges and penalties ultimately adopted by the GPSC were less stringent than those proposed by AGL. However, the level of such charges, even as approved by the GPSC, likely played at least some role in rendering market entry unprofitable for several marketers who subsequently withdrew from the Georgia market.[124]

1. Daily Imbalance Charges

With respect to daily balancing, AGL proposed a tiered rate structure pursuant to which AGL would begin assessing balancing charges when a shipper exceeded a two percent tolerance (as determined on an aggregate pool basis).[125] AGL would assess higher and higher charges (applied to all imbalance volumes) as that shipper's imbalance increased, culminating in a rate of $.13 per Dth for daily imbalances exceeding eight percent. Because they would target both marketers and poolers, balancing charges would necessarily apply to interruptible volumes as well as firm volumes, bringing within their scope large

---

121. Matthew C. Quinn, *PSC to Consider Roll-Back of Atlanta Gas Light's Rates*, THE ATLANTA JOURNAL-CONSTITUTION, Dec. 23, 1998, at F-1.

122. *Supra* Part One III.A. *See also* Matthew C. Quinn, *Regulators to Investigate Outcry Over AGL's Latest Bills*, THE ATLANTA JOURNAL-CONSTITUTION, Jan. 6, 1998, at D-1.

123. Just prior to the commencement of hearing, AGL and the GPSC entered into a stipulation (settlement) pursuant to which AGL agreed to refund approximately $14.5 million to customers affected by its rate hikes, which stipulation the GPSC adopted by order issued January 26, 1999. *Order Adopting Stipulation*, GPSC Docket No. 10270-U (Jan. 26, 1999).

124. *Seven Marketers Pull Out Of Georgia Retail Market*, Gas Markets Week (Sept. 21, 1998).

125. For balancing purposes, AGL created "aggregate" pools (made up of two or more delivery groups) to afford marketers the flexibility to balance across delivery groups.

interruptible (industrial) end-users electing to pool their own supplies.[126] According to AGL, its proposed balancing fees (purportedly based on AGL's storage costs) were necessary to protect system integrity by ensuring that marketers managed their resources and loads diligently.[127]

By contrast, several marketers and end-use customers complained that AGL's stringent "penalties" would dissuade marketers from participating in the Georgia retail market. While at least one marketer argued that daily balancing fees were not necessary in light of AGL's proposed monthly cash-out mechanism,[128] others proposed various ameliorative alternatives. These alternatives included (1) a higher tolerance level (ten percent); (2) lower tiered fees for imbalances outside such tolerance level (which would be assessed *only* on volumes within the relevant tier); and (3) the ability to trade imbalances prior to the implementation of any fees. Certain large interruptible end-use customers also argued separately that subjecting interruptible volumes to imbalance fees was tantamount to requiring an increase in interruptible rates, in direct contravention of the Act.[129]

The GPSC agreed with AGL that daily imbalance fees were appropriate for both firm and interruptible volumes.[130] It noted that "[t]o rely on upstream interstate pipeline daily balancing during operational flow orders and/or monthly balancing, is not sufficient to maintain system integrity."[131] However, in an apparent effort to strike a balance between the interests of shippers and AGL's operational concerns, the GPSC required that AGL: (1) implement a tolerance level of five percent (as opposed to two percent); (2) charge an imbalance fee of $.07 on all volumes exceeding this threshold; and (3) allow for the trading of imbalances between marketers and poolers prior to assessing any imbalance fees, effectively implementing a "no harm, no foul" rule.[132] AGL was required to

126. *See supra* note 55.

127. AGL had initially proposed to impose imbalance charges on all marketers except those that relied on AGL's "no notice" storage and peaking services. *Prepared Rebuttal Testimony of S. Moore, E. Stanek, M. Wingo*, GPSC Docket No. 8390-U (May 12, 1998), at 15. In response to claims that, by such proposal, AGL was effectively coercing marketers to purchase AGL's services, the GPSC ultimately ruled that "if a marketer uses a third-party no-notice storage or peaking service, [AGL] shall not subject such a marketer to balancing charges when using that service." *Partial Order on Motions to Reconsider, supra* note 8, at 9. In so ruling, however, the GPSC was careful to point out that "it is permissible for [AGL] to charge [sic] balancing fees to marketers who rely on only nominated service," as opposed to "no-notice" service. *Partial Order on Motions to Reconsider, supra* note 8, at 9.

128. *Transcript of Hearing*, GPSC Docket No. 8390-U at 111.

129. GA. CODE ANN. § 46-4-154(a)(1) (Supp. 1998).

130. In the latter regard, the GPSC gave short shrift to the claim that interruptible volumes should be exempt from imbalance charges, noting that such charges "are not imposed unless the [interruptible customer] is out of balance," and that "it is not appropriate to charge imbalance penalties on firm customers while exempting interruptible customers." *June 30 Order, supra* note 39, at 80.

131. *June 30 Order, supra* note 39, at 80.

132. Specifically, the GPSC ruled that on the 16th, 17th, and the 18th of each month, shippers should be permitted to trade imbalances for the 1st through the 15th of such month. "At the end of the month, while marketers are trading their monthly imbalances . . . they should also be allowed to trade their daily imbalances for the 16th through the end of the month." *June 30 Order, supra* note 39, at 80.

maintain a record of imbalances and file the same on a quarterly basis for GPSC review.[133]

2. Mismatch Penalties

Akin to operational flow orders, AGL proposed to impose "mismatch" orders to the extent it determined that the anticipated gas supply to one or more delivery groups was not going to "match" the anticipated demands of firm retail end-users in such delivery group(s). If an affected shipper did not take the action specified in a "demand" mismatch order,[134] AGL would impose a penalty of $110 per Dth.[135] Failure to adhere to a "supply" mismatch order resulted in a $55 per Dth charge.[136] These charges were nearly four times and twice AGL's then-existing mismatch penalty of $30 per Dth.

Although no party disputed the need for mismatch orders or penalties for non-compliance, several marketers and end-users disputed the proposed level of such penalties, despite AGL's insistence that deterrence principles demanded the same. Apparently unpersuaded by AGL's claims in this regard, the GPSC directed AGL to retain its $30 mismatch penalty for both demand and supply mismatches.[137] According to the GPSC, "[u]ntil a problem is demonstrated, the [GPSC] declines to implement penalties which, through unavoidable circumstances, increase prices to consumers and generates non-cost based excess revenues to [AGL]."[138]

3. Monthly Cash-Out Provisions

Modeled after interstate pipelines' cash-out mechanisms, AGL proposed a monthly cash-out procedure to resolve shippers' month-end imbalances (between receipts and deliveries). Under AGL's proposal, AGL would purchase a shipper's over-deliveries at month's end at the lowest published *Gas Daily* index price for any day during such month, and would sell back a shipper's under-deliveries at month's end at the highest published *Gas Daily* index price for any day during such month.[139] Both marketers and end-users challenged

133. *Partial Order on Motions to Reconsider, supra* note 8, at 7-8. ALG was prohibited from implementing any daily imbalance charges until a finding by the GPSC that AGL's EBB was fully operational and ready for commercial use. *June 30 Order, supra* note 39, at 80.

134. A demand mismatch order contemplated insufficient deliveries into AGL's system to meet firm retail load. *June 30 Order, supra* note 39, at 81.

135. The $110 charge purportedly equaled the cost of acquiring annual capacity on an upstream pipeline at the margin. *June 30 Order, supra* note 39, at 81.

136. A supply mismatch order contemplated over-deliveries of gas into AGL's system. *June 30 Order, supra* note 39, at 81.

137. *June 30 Order, supra* note 39, at 82; *Partial Order on Motions to Reconsider, supra* note 8, at 8. The GPSC likewise refused to adopt AGL's proposed "most favored nations" provision, which would have allowed AGL to increase its penalties to levels found reasonable in other states. "The circumstances of setting penalties varies from state to state, and another state's decision does not provide an adequate basis for determination of Georgia's penalty level." *June 30 Order, supra* note 39, at 82.

138. *June 30 Order, supra* note 39, at 82.

139. *June 30 Order, supra* note 39, at 82.

AGL's proposed cash-out mechanism as imposing prohibitively high penalties—high enough to drive marketers out of the Georgia market.

Although agreeing with AGL that monthly cash-out procedures were essential to deterring conduct inimical to the interest of Georgia ratepayers, the GPSC ultimately adopted a somewhat less stringent "tiered" cash-out mechanism based on the average daily index price of gas during the relevant month.[140]

B. Undue Restraints On Operational Flexibility: Intrastate Capacity Release

In keeping with secondary market principles, AGL proposed in its restructuring filing to allow marketers to release (or trade) intrastate capacity to other marketers to the extent they did not need the capacity to serve their firm load requirements.[141] AGL's proposal contemplated neither posting/bidding procedures akin to those adopted by the FERC for interstate capacity, nor a cap on the price of released capacity. Instead, marketers would be free to trade under terms and conditions of their choice.

However, despite the apparent flexibility accorded to marketers, various marketers challenged AGL's proposed capacity trading procedures as too restrictive. Specifically, these marketers objected to AGL's proposal insofar as it prohibited marketers from re-trading intrastate capacity (i.e., trading capacity acquired in the secondary market), claiming that such a prohibition imposed undue rigidity into the marketplace by restricting customers' capacity options.[142] The GPSC rejected this argument, agreeing with AGL that, at least initially, the proposed restrictions were necessary to preserve system integrity:

> [T]he Commission is concerned about [AGL's] system integrity, including the use of the intrastate capacity to meet firm requirements as necessary, particularly during the period of transition and early implementation of the unbundling process.... Once the market is operating effectively, the Commission will accept petitions from parties to lift this restriction.[143]

C. EBB Deficiencies

As of mid-June 1998, AGL "ha[d] done very little ... to even begin the development of" an EBB sufficient to ensure a successful transition to

140. Specifically, the mechanism approved by the GPSC provided that, with respect to negative imbalances of up to four percent at month's end, AGL would sell back under-deliveries to the affected marketer at the average daily index price of gas for such month times 1.2, plus applicable upstream pipeline costs (transportation, fuel and surcharges). To the extent a marketer's negative imbalance fell between four and 10 %, such marketer would pay AGL, for all of its imbalance volumes, an amount equal to the product of the average daily index price and 1.3, plus applicable upstream pipeline charges, etc. Positive imbalances were treated conversely. *June 30 Order, supra* note 39, at 83; *Partial Order on Motions to Reconsider, supra* note 8, at 8.

141. *Testimony of S. Moore, E. Stanek and M. Wingo, supra* note 37, at 27.

142. *See, e.g., Prefiled Testimony of B. Henderson, K. Tolleson, D. Hendley on Behalf of Sonat Marketing Company, L.P.*, GPSC No. 8390-U at 11 (Mar. 31, 1998).

143. *June 30 Order, supra* note 39, at 86.

competition.[144] Specifically, although AGL had filed a "plan" with the GPSC detailing what type of information it proposed to include on its EBB,[145] it had neither completed development of nor tested the EBB by mid-June, despite the fact that firm retail markets were to be opened to marketers on November 1, 1998. Also, AGL had not established any "back-up" procedures that would govern in the event the EBB failed or otherwise was not operational by November 1, 1998.

Recognizing the importance of a fully operational EBB to the achievement of the allocative efficiencies integral to any successful unbundling initiative, the GPSC put in place temporary measures designed to spur AGL's efforts in this regard. Specifically, the GPSC ruled that AGL "shall not assess any daily balancing fees and shall not be allowed to impose the new daily balancing charges and penalties adopted in the [GPSC's] Order until the [GPSC] determines that the EBB is fully operational and ready for commercial use by the marketers."[146] Although AGL thereafter urged the GPSC to lift the balancing fee ban to allow AGL "to implement daily balancing by January 1999,"[147] subsequent complaints by a host of marketers prevented such action.[148] As of the date this article was sent to print, the GPSC had not yet ruled the EBB fully operational.

D. Excessive Restrictions on Marketer Access to Customer Information

As noted, the GPSC's decision in the late fall of 1998 to restrict marketers' access to customer-specific information resulted in loud protest.[149] In particular, certain marketers argued that the GPSC had effectively suspended, for more than two months, the transition to competition by requiring marketers to wait until February 1, 1999, before obtaining customer-specific information essential to quoting accurate prices and thus "winning" customers.[150] According to such marketers, competition will not "work" unless AGL affords marketers immediate, *real-time* access to the following information upon the latter receiving authorization from customers: (1) the customer's name, type of service

---

144. *June 30 Order, supra* note 39, at 75.

145. AGL stated that its EBB would, by November 1, 1998, provide information regarding each marketer's estimated daily firm load by delivery group, the minimum amount of gas each marketer must tender to such delivery group, the amount of intrastate and upstream pipeline capacity allocated to each marketer, as well as each marketer's upstream storage entitlement. AGL also agreed to post "balancing information associated with the preceding day and information to facilitate trading of cash-out positions [and] capacity trades." *Prepared Rebuttal Testimony of S. Moore, E. Stanek, M. Wingo, supra* note 37, at 31

146. *Partial Order on Motions to Reconsider, supra* note 8, at 7-8.

147. Letter from William E. Rice, Attorney for Atlanta Gas Light Company, to Deborah Flannagan, Executive Director, Georgia Public Service Commission, 2 (Nov. 24, 1998).

148. Letter from David I. Adelman, Attorney for P.S. Energy, Infinite Energy, Shell Energy Services, Utility Management Corporation and PanCanadian Energy Services, to Chairman Robert Baker, Commissioner Bob Durden, Commissioner Lauren McDonald, Commissioner Stan Wise, Georgia Public Service Commission (Dec. 22, 1998). Among the EBB's noted problems were: (1) constantly changing measurement data; (2) failure to comply with certain standards and deadlines adopted by the Gas Industry Standards Board; and (3) late posting of cash-out rates. *Id.*

149. *Supra* Part One I.C.2.

150. *Enron, supra* note 93, at 10.

(residential or commercial), telephone number and mailing address; (2) the customer's delivery group; (3) the customer's design day capacity and consumption history for the previous twelve months; (4) the customer's AGL account number and billing cycle; and (5) the type of meter installed at the customer's premises.[151] At the time this article was sent to print, the GPSC had not responded to these marketers' arguments.

III. AGL'S ALLEGED RECOVERY OF "PHANTOM" COSTS AFTER CUSTOMER MIGRATION

As noted earlier, in a *sua sponte* order issued after it adopted the TSSR, the GPSC required certain cost adjustments thereto which effectively shifted approximately $20 million in expenses previously included in the TSSR to AGL's firm delivery base rates. These expenses will be payable by all firm customers until AGL files a new rate case. This initiative—apparently prompted by AGL's claim that it would under-recover fixed (and allegedly "unavoidable") costs to the extent such an adjustment were not made (creating the specter of stranded costs)—was the subject of vigorous challenge. Specifically, several marketers and end-users alleged that by shifting $20 million in expenses back into AGL's base rates from the TSSR—concomitantly reducing marketers' TSSR credits by that same amount—the GPSC effectively sanctioned AGL's indefinite recovery of expenses that AGL either would not or should not incur as customers migrate to marketers, to the detriment of customers as well as competition.[152]

The expenses at issue included marketing expenses and a portion of AGL's corporate management and overhead expenses. With respect to expenses related to marketing activities, the marketer complainants alleged that such expenses were far better "left to the competitive marketplace," since "[p]resumably, if these marketing activities are important and justified in a competitive marketplace, the marketers will take over the task."[153] Regarding corporate management and overhead expenses, however, the issue was not solely AGL's alleged improper recovery of costs, but also the potential for improper cross-subsidies between AGL's regulated and unregulated operations. According to the marketer complainants, such expenses were properly included in the TSSR, as the TSSR "recognizes that as customers leave AGL's system and enroll with

---

151. *Enron, supra* note 93, at 10-11.

152. *Enron, supra* note 93, at 4. In the latter regard, these marketers alleged that the GPSC's decision would discourage the development of competitive markets insofar as "[m]arketers will not have the $20 million in credits to pass on to Georgia consumers through promotions and other activities which require pricing flexibility." *Enron, supra* note 93, at 4. These same marketers were particularly concerned about the potential undue advantages inuring to AGL's marketing affiliate as a result of the GPSC's order: "the drastic reduction in the TSSR credit . . . will discourage non-affiliated marketer participation and will benefit the AGL marketing affiliate marketer . . . . The affiliate never actually pays for distribution services (taking money out of one pocket of AGL to another pocket of AGL is not a real payment) and thus there is an additional $20 million a year available to use for the affiliate, paid for by other marketers." *Enron, supra* note 93, at 4. *See also Motion for Reconsideration of the Georgia Natural Gas Group, et al.*, GPSC Docket No. 8390-U at 3-4 (Oct. 26, 1998).

153. *Enron, supra* note 93, at 8.

marketers, [the executives of AGL's parent] will spend less time on regulated . . . issues and presumably more time on the unregulated subsidies of [the parent]."[154] By contrast, according to such marketers, allowing AGL to place all such expenses back into base rates—and collect them indefinitely from marketers throughout and after the transition period—would require the latter effectively to subsidize the operations of AGL's unregulated affiliates. As of the date this article was sent to print, the GPSC had not ruled on these marketers' complaints.

PART THREE: STATE AND FEDERAL OBJECTIVES: COMPATABLE?

For more than a decade, the FERC has pursued initiatives aimed at ending the so-called "regulatory compact" and achieving a competitive national gas market that efficiently values and allocates pipeline capacity within a "seamless" interstate transportation grid. Some have expressed concern that the Deregulation Act, as implemented by AGL, may in fact frustrate these objectives by imposing regulatory conditions inimical to free market principles. More specifically, at least one natural gas producer/marketer has alleged that the GPSC-approved methodology for assigning AGL's upstream capacity rights among designated marketers constitutes a predetermined allocation methodology that may prevent those that most value the capacity from obtaining it, contrary to basic notions of allocative efficiency and a workably competitive market.[155] Another marketer sees these same notions jeopardized by the fact that AGL's allocation proposal requires designated marketers to take assignment of upstream capacity they may not need or want, frustrating any economies otherwise achieved by such marketers.[156] AGL's response to these contentions to date has focused largely on the state's interest in preserving the reliability of service to Georgia's firm ratepayers (as evidenced by the Act's explicit assignment directives,) and the importance of AGL's mandatory capacity allocation methodology to achieving this end during the transition period.[157]

It is apparent that the Deregulation Act's upstream capacity assignment directive, as implemented by AGL, clearly does impose market constraints during the transition period by failing to accord all marketers "equal access" to AGL's upstream capacity, and, conversely, by requiring certain marketers to

---

154. *Enron, supra* note 93, at 8. Historically, a portion of the executive salaries of AGL's parent has been recovered through AGL's rates, to recover the cost of the time such executives spent on regulated ratepayer issues.

155. *Request for Rehearing Of Exxon Corp.*, FERC Docket No. RP98-206-001, filed Aug. 31, 1998, at 8 (alleging that the goals underlying the FERC's recent initiatives will not be met "if [local distribution companies] and State commissions can effectively remove large blocks of capacity from the marketplace and direct its release to specific marketers . . . .")

156. *Answer of SCANA Energy Marketing Inc. to Atlanta Gas Light Company's Data Response*, FERC Docket No. RP98-206, filed July 14, 1998, at 3 (maintaining that "[t]he AGL plan would introduce a new long-term rigidity into the pipeline capacity marketplace, and would not permit marketers to achieve economies which stem from geographical proximity to the AGL service territory or from load diversity.")

157. *See, e.g., Request for Leave to File Answer and Answer of Atlanta Gas Light Company to Protest and Request for Technical Conference of SCANA Energy Marketing, Inc.*, FERC Docket No. RP98-206-000, filed June 23, 1998, at 11.

take such capacity regardless of need.[158] To be sure, AGL's designated marketer-assignees have the right to release some or all of the upstream capacity allocated to them to the extent they do not need or want such capacity.[159] However, it is rare (generally only during peak periods) that revenues generated in the secondary market cover all or even most of the releasing shipper's total cost of capacity.[160] Thus, the right to release assigned upstream capacity does not, in itself, eliminate the potential market inefficiencies resulting from having to take unwanted upstream capacity in the first instance.

However, the Deregulation Act *can* be implemented to accommodate—by intricately balancing—the FERC's interest in achieving a competitive national energy market and the state's dual interests in promoting retail competition and concomitantly preserving the reliability of service to firm ratepayers in Georgia. Specifically, achieving such a balance would dictate the following compromise approach: each certified marketer (1) would be offered, on a monthly basis, an allocated share of AGL's upstream capacity, based on its market share in the relevant delivery group;[161] and (2) would then be afforded the opportunity to "turn back" its allocated share of capacity to the extent such marketer determined that it could meet its firm obligations via alternative means.[162]

---

158. Interestingly, in analogous proceedings following the issuance of Order No. 636, the FERC authorized, and even encouraged, downstream pipelines (in much the same position as AGL in the instant case) to assign their capacity rights directly on upstream pipelines to designated customers based on the latter's firm requirements, regardless of whether such customers wanted the assignment. *See, e.g., Columbia Gas Transmission Corp.*, 64 F.E.R.C. ¶ 61,060 (1993).

159. *But see Answer of SCANA Energy Marketing Inc., supra* note 156, at 6-7 (alleging that "the wide-ranging degree of recall rights [retained by AGL], particularly without protections to assure AGL would exercise its recall on a non-discriminatory basis," renders the assigned capacity "virtually unsellable" in the secondary market.)

160. *See, e.g.,* Notice of Proposed Rulemaking, *Regulation of Short-Term Natural Gas Transportation Services*, Docket No. RM98-10-000 (July 29, 1998), slip op. at 16-17. Even during peak periods, capacity released subject to a recall (as authorized under AGL's tariff) "may be of lower quality than non-recallable capacity," which fact will likely "be reflected in the rate bid by bidders for the released capacity." *El Paso Natural Gas Co.*, 64 F.E.R.C. ¶ 61,265 at 62,819 (1993).

161. GA. CODE ANN. § 46-4-154(d) (Supp. 1998), and discussion *supra* Part Three.

162. *Answer of SCANA Energy Marketing Inc. to Atlanta Gas Light Company's Data Response, supra* note 156, at 4 (noting that some marketers might not need the upstream capacity allocated to them because they have elected "to purchase supplies in the Black Warrior Basin only a few hundred miles west of AGL's service territory [or] backhaul supplies from the Appalachian producing area . . . .") That such a showing should be sufficient is supported by recent remarks of Mark Caudill, Vice President of Rates and Regulatory Affairs of Atlanta Gas Light Resources (AGL's parent): "Frankly, we don't care what assets are used to get gas to the city gate. If you only use what we're assigning, great. If you want to use it in a higher value market, great. Just get gas to the city gate." *Panel Discussion: Retail Competition In The Natural Gas Market*, Federal Energy Bar Association Mid-Year Meeting, Washington, D.C., Dec. 3-4, 1998. AGL has argued vehemently that its statutory obligation "to contract for, and pay for, firm interstate pipeline capacity necessary to provide service to the 1.4 million customers located on its distribution system" makes clear that the Georgia legislature fully intended that marketers be forced to take and retain upstream capacity allocated to them by AGL as they take over AGL's merchant role. *See, e.g., Answer of Atlanta Gas Light Company to Motion to Reject of SCANA Energy Marketing, Inc.*, Docket No. RP98-206, filed Sept. 24, 1998, at 3; *see also* GA. CODE ANN. § 46-4-155(e) (Supp. 1998). While recognizing the relative strength of this argument, it is wholly irrelevant. Simply put, to the extent this part of the Act cannot be reconciled with the FERC's overriding federal policies, it is preempted. *See, e.g., California Power Exchange Corp*, 85 F.E.R.C. ¶ 61,263, at 62,064-66 (1998) (state legislation that conflicts with the FERC's goals of ensuring "broad-based" open-access transmission service

AGL would release the turned-back capacity in the secondary market for interstate capacity (coordinating the term of the release with AGL's proffer of assignment each month), thereby affording all marketers the opportunity to bid on and obtain such capacity for intrastate or other markets.[163] Thereafter, AGL would be entitled to recover as "stranded costs" the shortfall, if any, between the revenues generated via capacity release and the charges assessed under the affected upstream pipeline contracts.[164]

Clearly, the state has a legitimate and substantial interest in ensuring that Georgia's consumers continue to receive the same reliable service they have enjoyed historically as bundled sales customers of AGL. Achieving this end, however, does not require that AGL determine the content of marketers' supply/capacity portfolios as contemplated by AGL's upstream allocation proposal. As noted above, marketers must meet stringent certification requirements *prior* to commencing sales to firm customers in Georgia. The GPSC has made clear that, in evaluating a marketer's qualifications, it will consider not only that marketer's "anticipated gas supply and capacity," but also the latter's "contingency plan[s] to provide gas to firm customers" should a disruption occur.[165] Presumably, if a marketer lacks the requisite resources to effect delivery of gas to retail end-users, it will not receive certificate authorization.

Moreover, to the extent a certificated marketer fails to meet its firm commitments, it is subject not only to harsh statutory sanctions (including certificate revocation and financial penalties), but also severe operational penalties which could strip away its entire profit margin. In short, appropriate mechanisms are already in place to ensure that marketers "get gas to the city gate."[166] Finally, even in the unlikely event that a marketer does fail to meet its firm commitments, AGL can immediately recall upstream capacity assigned to marketers in order to restore service to affected customers,[167] and can likewise call on "retained" upstream storage/transportation capacity to backstop the system on an emergency basis.[168] All things considered, there simply is no need for AGL to dictate marketers' business decisions as proposed in AGL's upstream capacity assignment proposal, even during the transition period.[169]

---

and promoting regional coordination is preempted under the Supremacy Clause.) An extensive discussion of the issue of federal preemption and its applicability to this case falls outside the scope of this article.

163. AGL could release the capacity, subject to recall, to ensure that it would have ready access thereto in the face of system emergencies.

164. A decision by the FERC to lift the price cap on released capacity could well spur AGL to actively market such capacity. *See Regulation of Short-Term Natural Gas Transportation Services, supra* note 160.

165. GA. COMP. R. & REGS. r. 515-7-3-.03 (2)(h) (1998).

166. *Panel Discussion: Retail Competition in the Natural Gas Market, supra* note 162.

167. *Supra* note 45 and accompanying text.

168. AGL has retained a certain amount of upstream storage and associated transportation capacity for "operational purposes," i.e., to balance the distribution system as the swing operator, to provide "no-notice" capability in the event of demand fluctuations, and to provide line pack. *Prepared Direct Testimony of S. Moore, E. Stanek and M. Wingo, supra* note 37, at 17-18. However, such capacity can also be used "to meet essential human needs in emergencies." *See Prepared Rebuttal Testimony of S. Moore, E. Stanek, M. Wingo, supra* note 127, at 11.

169. *Request for Leave to File Answer and Answer of Atlanta Gas Light Company to Answer of SCANA*

PART FOUR: CONCLUSION

Many of those in favor of (or perhaps aware of the inevitability of) deregulation of natural gas sales to firm end-use customers have argued against a "cookie cutter" approach to achieving this end, urging instead that each state be permitted to address issues of service unbundling and retail competition in the context of its own unique circumstances.[170] Although a "cookie cutter" approach clearly may not be appropriate for all issues raised in the context of industry restructuring, the Deregulation Act, as implemented by AGL, nonetheless provides valuable insight into what the thorny issues are (from both a policy and an implementation perspective) and how one state has attempted to tackle them in the interest of achieving its dual reliability/pro-competitive objectives. The AGL experience has indeed helped provide a better understanding of the "[m]any difficult and novel issues [that] will arise during the period of transition to fundamentally different market structures."[171]

Will the Act achieve its purposes? Despite the bumps in the transition road to date (bumps which may not have existed had we known then what we know now,)[172] many believe the Act will succeed. Only time will tell.

Energy Marketing, Inc. to Atlanta Gas Light Company's Data Response, Docket No. RP98-206-000, filed July 23, 1998, at 10 (noting that "the GPSC may lift the requirement that [AGL] contract for interstate pipeline capacity and allocate it to marketers" after the transition period if the GPSC determines that marketers will secure adequate interstate capacity.)

170. *See, e.g.,* Comments of Jolynn B. Butler, Commissioner, Ohio Public Utilities Commission, *Panel Discussion: Retail Competition In The Natural Gas Market,* Federal Energy Bar Association Mid-Year Meeting, Washington, D.C., Dec. 3-4, 1998.

171. *Texas Eastern Transmission Corp.,* 82 F.E.R.C. ¶ 61,118, at 61,439 (1998).

172. *Supra* Part Two, I.