

## FERC Clarifies New Annual Reporting Requirement for Natural Gas Sellers and Buyers and Adopts One-Time Safe Harbor

On September 18, 2008, the Federal Energy Regulatory Commission (FERC) issued Order No. 704-A, clarifying the new requirement that certain natural gas sellers and buyers annually file a new Form No. 552 and report aggregate volumes for certain physical natural gas transactions. The reporting requirement implements the new provisions on price transparency of the Natural Gas Act (NGA) enacted in the Energy Policy Act of 2005 and applies to natural gas market participants, including entities not subject to FERC's traditional NGA jurisdiction, such as intrastate pipelines and end-users like large industrial customers and independent power producers (IPPs).

### APPLICABILITY

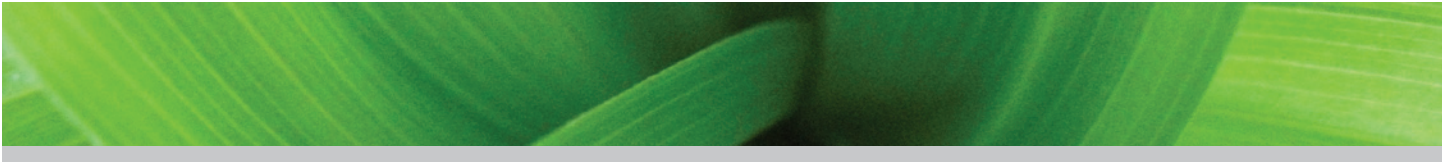
Form No. 552 must be filed by any entity with "reportable" physical natural gas sales or purchases equal to or greater than a *de minimis* threshold of 2.2 Trillion British Thermal Units (TBtu). Only "reportable" sales or purchases (as described below) count towards the *de minimis* threshold; if an entity meets the *de minimis* threshold for either sales or purchases, it must report both on Form No. 552. Sales and purchases cannot be netted against each other when calculating whether an entity meets the threshold. In addition, even if an entity sold natural gas in the prior calendar year at a volume below the *de minimis* threshold, it must submit Form No. 552 if those sales were made pursuant to a blanket certificate for unbundled sales services (18 C.F.R. § 284.284) or a blanket marketing certificate (18 C.F.R. § 284.402). In this case, the seller must provide identification information and answer questions regarding price reporting to price index publishers, but need not report sale and purchase volume data.

A company with multiple affiliates may report separately for each affiliate or in aggregate. If a company chooses to aggregate, it must aggregate all affiliates' data. In addition, customers of an asset manager must report volumes associated with transactions managed by the asset manager. Public joint action agencies may report members' data on an aggregate basis.

### REPORTABLE TRANSACTIONS

Entities must report physical transactions (sales or purchases) for next-day delivery or next-month delivery that utilize an index price, are reported to any price index publisher, or could be reported to any price index publisher. The phrase "transactions that could be reported to an index publisher" is intended to cover bilateral, arms-length, fixed price, physical natural gas transactions between non-affiliated companies. In a change from the final rule, "reportable" transactions under Order No. 704-A include all trading locations, and not just locations where index developers collect price information.

Transactions that must be reported also include end-use transactions that rely upon price indices or that could be utilized to form a price index, such as volumes associated with sales to or purchases from large industrial customers



or IPPs. “Reportable” transactions also include: book-outs; cash-out, imbalance makeup, and operational volumes; royalty-in-kind transactions; and purchases and sales related to exploration, production, and gathering functions. Form No. 552 also will provide additional lines to separately report physical basis transactions and trigger agreements such as NYMEX Plus contracts. Order No. 704-A also provided guidance on reporting transactions that span multiple years.

Excluded from Form No. 552 reporting (and the computation of the *de minimis* threshold) are volumes associated with: affiliate transactions; financially-settled transactions; futures contracts; unprocessed gas; imported liquefied natural gas (LNG) prior to regasification and exported LNG after liquefaction; transactions that are both originated and delivered outside of the lower 48 states of the United States; and traditional, bundled retail transactions by local distribution companies at state-approved tariff rates (and related purchases).

### EFFECTIVE DATE AND SAFE HARBOR

FERC denied requests to delay implementation of the reporting requirement. As a result, the first submission of Form No. 552 is due by **May 1, 2009** for 2008 calendar year transactions. Subsequent submissions are due by May 1 of each year for prior calendar year transactions.

Acknowledging that market participants began collecting data for 2008 without the benefit of the clarifications provided in Order No. 704-A, FERC adopted a one-time safe harbor under which Form No. 552 submissions filed in 2009 will benefit from a rebuttable presumption that the data is accurate and submitted in good faith. The safe harbor will not apply to future Form No. 552 submissions.

### FOR ADDITIONAL INFORMATION

Van Ness Feldman regularly counsels interstate and intrastate natural gas pipelines, natural gas marketers, and purchasers of natural gas such as industrial customers and independent generators on FERC compliance matters. For assistance in assessing how the new reporting requirements may affect your company or additional information, please contact Susan Olenchuk or Vincenzo Franco in our Washington, DC office at (202) 298-1800, or Pam Anderson in our Seattle office at (206) 623-9372, or any member of the firm's Natural Gas practice group.

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