

## FERC Reaffirms Modifications to Capacity Release Regulations

On November 20, the Federal Energy Regulatory Commission (Commission) issued an order reaffirming and clarifying its recently-adopted modifications to its regulations governing the release of firm transportation capacity on interstate natural gas pipelines. The revised regulations become effective 30 days after publication in the *Federal Register*.

### REVISED CAPACITY RELEASE REGULATIONS

In June 2008, the Commission issued Order No. 712, which revise regulations applicable to the release of firm interstate pipeline capacity for the purpose of improving the efficiency of the capacity release market. In particular, Order No. 712 (1) authorized market-based pricing for capacity releases of one year or less; (2) exempted from the Commission's prohibition on tying and requirement for competitive bidding those release transactions that are executed as part of an asset management arrangement (AMA) or a state-mandated retail access program; and (3) allowed shippers to impose conditions associated with the management of gas inventory on releases of storage capacity.

These changes to the Commission's capacity release regulations became effective in July 2008 and were generally supported by the industry. A number of entities, however, requested that the Commission clarify several aspects of the new regulations. Order No. 712-A addresses those requests.

### CLARIFICATIONS TO NEW CAPACITY RELEASE REGULATIONS

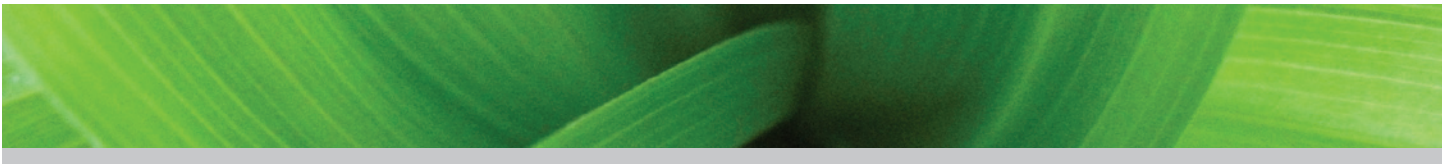
#### *Removal of the rate cap for short-term capacity releases*

The Commission addressed several issues regarding the decision to permit market-based pricing of short-term capacity releases, including, (1) denying requests to eliminate the maximum rate ceiling for short-term transportation agreements with a pipeline, because the availability of a pipeline's recourse rates protects buyers of capacity against the potential exercise of market power by both a pipeline and its releasing shippers; and (2) clarifying that removal of the price cap applies only to releases taking effect within one year of the date the pipeline is notified of the release, so that a releasing shipper may not simultaneously post for bid consecutive short-term contracts whose total term exceeds one year.

#### *Asset Management Arrangements*

The Commission provided numerous clarifications to Order No. 712's treatment of AMAs, including the following:

- *Delivery/Purchase obligations of the replacement shipper:* The Commission retained the requirement that, to qualify as an AMA, a capacity release must require that the replacement shipper have an obligation to deliver or purchase up to 100% of the releasing shipper's daily contract demand under the released transportation capacity, but made the following clarifications:



- For releases of more than 1 year, the obligation is 5 months of each 12-month period, and is five-twelfths of the days of any additional period of the release that is not equal to 12 months; and
- The obligation (1) is not limited to a single consecutive period; (2) is subject to provisions of the service provider's tariff, such as storage ratchets, that may limit the customer's contractual right to service; and (3) applies to the full contract demand under each capacity release, if releases occur on multiple pipelines.

■ *Exemption from competitive bidding.* The Commission made several clarifications, including that:

- AMAs and releases made pursuant to a state-approved retail access program are not subject to the prohibition on rolling over releases of less than 31 days to the same replacement shipper without bidding;
- A shipper may re-release capacity to the same replacement shipper if the release is subject to notice and bidding; and
- The exemption from bidding for releases at the maximum tariff rate applies only to releases of longer than one year, because they continue to be subject to the rate cap.

### *State-Mandated Retail Unbundling*

The Commission clarified that (1) consecutive short-term releases to a marketer participating in a state-regulated retail access program are not long-term releases subject to the maximum rate ceiling; (2) a marketer participating in a state-approved program can re-release its capacity to an asset manager that will satisfy the marketer's obligations under the program; (3) a marketer participating in a state-approved program may use its capacity to service customers not subject to the program during periods when capacity is not needed to serve retail access customers; and (4) foreign provincial retail unbundling programs will be treated the same as state retail unbundling programs. In addition, the Commission declined to extend the exemption to self-regulated municipals.

### *Tying Capacity and Gas Inventory*

The Commission clarified that when a release of storage capacity requires the sale or purchase of gas outside of the AMA context, the parties may negotiate additional terms and conditions related to the commodity portion of the transaction and such agreements will not be subject to the prohibition against tying of extraneous conditions. The Commission also clarified that the releasing and replacement shippers may use different methods of transferring title to storage gas.

### *Liquefied Natural Gas Facilities*

The Commission clarified that, where both an LNG terminal and a directly-connected interstate pipeline provide Part 284 open access service, a holder of capacity in the LNG terminal has the right to require a replacement shipper to take a release of both the terminal capacity and the pipeline capacity.

#### **FOR ADDITIONAL INFORMATION**

For additional information or assistance in evaluating the implications of the Commission's capacity release regulations for your organization, or counsel on participating in FERC proceedings, please contact Curt Moffatt, Paul Korman, or Susan Olenchuk in our Washington, D.C. office at (202) 298-1800, Pam Anderson in our Seattle office at (206) 623-9372, or any other member of the Van Ness Feldman Natural Gas practice.

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