(1) The retained earnings balance of the credit union at quarter-end as determined under generally accepted accounting principles, subject to paragraph (f)(3) of this section. Retained earnings consists of undivided earnings, regular reserves, and any other appropriations designated by management or regulatory authorities;

(2) For a low income-designated credit union, net worth also includes secondary capital accounts that are uninsured and subordinate to all other claims, including claims of creditors, shareholders and the NCUSIF; and

(3) For a credit union that acquires another credit union in a mutual combination, net worth includes the retained earnings of the acquired credit union, or of an integrated set of activities and assets, at the point of acquisition. A mutual combination is a transaction in which a credit union acquires another credit union, or acquires an integrated set of activities and assets that is capable of being conducted and managed as a credit union.

* * * * *

PART 704—CORPORATE CREDIT UNIONS

■ 1. The authority citation for Part 704 continues to read as follows:

Authority: 12 U.S.C. 1766(a), 1781, 1789.

■ 2. Amend § 704.2 by:

■ a. Revising the current definitions of *''Capital'', ''Core capital'', ''Moving daily average net assets''* and *''Retained earnings ratio''* to read as set forth below; and

■ b. Adding the definition of *''Mutual combination''* to read as follows:

§ 704.2 Definitions.

* * * * *

Capital means the sum of a corporate credit union's retained earnings, paid-in capital, and membership capital. For a corporate credit union that acquires another credit union in a mutual combination, capital includes the retained earnings of the acquired credit union, or of an integrated set of activities and assets, at the point of acquisition.

* * * * *

Core capital means the sum of a corporate credit union's retained earnings, and paid-in capital. For a corporate credit union that acquires another credit union in a mutual combination, core capital includes the retained earnings of the acquired credit union, or of an integrated set of activities and assets, at the point of acquisition.

* * * * *

Moving daily average net assets means the average of daily average net assets exclusive of identifiable intangibles and goodwill for the month being measured and the previous eleven (11) months.

Mutual combination means a transaction or event in which a corporate credit union acquires another credit union, or acquires an integrated set of activities and assets that is capable of being conducted and managed as a credit union.

* * * * *

Retained earnings ratio means the corporate credit union's retained earnings divided by its moving daily average net assets. For a corporate credit union that acquires another credit union in a mutual combination, the numerator of the retained earnings ratio also includes the retained earnings of the acquired credit union, or of an integrated set of activities and assets, at the point of acquisition.

* * * * *

[FR Doc. E8–28462 Filed 11–28–08; 8:45 am]

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 284

[Docket No. RM08–1–001; Order No. 712–A]

Promotion of a More Efficient Capacity Release Market

Issued November 21, 2008.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule; order on rehearing.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is issuing an order addressing the requests for clarification and/or rehearing of Order No. 712 [73 FR 37058, June 30, 2008]. Order No. 712 revised Commission regulations governing interstate natural gas pipelines to reflect changes in the market for short-term transportation services on pipelines and to improve the efficiency of the Commission's capacity release program. The order permitted market based pricing for short term capacity releases and facilitated asset management arrangements (AMA) by relaxing the Commission's prohibition on tying and on its bidding requirements for certain capacity releases. The Commission further clarified in the order that its prohibition on tying does not apply to conditions associated with gas inventory held in storage for releases of firm storage capacity. Finally, the Commission waived its prohibition on tying and bidding requirements for capacity releases made as part of state-approved open access programs. This order generally denies rehearing and clarifies Order No. 712.

DATES: *Effective Date:* The amendments to the regulations will become effective 30 days after publication in the **Federal Register**.

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SUPPLEMENTARY INFORMATION:

Before Commissioners: Joseph T. Kelliher, Chairman; Suedeen G. Kelly, Marc Spitzer, Philip D. Moeller, and John Wellinghoff.

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Order on Rehearing and Clarification

Order No. 712–A

(Issued November 21, 2008)

1. On June 19, 2008, the Commission issued Order No. 712,[1] a Final Rule that revised the Commission's Part 284 regulations concerning the release of firm capacity by shippers on interstate natural gas pipelines in order to enhance the efficiency and effectiveness of the secondary capacity release market. Specifically, the Final Rule made the following changes to the Commission's policies and regulations:

- The rule lifted the maximum rate ceiling on secondary capacity releases of one year or less to enhance the efficiency of the market while continuing to regulate long term capacity releases of more than one year and pipeline rates and services.
- The rule modified the Commission's policies and regulations to facilitate the use of AMAs. The first modification is to exempt capacity releases that implement AMAs from the Commission's prohibition on tying capacity releases to any extraneous conditions. The second change is to exempt capacity releases made as part of an AMA from the bidding requirements set forth in section 284.8 of the Commission's regulations.
- The rule established a definition of AMAs that will qualify for the tying and bidding exemptions. The definition provides for both delivery and supply side AMAs and requires that an asset manager satisfy certain delivery and/or purchase obligations.
- The rule also revised the Commission's prohibition against tying to allow a releasing shipper to include conditions in a release of storage capacity regarding the sale and/or repurchase of gas in storage inventory, even outside the AMA context. Specifically, this exemption from tying is meant to allow a shipper that releases storage capacity to require a replacement shipper to take title to any gas in the released capacity at the time the release takes effect and/or to return the storage capacity to the releasing shipper at the end of the release with a specified amount of gas in storage.
- Finally, the rule modified the Commission's regulations to facilitate retail open access programs by exempting capacity releases made under state-approved programs from the Commission's capacity release bidding requirements.

2. Three parties sought rehearing of Order No. 712.[2] Six parties sought rehearing and/or clarification.[3] Three parties filed for clarification only.[4] The Marketer Petitioners requested clarification and reconsideration. As discussed below, the Commission largely denies rehearing but grants clarification in part and makes certain adjustments to the regulations regarding AMAs.

I. Removal of the Price Ceiling for Released Capacity

A. Background

3. In Order No. 712, the Commission revised its regulations to remove the price ceiling on short term capacity releases. The Commission found that it had previously provided pipelines with the flexibility to enter into negotiated rate transactions that are permitted to exceed the maximum rate ceiling, as long as the shipper could avail itself of the pipeline's cost-of-service recourse rate. The Commission also found that

[1] *Promotion of a More Efficient Capacity Release Market,* 73 FR 37058 (June 30, 2008), *FERC Statutes and Regulations* ¶ 31,271 (2008).

[2] Those parties are Allegheny Energy Supply Company, LLC (Allegheny), Shell NA LNG LLC (Shell LNG) and Statoil Natural Gas LLC, Chevron USA Inc., and Constellation Energy Commodities Group, Inc. (collectively, LNG Petitioners).

[3] Those parties are the Interstate Natural Gas Association of America (INGAA), Iroquois Gas Transmission System, LP (Iroquois), the Natural Gas Supply Association and the Electric Power Supply Association (NGSA), Public Service Company of North Carolina, Inc., South Carolina Electric & Gas Company, and Scana Energy Marketing Inc. (collectively Scana), Spectra Energy Transmission LLC and Spectra Energy Partners (Spectra), Vector Pipeline LP (Vector) and Williston Basin Interstate Pipeline Company (Williston). INGAA filed a separate request for rehearing and a separate request for clarification.

[4] Those parties are the American Gas Association (AGA), BP Energy Company (BP) and Reliant Energy Inc. (Reliant).

removing the price ceiling for short term releases would extend such pricing flexibility to releasing shippers, subject to the continued protection of the recourse rate for capacity purchased directly from the pipeline.

4. The Commission noted the increased use of negotiated rate transactions by shippers and pipelines based on gas price differentials and found that such use demonstrated that buyers and sellers are attracted to the ability to calibrate the price of transportation to its value in the market. The Commission also found that the maximum rate ceiling as applied to capacity release transactions denied releasing and replacement shippers the same ability enjoyed by the pipelines to negotiate transactions that reflect the market value of capacity at all times. With the price ceiling in effect, releasing shippers were unable to effectively use price differentials as a measure of capacity value because they were denied the ability to recover the value of capacity during peak periods when that value exceeds the maximum rate cap.

5. The Commission further found that because the existing capacity release price ceiling did not reflect short-term variations in the market value of the capacity, the price ceiling inhibits the efficient allocation of capacity and harms, rather than helps, the short-term shippers it is intended to protect. Removal of the price ceiling will permit short-term capacity release prices to rise to market clearing levels, thereby allocating capacity to those that value it the most while providing accurate price signals to the marketplace. The Commission also found that the price ceiling harmed captive customers holding long-term contracts on the pipeline, and that the price ceiling reduces the dissemination of accurate capacity pricing information.

6. The Commission recognized that in removing the price ceiling from short term capacity releases it was departing from a cost-of-service ratemaking methodology, but determined that given the benefits to be derived from removing the price ceiling, sufficient protections existed against the exercise of market power by releasing shippers.

7. The Commission reviewed data collected over many years, which showed that as a general matter, the rates resulting from removal of the price cap for capacity release should be reasonably competitive. But the Commission did not rely solely on competition to ensure just and reasonable prices.[5] The Commission found that the same recourse rate that protects against the potential exercise of market power in pipeline negotiated rate transactions would serve a similar function in protecting against the potential exercise of market power by releasing shippers. The Commission found that any attempt by a releasing shipper to withhold capacity in order to raise rates will be undermined because the pipeline will be required to sell that capacity as interruptible capacity to a shipper willing to pay the maximum rate.[6]

8. The Commission also reasoned that the releasing shippers' ability to exercise market power in the short-term capacity release market is limited because short-term customers are not captive, even if only connected to one pipeline. Thus, the Commission found that short-term shippers always have the option simply not to take service, if the price demanded is above competitive market levels.[7]

9. In sum, the Commission found that its removal of the price ceiling on short-term capacity release transactions provides on balance advantages that ''offset whatever harm the occasional high rate might entail.'' [8] The Commission found that removal of the price cap permits more efficient utilization of capacity by permitting prices for short-term capacity releases to rise to market clearing levels, thereby permitting those who place the highest value on the capacity to obtain it and that it will also provide potential customers with additional opportunities to acquire capacity. Finally, the Commission found that by providing more accurate price signals concerning the market value of pipeline capacity, removal of the price ceiling for short-term capacity releases promotes the efficient construction of new capacity by highlighting the location, frequency, and severity of transportation constraints.

10. The Commission determined not to remove the price ceiling for pipeline short-term services, stating that by its action in removing the price ceiling from short-term capacity releases, the Commission intended to permit releasing shippers some of the same flexible pricing authority the Commission has already granted pipelines through the negotiated rate program.[9] The Commission stated that the pipelines' request to lift the maximum rate on short-term releases would effectively negate the recourse rate protection against the use of market power that the Commission included in its negotiated rate program. The Commission also determined that the maximum rate ceiling on pipeline capacity acts as a recourse rate for both pipeline transactions and capacity release transactions and thereby protects both pipeline customers and replacement shippers on capacity release transactions.[10]

11. The Commission also explained that pipelines differed from capacity releasers in that they are the principal holders of capacity and, therefore, the pipelines possess greater ability to exercise market power by withholding capacity and not constructing facilities than do releasing shippers.[11]

12. No party sought rehearing of the Commission's determination to remove the price ceiling for capacity release transactions. The only major issue raised on rehearing is whether to remove the price ceiling from pipeline short-term services. A number of clarification and rehearing requests also were filed regarding specific issues related to the removal of the price ceiling for released capacity.

B. Price Ceiling Applicable to Pipeline Capacity

1. Rehearing Requests

13. INGAA, Williston and Spectra filed requests for rehearing regarding the

[5] Specifically, the Commission also stated:

> [t]he Commission finds that the short-term capacity release market is generally competitive. Therefore competition, together with our continuing requirement that pipelines must sell short-term firm and interruptible services to any shipper offering the maximum rate, and the Commission's ongoing monitoring efforts will keep short-term capacity release rates within the ''zone of reasonableness'' required by *INGAA* and *Farmers Union*. Order No. 712 at P 39.

[6] Order No. 712 at P48–49. In this respect, the Commission continued the same protection on which it relied in Order No. 637. *Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services,* Order No. 637, FERC Stats. & Regs. ¶ 31,091 at 31,282, *clarified,* Order No. 637–A, FERC Stats. & Regs. ¶ 31,099, *reh'g denied,* Order No. 637–B, 92 FERC ¶ 61,062 (2000), *aff'd in part and remanded in part sub nom. Interstate Natural Gas Ass'n of America* v. *FERC,* 285 F.3d 18 (D.C. Cir. 2002), *order on remand,* 101 FERC ¶ 61,127 (2002), *order on reh'g,* 106 FERC ¶ 61,088 (2004), *aff'd sub nom. American Gas Ass'n* v. *FERC,* 428 F.3d 255 (D.C. Cir. 2005) (Order No. 637).

[7] Order No. 712 at P 50.

[8] Order No. 712 at P 51 (citing, *Interstate Natural Gas Association of America,* 285 F.3d 18, 33 (D.C. Cir. 2002) (INGAA)).

[9] Order No. 712 at P 83. In fact, the Commission reasoned that pipelines already possess significant pricing discretion in that they may enter into negotiated rate transactions above the maximum rate or by establishing that they lack market power and requesting market based rate authority or by requesting seasonal rates for their systems. The Commission stated that its rule was designed solely to give releasing shippers some of the same flexibility enjoyed by the pipelines, subject to the same recourse rate protection. Order No. 712 at P 86.

[10] Order No. 712 at P 83.

[11] Order No. 712 at P 84–85.

Commission's decision to retain the price ceiling for short-term pipeline services, while removing the price ceiling on short-term capacity releases.[12] They assert that the same data and rationale that supports removing the price ceiling from short-term capacity releases also supports the removal of the price ceiling for short-term pipeline capacity.[13]

14. They argue that the Commission acknowledged that short-term released capacity and short-term pipeline capacity compete in the same market, and maintain that the finding that the short-term market is ''generally competitive,'' supports lifting the price ceiling for short-term pipeline capacity.

15. They also maintain that the distinctions between released capacity and pipeline capacity set forth by Order No. 712 do not support retention of the price ceiling for pipeline capacity. They maintain that these distinctions are based on two incorrect premises: first, that interstate pipelines have market power in the relevant market; and second, that a capped rate for pipeline capacity is necessary as a safeguard against abuse in the released capacity and pipeline capacity markets. Therefore, they maintain that the Commission acted arbitrarily and capriciously in not treating short-term pipeline and released capacity similarly. Further, INGAA argues that the disparate treatment of released and pipeline capacity under Order No. 712 cannot be excused by reference to flexible rate options and policies open to the pipelines because such options continue to leave rates capped or cannot be attained as a practical matter.

2. Commission Determination

16. The Commission denies the requests for rehearing, and continues to find that maintenance of the maximum rate ceilings for pipeline short-term transactions is necessary to protect against the potential exercise of market power. As we explained in Order No. 712, the removal of the rate ceiling for short-term capacity release transactions is designed to extend to capacity release transactions the pricing flexibility already available to pipelines through negotiated rates without compromising the fundamental protection provided by the availability of recourse rate service. In the Alternative Rate Design Policy Statement, we offered the pipelines the flexibility to exceed the price cap in one of two ways: Pipelines can either make a filing with appropriate information to establish the market is competitive or pipelines can negotiate rates as long as the shipper has the option of purchasing capacity at the recourse (maximum) tariff rate.[14] In Order No. 712, we provide releasing shippers with flexibility similar to that enjoyed by the pipelines, while retaining the recourse rate as a protection for the buyer against the potential exercise of market power by both pipelines and releasing shippers.[15]

17. While our examination of the capacity release record did indicate that capacity release prices seem to suggest a competitive market for released capacity as a general matter, we did not make a finding, as suggested in the rehearing requests, that the entire secondary market is competitive. We recognize that on some portions of the pipeline grid, little effective competition may exist.[16] As we emphasized on several occasions in Order No. 712, precisely because we did not make such a competitive market finding, we are ''continuing to insist on the maintenance of the pipeline's recourse rate as protection against the exercise of market power.'' [17] As we explained, on parts of the pipeline grid where all firm capacity may be held by only a few or one firm shipper, the availability of the recourse rate prevents those shippers from withholding their capacity in order to charge a price above competitive levels. If a releasing shipper seeks to charge more than the maximum rate for capacity, and the pipeline segment is not constrained, the replacement shipper would have the option of turning down the deal and purchasing the capacity from the pipeline at the cost-based just and reasonable interruptible or short-term firm rate.

18. Moreover, as we also explained in Order No. 712, the implications of removing the price ceiling for pipeline capacity are more serious than for capacity release. Pipelines, due in part to their economies of scale, can exercise market power over pipeline capacity, particularly with respect to the construction of long-term capacity.[18] As the Court of Appeals for the District of Columbia Circuit has stated:

> Federal regulation of the natural gas industry is thus designed to curb pipelines' potential monopoly power over gas transportation. The enormous economies of scale involved in the construction of natural gas pipelines tend to make the transportation of gas a natural monopoly.[19]

19. Unlike releasing shippers, pipelines have a greater ability to exercise market power because of their control over the expansion of the pipeline itself. If a pipeline could on its own or as part of an oligopolistic market structure exercise market power in the short-term market, it would have an incentive not to construct additional needed capacity (withhold new capacity) because of the excess revenues it can garner in the short-term market. As the Commission explained in Order No. 637:

> Without rate regulation, pipelines would have the economic incentive to exercise market power by withholding capacity (including not building new capacity) in order to raise rates and earn greater revenue by creating scarcity. Because pipeline rates are regulated, however, there is little incentive for a pipeline to withhold capacity, because even if it creates scarcity, it cannot charge rates above those set by its cost-of-service. Since pipelines cannot increase revenues by withholding capacity, rate regulation has the added benefit of providing pipelines with a financial incentive to build new capacity when demand exists * * *. Thus, annual rate regulation protects against the pipeline's exercise of market power by limiting the incentive of a monopolist to withhold capacity in order to increase price as well as creates a positive incentive for a pipeline to add capacity when needed by the market.[20]

20. Not only may there be segments of a pipeline or even an entire pipeline

[12] These parties do not object to the removal of the price ceiling for capacity release transactions. *See* INGAA at 6. (''INGAA supports lifting the price cap on short-term released capacity * * *''), Spectra at 5 (''The Commission was correct to remove the price caps on short-term capacity release capacity'').

[13] INGAA at 1, Williston at 2, Spectra at 2.

[14] *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines and Regulation of Negotiated Transportation Services of Natural Gas Pipelines*, 74 FERC ¶ 61,076 (1996).

[15] The court in *INGAA* recognized the value of the recourse rate in protecting against the exercise of market power by both pipelines and releasing shippers:

> As to deliberate withholding of capacity, the Commission reasoned that this too was not within the power of capacity holders. If holders of firm capacity do not use or sell all of their entitlement, the pipelines are required to sell the idle capacity as interruptible service to any taker at no more than the maximum rate—which is still applicable to the pipelines. 285 F.3d at 33.

[16] *Williston Basin Interstate Pipeline Co.*, 519 F.3d 497, 502 (D.C. Cir. 2008) (where the pipeline's largest customer is its affiliate, the competitive capacity resale market is ''smaller than one would otherwise expect''); *United Distribution Cos.* v. *FERC*, 88 F.3d 1105, 1156 (D.C. Cir. 1996) (''when the capacity available for sale on a particular pipeline is limited, holders of even relatively small capacity allotments can exercise market power'').

[17] Order No. 712 at P 61.

[18] *Id.* P 67, 85.

[19] *United Distribution Cos.* v. *FERC*, 88 F.3d 1105, 1122 (D.C. Cir. 1996).

[20] Order No. 637 at 31,270. *See Tennessee Gas Pipeline Co.*, 91 FERC ¶ 61,053, at 61,191 (2000) (''there is little reason for the pipeline to exercise market power by withholding new capacity because the maximum rates established by the Commission prevent it from charging rates above the just and reasonable rates based on its cost of service''), *aff'd, Process Gas Consumers Group* v. *FERC*, 292 F.3d 831, 834 (D.C. Cir. 2002).

that is not competitive, as discussed above, but as we found in Order No. 712,[21] and as the pipelines have conceded, perfect arbitrage does not exist between the capacity release market and the market for pipeline capacity.[22] As a result, the pipelines will have the ability to exercise market power, which will create the very incentive our regulation is designed to prevent: An incentive to not construct capacity when it is needed and would ordinarily be profitable.[23] In balancing the risks and benefits of removing the price ceiling for pipeline capacity, we chose in Order No. 712 to err on the side of providing greater protection against the exercise of market power by both the pipelines and releasing shippers by retaining the recourse rate protection of regulated pipeline rates.

21. We find that the arguments raised by the pipelines on rehearing are the same arguments addressed in Order No. 712, and as discussed below, we do not find these arguments sufficient to change our determination to retain the price ceiling for short-term pipeline services.

a. Competitive Market Findings

22. INGAA, Williston, and Spectra all argue that the Commission's finding that the capacity release market is ''generally competitive'' justifies removing the price ceiling for pipeline short-term services as well. They maintain that released capacity and pipeline capacity compete with each other and that by concluding that the presence of a ''generally competitive'' market justified the removal of the rate ceiling for short-term release capacity the Commission also justified the removal of the price ceiling for short term pipeline capacity. These parties argue that because the data does not distinguish between released capacity and pipeline capacity there is no reason to treat one class of capacity differently from the other.[24]

23. The Commission agrees that to a large extent released capacity and pipeline capacity compete against each other. But, as we discussed above, we did not make a finding that the entire secondary market is competitive. Rather, we found that the extent of competition in the market for capacity release in conjunction with the maintenance of the recourse rate for pipeline services was sufficient to remove the price ceiling for capacity release.[25] As the Commission stated:

> The Commission is not relying only on a competitive market to ensure just and reasonable rates. The pipeline's maximum rates for short-term firm and interruptible services serve as recourse rate protection for negotiated rate transactions, and will provide the same protection to replacement shippers by giving them access to a just and reasonable rate if the releasing shipper seeks to exercise market power.[26]

24. Relying on our finding in Order No. 637, we explained that maintenance of the recourse rate is necessary in factual circumstances in which even with capacity release, competition is limited:

> The Commission is continuing to protect against the possibility that, in an oligopolistic market structure, the pipe-line and firm shipper will have a mutual interest in withholding capacity to raise the price because the Commission is continuing cost based regulation of pipeline transportation transactions. The pipeline will be required to sell both short-term and long-term capacity at just and reasonable rates. In the short-term, a releasing shipper's attempt to withhold capacity in order to raise prices above maximum rates will be undermined because the pipeline will be required to sell that capacity as interruptible capacity to a shipper willing to pay the maximum rate. Shippers also have the option of purchasing long-term firm capacity from the pipelines at just and reasonable rates.[27]

25. In retaining the recourse rate as protection against the exercise of market power, we recognized that, on many parts of the pipeline grid, sufficient competition may not exist to discipline pricing.[28] This can occur on laterals, at the extreme ends of certain pipeline systems where only one or a small number of firm capacity holders are present, or in some cases on an entire small pipeline. For example, on the Williston Basin pipeline as of 2000, 93 percent of the capacity of the pipeline was held by an affiliate of the pipeline.[29] We did not, and cannot, make a finding that such a market is sufficiently competitive to remove the protection afforded by the recourse rate.[30] As we explained in Order No. 712, the recourse rate in this situation will serve to protect the replacement shipper because if Williston's affiliate seeks to charge a price for released capacity above the just and reasonable maximum rate that is unjustified by competitive conditions, ''the replacement shipper has the option of turning down the deal and purchasing the capacity from the pipeline at the just and reasonable interruptible rate.'' [31]

26. Pipelines that believe their markets are competitive can file for market based rates under our Alternative Rate Design Policy Statement to show that their markets are competitive. We did not undertake such an analysis in this rulemaking, however, and therefore cannot find that removing the price ceiling from pipeline short-term services, and hence eliminating the recourse rate protection, assures just and reasonable rates.

27. Even on pipelines with secondary markets more competitive than Williston's, market power may exist on

[21] Order No. 712 at P 107.

[22] INGAA at 11. If perfect arbitrage did exist, no market for interruptible transportation would exist on fully subscribed pipelines because releasing shippers would capture the benefits of their unused capacity for themselves.

[23] C. McConnell, S. Brue, *Microeconomics: Principles, Problems, and Policies*, 211 (McGraw-Hill, 2004) (''by making it illegal to charge more than the [competitive price] per unit, the regulatory agency has removed the monopolist's incentive to restrict output to [the monopoly quantity] to obtain a higher price and greater profit'').

[24] See INGAA at 8, Spectra at 12 and Williston at 4 (''The Commission's findings that the short term capacity release market is workably competitive was not based on data that distinguishes between the types of sellers of capacity.'').

[25] As the Commission stated:

> One of the principal reasons for removing the price ceiling on released capacity is the existence of the pipeline's service as recourse in the event market power is exercised. Order No. 712 at P 101, citing, *Tennessee Gas Pipeline Co.*, 91 FERC ¶ 61,053 (2000), *reh'g denied*, 94 FERC ¶ 61,097 (2001), *petitions for review denied sub nom., Process Gas Consumers Group* v. *FERC*, 292 F.3d 831, 837 (D.C. Cir. 2002).

[26] Order No. 712 at P 48. The reliance on the recourse rate as protection was repeated continuously throughout the order. Order No. 712 at P 31, 39, 61, 101.

[27] Order No. 637 at 31,282, *aff'd, INGAA*, at 32 (''[i]f holders of firm capacity do not use or sell all of their entitlement, the pipelines are required to sell the idle capacity as interruptible service to any taker at no more than the maximum rate—which is still applicable to the pipelines'').

[28] Order No. 712 at P 61 (the recourse rate provides protection ''even on laterals or other parts of the pipeline grid where all firm capacity may be held by only a few or one firm shipper, those shippers cannot withhold their capacity in order to charge a price above competitive levels'').

[29] *Williston Basin Interstate Pipeline Co.*, 115 FERC ¶ 61081, at P24 n.29 (2006), *remanded on other grounds, Williston Basin Interstate Pipeline Co.* v. *FERC*, 519 F.3d 497, 502 (DC Cir. 2008) (recognizing that where the pipeline's largest customer is its affiliate, the competitive capacity resale market is ''smaller than one would otherwise expect''). In the proceeding at issue in these opinions, Williston did not even agree to permit a small customer to convert to Part 284 service so that it would be able to release capacity in competition with Williston and its affiliate.

[30] Such competitive problems can occur on other pipelines as well. For example, in addition to the Williston pipeline, affiliates on Equitrans, L.P, National Fuel Gas Supply Corp., and Questar Pipeline have a very high proportion of transportation service (from 50 percent–70 percent, and Tuscarora Gas Transmission Company has a non-affiliated shipper with 77 percent of its capacity. *See Index of Customers*, July 2008, FERC Form No. 549–B (*http://www.ferc.gov/docs-filing/eforms/form-549b/data.asp*). Considering the relevant information, we cannot make a finding that the secondary market is sufficiently competitive throughout the country that we can safely eliminate the recourse rate.

[31] Order No. 712 at P 61.

particular portions of the pipelines. Moreover, in Order No. 712, the Commission pointed out that a variety of pipeline limitations on shippers' release rights can limit the effectiveness of competition and arbitrage between the pipelines and releasing shippers. Pipelines' ability to selectively discount [32] can reduce the incentive of releasing shippers to compete with pipelines, as do negotiated rate agreements that contain provisions providing that the pipeline will share any revenues the shipper receives from a capacity release in excess of its discounted or negotiated rate.[33] Pipelines have indeed recognized that these provisions help insulate them from competition.[34] But the pipelines cannot legitimately argue that they should be able to limit themselves from competition on the one hand, and then seek to remove the recourse rate which serves to protect customers from the effects of such insulation. Retaining the recourse rate helps protect against the exercise of market power on such segments.[35]

28. Williston, in its rehearing request, claims that the Commission failed to explain how pipelines' ability to selectively discount relates to the retention of the maximum rate for pipeline short-term services. The ability of pipelines to selectively discount demonstrates that they have market power and are able to prevent arbitrage.[36] As we have explained above, limitations on the effectiveness of arbitrage could enable pipelines to exercise market power in some markets.[37]

b. Withholding Construction of Needed Pipeline Infrastructure

29. In Order No. 712, the Commission found that maintenance of the price ceiling on pipeline capacity was necessary to ensure that proper incentives to construct needed pipeline infrastructure were retained. On rehearing, the pipelines argue that because the pipeline capacity is identical to the released capacity, the Commission acted arbitrarily in lifting the capacity only on short-term released capacity and not on pipeline capacity. They argue that the Commission erred in asserting that they could exercise market power by withholding capacity, maintaining that capacity is either subscribed or not and that the Commission regulations require that all available capacity be sold.

30. First, as discussed above, the Commission has a sound basis for not removing the recourse rate from pipeline services, because the recourse rate acts as a check against both the market power of releasing shippers and the pipelines themselves in situations in which insufficient competition exists. Second, as we found in Order No. 712, and discussed above, ownership of the pipeline is not identical to shippers that lease the use of such capacity.[38]

31. Unlike shippers that cannot control the total amount of capacity, pipelines, because they control their own systems, can affect the total quantum of capacity by determining whether to construct additional capacity. The fundamental precept of our cost-of-service regulation of pipelines is based on ensuring that pipelines do not withhold existing capacity or future capacity.[39] The Commission prevents the withholding of future capacity by ensuring that pipelines do not have an economic incentive to refrain from constructing additional capacity when demand suggests that such capacity is needed and would be profitable. A pipeline that possesses market power and could charge supra-competitive prices in the short-term market will have an economic incentive not to build new capacity to relieve the scarcity permitting it to charge higher prices. As we stated in Order No. 712, as long as cost-of-service rate ceilings apply, pipelines will have a greater incentive to build new capacity to serve all the demand for their service than to withhold capacity, because the only way the pipeline could increase current revenues and profits would be to invest in additional facilities to serve the increased demand.[40]

32. The pipelines assert, without evidentiary support, that their construction decisions would not be influenced by prices in the short-term market. INGAA, for example, contends that ''rather than driving up prices, withholding unsubscribed firm capacity only results in lost sales.'' [41]

33. Basic economic theory holds that firms with market power, like pipelines, will construct less capacity than competitive firms because doing so results in higher prices and profits. A company with market power will produce less of a product or service, and at a higher price, than if the company were in a competitive market. Unlike a competitive firm that produces where marginal cost [42] intersects demand,[43] a firm with market power produces where the revenue from producing one additional unit of output (marginal revenue) [44] is greater than the cost of producing that unit (marginal cost).[45] With a typical downward sloping demand curve, the intersection of marginal cost and marginal revenue is at a smaller output and a higher price than would be produced by a competitive

[32] Selective discounting refers to the ability of pipelines to limit discounts to specific points so that those discounts cannot be arbitraged to alternate points at which the pipelines have less competition. In cases where pipelines use selective discounting, shippers can release at alternate points only if they pay the pipeline's maximum rate, thus eliminating or decreasing the profit the shipper can make on the release.

[33] *See LSP Cottage Grove, L.P.* v. *Northern Natural Gas Co.*, 111 FERC ¶ 61,108, at P 58–59 (2005).

[34] *See Williston Basin Interstate Pipeline Co.* v. *FERC*, 358 F.3d 45, 50 (D.C. Cir. 2004).

[35] Order No. 712 at P 88.

[36] As the U.S. Court of Appeals recognized in a case brought by Williston itself:

A pipeline is unlikely to be able to increase throughput by selective discounting, however, if capacity at secondary points can be transferred readily among shippers through resale at the discounted rate. Indeed, economic theory tells us price discrimination, of which selective discounting is a species, is least practical where arbitrage is possible—that is, where a low-price buyer can resell to a high-price buyer.

Williston Basin Interstate Pipeline Co. v. *FERC*, 358 F.3d 45, 50 (D.C. Cir. 2004). *See* F.M. Scherer, *Industrial Market Structure and Economic Performance*, 253 (Rand McNally College Publishing Co. 1970) (in order to price discriminate ''the seller must have some control over price—some market power'').

[37] Selective discounting decreases competition even when price exceeds the maximum rate. For example, assume that on a pipeline with a maximum rate of $1.00, a shipper has a discounted rate of $.75, and it values the capacity at $1.10, perhaps because it would cost $1.10 to use storage or a peak shaving device to replace the gas lost through the capacity release. If the shipper were required to pay the additional $.25 to the pipeline under the Commission's selective discounting policy, the shipper would release its capacity only when the capacity price is $1.35 or greater. Without the selective discounting policy, the shipper would be willing to release whenever the capacity price is $1.10 or greater.

[38] Order No. 712 at P 84 (*quoting, INGAA* at 35).

[39] Order No. 637 at 31,270.

[40] Order No. 712 at P 85.

[41] INGAA at 7 (citing, Comments of the Interstate Natural Gas Association of America, Docket No. RM08–1 (filed Jan. 25, 2008)).

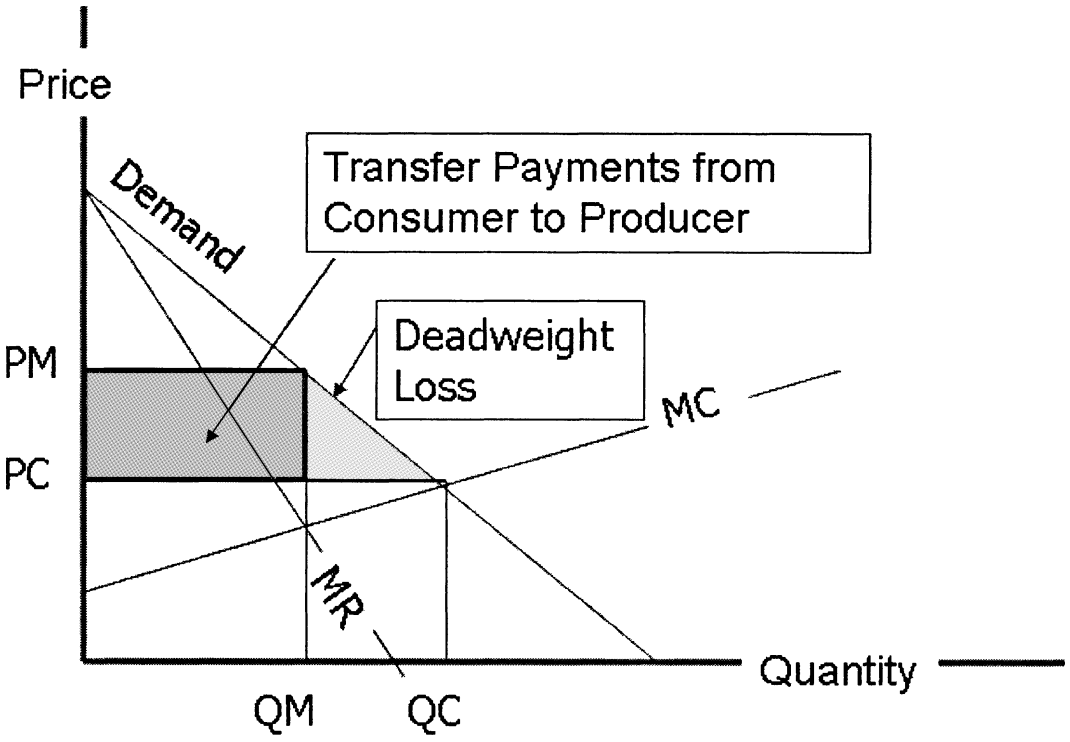
[42] Marginal cost is the added cost of producing one more unit.

[43] At this price, the firm recovers in price the added cost of producing one more unit. If the firm produced more units, the extra cost of producing those units would be less than the price paid for them.

[44] Marginal revenue is the extra revenue created by producing one more unit of output.

[45] As long as producing one more unit adds more to revenue than to cost, the firm with market power is better off (earns a profit) by producing that unit. Although producing one more unit would still be profitable even at a higher output (because the cost of producing that unit is less than the price) the firm with market power's overall revenue would decline because it has to charge everyone the lower price in order to add that unit. *See* A. Mas-Colell, M.D. Whinston, J. Green, *Microeconomic Theory*, 385 (Oxford University Press US, 1995) (the reason the monopolist's output is below the competitive level is ''the monopolist's recognition that a reduction in the quantity it sells allows it to increase the price on its remaining sales'').

outcome.[46] As the following graph demonstrates, a firm with market power will produce at Point QM with a price at PM, although the competitive quantity would be at Point QC and price at Point PC.[47]



34. Although producing at the higher output (and lower price) of a competitive market would still be profitable even for the firm with market power, the firm with market power makes more money if it reduces output and increases price.[48]

35. While current Commission regulations do not permit pipelines to withhold already-constructed capacity,[49] pipelines can withhold capacity by not constructing as much capacity as a competitive market would dictate. Even though long-term rates would still be capped under the pipelines' proposals, pipelines able to charge supra-competitive prices in the interruptible or short-term firm market would still have the same disincentive to build capacity to reach the competitive level, because such construction would result in less overall profit for the pipeline.[50]

36. INGAA argues that the Commission is acting inconsistently because the Commission found that lifting the price ceiling on released capacity gave an incentive to increase construction.[51] But INGAA takes the quoted portion of Order No. 712 out of context. The Commission was pointing out that high capacity release prices would send pipelines a signal that capacity is scarce and additional capacity is needed to relieve the scarcity. This same principle does not apply to removing the price ceiling for pipeline capacity. As pointed out above, if pipelines with market power find that maintaining scarce pipeline capacity increases their profits, then they will have much less incentive to construct long-term capacity because such capacity could result in lower profitability. The extent to which the pipelines' incentives to construct will be reduced is dependent on the circumstances facing each pipeline. But because pipelines can still exercise market power (as discussed above), we cannot find sufficient justification for removing recourse rate protection based solely on the unsupported statements of pipelines that short-term rates will never be sufficient to reduce or eliminate the amount of long-term capacity they choose to construct.

37. A recent example illustrates why the recourse rate is needed to ensure that pipelines retain the incentive to build needed pipeline infrastructure. After Order No. 712 became effective, capacity release prices exceeded maximum rates principally from the Rocky Mountains to the northwest and to the east. This was attributed to an excess supply of gas to be transported from the Rocky Mountains in relation to pipeline capacity.[52] Such scarcity

[46] Jean Tirole, *The Theory of Industrial Organization*, 66 (MIT Press, 1988) (''The monopoly sells at a price greater than the socially optimal price, which is its marginal cost'').

[47] Deadweight loss refers to the loss to society resulting from the firm with market power withholding the production of product that consumers value at more than the cost of production. Transfer payments refer to the extra income that the firm with market power earns as compared to what it would earn in a competitive market. It represents the amount of money transferred from consumers to the producer.

[48] In a competitive market, if a firm tried to price at Point PM, other firms would enter the market at that price, which would have the effect of increasing output and reducing the price for all firms to Point PC. R. Posner, *Economic Analysis of the Law* 198 (2d ed. Little, Brown, and Company, 1977).

[49] *See Tennessee Gas Pipeline Co.,* 91 FERC ¶ 61,053, at 61,191 (2000) (''there is little reason for the pipeline to exercise market power by withholding new capacity because the maximum rates established by the Commission prevent it from charging rates above the just and reasonable rates based on its cost of service''), *aff'd, Process Gas Consumers Group* v. *FERC,* 292 F.3d 831, 834 (D.C. Cir. 2002).

[50] For example, if a pipeline's affiliate holds the bulk of transportation capacity of a pipeline, the affiliate (if the recourse rate protection were removed) presumably has sufficient market power to raise short-term prices in a constrained market. The construction of additional capacity to relieve that scarcity could then result in a diminishment of the overall profitability of the company.

[51] INGAA at 7 (citing, Order No. 712 at P 60).

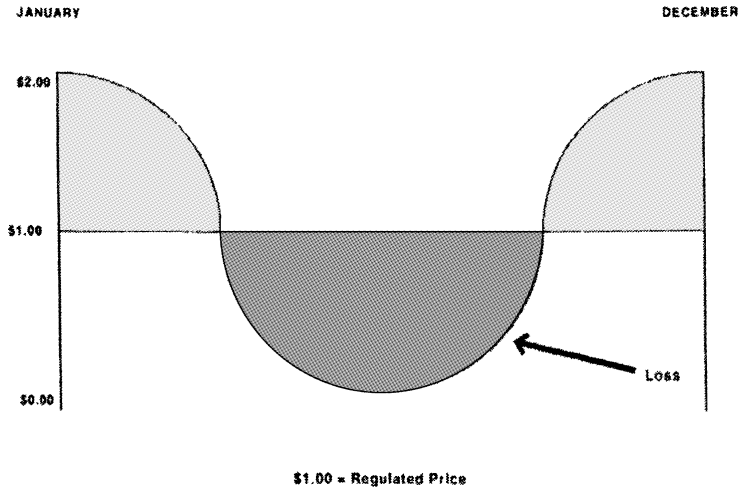
[52] *See* G. Lander, *Capacity Center Releases Post Order 712 Capacity Trading Stats* (September 2008)

should be a prime indicator to the pipelines of the need to expand capacity from the Rocky Mountains. Because shippers do not control expansion decisions, permitting the price to exceed the maximum rate helps to allocate scarce capacity efficiently to the highest valued user. However, if pipelines were able to capture the higher than maximum rate prices for such transactions, their incentives to expand would be blunted because any such expansion would reduce the scarcity revenues they would be receiving. The retention of the recourse rate for pipeline transactions ensures that pipelines have the proper incentive to build new capacity when capacity release prices show that construction of such capacity is needed and would be profitable.

c. Pricing Flexibility

38. INGAA, Williston and Spectra all maintain that the Commission's action in removing the price ceiling from short term capacity releases has given releasing shippers more flexibility in pricing their capacity than the pipelines have in pricing their capacity under the Commission's programs.[53]

39. In particular, they assert that negotiated rates are not as flexible as capacity releases. Williston asserts that negotiated rates must be submitted as a tariff filing, which requires a period of 30 days advance notice, before the rates can go into effect. Therefore, Williston argues that negotiated rate agreements are not useful in responding to a short-term price spike. Spectra argues that the requirement that the negotiated rate must be accompanied by a recourse rate alternative effectively means that pipelines are unable to sell short-term services above the maximum recourse rate. Spectra asserts that under either the net present value or first-come, first-served allocation methodologies, shippers have no reason to offer to pay more than the maximum rate for service even if the market would bear such a rate. Spectra maintains that as a result pipelines cannot recover their cost-of-service because they are required to discount capacity prices during off-peak periods, but cannot charge above maximum rates when such prices are justified, as shown in the following hypothetical graph included in Spectra's rehearing request.[54]



40. We recognize that negotiated rates and the capacity release program are not identical. For example, the capacity release program still requires bidding for deals of greater than one month (except for AMA transactions), while pipelines can negotiate rates without any bidding delay. On the other hand, negotiated rates do have to be filed with the Commission as Williston points out.

41. But we do not agree that the differences between these programs are as significant as the pipelines suggest. For example, contrary to Williston's argument, the Commission has waived the 30-day notice filing for negotiated rate deals, allowing such transactions to go into effect immediately:

> A pipeline may file the numbered tariff sheet implementing the negotiated rate at the time it intends the rate to go into effect. The Commission does not intend to suspend the effectiveness of the negotiated rate filings or impose a refund obligation for those rates. For these reasons, the Commission will readily grant requests to waive the 30 day notice requirement.[55]

42. Thus, negotiated rate transactions can occur as quickly as capacity release transactions. Moreover, there is no restriction on the use of negotiated rates even for short-term transactions.

43. Spectra argues that shippers will not enter into negotiated rate contracts above the recourse rate. The principal use of negotiated rates is to enable pipelines and shippers to enter into transactions that reflect the value of capacity as measured by price indices. Indeed, one of the principal reasons for removing the rate ceiling on capacity releases is to extend similar flexibility to price releases on price indices even when such prices exceed the maximum rate.[56] Spectra offers no reason why shippers would be any more reluctant to enter into negotiated rate contracts with the pipeline for short-terms using index

(contact CapacityCenter.com) *as reported in* Foster Natural Gas Report No. 2711 (September 12, 2008) (describing report issued by CapacityCenter.com on post Order No. 712 capacity release transactions showing higher than maximum rate releases out of the Rocky Mountains); Letter from Wyoming Governor Dave Freudenthal to Wyoming Legislature's Joint Minerals, Business and Economic Development Interim Committee (August 21, 2008) (indicating need for additional pipeline infrastructure), *http://governor.wy.gov/press-releases/state-of-wyoming-should-not-enter-into-the-pipeline-business-governor-says.html.*

[53] *See* Spectra at 30 (pipelines will face a competitive disadvantage); INGAA at 10 (alternatives do not provide comparable rate flexibility) and Williston at 12 (Order No. 712 provides releasing shippers with significantly greater pricing flexibility than is available to pipelines).

[54] Spectra at 17.

[55] *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines and Regulation of Negotiated Transportation Services of Natural Gas Pipelines,* 74 FERC ¶ 61,076, at 61,241–42. (1996).

[56] *See Standards for Business Practices for Interstate Natural Gas Pipelines,* 72 FR 38,757 (July 16, 2007), FERC Stats. & Regs. ¶ 31,251 at P 51 (2007), (industry requesting ability to use price indices for released capacity).

prices than they would be to enter into such contracts with releasing shippers.

44. We also disagree with Spectra's contention that under the Commission's determination, the pipeline will be unable to recover its cost-of-service. The graph included by Spectra is a typical graph of demand on a pipeline, where capacity is more valuable during the winter heating season than during the off-peak summer season. But that does not mean that the pipeline will be unable to recover its cost-of-service. As Spectra recognizes, shippers needing capacity in the winter cannot simply wait until they need capacity because capacity in the winter is scarce and under the pipeline's allocation requirements, shippers are unlikely to obtain the amount of capacity they need if they wait. Therefore, shippers like local distribution companies (LDCs) that need capacity for the winter typically will sign a long-term contract (or at least a full year's contract) at maximum rate to ensure that they will have the capacity they need during the peak winter season.

45. Moreover, pipelines are not precluded from recovering their cost-of-service in any event. Under longstanding Commission policy,[57] pipelines may adjust the volumes used to design their maximum recourse rates, so that they can recover their full cost-of-service, even though competition requires them to offer discounts including during off-peak periods. Also, as we pointed out in Order No. 712, pipelines have the option of applying for seasonal rates in such circumstances.

46. Spectra is correct that in limited circumstances (where a pipeline has unsubscribed capacity and suddenly demand for that capacity exceeds the available supply), the recourse rate will prevent the pipeline from allocating capacity to the shipper placing the highest value on the capacity. But that is the very nature of the protection afforded by recourse rates, and as discussed above, we cannot relax the recourse rate protection given that the entirety of the market has not been shown to be sufficiently competitive. As we explained in Order No. 712, we need to balance the risks of removing the price ceiling and the benefits from such removal, and we have decided that ensuring sufficient protection against market power must take precedence over potential losses in efficiency.[58]

47. Williston, Spectra, and INGAA also maintain that the other pricing flexibility the Commission mentioned in Order No. 712, filing for market-based rates and the use of seasonal rates, are not as flexible as removal of the price ceiling for capacity release. We did not maintain that these programs were identical. We simply pointed to them as potential flexibility that is available to the pipelines, and as discussed above, the use of seasonal rates may be a solution for situations in which demand differs significantly between seasons.

48. The pipelines specifically argue that market-based rate filings for pipeline transportation are difficult to make and that the Commission utilizes stringent criteria in evaluating such filings. But we find that, precisely because pipelines have such enormous economies of scale and enjoy market power, the application of economically correct standards is appropriate in reviewing an application to remove rate regulation entirely.

49. INGAA and Williston maintain that because the alternatives proposed by the Commission for pipelines are not as flexible as capacity release, the Commission's policy unjustifiably burdens and injures pipelines. Because the pipelines, even under their own proposals, would still be regulated under cost-of-service principles, any lack of flexibility would not result in losses to pipelines because cost-of-service ratemaking provides each pipeline with an opportunity to recover all of their reasonably incurred costs. If the Commission were to remove the recourse rate from the pipelines' short-term services, pipelines still would need to account for any extra revenues derived from short-term services as part of their overall cost-of-service. Because, as discussed above, we have not found the short-term market to be fully competitive, and pipelines are able to recover their cost-of-service, we find that maintaining the recourse rate is necessary to ensure continued protection of customers and does not unduly harm pipelines.

d. Bifurcated Markets

50. The pipelines again assert that the Commission has created a bifurcated market and that such a market will compromise allocative efficiency. INGAA asserts that because pipelines do not have market power there is no reason for the Commission to bifurcate the market to mitigate against pipeline market power and to rely on arbitrage, which the Commission admits is imperfect, to correct any market inefficiencies. Spectra argues that Order No. 712 regulates the short term capacity market on an asymmetric basis and that this will create a bifurcated market. It asserts that Order No. 712 regulated the short term capacity release market subject to light-handed, market-based regulation, but regulated pipeline participants in the same market continue under the more burdensome cost-of-service regime. Sempra also argues that the Commission's examples of arbitrage in Order No. 712 apply only to interruptible service, but that pipelines may have firm service available and bifurcated markets can occur.

51. As we explained in Order No. 712, we have attempted to reduce the costs of arbitrage so that we do not create a seriously bifurcated market. If arbitrage exists, then a bifurcated market will not be created regardless of whether the pipeline is selling interruptible or firm service. With respect to interruptible service, no shipper can rely on obtaining interruptible service at a lower than market price because it can lose the capacity to a replacement shipper obtaining a release, which has higher priority. Thus, if the market is constrained, those needing capacity will not be attempting to rely on their position in the interruptible queue but will be seeking firm released capacity. Similarly, bifurcated markets would not be created with respect to firm service because, as we discussed earlier, even if one shipper obtained capacity from the pipeline at a lower than market price, it could reallocate that capacity through the release market as long as arbitrage costs are not too high.

52. But as we recognized in Order No. 712, arbitrage is not perfect, and so there may be situations in which a bifurcated market may occur. Indeed, the fact that arbitrage is not perfect may provide the pipelines with market power.

53. Whatever amount of limited market bifurcation occurs, therefore, is a cost that must be incurred to maintain the protection against market power afforded by the recourse rate. INGAA provides no data supporting its contention that the markets are competitive, and, as discussed earlier, the Commission did not make such a finding, and in fact found that maintenance of the recourse rate is

[57] *See e.g. Southern Natural Gas Co.,* 65 FERC ¶ 61,347, at 62,829–40 (1993), *order on reh'g,* 67 FERC ¶ 61,155, at 61,456 (1994); *Williston Basin Interstate Pipeline Company,* 67 FERC ¶ 61,137, at 61,377–383 (1994) (''Williston's ceiling rates will be designed to give it the opportunity to recover its new cost-of-service if throughput is the same as during the base period despite the fact that it is reasonable to project a continuation of lower discounted rates for certain customers after the effective date of the subject rates.''); *see also Williston Basin Interstate Pipeline Company,* 107 FERC ¶ 61,164, at P 79–80 (2004).

[58] Order No. 712 at P 108. Depending on the costs of arbitrage, Spectra's example would not result in an inefficient allocation of capacity. As long as one shipper can release capacity to the other, the shipper placing the greatest value on the capacity would be able to obtain the capacity.

necessary precisely because various parts of the interstate grid may not be competitive. No amount of arbitrage will ensure a competitive market if a single shipper controls a large portion of the pipeline capacity either on the pipeline as a whole or in any individual market.

e. Proposed Alternatives

54. On rehearing Spectra offers two alternatives that it suggests will potentially mitigate any harm from removing the price ceiling from pipeline services.[59] It argues that the Commission could allow pipelines to post capacity, at the pipeline's option, through the same process and requirements as short-term capacity releases. If the pipeline opted to post some of its capacity using this mechanism, the capacity would be awarded to the highest bidder, without a rate cap. Spectra argues that, if the Commission deems further safeguards necessary, it proposed in its initial comments that the Commission could remove the price cap on short-term firm services but retain it on short-term interruptible services. This approach, it asserts, would retain a recourse rate alternative for all firm customers.

55. In the NOPR leading to Order No. 637, the Commission proposed an auction to provide recourse rate protection, similar to the one proposed by Spectra, in which pipelines would be able to participate by including their capacity along with that of released capacity. At that time most of the comments, including those of the pipelines, opposed such mandatory auctions, and the Commission did not adopt that proposal.[60] The Commission, however, did indicate in Order No. 637 that it would be open to a voluntary auction proposal from pipelines, such as the one suggested by Spectra, so long as such a proposal would protect against the exercise of market power by the pipeline:

> An auction also may be a means by which a pipeline could sell some or all of its capacity without a price cap if the auction is designed in such a way as to protect against the pipeline's ability to withhold capacity and exercise market power.* * * [T]he pipelines must design the auction in ways to prevent the withholding of capacity and the exercise of market power. Capacity can be withheld by a pipeline in two primary ways: the pipeline can withhold capacity directly by not putting it into the auction; or it can indirectly withhold capacity through the use of a reserve price. In a proposal for auctions without a rate cap, all capacity available at the time of the auction would have to be included in the auction. The auction proposal also needs to address the appropriate limitations that should be placed on the level at which the pipeline can establish reserve prices, particularly whether different reserve prices should be established for peak and off-peak capacity.[61]

56. The Commission also included specific guidance addressing basic principles for constructing such an auction to ensure that it would be transparent, verifiable, and non-discriminatory.[62] Despite the opportunity offered in Order No. 637, no pipeline has ever proposed to use an auction methodology to allocate capacity at prices exceeding the maximum recourse rate. Spectra does not claim that it proposed this auction proposal in its initial comments, and provides no details in its rehearing request about how it would structure such an auction to ensure that pipelines cannot exercise market power, ensure that sufficient arbitrage opportunities exist so that releasing shippers can compete equally, and ensure that the pipeline retains an incentive to construct long-term capacity when it is needed.[63] Other parties have not had an opportunity to comment on the details of such a proposal, and we, therefore, do not have a sufficient record to rule on a generic basis on such a proposal in this rulemaking. But Spectra, and other pipelines, can still make such a proposal through an NGA section 4 filing on an individual case-by-case basis, as indicated in Order No. 637.

C. Clarification Regarding Specific Issues

1. Consecutive Releases

a. Clarification Requests

57. Allegheny, the Marketer Petitioners and Reliant all note that under the Commission's regulations, they would be permitted to post for bid at around the same time capacity to be released for multiple, consecutive short-term periods. Each of these parties requests that in order to provide clarity to the market, the Commission specifically clarify that such releases are permissible.

58. Allegheny argues that the Commission erred by failing specifically to find that the offer by a capacity holder of simultaneous discrete sequential releases of its capacity, each for up to one year at prices above the pipeline's current maximum tariff rates, is consistent with Order No. 712. Allegheny asserts that such a clarification would allow a capacity holder to auction all of its capacity rights in one-year blocks, and to award the capacity to the replacement shippers offering the highest price for the capacity in future years without running afoul of the price cap. Each replacement shipper would lock into a contractual commitment for only one year. Allegheny asserts that each auction could produce a different price for the capacity, and thereby allow the market to reflect changing expectation about the congestion value of the capacity.

59. The Marketer Petitioners also request clarification that it is permissible for a releasing shipper and a replacement shipper to engage in two (or more) consecutive short-term (one year or less) releases of the same capacity, at the same (or approximately the same) time, without subjecting the releases to the maximum rate cap.[64] Reliant adds that permitting a firm shipper to post for bidding, at or near the same time, capacity for multiple successive short-term releases would work to achieve the Commission's goal of ensuring that capacity be allocated to those who value it most.

[59] Williston, in a single sentence without providing details, seems also to endorse a bidding approach. Williston at 10.

[60] *Regulation of Short-Term Natural Gas Transportation Services,* Order No. 637, 65 FR 10,156 (Feb. 25, 2000), FERC Stats. & Regs. ¶ 31,091, at 31,279 (Feb. 9, 2000).

[61] Order No. 637, FERC Stats. & Regs. ¶ 31,091 at 31,295. The Commission's concern with reserve prices was to ensure that if a pipeline can benefit from competition by selling at above the maximum rate during peak periods, it also should be required to sell capacity at more competitive prices during off-peak periods. If pipelines were permitted to set the reserve price at the existing maximum rate during off-peak periods, they still would be able to exercise market power with respect to off-peak transactions, for example, by selectively discounting. Requiring the pipeline to set a lower reserve price during off-peak periods, therefore, would ensure more competitive pricing during all time periods.

[62] *See* Order No. 637, FERC Stats. & Regs. ¶ 31,091 at 31,296.

[63] In its initial comment and its rehearing request, Spectra also offers no details about how its proposal to allow pipelines to sell short-term firm capacity without a rate ceiling would work. For example, it does not explain how short-term firm capacity is to be differentiated from long-term firm capacity because available capacity on a pipeline would be available for any time period. Spectra also fails to explain how bidding on short-term and long-term capacity would be evaluated to ensure that the pipeline was not favoring a short-term bid over a long-term bid. Should Spectra choose to make a Natural Gas Act (NGA) section 4 filing with respect to its proposals, it would need to specify the details of its plan and how it would protect against market power.

[64] Marketer Petitioners at 11. As an example, the Marketer Petitioners question whether, subject to applicable pipeline tariff provisions, a shipper may, on the same day, post for bidding without a maximum rate cap limitation (i) a release of a capacity package for the year 2009, (ii) a release of the same capacity package for the year 2010, and (iii) a release of the same capacity package for the year 2011.

b. Commission Determination

60. The Commission will deny the requests for clarification as discussed below. In the Commission's view, permitting a releasing shipper to simultaneously post for bid consecutive short-term contracts whose total term exceeds one year would be contrary to the Commission's decision to lift the price ceiling only for releases of one year or less. In Order No. 712, the Commission explained that it removed the price ceiling for short-term capacity releases in order to allow the prices of short-term capacity release transactions to reflect short-term variations in the market value of that capacity. Specifically, the Commission stated that, ''[b]ecause the existing capacity release price ceiling does not reflect short-term variations in the market value of the capacity, the price ceiling inhibits the efficient allocation of capacity and harms, rather than helps, the short-term shippers it is intended to protect.'' [65] Moreover, in Order No. 712, the Commission also considered whether to extend the removal of the price cap to long-term releases, but reasoned that, ''the Commission's policy emphasis in this rule is on short-term transactions, because that is where there is a problem to be solved. No commenter has made a convincing argument that price ceilings on longer term transactions create significant allocative inefficiencies or market failures. Accordingly, the Commission concludes that the current record does not warrant removal of the price ceiling on long-term capacity releases.'' [66]

61. When a shipper seeks to release its capacity for a period of more than one year, albeit in separate blocks of a year or less, the release cannot be considered to be for the purpose of responding to short-term variations in the value of the capacity as contemplated by the Commission when it removed the price ceiling for short-term capacity. Further, if the Commission were to permit releasing shippers to simultaneously post for bidding consecutive short-term releases at market rates extending for more than a year, such action would result in granting *de facto* permission to permit long-term releases at market rates, contrary to the Commission's findings in Order No. 712.

62. Therefore, the Commission will revise its regulations so that the lifting of the price cap for short-term releases will only apply to releases that take effect within one year of the date the pipeline is notified of the release. This will prevent shippers from releasing units of capacity in a manner designed to circumvent the price ceilings that the Commission has determined must remain in effect.

2. Definition of Short-Term

63. Iroquois states that Order No. 712 defines a short-term release as a release of capacity for ''one year or less''; and defines a long-term release as ''more than one year.'' [67] Iroquois argues that this definition is different from the Commission's current definitions of short and long term as applied to the right of first refusal. Iroquois points out that in Order No. 636–A, the Commission determined that the regulation's right of first refusal applies to firm long-term contracts and that ''[a] long-term transportation service is one that is pursuant to a contract for a term of one year or more.'' [68] Iroquois argues that modifying the determination of what is a short-term or long-term contract in the manner proposed by the Commission in Order No. 712 could reduce customer rights. Iroquois seeks clarification that Order No. 712 did not modify the definition of ''short term'' and ''long term,'' so that a long-term contract will continue to be defined as a contract for a term that is one year or more and that the current definition of short term as being ''less than one year'' will remain in effect.

64. We chose to define a release exempt from the price ceiling as being one year or more to enable releasing shippers to enter into reasonable commercial contracts for a standard duration, rather than for atypical periods, such as 364 days. However, we clarify that this definition has no application beyond defining those capacity releases exempt from the price ceiling. Specifically, we have not changed the definition of those contracts that qualify for the right of first refusal, as raised by Iroquois.[69] Shippers will continue to qualify for a right of first refusal by entering into contracts to purchase transportation or storage services directly from a pipeline of one year or more.[70]

3. Lump Sum Payments

65. Allegheny states that the Commission's regulations, rules and precedents do not clearly specify how to determine whether a permanent release of a discounted rate contract exceeds the maximum tariff rate when the replacement shipper makes a lump-sum payment to the releasing shipper of the present value difference between the maximum rate and the discounted rate. Allegheny argues that the Commission's regulations permit a capacity holder paying a discounted rate to release its capacity to a replacement shipper at the maximum rate and keep the difference, unless the service agreement with the pipeline specifically provides for a different arrangement.[71] Allegheny points out that the Commission has granted waivers of the long-tem release price cap in the context of shippers seeking to exit the natural gas business but it did not rule on the question of whether the lump sum payment exceeded the price cap on capacity releases.[72] Allegheny asserts that the Commission should resolve this uncertainty regarding the calculation of the maximum rate because it inhibits the negotiation of permanent capacity releases.

66. We find no need to provide clarification with respect to lump sum payments for permanent releases because under our regulations permanent releases cannot involve lump sum payments. Allegheny is correct that under our capacity release program, shippers holding discount contracts are permitted to release capacity at a rate up to the maximum rate under the contract. Under such releases, the releasing shipper remains liable for the full

[65] Order No. 712 at P 34.

[66] *Id.* P 79.

[67] Iroquois at 2 (citing, proposed section 284.8 (b) of the Commission's regulations and Order No. 712 at P 30).

[68] Iroquois at 3 (citing, Order No. 636–A, *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, FERC Stats. & Regs. ¶ 30,950 at 30,627, *order on reh'g*, Order No. 636–B, 61 FERC ¶ 61,272 (1992), *order on reh'g*, 62 FERC ¶ 61,007 (1993), *aff'd in part and remanded in part sub nom. United Distribution Cos.* v. *FERC*, 88 F.3d 1105 (D.C. Cir. 1996), *order on remand*, Order No. 636–C, 78 FERC ¶ 61,186 (1997).

[69] Order No. 712 did not modify 18 CFR 284.221 (d)(2), which continues to provide a right of first refusal ''if the individual transportation arrangement is for firm transportation under a contract with a term of one year or more'' and satisfies certain other requirements.

[70] The Commission chose to make the ROFR applicable to contracts of one year or more for the same reason we have chosen to apply the price cap exemption to contracts of one year or less: both definitions enable reasonable commercial contracts to qualify. We also clarify that capacity release contracts are not subject to a right of first refusal.

[71] Allegheny at 7 ((citing, Order No. 636–A at p. 30,557; *Great Lakes Gas Transmission Limited Partnership*, 64 FERC ¶ 61,017, at p. 61,170 (1993) (''As provided in Order No. 636–A, Great Lakes should clarify that a releasing shipper is credited with the total amount of the replacement shipper's reservation charge, even if it exceeds the reservation charge paid by the releasing shipper to Great Lakes.'')); *Southern Natural Gas Co.*, 62 FERC ¶ 61,136, at p. 61,960 (1993).

[72] Allegheny at 8 (citing, *Wasatch Energy, LLC*, 118 FERC ¶ 61,173, at P 9 (2007); *Duke Energy Marketing America, LLC*, 114 FERC ¶ 61,198, at P 13 (2006); *Northwest Pipeline Corp.*, 109 FERC ¶ 61,044, at P 30 (2004)).

amount of its reservation charges.[73] But in such temporary releases no lump sum payment is made. Rather, because the releasing shipper is still obligated to the pipeline for its full reservation charge, the releasing shipper receives a credit or payment against its overall bill reflecting the replacement shipper's payment. Therefore, a shipper releasing capacity on a temporary basis pays its full reservation charge to the pipeline and receives a payment representing the rate paid by the replacement shipper.

67. Permanent releases, however, are different, because under a permanent release, the releasing shipper releases its capacity for the entire remaining term of its contract and the pipeline and shipper agree to terminate the releasing shipper's contract, so that the releasing shipper no longer has any liability to the pipeline to pay for the capacity.[74] Under a permanent release, therefore, the releasing shipper receives no payment or credit (whether lump sum or otherwise); its contract simply is terminated.[75]

II. Asset Management Arrangements

A. Background

68. In Order No. 712, the Commission revised its capacity release regulations and policies in order to facilitate the use of AMAs. Based on the industry-wide support for the use of AMAs, the Commission found that AMAs are in the public interest because they are beneficial to numerous market participants and to the market in general. The Commission therefore made two basic changes in order to eliminate obstacles to the utilization and implementation of AMAs. First, we exempted capacity releases meant to implement AMAs from the prohibition on tying capacity releases to extraneous conditions. Second, the Commission amended its section 284.8 regulations to exempt capacity releases meant to implement AMAs from competitive bidding.

69. In Order No. 712, the Commission noted that AMAs are a relatively recent development in the natural gas market, which the Commission did not anticipate when it adopted the capacity release program in Order No. 636. The intended purpose of the capacity release program under Order No. 636 was to permit shippers to ''reallocate unneeded firm capacity'' to those who do need it.[76] The bidding requirements of section 284.8 and the prohibition against tying the release to extraneous conditions were all part of the Commission's fundamental goal of ensuring that such unneeded capacity would be reallocated to the person who values it the most. The Commission found that such ''capacity reallocation will promote efficient load management by the pipeline and its customers and, therefore, efficient use of pipeline capacity on a firm basis throughout the year.''[77] The Commission thus developed its capacity release policies and regulations based on the assumption that shippers would handle their own gas purchase and transportation arrangements and release their capacity only when they were not using the capacity to serve their own needs.

70. Based on industry comments, however, it became clear that this basic assumption underlying the capacity release program does not hold true in the context of AMAs. As the Commission found in Order No. 712, a distinguishing factor between standard capacity releases and AMAs is that in the AMA context, the releasing shipper is not releasing unneeded capacity but capacity that it needs to serve its own supply function. Releasing shippers in the AMA context are releasing capacity for the primary purpose of transferring the capacity to entities that they perceive have greater skill and expertise both in purchasing low cost gas supplies, and in maximizing the value of the capacity when it is not needed to meet the releasing shipper's gas supply needs. In short, AMAs entail the releasing shipper transferring its capacity to a third party expert who will perform the functions the Commission expected releasing shippers would do for themselves—purchasing their own gas supplies and releasing capacity or making bundled sales when the releasing shipper does not need the capacity to satisfy its own needs. The goal of the changes adopted by the Commission in Order No. 712 was to make the capacity release program more efficient by bringing it in line with these developments in today's secondary gas markets.

71. In Order No. 712 the Commission agreed with the industry-wide view that AMAs provide significant benefits to a variety of participants in the natural gas and electric marketplaces and to the secondary natural gas market itself. One of the most important aspects of AMAs is that they provide broad benefits to the marketplace in general. By permitting capacity holders to use third party experts to manage their gas supply arrangements and their pipeline capacity, AMAs can lower gas supply costs for releasing shippers and provide for more efficient use of the pipeline grid. AMAs also bring diversity to the mix of capacity holders and customers that are served through the capacity release program, thus enhancing liquidity and diversity for natural gas products and services. AMAs result in an overall increase in the use of interstate pipeline capacity, as well as facilitating the use of capacity by different types of customers in addition to LDCs. AMAs benefit the natural gas market by creating efficiencies as a result of more load-responsive gas supply, and an increased utilization of transportation capacity. AMAs also bring benefits to consumers, mostly through reductions in consumer costs. AMAs provide, in general, for lower gas supply costs, resulting in ultimate savings for end use customers. The overall market benefits described above also inure to consumers.[78]

72. As noted above, in light of these substantial benefits provided by AMAs, the Commission in Order No. 712 modified its capacity release regulations and policies to exempt pre-arranged capacity releases meant to implement AMAs from the prohibition against tying and from the bidding requirements of section 284.8 of the Commission's regulations. The decision to modify the Commission's policies and regulations to facilitate the use of AMAs is widely supported and not challenged by those parties filing for clarification or rehearing or Order No. 712. In general, those parties seek minor modifications to the Commission's method for implementing AMAs or seek to expand

[73] 18 CFR 284.8(f) (''unless otherwise agreed by the pipeline, the contract of the shipper releasing capacity will remain in full force and effect'').

[74] *El Paso Natural Gas Co.*, 61 FERC ¶ 61,333, at 62,311–12 (1992); *Rockies Express Pipeline LLC*, 121 FERC ¶ 61, 130 (2007) (*Rockies Express*) (citing, *Pacific Gas Transmission Co.*, 76 FERC ¶ 61,246, at 62,270 (1996), *reh'g denied*, 82 FERC ¶ 61,289, at 62,135 (1998) (stating that the Commission's general policy is that there are no credits to the releasing shipper after a permanent release, but approving a settlement provision allowing a particular shipper such credits for permanent releases in the unique circumstances of that case)).

[75] The cases cited by Allegheny on reverse auctions are inapposite because these were special requests for waivers for firms that were exiting the gas business, and the Commission made clear that the releasing shipper could not profit from the transaction by receiving more than the maximum rate for the capacity. *Duke Energy Marketing America, LLC*, 114 FERC ¶ 61,198, at P 29 (2006). Allegheny can apply for waivers if it can similarly justify its request based on exigent circumstances.

[76] Order No. 636, *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, FERC Stats. & Regs. ¶ 30,939 at p. 30,418.

[77] *Id.*

[78] The Commission noted in Order No. 712 that these benefits have been recognized by state commissions and the National Regulatory Research Institute. Order No. 712 at P 126 and n. 122.

the flexibility and/or authority granted to parties desiring to enter into AMAs.

B. Definition of AMAs

73. In Order No. 712 the Commission established a definition of AMAs that was intended to strike a balance between facilitating flexible and innovative AMAs and drawing a clear line between AMAs and standard capacity releases. The definition established in Order No. 712 is as follows:

> Any pre-arranged release that contains a condition that the releasing shipper may, on any day during a minimum period of five months out of each twelve-month period of the release, call upon the replacement shipper to (i) deliver to the releasing shipper a volume of gas up to one-hundred percent of the daily contract demand of the released transportation capacity or (ii) purchase a volume of gas up to the daily contract demand of the released transportation capacity. If the capacity release is for a period of less than one year, the asset manager's delivery or purchase obligation described in the previous sentence must apply for the lesser of five months or the term of the release. If the capacity release is a release of storage capacity, the asset manager's delivery or purchase obligation need only be one-hundred percent of the daily contract demand under the release for storage withdrawals or injections, as applicable.

74. The Commission imposed a delivery and/or purchase obligation on the replacement shipper in order to distinguish between *bona fide* AMAs that would qualify for the exemptions provided to AMAs and standard capacity releases. Thus, as shown, the definition of AMA requires that to qualify a pre-arranged release must contain a condition that ''the releasing shipper may, on any day during a minimum period of five months out of each twelve month period of the release, call upon the replacement shipper to (i) deliver to the releasing shipper a volume of gas up to one-hundred percent of the daily contract demand of the released transportation capacity or (ii) purchase a volume of gas up to the daily contract demand of the released transportation capacity.'' [79] The Commission also explained that, by requiring that the asset manager's delivery or purchase obligation in AMAs with terms less than a year apply for the lesser of five months or the term of the release, the definition effectively required that the delivery/purchase obligation for any AMA between five months and a year would be for five months of the release, and that the delivery/purchase obligation would apply to the entire term of any AMA of less than five months.

75. The Commission reasoned that the definition of AMA established in Order No. 712 would further its goal of delineating AMAs from standard capacity releases by placing a significant delivery/purchase obligation, applicable during at least five months out of each 12 month period of the release, on the asset manager. The Commission further explained that under the definition the releasing shipper will have the right to call upon the asset manager to deliver the full contract volume on every day of the five month minimum, though it need not actually do so. Thus the definition also furthers the Commission's goal of defining AMAs in such a way that they will be flexible enough to allow diverse parties to enter into AMAs and for those parties to be able to maximize the value of pipeline capacity within the context of an AMA. The definition only requires a delivery obligation on behalf of the replacement shipper for a portion of each twelve month period, thus giving the asset manager additional assurance it can utilize the capacity during non-peak periods. The definition adopted in Order No. 712 also allows for releasing shippers to only release a portion of their capacity, places no limitations on the asset manager that would require it to use the released capacity to make its deliveries to the releasing shipper, and does not limit the type of party that can enter into an AMA.

76. Numerous parties seek clarification and reconsideration of several aspects of the definition. First, Marketer Petitioners assert that the ''five-month'' delivery/purchase obligation is ''out of proportion'' in the context of releases of less than a year because it would require an asset manager to have a delivery purchase obligation almost every day during an AMA with a six month term. Marketer Petitioners claim such an obligation would substantially reduce the incentives for asset managers and may create market inefficiencies.[80] They also note that it is unclear what the delivery purchase obligation would be for a 13-month term under Order No. 712. The NGSA agrees with the Marketer Petitioners that the five month delivery/purchase obligation is too stringent. Both parties thus request that the Commission adopt a ''five-twelfths'' rule for the delivery/purchase obligation for capacity releases to implement AMAs, whereby the obligation of the asset manager would be revised to five-twelfths of the days in the term of the AMA, regardless of the term of the agreement. Those parties also request that the Commission clarify that the five-month obligation does not require that the months (or days) be consecutive.[81]

77. The Commission will not adopt an outright ''five-twelfths'' rule to replace the five month delivery purchase obligation for AMAs. The Commission established the exemptions for AMAs as opposed to standard capacity releases on the premise that the capacity released to implement an AMA was not excess capacity of the releasing shipper but capacity that the releasing shipper needed to serve its own needs.[82] In Order No. 712, the Commission determined that a delivery/purchase obligation of at least five months out of each twelve month period of the release would appropriately distinguish *bona fide* AMAs from standard capacity releases. The Commission arrived at the five month minimum requirement based on the fact that, at least in cold weather markets, the period of peak use is generally regarded as being the five months from November through March. Thus, a five-month delivery/purchase obligation in a twelve month release would roughly correspond to a releasing shipper's need to call upon the capacity to serve its peak requirements, while giving the asset manager assurance it can utilize the capacity during non-peak periods.

78. However, AMAs may also be for a term of less than a year. In these circumstances, the release is less likely to encompass any seasonal variations in the releasing shipper's need for the capacity to be used on its behalf. Therefore, the shorter the term of the release, the less reason there is to exempt some portion of the release term from the AMA delivery/purchase obligation. Thus, the Commission concludes that, in order to assure that releases of less than a year are part of a *bona fide* AMA in which the capacity will be used on behalf of the releasing shipper, the asset manager's delivery/purchase obligation should be increasingly stringent the shorter the term of the release. The AMA definition adopted by Order No. 712 accomplishes this by requiring that the asset manager's delivery/purchase obligation apply to the entire term of any AMA of less than five months and apply to at least five months of any release of

[79] Order No. 712 at P 153.

[80] Marketer Petitioners at 4.

[81] Marketer Petitioners at 4, NGSA at 6.

[82] *See e.g.* Order No. 712 at P 121 (stating that the distinguishing factor between a *bona fide* AMA and a standard capacity release ''is that in the AMA context, the releasing shipper is not releasing unneeded capacity, but capacity that it needs to serve its own supply function.'')

between five and twelve months. Accordingly, the Commission will retain the current minimum five month obligation for AMAs of one year or less.

79. The Commission recognizes, however, that the asset manager's obligation under the ''five month'' rule may be unclear for a release that is more than one year and not an exact number of years, for example a 13-month term, as pointed out by the Marketer Petitioners. Thus, the Commission is revising the definition of AMA established in Order No. 712 to provide that the delivery/purchase obligation for a release of more than one year will be five months (or 155 days) of each 12 month period of the release and five-twelfths of the days of any additional period of the release not equal to 12 months.[83] The delivery/purchase obligation for a 13 month AMA therefore, would be a minimum of five months out of the first 12 month period and five-twelfths of the thirteenth month of the agreement. The concerns discussed above about the need for a more stringent purchase/delivery obligation in short term releases of less than a year do not apply to releases with terms of more than a year, because such releases will encompass any seasonal variations in the releasing shipper's need for the capacity to be used for its own purposes. The Commission accordingly concludes that the revised definition will balance its goals of ensuring that there is a significant obligation on the asset manager to distinguish AMAs from standard capacity releases while also allowing sufficient flexibility for parties to negotiate beneficial AMAs.

80. Parties also seek clarification that the five month delivery purchase obligation, or a daily obligation if accepted by the Commission, does not require the obligation to be for a single consecutive period. Marketer Petitioners for example, request that the Commission clarify that the ''delivery/purchase obligation of section 284.8(h)(3) does not require the months to be consecutive'' and would be satisfied by the use of any five months.[84] The NGSA contends that the Commission should clarify that the five month obligation need not be on consecutive days but can be ''satisfied by an AMA that imposes a delivery obligation on nonconsecutive days as long as those nonconsecutive days amount to a total of five twelfths of the term of the AMA.'' [85]

81. The Commission grants clarification that the delivery purchase obligation for an AMA need not be for a single consecutive period. The Commission did not intend by the definition established in Order No. 712, and the definition as written does not require, that the obligation must be for five consecutive months. To provide flexibility in fashioning AMAs the Commission is aware that parties may want to divide the delivery/purchase obligation in a manner that corresponds to whatever variations exist in the releasing shipper's need to use the capacity over the course of a year. Thus, under the revised rule established in this order, the minimum delivery/purchase obligation may be satisfied by use of any combination of months and/or days during the term of the release that equals the requisite obligation for that release. In this regard, the parties need not use calendar months for purposes of complying with the requirement that the delivery/purchase obligation equal at least five months out of each twelve month period of the release. The parties may spread the obligation over days, rather than months, so long as the total obligation equals five months, treating 31 days as equal to one month.

82. The AGA, Marketer Petitioners and Scana request that the Commission provide clarification and consistency in the regulatory language to describe the delivery/purchase obligation in the transportation capacity and storage injection and withdrawal context. They note that Order No. 712 adopted a standard for the replacement shipper in an AMA to deliver and/or purchase ''up to one-hundred percent of the daily contract demand of the released transportation capacity'' but that the standard for releases of storage capacity is for ''one-hundred percent of the daily contract demand under the release for storage injection and withdrawals.'' The parties contend that the same ''up to'' language should apply to releases of both storage and transportation capacity meant to implement an AMA and that the Commission did not intend in Order No. 712 to impose different obligations on asset managers depending on type of capacity released.

83. The Commission agrees. The Commission intended in Order No. 712 to establish the same obligation on releasers of transportation and storage capacity, *i.e.*, that they need to be obligated to deliver and/or purchase up to 100 percent of the daily contract demand of the applicable agreement. The Commission is therefore revising section 284.8 of its regulations accordingly.

84. The AGA, the Marketer Petitioners and Scana state that often pipeline tariffs contain ratchet provisions that limit the ability of a storage customer to make injections and withdrawals from storage at maximum contract levels. Consequently, the maximum amount of gas a storage customer may be able to withdraw may fluctuate. These parties seek clarification that the delivery/purchase obligation under a storage AMA incorporates or is intended to reflect any limitations on the customers' injection or withdrawal rights contained in the service provider's tariff.

85. The Commission grants the requested clarification. The Commission's goal in Order No. 712 was to facilitate efficient and beneficial AMAs. This goal would not be advanced by disqualifying an AMA because of an operational limit imposed by the service provider's tariff on a customer's injection or withdrawal rights. All AMA agreements are subject to the tariff provisions of the service provider. Storage ratchet provisions limit the customer's contractual right to demand service. The delivery/purchase obligation under a storage AMA was intended to reflect such limits on the customer's contract demand and thus is satisfied if the releasing shipper has the right to call upon the asset manager to deliver or purchase gas consistent with the withdrawal or injection rights available under the tariff to the asset manager at the time the releasing shipper requires performance.

86. Scana requests clarification that in a situation where parties include released capacity on both an upstream and downstream pipeline in an AMA, the delivery obligation only applies to the capacity released on the downstream pipeline that directly connects to the releasing shipper's delivery point.[86] Scana contends that when a shipper acquires capacity on several interconnected pipelines to create a seamless transportation path from a supply access point to the shipper's delivery point, the capacity released on each pipeline will not be the same because the shipper typically needs more capacity on the upstream pipeline in order to account for additional fuel retention. Scana points to an example in the Commission's November 15, 2007 Notice of Proposed Rulemaking, showing that an asset manger's delivery obligation is not cumulative where an AMA involves separate releases, as support for its request that the Commission clarify that the delivery obligation for a multi-pipeline AMA need only be satisfied on

[83] The Commission is making conforming changes to section 284.8 of its regulations.

[84] Marketer Petitioners at 5.

[85] NGSA at 5.

[86] Scana at 5.

the downstream pipeline connected to the delivery point.[87]

87. The Commission denies Scana's request. Scana states that in an AMA where capacity is released on an upstream and a downstream pipeline, the amount of capacity released will be greater on the upstream pipeline. It provides no reasons, however, as to why the delivery/purchase obligation under such an AMA should be limited to the furthermost downstream pipeline that is connected to the delivery point. As discussed previously, the purpose of the minimum delivery/purchase obligation is to ensure that each release to an asset manager is part of a *bona fide* AMA, *i.e.*, that the capacity included in the release is not simply unneeded capacity, but is capacity which the releasing shipper has a continuing need to use for its own business purposes. However, if the delivery/purchase obligation in Scana's example did not apply to the full amount of the upstream released capacity, the releasing shipper could include in the upstream capacity release capacity that it does not need for its own legitimate business purposes during the term of the release. It is the Commission's position that the asset manager's delivery/purchase obligation must apply to the full contract demand under each capacity release in the transportation chain. Thus, while Scana is correct that the delivery/purchase obligation is not cumulative of the capacity in a released chain of contracts that constitute a single capacity path, there is still a delivery/purchase obligation up to the contract demand of each specific contract.

88. Scana and BP also seek clarification that where both storage capacity and transportation capacity are combined in an AMA that the storage and transportation obligations are not cumulative. As with upstream and downstream transportation capacity on several pipelines, the delivery obligation of the AMA is not cumulative of the storage capacity and the transportation capacity used to transport the gas to or from storage, but to qualify for the exemptions the asset manager must meet the necessary obligation under each separate agreement.

C. Exemption From Bidding for AMAs

89. In Order No. 712, the Commission exempted pre-arranged releases to implement AMAs from the bidding requirements of section 284.8 of its regulations. The Commission concluded that, in the AMA context, the bidding requirement creates an unwarranted obstacle to the efficient management of pipeline capacity and supply assets. The Commission noted that all capacity releases made to implement AMAs are pre-arranged because it is important that a releasing shipper be able to use the asset manager of its choice to effectuate the components of the agreement. Unlike a normal capacity release where the releasing shipper is often shedding excess capacity and has no intention of an ongoing relationship with the replacement shipper, in the AMA context the identity of the replacement shipper is often critical because it will manage the releasing shipper's portfolio for some time into the future. The Commission determined that because the asset manager will manage the releasing shipper's gas supply operations on an ongoing basis, it is critical that the releasing shipper be able to release the capacity to its chosen asset manager. Requiring releases made in order to implement an AMA to be posted for bidding would thus interfere with the negotiation of beneficial AMAs by potentially preventing the releasing shipper from releasing the capacity to its chosen asset manager. Moreover, AMAs at their core entail a bundling of commodity sales with capacity release. As a result, it is difficult to have meaningful bidding on the released capacity as a stand-alone component of the arrangement because the values of the commodity and capacity components of the arrangement are not easily separated. The Commission thus concluded that the benefits of facilitating AMAs outweigh any disadvantages in exempting such releases from bidding.

90. The final rule provided that the exemption from bidding will apply to all releases to asset managers made for the purpose of implementing an AMA, regardless of the term of the AMA and whether the release is subject to the price ceiling. The rule also provided that the exemption from bidding for AMAs applies to all releases to an asset manager, including those made for the purpose of extending a short-term AMA. The Commission determined that the rationale for exempting releases to an asset manager from bidding applies equally to releases made for the purpose of extending a short-term AMA as to any other release to an asset manager. In all such releases, the identity of the asset manager is critical to the releasing shipper, because the releasing shipper will be relying on the asset manager to obtain its gas supplies. The Commission concluded that as with any other release to an asset manager, requiring releases made for the purpose of extending a short-term AMA to be posted for bidding could interfere with the negotiation of beneficial AMAs by potentially preventing such releases to be made to the releasing shipper's chosen asset manager. The final rule also extended the blanket exemption from bidding granted to AMAs to capacity releases made to a marketer participating in a state approved retail access program.

91. No party requests rehearing of the Commission's decision to exempt all releases to asset managers or marketers participating in retail unbundling programs from bidding. However, several parties filed requests for rehearing/clarification of the revised regulations the Commission adopted in order to implement that decision. Under Order No. 712, section 284.8(h)(1) exempts from the notification and bidding requirements in paragraphs 284.8(c) through (e): ''a release of capacity by a firm shipper to a replacement shipper for any period of 31 days or less, a release of capacity for more than one year at the maximum tariff rate, a release to an asset manager as defined in (h)(3) of this section, or a release to a marketer participating in a state-regulated retail access program as defined in (h)(4) of this section.'' Section (h)(2) provides that ''When a release of capacity for 31 days or less is exempt from bidding requirements under paragraph (h)(1) of this section a firm shipper may not roll-over, extend, or in any way continue the release without complying with the requirements of paragraphs (c) though (e) of this section, and may not re-release to the same replacement shipper under this paragraph at less than the maximum tariff rate until 28 days after the first release period has ended.''

92. The AGA, INGAA and Spectra request that the Commission clarify that the prohibition contained in section 284.8(h)(2) of the regulations against rollovers and re-releases without bidding to the same party within 28 days does not apply to AMAs or to releases pursuant to state mandated retail access programs.[88] They contend that while the rule generally exempts releases to implement AMAs and releases for retail choice marketers from bidding under section 284.8(h)(1), it is unclear whether the prohibition on rollovers in section 284.8(h)(2) applies to such releases that are for a term of 31 days or less. AGA notes that AMAs or retail choice releases may in many instances be for 31 days or less, and that

[87] Scana at 5 and n. 5 (citing *Promotion of a More Efficient Capacity Release Market,* Notice of Proposed Rulemaking, 72 FR 65,916 (November 27, 2007), FERC Stats. & Reg. ¶ 32.625 at P 9 and n. 92 (2007)).

[88] AGA at 6, INGAA request for clarification at 1.

to require competitive bidding to extend such releases would frustrate the final rule's goal of fostering such arrangements.

93. The Commission clarifies that the prohibition in section 284.8(h)(2) on rolling over a 31 day or less release to the same replacement shipper without bidding does not apply to AMAs or to releases pursuant to a state approved retail access program.[89] As stated in the rule, the regulatory language of section 284.8(h)(2) was designed so that the prohibition on extending exempt releases without bidding only applied to the first category of releases exempted from bidding by section 284.8(h)(1), namely releases of 31 days or less. The Commission intended by this language that releases pursuant to the other categories in section 284.8(h)(1), *i.e.*, releases for more than a year at maximum rate, releases to implement AMAs and releases to marketers participating in state retail access programs, would not be subject to the prohibition on extensions without bidding. The Commission's goal in the rule was to facilitate AMAs and state unbundling programs that would give retail end-users a greater choice of suppliers by generally exempting certain releases from its bidding requirements. The Commission did not intend to require bidding to extend such releases that are for 31 days or less. Accordingly the Commission clarifies that AMAs and releases pursuant to state approved retail access programs are not subject to the section 284.8(h)(2) prohibitions on extending releases without bidding.

94. The Commission is also revising the regulatory text of sections 284.8(h)(1) and (2) so as to more clearly limit the section 284.8(h)(2) prohibition on rollovers, extensions and re-releases to the same shipper without bidding to release transactions that were exempt from bidding solely by virtue of the fact they were for a term of 31 days or less. As revised, section 284.8(h)(1) separately sets forth each category of release that qualifies for an exemption from bidding as follows:

(h)(1) The following releases need not comply with the bidding requirements of paragraphs (c) through (e) of this section:

(i) A release of capacity to an asset manager as defined in paragraph (h)(4) of this section;

(ii) A release of capacity to a marketer participating in a state-regulated retail access program as defined in paragraph (h)(5) of this section;

(iii) A release for more than one year at the maximum tariff rate; and

(iv) A release for any period of 31 days or less.

As revised, the section 284.8(h)(2) prohibition on re-releases to the same shipper without bidding will only apply: ''When a release of capacity is exempt from bidding under paragraph (h)(1)(iv) of this section.'' (*i.e.* is for 31 days or less).

95. Several parties also seek two clarifications with regard to section 284.8(h)(2) as it applies to releases of 31 days or less that do not qualify for the AMA or retail unbundling exemptions from bidding.[90] Their concerns focus on the language in section 284.8(h)(2) prohibiting re-releases ''to the same replacement shipper under this paragraph at less than the maximum tariff rate until 28 days after the first release period has ended.'' First, BP seeks clarification that this language does not prevent a releasing shipper from releasing the same capacity to the same replacement shipper for another consecutive period of 31 days or less if the releasing shipper subjects that capacity to the Commission's posting and bidding requirements.

96. The Commission grants this clarification. Order No. 712 did not change the language of section 284.8(h)(2) concerning the prohibition on re-releases to the same replacement shipper, which was originally adopted in Order No. 636–A. By its terms, that prohibition only applies to re-releases ''under this paragraph,'' namely to re-releases pursuant to the exemption from bidding for 31-day or less releases contained in paragraph (h) of section 284.8. Therefore, the prohibition on re-releases to the same replacement shipper does not apply to re-releases made pursuant to the notice and bidding requirements in paragraphs (c) through (e) of section 284.8. As Order No. 636–B explained, the purpose of the prohibition on re-releases to the same shipper until 28 days after the first release was ''to protect the integrity and allocative efficiency of the capacity release mechanism by preventing parties from avoiding the bidding requirement by extending short-term releases.'' [91] That purpose is satisfied so long as the re-release to the same replacement shipper is subject to bidding.

97. Second, INGAA, Spectra, Williston, NGSA and EPSA note that Order No. 712 retained the existing language of section 284.8(h)(2) that limits the 28-day prohibition on re-releases to the same shipper without bidding to re-releases ''at less than the maximum tariff rate.'' Those seeking clarification assert that the retention of this language is potentially inconsistent with the Commission's decision to remove the price ceiling on short term capacity releases of a year or less. They state that the language limiting the 28-day prohibition on rolling over releases of 31 days or less without bidding to re-releases ''at less than the maximum tariff rate'' could be read to permit re-releases to the same replacement shipper without bidding for periods of a year or less if the release rate is at or higher than the pipeline's maximum recourse rate. Therefore, they seek clarification that all re-releases for a period of a year or less, which are no longer subject to a maximum ceiling rate, must be subject to bidding, regardless of the release rate. INGAA and Spectra also seek clarification that the ''at less than maximum tariff rate'' language now applies only in the context of re-releases for more than one year to which the maximum rate ceiling still applies.

98. The Commission grants clarification. Because Order No. 712 removed the maximum rate ceiling for all releases of one year or less, all such releases must be subject to bidding, unless they qualify for exemptions from bidding for: (1) Releases of 31 days or less, (2) releases to asset managers, or (3) releases to marketers participating in a state regulated retail access program. The exemption from bidding for releases at the maximum tariff rate is only applicable to releases of more than a year, because only those releases are subject to a maximum tariff rate. Therefore, a capacity release that was not subject to bidding pursuant to the exemption for releases of 31 days or less may not be rolled over to the same replacement shipper without bidding until 28 days after the end of the first release period, unless the re-release is for more than a year at the maximum rate and thus qualifies for the exemption from bidding for maximum rate releases.

99. Consistent with the revisions to section 284.8(h)(1) set forth above, and the various clarifications discussed above, the Commission has determined to modify section 284.8(h)(2) so as to more clearly state its intent. As revised, section 284.8(h)(2) reads as follows:

(h)(2) When a release of capacity is exempt from bidding under paragraph (h)(1)(iv) of this section, a firm shipper may not roll over, extend or in any way continue the release to the same replacement shipper using the 31

[89] Indeed the Commission expressed this intention for AMAs in the rule itself, when it stated that the exemption from bidding for AMAs applies to all releases to an asset manager, ''including those made for the purpose of extending a short-term AMA.'' Order No. 712 at P 135.

[90] *See e.g.,* INGAA clarification request at 2, Spectra at 37, NGSA and EPSA at 10, and BP at 8.

[91] Order No. 636–B, 61 FERC ¶ 61,272 at 61,995.

days or less bidding exemption until 28 days after the first release period has ended. The 28-day hiatus does not apply to any re-release to the same replacement shipper that is posted for bidding or that qualifies for any of the other exemptions from bidding in paragraph (h)(1).

100. This revised language ensures that a release of 31 days or less, which was exempt from bidding solely pursuant to the exemption for short term transactions, may not be rolled over to the same replacement shipper until at least 28 days after the first release period has ended, unless (1) the releasing shipper posts the new release for bidding or (2) the new release qualifies for one of the three other exemptions from bidding. In order to qualify for the maximum rate exemption from bidding, the re-release must be for a term of more than a year. The releasing shipper could release the capacity to another shipper under the bidding exemption for releases of 31 days or less, as stated in Order No. 636–B.[92]

D. Posting and Reporting Requirements

101. In Order No. 712, the Commission revised its regulations to include new posting requirements for capacity releases to implement AMAs. Specifically, the Commission determined that any posting under section 284.13(b) that relates to a release to implement an AMA should include (1) the fact that the release is to an asset manager and (2) the delivery or purchase obligation of the AMA, in addition to the information required to be posted for all capacity releases. The Commission reasoned that the requirement of an asset manager to deliver or purchase gas to fulfill the releasing shipper's supply or marketing obligations is the cornerstone for differentiating AMAs from standard capacity releases. In order to ensure that capacity releases posited as AMAs eligible for the exemptions from tying and bidding are *bona fide* AMAs, the Commission must have a means to monitor this critical component of the arrangement. Accordingly the Commission revised section 284.13(b)(1) of its regulations to add a new subsection (x) specifying that a posting of any capacity release meant to implement an AMA must specify the volumetric level of the replacement shipper's delivery or purchase obligation and the time periods during which that obligation is in effect. The Commission also added new subsection (xi) requiring that a release to a marketer participating in a state regulated retail access program must be so identified in the posting. The Commission noted that existing regulations required parties to identify asset managers and agents in the index of customers. The Commission further stated that parties are not required to include commercially sensitive aspects of AMAs. Certain parties seek rehearing and/or clarification of these parts of Order No. 712.

1. Posting Requirements

102. Marketer Petitioners request reconsideration concerning the information required to be posted in connection with a release of capacity associated with an AMA under Order No. 712.[93] Marketer Petitioners submit that the specific days/months during which an AMA manager's delivery/purchase obligation is in effect should not have to be posted in the release. Instead, they assert that the fact the release is associated with an AMA, the identity of the asset manager, and the fact that the asset manager's delivery/purchase obligation is for the requisite quantity and time period should be adequate to demonstrate that the release is associated with a *bona fide* AMA. Marketer Petitioners argue that posting the specifics of the delivery/purchase obligation may result in disclosure of competitive and commercially sensitive information that will reduce the flexibility of parties in structuring AMAs.

103. The Commission denies the reconsideration request. As noted above, the Commission in Order No. 712 found that the delivery/purchase obligation is the foundation for differentiating AMAs from standard capacity releases, and that the Commission needed a way to accurately monitor this component of an AMA. Thus the Commission revised its regulations to include the specifics of what it deemed necessary to execute this monitoring function. Marketer Petitioners assert that it is adequate to include the fact that the manager's delivery/purchase obligation is for the requisite quantity and time period to demonstrate the validity of the AMA, but they do not state how those facts can be discerned without information regarding the volumetric level of the obligation and the time periods that it will be in effect. Further, Marketer Petitioners claim that posting of specific dates will potentially result in disclosure of commercially sensitive information but provide no details as to how such information is commercially sensitive. The Commission finds that it is important for determining the validity of *bona fide* AMAs that it and the public can see and review the details of how the release qualifies as an AMA under the definition. The Marketer Petitioners' request is thus denied.

2. Index of Customers

104. Several parties seek clarification that the Commission did not intend to amend its regulations pertaining to the Index of Customers.[94] They note that in Order No. 712 the Commission revised certain of its regulations concerning the posting and reporting requirements for AMAs under the new rule. In that discussion the Commission stated that ''sections 284.13(c)(2)(viii) and (ix) require that the pipeline's index of customers include the name of any agent or asset manager managing a shipper's transportation service and whether that agent or asset manager is an affiliate of the releasing shipper.'' [95] The parties point out that the actual language in the referenced regulation relating to affiliate relationships requires the reporting on the index of customers of any ''affiliate relationship between the *pipeline* and a shipper's asset manager or agent.'' 18 CFR 284.139(c)(2)(ix) (*emphasis added*). They seek clarification that the discussion in the preamble is not intended to modify the language of section 284.13(c)(2)(ix) concerning the Index of Customers.

105. The Commission clarifies that the discussion in Order No. 712 inadvertently misstated the regulation and that the Commission did not intend to change the language or impact of section 284.13(c)(2)(ix), nor as the parties note, did the Commission make any revisions to that section in Order No. 712. Therefore, pipelines will not be required to state in their Index of Customers whether there is an affiliate relationship between the releasing shipper and its asset manager. However, the Commission notes that existing section 284.13(b)(ix) requires that the pipeline's posting of capacity release transactions include a statement ''whether there is an affiliate relationship between * * * the releasing and replacement shipper.'' Therefore, the pipeline's transactional reports will indicate whether the releasing shipper and any asset manager to which it releases capacity are affiliated. The Commission also notes that section 284.13(c)(2)(viii) does require that the index of customers include the name of any agent or asset

[92] Order No. 636–B, 61 FERC at 61,995.

[93] Marketer Petitioners at 8–9.

[94] *See*, INGAA at 3, Iroquois at 7, Spectra at 38, Williston at 18.

[95] Order No. 712 at P 172.

manager managing a shipper's transportation service.[96]

106. INGAA seeks clarification that the posting requirements for capacity releases under AMAs apply only to capacity releases initiated and reported to the pipeline after the effective date of Order No. 712. The Commission so clarifies. Nothing in Order No. 712 indicates that any provision would take effect retroactively. Further, no capacity releases to implement AMAs under Order No. 712 are valid until the effective date of the rule. Accordingly, pipelines need only report capacity releases that are meant to implement AMAs under Order No. 712 after the effective date of the rule.

E. Miscellaneous AMA Issues

107. The NGSA requests that the Commission clarify that on days when the releasing shipper has a right to call upon the asset manager to deliver or purchase gas under an AMA, the parties may specify a nomination deadline no earlier than the 8 a.m. on the weekday morning before gas flows, after which the asset manager may release any capacity not wanted by the releasing shipper without recall in order to maximize the value of the capacity.[97] The NGSA asserts that as written, Order No. 712 requires the asset manager to provide the releasing shipper an absolute call on the full contract volume of the released capacity on every day of the five month minimum period. According to the NGSA, a strict reading of the shipper's right would require an asset manager to re-release the capacity subject to recall during each day of the delivery/purchase obligation period, thereby limiting the value of the capacity and the AMA.

108. The NGSA submits that one way to address this issue is for the Commission to allow the parties to an AMA to agree to a specific nomination deadline after which the asset manager would be free to market the capacity without any recall rights. NGSA asserts that nomination deadlines are regular features of AMAs and may be fixed at various times depending on the needs of the parties and pipeline specifications, and that 8 a.m. on the weekday before gas flows is a commonly used deadline. Under such a scenario, the releasing shipper may call upon the replacement shipper for the full contract volume until the nomination deadline. In the event that the releasing shipper knows the day before, however, that it does not need all or some portion of the capacity at the nomination deadline, the asset manager would be free to release the unwanted capacity without any recall rights, thus maximizing the value of the capacity to the mutual benefit of both the releasing shipper and the asset manager.

109. The Commission grants NGSA's clarification request to allow the parties to an AMA to specify a deadline in their AMA agreement after which the asset manager may re-release the capacity without attaching a recall provision. This deadline may be no earlier than 8 a.m. on the weekday before gas flows. As noted by NGSA, allowing the parties to establish a deadline after which the releasing shipper can no longer exercise its recall right is consistent with the Commission's goal of maximizing the value of capacity released pursuant to an AMA. The Commission finds limiting the ability to determine a deadline to no earlier than 8 a.m. on the weekday prior to gas flow is reasonable as a means of providing this flexibility while ensuring that parties do not utilize the deadline as a means of essentially vitiating the delivery purchase obligation of the AMA.[98]

110. BP requests clarification that a releasing shipper may include more capacity in its AMA than it has previously used to supply its natural gas needs.[99] BP notes that in Order No. 712 the Commission supported the delivery/purchase obligation for AMAs by referring to the fact that an asset manager should be able to reasonably forecast a releasing shipper's needs based on historical usage. BP contends that because in nearly all cases shippers acquire capacity for use as a mechanism for gas supply, a releasing shipper should be able to include its portfolio of assets making up an AMA transportation capacity that it owns, not only that capacity historically used to meet past peak day demands or to transport supply. It asserts that entities on both the supply and demand side typically purchase and hold capacity in excess of its historic gas needs.

111. The Commission grants the requested clarification. In referring to an asset manager's ability to make reasonable judgments about the releasing shipper's demand or supply requirements the Commission did not in any way limit the capacity that could be included in an AMA to that reflected by historical usage. A releasing shipper may include more capacity in an AMA than it has previously used to meet its needs, provided that the releasing shipper owns that capacity and that the delivery/purchase obligation in the AMA applies to all the capacity included in the AMA.

112. Marketer Petitioners seek clarification that a release of AMA capacity by an asset manager to another asset manager is eligible for the exemptions under section 284.8(h)(3) of the regulations.[100] They point out that different asset managers have expertise in different markets, and thus may desire to work cooperatively with other asset managers to maximize the value of the capacity. One way for this to occur is for one asset manager to re-release capacity received from the original releasing shipper to a second asset manager.

113. The Commission clarifies that an asset manager may release capacity it obtained as part of an AMA to another asset manager. Provided each release is made to implement an AMA and satisfies the delivery/purchase obligation and other criteria in the definition of AMA, such releases would qualify for the exemptions granted by Order No. 712 to AMAs.

114. BP seeks clarification that any entity holding interstate transportation capacity may enter into an AMA as a releasing shipper, including wholesale marketers. BP cites to Order No. 712 and the Commission's statement that the definition adopted in the rule was meant to be flexible enough so that it ''does not limit the type of party that can enter into an AMA.'' The Commission grants clarification. As BP itself points out, the definition was meant to be flexible enough so as to not limit the type of entities that could take advantage of AMAs so long as the criteria in the definition are satisfied.

III. State Mandated Retail Unbundling

115. In Order No. 712, the Commission determined that capacity releases by LDCs to implement state approved retail access programs should be granted the same blanket exemptions from the prohibition against tying and the bidding requirements as capacity releases made in the AMA context. The

[96] Spectra also requests clarification that the Commission's statement in P 136 of Order No. 712, stating that the existing requirements referenced in section 284.13(c)(2)(viii) (Index of Customers) of the regulations still apply with regard to identifying asset managers, which was followed by a statement that the Commission was adding a requirement to post the asset manager's delivery obligation to the releasing shipper, did not intend to add any requirements to the index of customers. The Commission so clarifies. The Commission clearly stated in that paragraph that the new reporting requirements were ''in addition'' to the existing requirements under the index of customers.

[97] NGSA at 6.

[98] The Commission notes that 8 a.m. on the day before gas flows is consistent with the current North American Energy Standards Board (NAESB) standard for notification by the releasing shipper of a recall of capacity. *See* NAESB Standard 5.3.44.

[99] BP at 3.

[100] Marketer Petitioners at 12.

Commission found that state retail unbundling programs that give retail end-users a greater choice of suppliers from whom to purchase their gas provide benefits similar to AMAs. Accordingly, the Commission clarified in Order No. 712 that the prohibition against tying does not apply to releases by an LDC to a marketer that agrees to sell gas to the LDC's retail customers under a state approved retail access program. The Commission also amended section 284.8(h) in order to provide an exemption from bidding for such releases. Under Order No. 712, in order to qualify for the exemption, the capacity release must be used by the replacement shipper to provide the gas supply requirement of retail consumers pursuant to a retail access program approved by the state agency with jurisdiction over the LDC that provides delivery service to such retail consumers. The Commission also stated that the exemption does not apply to re-releases made by marketers participating in the retail access program.

116. The AGA seeks clarification that consecutive short-term releases to a marketer participating in a state-regulated retail access program will not be considered a long-term release subject to the maximum rate ceiling.[101] The AGA states that pursuant to the state approved programs local distribution companies typically release capacity to the same retail marketers on a monthly or other regular basis. AGA contends that consecutive short term releases to a retail marketer under a state approved program are different than long-term transactions because a retail marketer is generally only eligible to contract for released capacity to the extent of its market share and the short term releases often vary with each separate transaction based on changes to the marketer's share of the retail market or the source of the released capacity.

117. The Commission grants clarification. In the circumstances described by AGA, consecutive short-term releases to the same marketer are appropriately treated as separate short-term releases not subject to the maximum rate ceiling. Marketers taking these releases have no continuing right to any particular capacity from one release to the next. Rather, the amount of capacity released to each marketer is dependent upon their continuing participation in the retail access program and varies with their market share. There is nothing in the Commission's current regulations or the revisions in this order that would lead the Commission to deem such a series of short term releases under a state program to be a single long-term release.

118. Marketer Petitioners request that the Commission clarify that a marketer participating in a state approved retail access program can re-release its capacity to an asset manager that will fulfill the marketer's obligations under the state approved program.[102] The Commission grants clarification. The statement in Order No. 712 that the exemptions afforded to marketers participating in state approved retail access programs did not apply to re-releases made by such marketers was referring to a re-release that was a standard capacity release, not a re-release to an asset manager. As clarified above, an asset manager may re-release to a second asset manager and if the release satisfies the criteria of the AMA definition, the exemptions will apply. Likewise, a marketer participating in a state regulated retail access program may re-release to an asset manager and the second release will qualify for the exemptions afforded AMAs as long as it meets the necessary requirements.

119. BP seeks clarification that a marketer participating in a retail unbundling program can use its released capacity to serve customers who are not subject to the retail access program during periods when the capacity is not needed to serve retail access customers. BP contends that such use of excess capacity would facilitate the efficient use of capacity and put retail access providers in a position comparable to that of asset managers.

120. The Commission grants clarification. In establishing the exemptions for AMAs the Commission found in part that AMAs were beneficial because they would encourage maximum use of capacity during periods when it was not needed by the releasing shipper. Similarly, alternative use of capacity by a marketer participating in a retail access program during periods when that capacity is not needed to serve the retail access customers' needs promotes the efficient use of capacity.

121. BP also seeks clarification that a wholesale supplier who obtains capacity directly from an LDC as part of an unbundling program but who is not a marketer under the program nevertheless qualifies for the tying and bidding exemptions.[103] As the Commission understands this request by BP, it seeks the exemptions afforded to retail access marketers for a release of capacity to a wholesale supplier, who will in turn sell gas to the retail access marketer. In other words, BP seeks the exemption for an entity that is one-step removed from the situation under which Order No. 712 grants exemptions from tying and bidding.

122. The Commission declines to grant BP's request in this generic rulemaking proceeding. As noted, BP requests the Commission to approve a specific deal structure that does not meet the criteria under which the rule generally grants exemptions. BP is free to file separately on a case-by-case basis for approval of individual arrangements that it believes may merit a waiver of the Commission's bidding and tying strictures.

123. Lake Apopka Natural Gas District, Florida (Lake Apopka) filed a late request for clarification, or reconsideration, requesting the Commission clarify that the blanket exemptions from tying and bidding granted for releases made as part of a state approved retail access program apply equally to self-regulated municipals. Lake Apopka states that it is a special district created by the state of Florida and authorized to transport and distribute natural gas to its member municipalities and to other municipalities. Lake Apopka states that its rates and terms of service are not subject to regulation by the Florida Public Service Commission. Lake Apopka currently does not have a retail access program and provided no information in its pleading as to the way in which such a program would be structured and whether it would have protections comparable to state governmental review.

124. The Commission denies Lake Apopka's request. As noted, the Commission's bidding requirements and its prohibition against tying are meant to ensure a transparent, liquid, and non-discriminatory wholesale energy market. In cases where retail access programs have been reviewed and approved by state regulators, there is a sound basis to believe that retail access and wholesale access programs are working toward common goals of promoting customer choice and competition, subject to state supervision and oversight. State regulators can review a proposed program and establish essential conditions to ensure that a local utility monopoly does not create a retail access program that transfers its market power to an unregulated affiliate at the expense of local retail ratepayers and nearby wholesale market competitors.

125. From the information provided, it appears that these protections are lacking in the situation described by

[101] AGA at 9.

[102] *Id. See also* BP at 8–9.

[103] BP at 9.

Lake Apopka. The Commission's determination in Order No. 712 was not intended to apply to such wholly unregulated entities and the Commission declines to revise its regulations to grant a blanket exemption in this rulemaking proceeding. The Commission is open to considering waiver requests on this issue on a case-by-case basis if presented to us in a fully justified proposal.

126. Vector Pipeline LP (Vector) filed a request for clarification or in the alternative rehearing asking that the Commission clarify that Canadian provincial retail unbundling programs will be treated the same as state unbundling programs under Order No. 712. Vector notes that Order No. 712's exemption from bidding for state-regulated open access programs defines a state retail unbundling program as one ''approved by the state agency with jurisdiction over the local distribution company that provides delivery service to such retail customers.'' [104] Vector states that it does not oppose the exemption but contends that the Commission should clarify that it also applies to programs authorized by a province in Canada. Vector states that it has firm shippers on its system that have participated in a retail unbundling program authorized by the Province of Ontario and that the Commission has previously treated such Canadian programs identical to state retail unbundling programs.[105]

127. The Commission grants clarification. As noted by Vector, during the period when the price cap on short-term releases was removed pursuant to Order No. 637, the Commission granted Union Gas, a firm shipper on Vector's system, a waiver of the Commission's posting and bidding requirements to further its efforts to participate in a provincial retail unbundling program similar to waivers the Commission issued for domestic LDCs to participate in state approved retail unbundling programs during the same period. The Commission finds that its rationale in equating Canadian provincial retail unbundling programs with state approved retail access programs for the purposes of Order No. 637 applies equally to Order No. 712's bidding exemption for such programs. Accordingly, the Commission clarifies that Canadian provincial retail unbundling programs will be treated the same as state unbundling programs for purposes of the bidding exemption for state-regulated retail unbundling programs under Order No. 712.

IV. Tying of Storage Capacity and Inventory

128. In Order No. 712, the Commission granted an exception to its prohibition on tying to allow a releasing shipper to include conditions in a release concerning the sale and/or repurchase of gas in storage inventory outside the AMA context. The Commission reasoned that in the storage context, storage capacity is inextricably attached to the gas in storage, and that by allowing releasing shippers to condition the release of storage capacity on the sale and or repurchase of gas in storage inventory and on there being a certain amount of gas left in storage at the end of the release, the Commission would enhance the efficient use of storage capacity while at the same time ensuring that the releasing shipper would have gas in storage for the winter.

129. The AGA requests clarification that the exemption from the tying prohibition applies to other terms and conditions related to the purchase and sale of storage gas in inventory.[106] It argues that such an exemption is akin to the clarification for AMAs that the tying exemption applies to all other agreements necessary to implement the agreement.[107] AGA notes as an example that credit requirements may be necessary to address the risks associated with transferring substantial amounts of commodities, particularly storage gas. AGA states that given the large quantities of gas in storage sought to be transferred and the high commodity prices in today's marketplace, a bidder that is creditworthy for purposes of pipeline transportation service may not be sufficiently creditworthy to provide security for commodity transfers. AGA suggests that the current creditworthy provisions contained in pipeline tariffs only cover the risks associated with failure of shipper to pay for capacity and are likely inadequate to address commodity transfer risks.

130. The Commission agrees that in the situation where a release of pipeline capacity is tied to storage inventory, existing pipeline creditworthy provisions may not be adequate to cover the risks associated with the transfer of large amounts of storage gas. As the AGA points out, given the relatively high prices of commodities in today's natural gas marketplace, a bidder that is creditworthy relative to the risks associated with pipeline services may not be creditworthy in terms of being able to secure large quantities of storage gas. The Commission has recognized elsewhere the difference between the potential values of pipeline services as opposed to the value of the commodity.[108] Accordingly, the Commission clarifies that with regard to a storage release that includes a condition regarding the sale and/or repurchase of gas outside the AMA context as authorized by Order No. 712, the parties may negotiate further terms and conditions related to the commodity portion of the transaction, and such agreements shall not be subject to the prohibition against tying of extraneous conditions.

131. BP seeks clarification on several aspects of the storage tying exception. First, BP seeks clarification that the Commission's statement that it would allow the releasing shipper to require the replacement shipper to take title to the gas in storage does not require that the replacement shipper actually pay the releasing shipper for gas in storage in situations where the replacement shipper will return the capacity to the releasing shipper with an equivalent amount of gas in storage. According to BP parties may make arrangements where the payment of consideration is deferred until no later than when the storage capacity is returned to the releasing shipper.

132. The Commission grants clarification. Order No. 712 is intended to permit parties flexibility in structuring storage release arrangements. It is reasonable that these arrangements may at times involve in-kind transfers of gas in lieu of monetary payments.

133. BP also requests clarification that when the Commission stated that it was providing an exception from the tying prohibition to allow a releasing shipper to include conditions in a release concerning the sale and/or repurchase of gas in storage inventory even outside the AMA context, that it did not mean to limit the allowed ties to the examples provided, *i.e.*, transfer of title to gas in storage and return of a specified amount of gas. BP asserts that those are only two of the potential ties between storage capacity and inventory and that other extraneous conditions exist that contain the same inextricable link between storage capacity and gas in storage, such as a call option on gas in storage.[109] BP

[104] Vector at 1.

[105] *Id.* (citing, *Union Gas Ltd.,* 93 FERC ¶61,074 (2000)).

[106] The Commission in Order No. 712 clarified that if an AMA meets the essential elements of the definition of AMAs, then the tying exemption applies to all other agreements necessary to implement the AMA. Order No. 712 at P 171.

[107] AGA at 9.

[108] *See e.g., Gulf South Pipeline Co., LP,* 103 FERC ¶61,129, at 61,422 (2003).

[109] BP at 7 and n.14.

asserts that the Commission should allow ties other than those specified in the rule.

134. The Commission acknowledges that there may be different means by which parties may effectuate a transfer of title to the gas in storage, or that parties may desire, as BP suggests, to allow for an option for the releasing shipper to require the replacement shipper to sell the gas in storage back to the releasing shipper if it needs to use the storage gas. The Commission thus clarifies that parties may utilize different methods to transfer the title to the gas and may include such a method as a condition in a combined storage capacity and inventory release. The Commission's clarification, however, is limited to ties related to the gas in storage. If parties desire to condition storage releases on non-commodity related items, then such parties should file separately with the Commission for approval of those transactions.

135. BP also seeks clarification for the following three scenarios regarding how storage releases that include conditions concerning storage inventory should be posted for bidding:

(i) if no pre-arranged replacement shipper exists but the releasing shipper has established a purchase price for the gas, the posting for the capacity must include the purchase price and all bids will be based on an equivalent purchase price so that the winning replacement shipper will be decided solely upon the competing bids for the capacity itself;

(ii) if a pre-arranged shipper exists, the posting will include the purchase price for the gas offered by the pre-arranged shipper, and any competing bids must be based on an equivalent purchase price so that the winning replacement shipper will be decided solely upon the competing bids for the capacity itself; or

(iii) if no purchase price has been established by the releasing shipper and/or offered by a pre-arranged shipper, the posting will indicate that the winning bid will be based solely upon the offers made on the capacity itself, along with a condition subsequent providing that the parties will mutually agree on a purchase price for the gas after the award.

136. BP states that in situation (iii), if the parties are unable to mutually agree upon a price, the award will be voided and the capacity may be re-posted by the releasing shipper.[110]

137. BP asserts that if the condition on the replacement shipper is the purchase of remaining gas in storage, then the consideration to be paid for the capacity and the price of the gas both become economic factors for the transaction. BP states that the intent of its request for clarification of the examples is to make the capacity the only economic factor to be evaluated for purposes of competitive bidding.

138. The Commission agrees with BP that the only factor that should be considered for competitive bidding purposes in the context where storage capacity is tied to storage inventory is the capacity. This is because the bidding requirements in the Commission's regulations only apply to capacity releases and must result in a rate that the replacement shipper will pay to the pipeline for services using the released capacity. With regard to how releases with conditions concerning storage inventory may be posted, Commission policy allows releasing shippers to include in capacity release postings reasonable and non-discriminatory terms and conditions, provided that all such terms and conditions are posted on the pipeline's EBB, are objectively stated, are applicable to all potential bidders, and relate solely to the details of acquiring capacity on interstate pipelines.[111] BP's first two suggestions for posting scenarios appear consistent with these requirements. The third, however, could be problematic in light of the fact that the commodity price would not be posted or objectively stated.

V. Liquefied Natural Gas

139. In Order No. 712, the Commission rejected a request that parties be allowed to link throughput agreements and/or sales of gas at the outlet of an NGA Section 3 liquefied natural gas (LNG) terminal with a prearranged capacity release on an interstate pipeline connected to the terminal, akin to the exemption for AMAs that allows the tying of released capacity to gas sales agreements. Several parties [112] had argued that LNG importers often hold firm capacity on interstate pipelines adjacent to the terminals to ensure that re-gasified LNG can exit the terminal efficiently and be transported to the markets on the interstate pipeline grid. The requesting parties suggested that the Commission should recognize and permit the natural link between an LNG terminal throughput agreement and an agreement to release downstream pipeline capacity and clarify that such a tie is permissible.

140. The Commission declined to grant the LNG importers' request in Order No. 712. The Commission noted that Order No. 712 permitted the use of supply side AMAs and that LNG importers holding firm capacity on interstate pipelines connected to an LNG terminal were free to use a supply AMA. The Commission also found that the requesters had not provided adequate detail on the types of transactions for which they were requesting the exemptions to explain why a further exemption beyond that provided for supply AMAs is required for LNG facilities, and that it was unclear from their comments how far downstream they sought to have the exemption apply. The Commission also found that the record was insufficient to evaluate the possible benefits of the requested exemption or the effect on open access competition that such an exemption might have. The Commission stated that it was open to considering waiver requests on the issue on a case-by-case basis if presented to it in a fully justified proposal.

141. Several parties seek rehearing of the Commission's decision. The LNG Petitioners argue that the Commission erred in declining to grant the requested clarification that it would be a permissible tie for permit holders of capacity at an LNG terminal to link throughput agreements and/or sales of gas at the outlet of an LNG terminal with a pre-arranged capacity release on an interstate pipeline directly connected to the LNG terminal, or alternatively to provide an exemption for such transactions.[113] They also contend that the Commission erred by not granting an exemption from bidding for capacity releases included in such transaction. They assert the Commission erred further by concluding that LNG and pipeline capacity holders could instead use supply side AMAs, and that it was unreasonable for the Commission to grant tying and bidding exemptions for releases to implement AMAs and retail state unbundling programs but not for LNG capacity holders. Shell LNG makes similar arguments and the NGSA states that the exemption should be granted.

142. The LNG Petitioners state that they have contracts with the owners of U.S. LNG terminals to use the capacity of those terminals to receive, store and regasify LNG. The LNG Petitioners also hold transportation capacity on open access interstate pipelines directly connected to the LNG terminal. Some of the terminals provide open access service pursuant to part 284 of the Commission's regulations. Other terminals are not open access, as

[110] BP at 5–6.

[111] Order No. 636–B at 61,996 (citing Order No. 636–A at 30,557).

[112] Statoil and Shell LNG.

[113] In earlier comments the LNG Petitioners had requested only an exemption from the prohibition against tying. In their rehearing request, they now also seek an exemption from bidding because Order No. 712 removed the rate ceiling for short term releases. LNG Petitioners at 7, n. 20.

permitted by the Commission's *Hackberry* policy.[114]

143. The LNG Petitioners explain that they have been unable to enter into long-term contracts to purchase enough LNG from LNG suppliers, so that the LNG Petitioners can use their terminal and pipeline capacity for their own LNG. However, they assert that some LNG suppliers, including state-owned gas and oil companies and European and Asian utilities with significant natural gas reserves, are willing to negotiate arrangements under which the LNG Petitioners would, in essence, release both their terminal and interstate pipeline capacity to the LNG suppliers. The LNG suppliers would then use that capacity to import their own LNG into the United States, and they or their marketing affiliates would resell the regasified LNG in the downstream U.S. natural gas market. The LNG suppliers' use of the capacity would be sporadic, because it would depend on whether spot market gas prices and demand in competing markets justifies importing a particular LNG cargo into the U.S. The LNG Petitioners do not state what the term of these arrangements is likely to be, but it would appear that at least some of these arrangements would be for terms of between 31 days and one year, and thus would not qualify for the exemptions from bidding for either short term releases of 31 days or less or the exemption for maximum rate releases of more than a year.[115]

144. The LNG Petitioners and others contend that the above described transactions generally cannot be structured as supply side AMAs. They state that the traditional AMA model, where the releasing shipper is releasing capacity to an expert that will help to manage capacity that the releasing shipper still needs to serve its own supply function, does not fit their situation. In the context of the tying and bidding exemptions requested for LNG the terminal capacity holder is not seeking to have a third party manage or market that capacity. Rather, the capacity holder is attempting to demonstrate to the LNG supplier firm takeaway capacity from the LNG terminal so that the supplier will not strand its gas in the terminal. Therefore, they assert that the Commission's amendment of its regulations to permit supply side AMAs is not an adequate substitute for the exemptions they seek.

145. The Commission clarifies that with respect to LNG terminals providing open access service, where both the LNG terminal and the directly connected interstate pipeline are facilities subject to the Commission's Part 284 open access regulations, a holder of capacity in the LNG terminal has the right to release both its terminal capacity and its capacity on the downstream pipeline pursuant to the Commission's capacity release program. As the Commission stated in Order No. 712, existing Commission policy permits releasing shippers to tie releases of upstream and downstream capacity, and requires the replacement shipper to take a release of the aggregated contracts on both pipelines.[116] Thus, existing policy permits the holder of capacity in an open access LNG terminal to require a replacement shipper to take a release of both its terminal capacity and its pipeline capacity. In addition, even if the releases were not made as part of an AMA, the tied releases would be exempt from bidding if they qualified for either of the standard bidding exemptions of section 284.8(h) for releases of 31 days or less or prearranged releases to an LNG supplier for more than a year at the maximum rate. However, if the release were for a term of between 31 days and a year, the LNG capacity holder would have to post for third party bids any prearranged tied release with an LNG supplier. That is necessary to ensure that the tied release is made to the person placing the highest value on the subject capacity.

146. The Commission denies rehearing, however, with respect to non-open access LNG terminals. Such terminals are not subject to the Commission's open access policy, and any releases or assignments of terminal capacity would not be made pursuant to the Commission's capacity release program. Thus, there is no Commission process to ensure that a release of terminal capacity would be non-discriminatory and transparent. As noted by the LNG Petitioners, transfers of terminal capacity may be accomplished in a myriad of ways depending on the specifics of the agreements between the terminal owners and the capacity holders, including through a buy/sell arrangement. Thus, the Commission continues to lack sufficient knowledge about how the arrangements for use of a non-open access terminal may be structured to permit a generic decision in this rulemaking proceeding. Nor do we have a sufficient record at this time to evaluate the possible benefits of such an exemption or the effect on open access competition that such an exemption may have. Accordingly, the Commission does not find it reasonable to grant the requested blanket exemptions from tying and bidding in this rulemaking proceeding in the context of a non-open access LNG terminal. As stated in Order No. 712, the Commission is open to considering waiver requests for such transactions on a case-by-case basis if presented to it in a fully justified proposal.

VI. Information Collection Statement

147. Order No. 712 contains information collection requirements for which the Commission obtained approval from the Office of Management and Budget (OMB). The OMB Control Number for this collection of information is 1902–0169. This order generally denies requests for rehearing and clarifies certain provisions of Order No. 712. This order does not make substantive modifications to the Commission's information collection requirements and, accordingly, OMB approval for this order is not necessary. However, the Commission will send a copy of this order to OMB for informational purposes.

VII. Document Availability

148. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (*http://www.ferc.gov*) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5 p.m. Eastern time) at 888 First Street, NE., Room 2A, Washington, DC 20426.

149. From FERC's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

150. User assistance is available for eLibrary and the FERC's website during normal business hours from FERC Online Support at 202–502–6652 (toll free at 1–866–208–3676) or email at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. E-mail the Public Reference Room at *public.referenceroom@ferc.gov.*

[114] *Hackberry LNG Terminal, L.L.C.,* 101 FERC ¶ 61,294 (2002) (*Hackberry*).

[115] The removal of the price cap for all releases of one year or less means that all releases of more than 31 days and less than a year must be posted for bidding, unless they are made as part of an AMA or retail access program.

[116] Order No. 712 at P 127 n.123 (citing, Order No. 636–A at 30,558 and n. 144).

VIII. Effective Date and Congressional Notification

151. These regulations will become effective December 31, 2008.

List of Subjects in 18 CFR Part 284

Continental shelf, Natural gas, and Reporting and recordkeeping requirements.

By the Commission.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

■ In consideration of the foregoing, the Commission amends Part 284, Chapter I, Title 18, *Code of Federal Regulations*, as follows:

PART 284—CERTAIN SALES AND TRANSPORTATION OF NATURAL GAS UNDER THE NATURAL GAS POLICY ACT OF 1978 AND RELATED AUTHORITIES

■ 1. The authority citation for part 284 continues to read as follows:

Authority: 15 U.S.C. 717–717w, 3301–3432; 42 U.S.C. 7101–7352; 43 U.S.C. 1331–1356.

■ 2. Amend § 284.8 as follows:

■ a. Paragraphs (b) and (h) are revised to read as follows:

§ 284.8 Release of firm capacity on interstate pipelines.

* * * * *

(b)(1) Firm shippers must be permitted to release their capacity, in whole or in part, on a permanent or short-term basis, without restriction on the terms or conditions of the release. A firm shipper may arrange for a replacement shipper to obtain its released capacity from the pipeline. A replacement shipper is any shipper that obtains released capacity.

(2) The rate charged the replacement shipper for a release of capacity may not exceed the applicable maximum rate, except that no rate limitation applies to the release of capacity for a period of one year or less if the release is to take effect on or before one year from the date on which the pipeline is notified of the release. Payments or other consideration exchanged between the releasing and replacement shippers in a release to an asset manager as defined in paragraph (h)(3) of this section are not subject to the maximum rate.

* * * * *

(h)(1) The following releases need not comply with the bidding requirements of paragraphs (c) through (e) of this section:

(i) A release of capacity to an asset manager as defined in paragraph (h)(4) of this section;

(ii) A release of capacity to a marketer participating in a state-regulated retail access program as defined in paragraph (h)(5) of this section;

(iii) A release for more than one year at the maximum tariff rate; and

(iv) A release for any period of 31 days or less.

(v) If a release is exempt from bidding under paragraph (h)(1) of this section, notice of the release must be provided on the pipeline's Internet Web site as soon as possible, but not later than the first nomination, after the release transaction commences.

(2) When a release of capacity is exempt from bidding under paragraph (h)(1)(iv) of this section, a firm shipper may not roll over, extend or in any way continue the release to the same replacement shipper using the 31 days or less bidding exemption until 28 days after the first release period has ended. The 28-day hiatus does not apply to any re-release to the same replacement shipper that is posted for bidding or that qualifies for any of the other exemptions from bidding in paragraph (h)(1) of this section.

(3) A release to an asset manager exempt from bidding requirements under paragraph (h)(1)(i) of this section is any pre-arranged release that contains a condition that the releasing shipper may call upon the replacement shipper to deliver to, or purchase from, the releasing shipper a volume of gas up to 100 percent of the daily contract demand of the released transportation or storage capacity, as provided in paragraphs (h)(3)(i) through (h)(3)(iii) of this paragraph.

(i) If the capacity release is for a period of one year or less, the asset manager's delivery or purchase obligation must apply on any day during a minimum period of the lesser of five months (or 155 days) or the term of the release.

(ii) If the capacity release is for a period of more than one year, the asset manager's delivery or purchase obligation must apply on any day during a minimum period of five months (or 155 days) of each twelve-month period of the release, and on five-twelfths of the days of any additional period of the release not equal to twelve months.

(iii) If the capacity release is a release of storage capacity, the asset manager's delivery or purchase obligation need only be up to 100 percent of the daily contract demand under the release for storage withdrawals or injections, as applicable.

(4) A release to a marketer participating in a state-regulated retail access program exempt from bidding requirements under paragraph (h)(1)(ii) of this section is any prearranged capacity release that will be utilized by the replacement shipper to provide the gas supply requirement of retail consumers pursuant to a retail access program approved by the state agency with jurisdiction over the local distribution company that provides delivery service to such retail consumers.

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 556 and 558

[Docket No. FDA–2008–N–0039]

New Animal Drugs; Ractopamine

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of a new animal drug application (NADA) filed by Elanco Animal Health. The NADA provides for use of ractopamine hydrochloride Type A medicated articles to make Type B and Type C medicated feeds used for increased rate of weight gain and improved feed efficiency in finishing turkeys.

DATES: This rule is effective December 1, 2008.

FOR FURTHER INFORMATION CONTACT: Timothy Schell, Center for Veterinary Medicine (HFV–128), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 240–276–8116, e-mail: *timothy.schell@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: Elanco Animal Health, A Division of Eli Lilly & Co., Lilly Corporate Center, Indianapolis, IN 46285, filed NADA 141–290 that provides for use of TOPMAX 9 (ractopamine hydrochloride) Type A medicated article to make Type B and Type C medicated feeds used for increased rate of weight gain and improved feed efficiency in finishing turkeys. The NADA is approved as of November 12, 2008, and the regulations in 21 CFR 556.570 and 558.500 are amended to reflect the approval.

In accordance with the freedom of information provisions of 21 CFR part 20 and 21 CFR 514.11(e)(2)(ii), a summary of safety and effectiveness data and information submitted to