

MEMORANDUM

TO: Transmission Regulatory Principles Work Group (TREG)

FROM: Thomas Carr, Western Interstate Energy Board

DATE: January 19, 2005

RE: FERC's Natural Gas Pipeline "Open Season" Policy

Introduction

The Federal Energy Regulatory Commission (FERC) has incorporated an open season policy as a component of its broader policy to price and certify natural gas pipelines. FERC's open season policy is not articulated in a single document but is spelled out in multiple policy statements and FERC certification case law going back more than 20 years. This memo provides a brief overview of FERC's policy statements and procedures set forth by case law regarding open season policy for natural gas pipeline facilities.

Background on Pricing and Certification

Pipeline companies seeking to construct natural gas pipeline facilities must obtain a certificate of public convenience and necessity from FERC pursuant to Section 7c of the Natural Gas Act of 1938. In 1991, FERC issued Order 555 (the "construction rule") in an attempt to provide a comprehensive statement on the construction project review process. FERC never implemented Order 555. In 1995, FERC issued a new policy statement on the certification and pricing of new and expanded natural gas pipelines. (1995 Policy Statement)¹. By 1999, changing conditions in the industry prompted FERC to revise the certification and pricing policy. (1999 Policy Statement)². In February 2000, FERC issued a clarifying statement on the policy that expanded upon the open season process. (2000 Policy Statement)³.

¹ 71 FERC ¶61,241 Docket No. PL94-4-000, Pricing Policy For New And Existing Facilities Constructed By Interstate Natural Gas Pipelines, STATEMENT OF POLICY; (Issued May 31, 1995)

² 88 FERC 61,227; Docket PL99-3-000, Certification of New Interstate Natural Gas Pipeline Facilities, STATEMENT OF POLICY; (Issued September 15, 1999).

³ 90 FERC ¶ 61,128 ; Docket No. PL99-3-001 , Certification of New Interstate Natural Gas Pipeline Facilities , ORDER CLARIFYING STATEMENT OF POLICY, (Issued February 9, 2000)

FERC's policy statements addressed two key issues: (1) whether projects should be priced on a rolled-in basis or an incremental basis; and (2) whether there is a need for a specific project and whether the project serves the public interest. When reviewing proposed projects, the 1999 Policy Statement stated the threshold question applicable to existing pipelines as to whether the project can proceed without subsidies from their existing customers. As a general rule, projects expanding an existing pipeline would be incrementally priced. Exceptions would be allowed in some cases where rolled in pricing would prevent subsidization by existing customers. The next step involved the determination whether the applicant made efforts to minimize adverse effects of a project on (a) existing customers of the pipeline; (b) existing pipelines in the market and their captive customers, and (c) landowners and communities on the route.

Policy Statements on Open Season

FERC's 1995 Policy Statement first endorsed the open season process in terms of mitigating rate increases on existing customers from rolled-in pricing. FERC sought to encourage capacity release from existing users prior to approving new construction. The open season process became the tool to check whether the project was the correctly size.

“Thus, in evaluating whether a pipeline project is correctly sized in the certificate proceeding, the Commission will give great weight to whether the pipeline has conducted an open season for all new capacity prior to submitting the application. During the open season, the pipeline should post the proposed project, permit all potential shippers to submit their capacity requests, and employ a non-discriminatory method of allocating the available capacity. The pipeline should then solicit permanent capacity release offers and account for any offers to release capacity in determining the size of the expansion.”

As noted above, FERC's 1999 Policy Statement set forth revised principles for pipeline certification and pricing policy. The following clarification in the 2000 Policy Statement expanded on FERC's view of the open season process as a means identify relinquished capacity of a proposed expansion project.

The Commission has a two-step process for determining whether the market finds an expansion project economically viable. The first step, which occurs prior to the certificate application, is for the pipeline to conduct an open season in which existing customers are given an opportunity to permanently relinquish their capacity.^{4/} This first step ensures that a pipeline will not expand capacity if the demand for that capacity can be filled by existing shippers relinquishing their capacity. The open season policy was not changed by the recent Policy Statement. The second step is that the expansion shippers must be willing to purchase capacity at a rate that pays the full costs of the project, without subsidy from existing shippers through rolled-in pricing.

Aside from these two policy statements, FERC has carved its open season policy in case law addressing individual applications for certification.

General Procedures in the Open Season Process

FERC case law has set precedents governing the procedures to conduct an open season. A complete review of FERC's case law governing the open season policy is beyond the scope of this summary. The Appendix provides the citations and selected text from the leading FERC cases. In general, the pipeline applicant conducting an open season must provide notice of the project, and the notice must contain specific details about the project and describe in sufficient detail the terms for submitting bids.

Attached with this paper is an open season notice by the Wyoming Interstate Company on its proposal for an expansion of Piceance Lateral and Mainline Expansion. The document identifies the length of the open season, describes the project, describes how to submit bids, bid conditions, how capacity will be awarded, and includes templates for a transportation precedent agreement.

Another illustration of FERC policy on open season procedures comes from FERC's proposed regulations that would govern open season policy for natural gas pipelines under the Alaska Natural Gas Act.⁴ Although not applicable to projects outside Alaska, FERC staff indicated that these proposed regulations represent FERC's current view of appropriate open season procedures. Key elements of the proposed Alaskan open season regulations include the following:

- Any application for a certificate of public convenience and necessity will require that the applicant conducted an open season for capacity on the proposed project.
- Notice -- Applicants must provide public notice of an open season at least 30 days prior to the commencement of the open season. The method of notice includes postings on Internet websites, press releases, direct mail solicitations, and other advertising.
- Contents of Notice – Open season notices the following information:
 - General route of the project;
 - Size and design capacity;
 - Maximum allowable operating pressure and expected actual operating pressure;
 - Delivery pressure;
 - Projected in-service date;
 - An estimated unbundled transportation rate for each service offered;
 - Estimated costs of proposed facilities and cost of service, and expected return on equity used to justify the transportation rates;
 - Negotiated rate and other rate options under consideration;

⁴ Docket RM05-1-000; Regulations Governing the Conduct of Open Seasons for Alaska Natural Gas Transportation Projects, NOTICE OF PROPOSED RULEMAKING, (Issued November 15, 2004).

- Quality specifications and other requirements;
 - Terms and conditions for each service offered;
 - Creditworthiness standards to prospective shippers;
 - Date by which potential shippers must execute precedent agreements;
 - Detailed methodology for determining the value of bids;
 - Methodology by which capacity is awarded;
 - Required bid information (binding or non-binding, receipt and delivery points, form of a precedent agreement and time of execution, definition and treatment of non-conforming bids);
 - Projected date for filing the application with FERC;
 - All other information relevant to the open season (proposed service offered, projected pipeline capacity and design, proposed tariff provision, cost of projections)
- Timing – Applicants must provide shippers at least 90 days from the date on which notice is given to submit requests for transportation services.
 - Capacity Allocation – Capacity allocated in the open season process shall be awarded without undue discrimination or preference of any kind.

FERC Staff Contact Information

FERC staff member Richard Foley provided me with detailed notes on the policy statement and case law references identified in this memo. The case law notes are in the Appendix. For additional questions about FERC open season policy, you may want to contact Richard Foley at 202-502-8955 or Richard.Foley@FERC.gov.

APPENDIX:
Notes on FERC Case Law for Natural Gas Pipeline Open Season
Richard Foley, FERC Staff

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I. CERTIFICATE CASES -- Problems before Policy Statement (1980's – early 1990's)

40 FERC ¶61,193, Pacific Gas Transmission Company, Docket Nos. CP87-159-000 and CP87-304-000, (Aug. 21, 1987) Order Issuing Certificate Amended and clarified in part, 41 FERC ¶61,023 (1987), reh'g denied, 41 FERC ¶61,299 (1987), reh'g denied, 42 FERC ¶61,014 (1988).

“PGT's procedure in establishing the initial queue raises two issues for our deliberation: (1) should the Commission permit open seasons as an appropriate method to initiate a first-come, first-served queue; and (2) if so, is the lottery a permissible way to assign priority to bids received during the open season, or should some other method, such as prorationing capacity, be required?”

We are persuaded that PGT's open-season treatment of transportation requests is an appropriate tool to establish the initial queue. Notwithstanding the detrimental reliance and fairness arguments of the lottery opponents, the open-season treatment and the ten-day, cut-off period provides a fair notice of service and fosters an equal opportunity to request service.

In our view, the use of an open season for receiving initial service requests promotes the Order No. 436 goal of equality of access for all interested shippers. This is so because (1) the ten-day, open season in conjunction with the lottery ensures that small Canadian and domestic shippers (who, unlike the large shippers, may not have the resources to engage in the equivalent of a "race to the courthouse") will have an equal opportunity to gain a high position on the queue, and (2) because the open-season treatment of transportation bids (i.e., treating all requests received during the open season as if they were simultaneously filed on the same day) will eliminate the possibility that shippers (affiliated and non-

affiliated) with close ties to PGT could use advance knowledge of PGT's plans to implement Order No. 436 transportation to gain a high position on the queue.

In this regard, the Commission in two recent cases, the Notice of Proposed Rulemaking (NOPR) on marketing affiliates ¹¹ and the IPAMS proceeding, ¹² has recognized that the use of an open-season for prioritizing requests eliminates the abuses which invariably result when some shippers receive advance information about when and how a pipeline will begin its first-come, first-served queue. Specifically, in the IPAMS case (mimeo at 20), we required the pipeline to reestablish its queue by using the open-season approach, after concluding that the queue was defective because certain shippers were made privy to inside information. In the NOPR, the Commission indicated that, as a proposed remedy to the advance notice problem, it was considering a requirement that all pipelines seeking an open-access transportation certificate or any other significant transportation authorization offer potential shippers an open-season for the receipt of transportation requests. The Commission also indicated that all requests during the period "would be considered" have been received simultaneously." ¹³

¹¹ Notice of Inquiry into Alleged Anticompetitive Practices Related to Marketing Affiliates of Interstate Pipelines, Docket No. RM87-5-000, 39 FERC ¶61,247 [FERC Statutes and Regulations ¶32,445] (1987).

¹² Independent Petroleum Association of Mountain States v. Panhandle Eastern Pipe Line Company, 39 FERC ¶61,274 (1987)(Opinion No. 275).

¹³ NOPR, mimeo at 23.

56 FERC ¶61,015, Colorado Interstate Gas Company, Docket No. CP91-1110-000, (July 02, 1991) Preliminary Determination on Non-Environmental Issues, (July 2, 1991)

“ Colorado Interstate elected not to hold an open season to test market interest. Colorado Interstate’s April 19, 1991 data response suggests that an open season would not elicit firm commitments to support the project. Colorado Interstate contends that its search for firm shippers blanketed the available market. Colorado Interstate insists that it was unable to identify any other shippers willing to commit to long-term firm contracts prior to filing the application. Colorado Interstate rejects any suggestion that lateral capacity has been arbitrarily restricted and states that the lateral is designed to match the volumes contracted for by interested shippers. Given the modest level of interest, Colorado Interstate concluded that an open season to allocate initial capacity was unnecessary. To insure open access to the proposed lateral and to avoid any appearance of discriminatory conduct in allocating capacity, Colorado Interstate proposes to hold an open season 30 days after receipt and acceptance by Colorado Interstate of a certificate authorizing the Uinta Lateral. If the response to the open season warrants, Colorado

Interstate states that it will apply for authorization to expand the lateral in order to accommodate the additional volumes associated with the additional firm transportation contracts. However, Colorado Interstate notes that its willingness to construct additional facilities is predicated upon the conditions that the contracts are long-term and that the new contracts economically justify the expansion.

As noted above, Colorado Interstate did not hold an open season for allocating capacity on the lateral. While there is no specific evidence that unduly discriminatory or arbitrary procedures were used, the Commission shares the objections of WestGas and the Public Service Distribution Group to the approach adopted by Colorado Interstate to subscribe initial capacity on the new facility. WestGas states that it was not approached by Colorado Interstate about being a shipper on the lateral. This would appear to be a significant omission on Colorado Interstate's part, given the prominence of WestGas and the Public Service Distribution Group in the region. Colorado Interstate may well have failed to consult other potential shippers as well. The Commission is concerned that Colorado Interstate's efforts to solicit shippers were not exhaustive, and not advertised or conducted in public view. Accordingly, to remedy any inadvertent discriminatory activities which may have occurred in conjunction with Colorado Interstate's advance commitment of capacity, Colorado Interstate will be required to establish new open season procedures for the initial allocation of all lateral capacity. Further, to allay Westgas' concerns regarding bidding for capacity, the Commission will require Colorado Interstate to file, within 30 days of issuance of a preliminary determination in this proceeding, detailed procedures regarding its conduct of the open season. These procedures will then be evaluated in the final order.

59 FERC ¶ 61,364, Colorado Interstate Gas Company, Docket No. CP91-1110-000 and 001, ORDER DENYING REQUESTS FOR REHEARING AND ISSUING CERTIFICATE (Issued June 26, 1992)

2. Colorado Interstate's Open-Season Arguments

Finally Colorado Interstate contends that the Commission's decision to require an open season to solicit initial capacity is unreasonable. Colorado Interstate states that it has explained in detail the method by which it had solicited and obtained contracts for capacity on the Uinta Lateral. This involved a comprehensive search for customers that would have an interest in long-term transportation service on the Uinta Lateral. 5/ In the data responses, Colorado Interstate offered, as it had in its initial Application, in order to ensure that no potential customer was inadvertently missed, to hold an open season 30 days after receipt and acceptance of a certificate authorizing the Uinta Lateral. Colorado Interstate represented that if the response to the open season brought additional contracts for long term firm service, it would apply for authorization to expand the Uinta Lateral to accommodate the additional volumes associated with such requests for firm transportation. Colorado Interstate states that in addressing the open season issue in the preliminary determinations order, the Commission acknowledged that the record contained no specific evidence that unduly

discriminatory or arbitrary procedures were used in Colorado Interstate's solicitation of customers. Colorado Interstate argues that requiring it to hold an open season for allocation of initial capacity is inappropriate and contrary to Commission precedent. Instead, Colorado Interstate suggests that a condition, if required at all, should limit the scope of the open season to determining the level of interest in incremental

5/ This included initial inquiries to determine feasibility, contact with the current producers along the route, and substantial research of publications and computer service with reports of new and planned drilling in order to identify and contact potential shippers. Conversations with those identified as well as additional potential shippers identified in these conversations followed. See Response to Staff Data Request Question No. 3.

service on the Uinta Lateral over and above the service subscribed by the original shippers.

Commission Response

The Commission finds its open season condition is justified and it will be retained without modification for two reasons. First, a number of parties raised specific concerns on this issue and indicated that they might have subscribed to service if approached. More importantly, Colorado Interstate's response to a staff data request, indicated that the procedures observed by Colorado Interstate in soliciting service were not as open and broad-based as they should have been - i.e., they were not the functional equivalent of a formal open season. Therefore, although there is no specific evidence of discrimination by Colorado Interstate in initially allocating capacity and contracting for service on the Uinta Lateral, the condition is appropriate as a means of ensuring that the lateral's capacity is allocated in a non-discriminatory manner.

Colorado Interstate argues that the Commission declined to impose an open season condition in Green Canyon Pipe Line Company, 6/ and that this precedent is applicable here. However, Green Canyon is distinguishable from this case. Emphasizing the extreme water depths, the distance offshore of the proposed pipeline, and the extraordinary expense of development, the Commission recognized that the Green Canyon project entailed unusual risk and therefore could not be viewed in the same light as a conventional project. In this unique situation, given the limited number of shippers with the financial and physical wherewithal to produce in this environment, an open season was neither practical nor necessary.

In any case, Colorado Interstate's opposition to an open season is now moot. In compliance with the Commission's July 2, order, Colorado Interstate filed proposed open season procedures, conducted an open season from August 1, 1991, through August 31, 1991, and notified the Commission of the results. In its notification, Colorado Interstate reports that other than the five original shippers reflected in the application, no shipper

requested service. Since the original capacity allocation on the proposed lateral remains intact, the open season has not impacted the Uinta project or necessitated modification of any of the underlying assumptions as feared by Colorado Interstate.

3. The objections of the Public Service Group

As discussed above, on August 1, 1991, Colorado Interstate filed open season procedures for Commission review. Accompanying the filing was a request for expedited approval of the procedures. Colorado Interstate subsequently conducted the open season as scheduled.

6/ 47 FERC ¶ 61,310 (1989)

On August 26, 1991, the Public Service Group (Public Service) objected to the open season procedures as not in compliance with the preliminary determinations order. Public Service argued that the procedures failed to establish the manner in which the open season would be conducted and that the procedures covered only requests for incremental capacity. It was claimed that new prospective shippers were given no guidelines to file their requests with Colorado Interstate. Accordingly, Public Service Group urged the Commission to reject the open season procedures and require Colorado Interstate to refile procedures in compliance with the order.

Commission Response

On September 10, 1991, Colorado Interstate filed an answer to the Public Service objection, taking issue with Public Service Group's position. Colorado Interstate generally asserted that its procedures were fair, reasonable, and workable and that the original Uinta shippers would have no special preference. The Commission has reviewed Colorado Interstate's open season procedures and concludes that they were appropriate and in compliance with the intent of the July 2, 1991, order. Colorado Interstate allotted one month for prospective shippers to request service and set forth specific steps for filing requests. Colorado Interstate then provided an additional four weeks for any new shippers requesting service to execute a contract. These time periods were adequate. Colorado Interstate's effort to give public notice of the open season included a press release, posting of procedures on an electronic bulletin board, and serving parties to the proceeding with a copy of the procedures. Colorado Interstate also spelled out the basis for allocating capacity, if requests exceeded the proposed capacity of the lateral. Finally, to place all potential shippers on the same footing, Colorado Interstate proposed to assign the five original Uinta Lateral shippers the same priority of service as parties requesting service during the open season. 7/

On balance, Colorado Interstate's procedures were sufficiently open and detailed to allow a fair opportunity for all potential shippers to subscribe to service on the Uinta Lateral on equitable terms. Review of the procedures fails to substantiate Public Service Group's claims of undue preference for existing shippers and lack of clarity. Significantly, when the open season was held, no new party requested service 8/ and

no party raised objections to the underlying procedures other than Public Service Group. Public Service Group's objection is not supported and is therefore denied.

7/ The priority of service date assigned to new shippers could be retained only if a contract was executed with Colorado Interstate by September 27, 1991.

8/ See Notification of Results of Open Season, filed by Colorado Interstate April 16, 1992.

62 FERC ¶61,261, Williams Natural Gas Company, Docket Nos. RS92-12-000, RP89-183-000, RP89-183-002, TC89-8-000, RP91-43-000, TM91-3-43-000, and RP91-152-000, (Mar. 17, 1993)

"The Commission finds that WNG's open season was flawed for several reasons. First, it is clear that many customers were not aware when they submitted their nominations to WNG that WNG planned to treat the early nominations as binding. WNG's customers have a right to know the terms and conditions of what they are buying, and the cost, before committing themselves by making binding nominations.

It is also inappropriate to require converting customers to agree to a minimum term of five years to retain their service. Converting customers' contracts will expire either before or upon implementation of WNG's restructuring. Thus, the same rules should apply as the right of first refusal provisions discussed in this order. Accordingly, WNG's customers must compete with other bidders on price and term to retain service at their current entitlement levels. However, WNG may not require converting customers to agree to a term before this process has taken place. Thus, if the converting customer offers to pay the maximum rate and no one else bids on the capacity, the converting customers can select the term of the contract.

Accordingly, WNG must conduct a new open season in which converting customers are not required to commit to a minimum term. Nor can WNG require converting customers, when matching bids, to agree to purchase more capacity than the competing bid.

II. CERTIFICATE CASES - Applied after Policy Statement (1990's)

76 FERC ¶61,142, Natural Gas Pipeline Company of America, Docket Nos. CP96-27-000 and CP96-27-001, (Aug. 01, 1996) Order Making Preliminary Determination on Non-environmental Issues

“In its March-April, 1996 open season, Natural offered its firm shippers a 10-cent credit towards a 15-cent rate for turn-back capacity, while Natural subsequently offered MidCon Gas a permanent release of capacity without any rate responsibility for released volumes. Natural states that it did not believe that other shippers would be interested in granting Natural a unilateral right to terminate their contracts.¹⁷ However, Natural states that it is willing to enter into release agreements with other shippers that are substantially the same as included in its back-up agreement with MidCon Gas.

The existing customers did not turn back any existing excess capacity in Natural's March-April, 1996, open season. Natural offered different terms to MidCon Gas after the March-April open season than it did to all other shippers during the open season. Such difference in the terms of capacity turn-back is unduly discriminatory. The Commission will require Natural to remedy such discrimination by holding another open season for the release and turn-back of capacity within 15 days after the issuance of this order and to report the results of such open season to the Commission within 45 days after the issuance of this order. In such open season, Natural must offer the same terms and conditions to its affiliated and non-affiliated shippers.

Williams Natural Gas Co., 79 FERC ¶61,055 (1997).

On April 18, 1997, the Commission issued an order requiring Williams to hold another open season because Williams had bundled production and market area capacity in its original open season.¹ Additionally, we held Williams' certificate application in abeyance, including any environmental review of the proposal, pending the results of the new open season. We found that Williams had improperly conducted its open season because it had bundled services by requiring bidders for market area transportation to take production area transportation.

“The Commission's goal in restructuring pipelines has been to require unbundling of services, including gathering or production services from transportation.⁸ In a similar case, we ordered Pacific Gas and Electric Company (PG&E) to cease and desist from bundling released capacity on two different segments of Pacific Gas Transmission Company's (PGT) facilities.² We find in this case that the language Williams used in the open season announcement lends itself to a strong interpretation that bidders were required to take both market and production area capacity.

The record does not show an operational justification for bundling Williams' production and transportation capacity. (We have stated that economic reasons for bundling capacity are insufficient justification.¹⁰) There may even be released and interruptible capacity available in the production area at less cost than the

capacity offered in the open season, a claim made by Conoco which Williams did not refute.

For these reasons, we will require Williams to hold another open season for at least a two week period. Williams shall permit shippers to bid separately and independently on either market or production area capacity. Further, all of the shippers that subscribed to capacity in Williams' initial open season must be given the option to cancel their subscriptions and to submit new bids. Missouri Gas must be allowed to rescind, if it desires to do so, the additional terms of the subject transportation agreements that were extended in lieu of subscribing to production capacity.

79 FERC ¶61,394, Iroquois Gas Transmission System, L.P., Docket No. CP96-687-000, (June 27, 1997) some parties also allege that Iroquois' open season and subsequent solicitation of released capacity was flawed because the open season announcement set a minimum bid. We do not agree. [But lead to : 91 FERC ¶ 61, 116 Iroquois Gas Transmission System, Docket No. CP96-687-002, ORDER ON REMAND AND VACATING PRIOR ORDER, IN PART (Issued April 28, 2000) re On April 13, 1999, the United States Court of Appeals for the District of Columbia Circuit (Court) remanded to the Commission the proceedings in Iroquois Gas Transmission System, L.P., v. FERC (No. 98-1081) (Iroquois).

80 FERC ¶61,195, Natural Gas Pipeline Company of America, Docket No. CP96-720-000, (Aug. 05, 1997) Order Deferring Action to Permit New Open Season

“During Natural's Louisiana Line open season, a shipper relying on Natural's EBB to evaluate whether sufficient Arkoma Lateral and/or other Texok Zone capacity existed to support a bid for Louisiana Line expansion capacity would have been misinformed as to the capacity actually available on the Arkoma Lateral and within the Texok Zone. During the same period, MidCon successfully bid for 50 MMcf/d of Louisiana Line expansion capacity, despite the EBB's indication that only 38 MMcf/d was available. We believe that the issues raised in this proceeding with respect to potential affiliate abuses and the events leading to the MidCon Precedent Agreement cannot be resolved independently of the broader issues raised in the complaint in Docket No. RP97-232-000

86 FERC ¶61,066, Tennessee Gas Pipeline Company, Docket No. RP98-140-003, (Jan. 27, 1999) Order on Rehearing And Clarification

“The Commission will grant Tennessee's request for clarification to the extent set forth below. The Commission clarifies that, if Tennessee holds an open season for Expired Contract Capacity before the expansion project open season in order to

reserve such capacity for the expansion project, Tennessee may impose in the open season for Expired Contract Capacity the same minimum terms and conditions that it anticipates it will impose in the future expansion project open season. In that circumstance, if the expansion project's minimum terms and conditions are materially different than the terms and conditions that were imposed in the open season for Expired Contract Capacity, then Tennessee must hold another open season for Expired Contract Capacity with the same new open season minimum terms and conditions. Consistent with the September 24, 1998 order, where Tennessee holds an open season for Expired Contract Capacity during or after the expansion project open season in order to reserve such capacity for the expansion project, the open season for Expired Contract Capacity must reflect the same minimum terms and conditions imposed in the expansion project open season. Because the September 24, 1998 order required Tennessee to impose the same minimum terms and conditions on the open seasons for Expired Contract Capacity and the expansion project in all circumstances, without condition, the September 24, 1998 order is modified, and Tennessee must file revised tariff provisions, to reflect these clarifications.

III. CERTIFICATE CASES – Current Cases (2000 +)

Natural Gas Pipeline Company of America, Docket No. CP02-391-000 PRELIMINARY DETERMINATION ON NON-ENVIRONMENTAL ISSUES (Issued October 31, 2002), Where NGPL had to redo its open season because they did not include a recourse rate.

“Thus, we find that Natural's open season is invalid. We will require Natural to hold another open season that conforms to the Commission's negotiated rate policy within 15 days after the issuance of this order and to report the results of the open season within 45 days after the issuance of this order. (1)

In regard to Dynegy's protest, we require that pipelines solicit turn-back capacity before filing an application for authority to construct new capacity. (2) This requirement ensures that the construction is properly sized and that the new construction is actually needed. Here, Natural did not solicit turn-back capacity. Thus, in its new open season, we will require Natural to solicit turn-back capacity from its existing customers.”

1 Natural Gas Pipeline Company of America, 76 FERC 61,142, p. 61,788 (1996).

2 Northern Border Pipeline Company, 90 FERC ¶ 61,263 (2000).

Natural Gas Pipeline Company of America, Docket No. CP02-391-000 101 FERC 61,361. ORDER ISSUING CERTIFICATE (Issued December 24, 2002)

“The preliminary order directed Natural to hold a new open season because Natural required negotiated fixed rate bids, but did not provide a cost-of-service alternative, and because Natural did not solicit turn-back capacity from its existing customers. The order required Natural to hold a new open season within 15 days and to report the results of the open season within 45 days of the date of the order.”

102 FERC ¶61,044, PG&E Gas Transmission, Northwest Corporation, Docket Nos. RP02-362-001 and RP02-362-002, (January 16, 2003), Order Accepting Compliance Filing, Subject to Conditions.

” The Commission is not persuaded that GTN should be precluded from entering into pre- arranged deals prior to an open season. Paragraph 18.1(b) of GTN's tariff provides that GTN may enter into a pre-arranged deal for capacity prior to holding an open season provided that GTN will post the terms of the pre-arranged deal and other parties will have an opportunity to bid on the capacity. The Commission has allowed pipelines to enter into pre-arranged deals for capacity before it has been offered in an open season provided that other parties will have an opportunity to bid on the capacity prior to the commencement of the pre-arranged agreement.⁵ Therefore, GTN's proposal is consistent with Commission policy.

⁵ See, e.g., Southern Natural Gas Co., 100 FERC ¶61,089, at p. 61,375 (2002).

103 FERC ¶61,390, Northern Border Pipeline Company, Docket No. RP03-507- 000, (June 30, 2003) Order Accepting Tariff Sheets Subject to Conditions

“ Northern Border's proposal to reserve capacity for future expansion projects is generally consistent with Commission policy.⁶ The Commission previously found that the reservation of capacity will minimize facility construction and associated environment impacts, will encourage fuller utilization of capacity, and will minimize the rate impact of allocating costs of unsubscribed capacity to existing customers once the pipeline completes the expansion. However, the Commission finds that PGC has raised several concerns which require revisions to the proposed tariff provision to ensure that Northern Border offers reserved capacity in a not unduly discriminatory manner.

In accordance with Tennessee and Columbia Gulf, we shall also require Northern Border to solicit turnback capacity as part of the capacity reservation process.⁷ Further, to ensure that solicitation of capacity turnback occurs in the same general time frame as the reservation, we direct Northern Border to revise its tariff to incorporate a turnback solicitation requirement comparable to Tennessee's solicitation requirement. Additionally, Northern Border's filing does not address when it will solicit its existing customers for excess or turnback capacity in order to determine the amount of reserved capacity needed for the expansion project. In order to effectuate the Commission's policy to promote "the efficient allocation of capacity," we direct Northern Border to amend its reserved capacity provision to include solicitation procedures to ensure that excess and turnback capacity is posted prior to determining the reserved capacity needed for future expansion projects.⁸

Finally, consistent with the Commission's Certificate Policy Statement, to ensure that Northern Border's existing customers will not subsidize the reserved capacity,

we direct Northern Border to revise its tariff to provide that its existing customers will not bear any of the costs of the reserved capacity to which they did not subscribe.⁹ Further, notwithstanding Northern Border's proposed tariff revisions, its shippers retain the right to challenge the validity and reasonableness of a capacity reservation in a complaint proceeding.

⁶ See Northwest Pipeline Corp., 85 FERC ¶61,335, at p. 62,312 (1998), order on reh'g, 86 FERC ¶61,132 (1999).

⁷ Tennessee, 86 FERC at p. 61,259, citing Pricing Policy for New and Existing Facilities Constructed by Interstate Natural Gas Pipelines, 71 FERC ¶61,241 (1995).

⁸ See, e.g., Tennessee, 86 FERC at p. 61,260.

⁹ Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶61,227 (1999).

95 FERC ¶61,220, Southern Natural Gas Company, Docket No. CP00-233-002, (May 16, 2001) Order Denying Request for Rehearing

“The Municipals contend that Southern should have conducted another open season after the settlement of its rate case because the rate case extended the transportation contracts of its customers until 2005. However, there is no requirement in our policies that a pipeline hold a second open season after a rate case or after some other intervening factor. Moreover, the settlement in the rate case came after Southern filed its application in this case to construct the South System Expansion Project. Thus, we conclude that Southern did not violate the Certificate Policy Statement by not holding a second open season.

IV. CERTIFICATE CASES - Change from first-come / first serve to net present value (NPV) bidding

76 FERC ¶61,101, Tennessee Gas Pipeline Company, Docket No. RP96-275-000, (July 31, 1996) early case for NPV and open seasons

“The Commission agrees with the commentors that the tariff should contain more detailed criteria concerning the open season. In reply comments Tennessee proposed to modify its proposal to state that the open season NPV proposal will automatically apply to service offerings with a duration of three months or longer and clarify the procedures that will be used to award capacity when Tennessee receives a request for service for

which Tennessee has not proposed an open season. These modifications address some of the concerns raised by the comments. Tennessee is directed to make these changes.

Southern Natural Gas Company, Docket No. RP03-576-000, 104 FERC 61,333; 2003 September 30, 2003 later case on NPV and open seasons

"This order benefits the public by adopting the NPV method for awarding receipt point capacity on Southern's system, thereby ensuring that this capacity will be awarded to the shippers that value it most.

CERTIFICATE CASES – Limited Exception

97 FERC ¶61,276, Cove Point LNG Limited Partnership, Docket Nos. CP01-76-001, CP01-77-001, RP01-217-001, and CP01-156-001 (Not Consolidated), (Dec. 19, 2001) Order Granting Rehearing in Part, Denying Rehearing in Part, Granting and Denying Clarification and Establishing Limited Hearing Proceeding

" Washington Gas states that when Cove Point held its open season for the new firm storage and transportation capacity associated with the reactivation of the LNG facilities it bundled these services together under the LTD-1 Rate Schedule. Washington Gas asserts that the Commission's failure to require Cove Point to unbundle the components of the LNG service and to offer a separate firm transportation service in an open season is contrary to Commission orders, such as in Equitrans, Inc.,¹⁹ that have required that pipeline services to be unbundled into separate sales, transportation, and storage components.

Washington Gas also contends that the bundled transportation arrangement ignores Washington Gas's historic reliance on the Cove Point pipeline for service and will force it to purchase the bundled LNG service for its captive gate stations rather than allowing Washington Gas to contract for capacity so that it can bring gas purchased in the open market through the Cove Point interconnects with Columbia, Dominion, or, in the future, Transco. Washington Gas states that it desires to contract for additional firm transportation on Cove Point service but has been unable to do so because no separate firm transportation service was offered in Cove Point's open season. In addition to being contrary to the Commission's open access policies, Washington Gas states that Cove Point's proposal represents an unlawful tying arrangement under the applicable principles of antitrust law.²⁰ For these reasons, Washington Gas requests the Commission to grant rehearing to require the unbundling of Cove Point's LTD service and to hold another open season so that Washington Gas may bid only for firm transportation service.

The Cove Point terminal and pipeline were constructed for the purpose of importing and delivering LNG.²¹ After the project became uneconomical and was "mothballed" in 1980, Cove Point began using the pipeline to provide transportation service. Cove Point's LNG storage facilities were reactivated in 1994 to provide gas peaking services utilizing domestic supplies and are now

being enlarged to recommence storage and transportation service that utilizes imported LNG supplies. As a result, the pipeline is again needed for its original purpose, the delivery of imported LNG.

For its LNG storage facilities to be used for importation, Cove Point must be able to ensure its customers that they can unload tankers at the LNG facility, store the gas at the facility and then have the LNG revaporized and redelivered to points on Cove Point's pipeline facilities. Requiring Cove Point to unbundle capacity contracted to secure its LNG import function could result in underutilization of Cove Point's terminalling, offloading, storage, liquefaction, vaporization and storage facilities, which represent a far greater investment than the 87.7-mile pipeline. Such a requirement would be inconsistent with the purpose for which the certificate was issued.

The Equitrans case cited by Washington Gas did not involve the special considerations present here. We deny Washington Gas' rehearing request that Cove Point be required to conduct a new open season for the purpose of reallocating the capacity under contract for its new LTD peaking services.

¹⁹ 62 FERC ¶61,082, at p. 61,612 (1993).

²⁰ Citing *Eastman Kodak Co. v. Image Technical Service, Inc.*, 504 U.S. 451, 461-62 (1992); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 9-18 (1984).

²¹ *Columbia LNG Corp. and Consolidated System LNG Co.*, Opinion No. 622, 47 FPC 1624 (1972), *aff'd and modified*, Opinion No. 622-A, 48 FPC 723 (1972).