

contracts, not to “force fit” payments into transportation or commodity components.

- C. The proposed reporting requirements applicable for sellers of natural gas should be clarified or revised to provide that:
 - 1. Only parties making sales at or into the California market should be subject to the proposed reporting requirements. A party selling natural gas to an LDC or other purchaser outside of California will not know what the purchasers’ plans are for delivery of the natural gas
 - 2. Sellers of natural gas should not be required to research and report the pipeline affiliation or industry “category” (marketer, end-user or LDC) of a purchaser in connection with compliance with the May 18 Order.
 - 3. Proposed Natural Gas Seller Reporting Requirement No. 5 should be clarified. It is unclear whether purchased volumes must be reported on a daily or some other basis.

- D. The reporting requirements imposed by the May 18 Order should be limited in duration to one year, unless the Commission determines, on the basis of substantial evidence, that an extension is warranted.

- E. The provision of non-jurisdictional information by non-jurisdictional companies pursuant to the May 18 Order should not in any manner be interpreted as conceding the Commission’s authority to compel provision of this data in this or in any other proceeding or otherwise to regulate non-jurisdictional transactions.

- F. Appropriate assurances against public disclosure of contract-specific gas pricing information should be provided, consistent with relevant judicial precedent.

II. Communications and Correspondence.

Communications and correspondence regarding this filing should be directed to:

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III. NGSAs Interest in this Proceeding.

NGSA represents integrated and independent companies that produce and market domestic natural gas. Established in 1965, NGSA encourages the expanded use of natural gas and a regulatory climate that fosters competitive markets.²

IV. Overview of the May 18 Order.

The May 18 Order proposes a series of new reporting requirements applicable to sales and purchases of natural gas at or into the California market, in addition to supplemental reporting obligations applicable to natural gas transportation transactions in the same market.³ Separate proposed reporting requirements are applicable for interstate pipelines, natural gas sellers and local distribution companies.

The new proposed reports are to be filed quarterly in both hard copy and electronic format. The May 18 Order states that “[p]arties responding to the request could request confidential treatment of their responses. The Commission would aggregate the data submitted and analyze it promptly. The Commission would then determine, what action, if any, is warranted.”⁴

V. NGSAs Comments on the May 18 Order.

As the Commission correctly points out in its order in this proceeding, the proposed reporting requirements the Commission wishes to impose are directed at both regulated and **non-regulated** entities. NGSA has serious concerns regarding Commission attempts to exert authority over areas for which it does not have jurisdiction

² NGSA’s membership intends to do what is necessary to provide the Commission with what it needs to perform its statutory responsibilities. However, the views expressed herein are those of NGSA as an association and do not necessarily reflect the positions that may be taken by individual NGSA member companies in this or related proceedings.

³ May 18 Order, Appendix.

⁴ May 18 Order, slip op. at 6.

and is concerned about the future implications of doing so. These concerns are stated more explicitly below. However, in the spirit of cooperation, NGSA offers the following suggestions with respect to the proposed reporting requirements:

*A. Duplication of Reporting Obligations Must Be Avoided.*⁵

Consistent with the Commission's obligations under the Paperwork Reduction Act, any new reporting requirement must minimize regulatory burdens and must be necessary for the proper performance of the functions of the agency. At a minimum, duplicative reporting requirements or information already publicly available should be eliminated.

Proposed Natural Gas Seller Reporting Requirement No. 4 requests information on a daily basis for an unstated period of time relating to contracts for the transportation of gas to the California border. The requested information includes:

- a. Contract demand;
- a. Daily nominated volumes;
- b. Daily scheduled volumes;
- c. Daily delivered volumes;
- d. Whether the service is firm or interruptible;
- e. The rate charged; and
- f. Receipt and delivery points associated with the contract.

Requested items for "sellers" 4.a, 4.c, 4.d, 4.e, and 4.f duplicate verbatim information that the May 18 Order proposes to collect from interstate pipelines. Furthermore, the

⁵ In these comments, NGSA focuses specifically on the proposed reporting obligations applicable to sellers of natural gas.

proposed Interstate Pipeline Reporting Requirements themselves largely duplicate information already required to be provided pursuant to 18 C.F.R. § 284.13(b)(1).⁶

B. Parties Subject to a Valid Reporting Requirement Must Not Be Required to “Force Fit” a Delivered Price into a Transportation or a Commodity Component.

Proposed Natural Gas Seller Reporting Requirement No. 3 requires that natural gas sellers “to the California market” identify, for each sales contract, separate transportation and commodity components of the price. The May 18 Order adds that “[I]f these components are not specifically set forth in the contract, provide a valuation, with explanation of each component.”⁷

Parties should not be required to “force fit” a delivered price into a transportation or commodity component. With appropriate safeguards for confidential treatment of requested information, parties can only reasonably provide the actual prices under the contract. If a contract provides for a delivered price at the border, a subjective analysis by an individual of the transportation/commodity breakdown would be meaningless and without value. Therefore, only actual prices under the contracts should be reported.

C. Reporting Obligations Should Be Clear and Fair.

The May 18 Order imposes reporting obligations applicable to sales and purchases pursuant to which gas is physically delivered at or into the California market. The May 18 Order appears to state that sellers would not be subject to the reporting obligation if their gas is resold at a point outside California. Assume that Producer A sells to Marketer M in Alberta. Marketer M subsequently resells the gas at or into the

⁶ 18 C.F.R. § 284.13(b)(1) does not address daily scheduled volumes by shipper or daily delivered volumes by shipper. Nor does the current regulation address daily nominations by shipper.

⁷ May 18 Order, Appendix at 3.

California market. Marketer M, not Producer A, would have the reporting obligation under the May 18 Order. NGSAs seek confirmation of this interpretation.

Imposing the reporting requirement on the party selling gas at or into the California market makes sense. A producer (or a marketer operating outside of California) may not know the ultimate destination for gas sold to a reseller. This would also minimize the risk of multiple reports being submitted for the same transaction, and decrease the administrative burdens associated with complying with the May 18 Order.

Proposed Natural Gas Seller Reporting Requirement No. 2 requires sellers to state whether their buyers are energy marketers, LDCs, or end users, and to state whether they are affiliated with an interstate pipeline. Natural gas sellers simply may not know whether their buyers are pipeline affiliates, or whether they are marketers, LDCs or end users (a given buyer may have subsidiaries engaged in one or more of these functions). For this reason, natural gas sellers should not be required to research or report this information.

Proposed Reporting Requirement No. 5 should be clarified. Presently, it is unclear whether purchase volumes should be stated on a daily basis or some other basis.

D. Any Reporting Requirements Should Be Limited in Duration.

The information collection requirements imposed by the May 18 Order must be limited in duration. The requirements should terminate of their own force within one year of their effective date, unless the Commission specifically determines that an extension is warranted, based on substantial evidence.

E. The Commission's Jurisdiction over Sales of Natural Gas Is Limited.

The Commission's rate jurisdiction over sales of natural gas is extremely limited, as the May 18 Order concedes, in part. The Commission has no jurisdiction over any first sales of natural gas.⁸ The Commission has no jurisdiction over direct sales of natural gas⁹ and thus, no jurisdiction over the commodity component of a direct sale of natural gas.¹⁰ The Commission's jurisdiction under Section 4 of the Natural Gas Act ("NGA") encompasses only sale for resale transactions. All sale for resale transactions currently are subject to blanket certificates authorizing the use of market-based rates.¹¹ Neither Section 14 nor Section 16 of the Natural Gas Act confer on the Commission any independent authority to regulate sales of natural gas exempt from jurisdiction under Section 1(b) of the NGA or the Wellhead Decontrol Act.¹² Thus, the provision of non-jurisdictional information by non-jurisdictional companies pursuant to the May 18 Order should not in any manner be interpreted as conceding the Commission's authority to compel provision of this data in this or in any other proceeding or otherwise to regulate non-jurisdictional transactions.

⁸ NGPA §§ 601(a)(1)(A), -(1)(B), -1(C). Under the Energy Policy Act of 1992, sales of imported LNG and gas imported from a country with which there is in effect a free trade agreement mandating national treatment for trade in natural gas are first sales. P.L. 102-486, Title II, Section 201, 106 Stat. 2866 (October 24, 1992), *codified at* 15 U.S.C. § 717b(b) & -(c). Sales by an affiliate of an interstate pipeline, intrastate pipeline or local distribution company of affiliated production also are first sales. NGPA § 2(21)(B).

⁹ 15 U.S.C. § 717b.

¹⁰ *See, e.g., Mississippi River Transmission Corp. v. FERC*, 969 F.2d 1215 (D.C. Cir. 1992).

¹¹ Final Rule, *Regulations Governing Blanket Marketer Sales Certificates*, Order No. 547, 57 Fed. Reg. 57952 (Dec. 8, 1992), FERC Stats. & Regs. ¶ 30,957 (1992), 61 F.E.R.C. (CCH) ¶ 61,281 (1992), *order on reh'g*, 62 F.E.R.C. (CCH) ¶ 61,239 (1993). *See also* 18 C.F.R. § 284.402 (2000).

¹² *See, e.g., FPC v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 505-06 (1949)(Section 14 creates no independent statutory jurisdiction to regulate otherwise exempt transactions); *Mobil Oil Corp. v. FPC*, 483 F.2d 1238, 1254 (D.C. Cir. 1973)(Section 16 is not an independent grant of jurisdiction).

F. Any Reporting Requirements Adopted in this Proceeding Must Safeguard Competitive Data and Other Trade Secrets.

The Commission's jurisdiction under Section 14 of the NGA is limited to (a) investigations to determine whether any person has violated or is about to violate the Natural Gas Act or any rule regulation or order thereunder (or to aid in the enforcement of the NGA, or (b) in obtaining information to serve as a basis for recommending further legislation to Congress. As a threshold matter, a substantial legal question exists as to whether the Commission has the authority to compel a non-jurisdictional entity under the NGA to provide data concerning non-jurisdictional activities.¹³

Even if the Commission has authority under Section 14 of the NGA to require production of the requested data for purposes of a Commission investigation, the Commission does not have the authority to release the confidential aspects of the information (including natural gas sales data) to the public without first safeguarding the interests of those providing the information.

Natural gas sales contract data of the type requested in the May 18 Order is not the type of information generally disclosed to the public. This type of information constitutes a commercially sensitive trade secret within the scope of the Freedom of Information Act and the Trade Secrets Act.¹⁴ Disclosure of contract-specific information can and will result in direct and immediate competitive harm to those subject to the reporting requirements.

¹³ Prior Commission orders reviewed by the federal courts under the NGA only have addressed situations in which the Commission sought data from natural gas companies or affiliates of natural gas companies. *See Continental Oil Co. v. FPC*, 519 F.2d 31 (5th Cir. 1975), *cert. denied*, *Superior Oil Co. v. FPC*, 425 U.S. 971 (1976); *Superior Oil Co. v. FERC*, 563 F.2d 191 (5th Cir. 1977). Unlike Section 311 of the Federal Power Act, Section 14 of the NGA does not confer on the Commission free-standing authority to investigate non-jurisdictional activities relating to sales of natural gas.

¹⁴ Confidentiality concerns primarily arise with respect to Proposed Natural Gas Seller Reporting Requirements 2, 3 and 5 (which request contract-specific gas pricing information).

Federal courts have stressed that the Commission cannot release information collected pursuant to Section 14 of the NGA without taking into consideration the legitimate commercial interests of those producing the data. In the cases most analogous to this one, courts generally have barred the Commission from releasing data to the public in any way other than in an aggregated format.¹⁵ Similar protections should be afforded here.

VI. Conclusion.

WHEREFORE, for the reasons outlined above, NGSA requests that the Commission clarify or modify the proposed reporting requirements in accordance with these comments, to the extent the Commission determines that imposition of the proposed requirements is necessary and consistent with the Commission's jurisdiction under the Natural Gas Act.

Respectfully submitted,

NATURAL GAS SUPPLY ASSOCIATION

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DATED: June 18, 2001

¹⁵ *Continental Oil Co. v. FPC*, 519 F.2d 31 (5th Cir. 1975), *cert. denied*, *Superior Oil Co. v. FPC*, 425 U.S. 971 (1976); *Superior Oil Co. v. FERC*, 563 F.2d 191 (5th Cir. 1977). *See also Pennzoil v. FPC*, 534 F.2d 627 (5th Cir. 1976). The May 18 Order does not directly address potential public disclosure of information after its receipt and review by the Commission, other than to note that parties can request confidential treatment pursuant to 18 C.F.R. § 388.112 (2000). *See* May 18 Order, slip op. at 6.

CERTIFICATE OF SERVICE

Pursuant to Rule 2010 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2010 (2000), I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., this 18th day of June 2001.

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