

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Promotion of a More Efficient Capacity Release Market)
) **RM08-1-000**

COMMENTS OF THE NATURAL GAS SUPPLY ASSOCIATION

The Natural Gas Supply Association (“NGSA”) hereby submits its comments in the above captioned proceeding.¹

I. COMMUNICATIONS

NGSA represents integrated and independent companies that produce and market domestic natural gas. Established in 1965, NGSA encourages the use of natural gas within a balanced national energy policy, and promotes the benefits of competitive markets to ensure reliable and efficient transportation and delivery of natural gas and to increase the supply of natural gas to U.S. consumers.

Notices and communications concerning these comments should be addressed as follows:

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¹ *Promotion of a More Efficient Capacity Release Market*, Docket No. RM08-1-000, FERC Stats and Regs., Proposed Regs. ¶ 32,625, 72 Fed. Reg. 65,916 (2007)(“Capacity Release NOPR” or “NOPR”).

II. EXECUTIVE SUMMARY

In the Capacity Release NOPR, the Commission proposes to (i) permanently remove the rate cap on capacity release transactions with terms of one year or less, (ii) exempt the release of capacity, made as part of an asset management arrangement (“AMA”), from bidding and the prohibition against tying, and (iii) address other aspects of its capacity release program, including allowing a releasing shipper to condition a release of storage capacity on taking its gas in storage.

The following are the positions of NGSAs on these and other issues arising from the Capacity Release NOPR. NGSAs:

- does not oppose permanently removing the rate cap on capacity release transactions with terms of one year or less, if the Commission takes steps to effectively protect customers against the potential exertion of market power. NGSAs believe this can be accomplished as long as the Commission puts in place the following customer safeguards:
 - (i) prohibit pipeline capacity from being sold at an amount higher than the maximum Commission-approved rate and retain the cap on capacity release transactions with terms of more than one year;
 - (ii) actively monitor the capacity release market and promptly investigate any allegations of the exercise of market power; and
 - (iii) reassess its decision to remove the cap following issuance of the Commission-ordered Staff report and public comment on that report.
- believes releasing shippers should have the ability to make multiple, consecutive releases with terms of one year or less at rates above the pipeline’s rate cap, as long as the capacity is subject to bidding following the expiration of each contract.
- supports continuation of pre-arranged releases without bidding for transactions of one year or less, as long as the releases are made at the pipeline’s rate cap.
- supports the NOPR proposal on asset management arrangements (“AMAs”) but proposes further refinements to allow (1) the replacement shipper to maximize the use of the capacity associated with the AMA and

(2) other market participants to participate in such beneficial transactions. With these refinements to the definition of an AMA, the revised definition would read as follows:

AMA: any pre-arranged release that contains a condition that the releasing shipper may, as agreed upon by the parties, require the replacement shipper to deliver to (in the case of a release by a downstream entity) or accept delivery from (in the case of an upstream entity) the releasing shipper a volume of gas equal to the daily contract demand of the released transportation capacity or the daily contract demand for storage withdrawals.

- asks for clarification that AMA releases of capacity for periods of more than one year are exempted from the rate cap imposed on standard capacity release transactions.
- supports allowing a releasing shipper to condition the release of storage capacity on the sale and/or repurchase of gas inventory in storage.

III. COMMENTS OF NGSА ON THE CAPACITY RELEASE NOPR

A. NGSА Does Not Oppose Permanently Lifting the Rate Cap on Short-Term Capacity Release Transactions as Long as Consumer Safeguards are in Place to Prevent the Potential Exertion of Market Power.

The Commission proposes to lift the rate cap on capacity release transactions with terms of a year or less,² citing various benefits to competitive natural gas markets,³ as well as evidence that purchasers of capacity will be protected from the exercise of market power.⁴

² *Id.* at ¶¶ 23-42. At the same time, the Commission retains the cap for capacity release transactions longer than a year. Moreover, firm and interruptible pipeline capacity could not exceed the Commission approved rate. *Id.* at ¶¶ 43-52.

³ *Id.* at ¶ 25 (removal of the price ceiling will (i) enable releasing shippers to offer competitively-priced alternatives to the pipelines' negotiated rate ceilings, (ii) permit more efficient utilization of capacity by permitting prices to rise to market clearing levels, (iii) provide potential customers with additional opportunities to acquire capacity by increasing the incentive of firm capacity holders to release capacity during times of scarcity, and (iv) provide more accurate price signals concerning the market value of pipeline capacity).

⁴ *Id.* at ¶ 29 (data obtained during the experiment of Order No. 637 and most recently confirmed that short term release prices are reflective of market prices rather than the exercise of market power).

NGSA does not oppose the Commission's proposal, as long as effective steps are taken to protect shippers from the potential exertion of market power. To effectively mitigate the potential exercise of market power, the Commission must put in place consumer safeguards including:

- (i) continuing to prohibit pipelines from charging an amount higher than its maximum Commission-approved rate⁵ -- outside the context of negotiated rate transactions;⁶
- (ii) not removing the rate cap on standard capacity release transactions for terms exceeding one year;
- (iii) aggressively monitoring the market, including any significant migration of pipeline primary capacity to an affiliate; and
- (iv) reassessing its decision following industry input on the Commission-ordered Staff Report.

The Commission should only remove the rate cap on capacity release transactions if the Commission prevents releasing shippers from exercising market power.⁷ Continued Commission regulation of pipeline rates for its primary capacity will prevent the exercise of market power by providing replacement shippers recourse

⁵ *Id.* at ¶¶ 46-52. In its initial comments on the request filed by the Pacific Gas & Electric and Southwest Gas Corp. to remove the cap, the NGSA made clear that consideration of removal of the cap (even in the context of a further experiment) was "fully contingent" upon primary pipeline capacity continuing to be available as a recourse option to capacity release shippers at the maximum tariff rate. *Comments of the Natural Gas Supply Association*, filed on April 11, 2007 in Docket No. RM06-21-000, et. al., at 6.

⁶ NOPR at ¶ 48 (recognizing that pipelines can currently enter into negotiated rate transactions above the maximum rate).

⁷ *Alternatives to Traditional Cost of Service Ratemaking for Natural Gas Pipelines*, 74 FERC ¶ 61,076, reh'g denied, 75 FERC ¶ 61,024 (1996).

if a releasing shipper attempts to exercise market power in the capacity release market. Moreover, such caps prevent pipelines and releasing shippers from exercising market power by withholding capacity or, in the case of the pipelines, failing to build new capacity.

Similarly, continued rate caps on capacity release transactions for periods of more than one year will prevent a replacement shipper from being locked into a transaction without the protection from the exercise of market power afforded by a Commission-approved rate.

The Commission can only prevent the exercise of market power if it actively monitors the capacity release market and responds aggressively to allegations of market power abuse. This monitoring effort should include all market participants, especially focusing on capacity release transactions by affiliates of pipelines and, in particular, where large portions of capacity on a pipeline could migrate into the hands of an affiliate of that pipeline. In this situation, the potential to exercise market power exists and the opportunity for third parties to obtain primary pipeline capacity at a rate no greater than regulated cost-based rates, or the ability to obtain released capacity at fair market values, may be thwarted.⁸ Also, as the Commission pointed out in Order No. 637, affiliates holding large amounts of transportation capacity could act in conjunction

⁸ As the Commission stated in Order No. 637, “if a pipeline affiliate holds a large enough block of capacity on its related pipeline, the corporate entity as a whole could benefit if the pipeline refused to build capacity, creating greater scarcity and higher prices and profits for the affiliate, which is not subject to cost-of-service limitations.” *Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services*, 63 Fed. Reg. 10156 (2000), *FERC Stats and Regs.* ¶ 31,091, 31,287 (2000) (“Order No. 637”).

with their affiliated pipeline to restrict access to capacity, tie services from each of the corporate entities that would benefit the corporate entity as a whole, and otherwise act in a discriminatory manner.⁹

For these reasons, the pipeline affiliate standards of conduct and the Commission's market manipulation rules must be strictly enforced as the Commission removes the rate cap on released capacity. If the Commission uncovers affiliate abuse, it should act swiftly and strongly to remedy the situation by: (i) re-imposing the rate cap on any released capacity offered by the pipeline affiliate, (ii) limiting the amount of capacity the affiliate can hold, or (iii) revoking the blanket sales certificate given to the affiliate to market natural gas.

The results of such monitoring should be reflected in the report proposed within two and one half years of the effective date of the final rule. NGSAs proposes that the report be issued for public comment and that the Commission once again impose a rate cap should the report or comments warrant.

B. The Commission Should Not Limit Multiple, Consecutive Releases of Short-Term Capacity as Long as the Capacity is Subject to Bidding.

In the NOPR, the Commission proposed to allow consecutive short-term releases to exceed the rate cap but requested comments on whether there should be any limit on such releases.¹⁰ NGSAs supports the Commission's proposal that it should not limit a releasing shipper from making multiple, consecutive releases with a term of one year or less, as long as the capacity is subject to bidding.

⁹ The Commission committed to being sensitive to these types of situations in Order No. 637. *Id.*

¹⁰ Capacity Release NOPR at ¶ 45.

Multiple releases, each with a term of one year or less, will not present any concerns of abuse or circumvention of the rate cap if these transactions are subject to bid each time a contract expires, as proposed in the NOPR. As long as other market participants are provided the opportunity to bid for that capacity, there is no need to impose additional restrictions which could withhold the benefits associated with lifting the rate cap for such transactions.¹¹

C. The Commission Should Provide the Option For Parties to Continue Short-Term Pre-Arranged Releases Without Bidding As Long As Those Releases Are Made at the Pipeline's Maximum Tariff Rate.

In a similar vein, the Commission should continue to allow market participants to enter into a pre-arranged capacity release transaction without bidding for releases of capacity with a term of a year or less as long as those releases are made at the pipeline's maximum tariff rate. Pipeline shippers are accustomed to relying on these types of transactions. Moreover, prearranged releases at the pipeline's maximum rate without the competitive bidding requirement have been proven to provide significant market benefits over the past decade and a half, and NGSAs believe these benefits should be retained under the Commission's new policy. Therefore, pre-arranged releases without bidding for terms of a year or less should not be eliminated entirely, solely because the Commission removes the rate cap on short-term capacity release transactions.

¹¹ To the extent that a releasing shipper makes subsequent releases of the same capacity, regardless of whether those releases are contracted sequentially or concurrently in time, each of the release transactions must be treated independently on a stand-alone basis. That is, there can be no aspects of tying the multiple release transactions together; there can be no right of first refusal by any of the previous replacement shippers, and each transaction must be subject to competitive bidding which is separately evaluated and awarded.

NGSA urges the Commission to retain the benefits and certainty of pre-arranged capacity transactions that are not subject to competitive bidding process as long as the parties to a pre-arranged release agree to use the pipeline's maximum rate.¹² By permitting this option, the Commission is maintaining an essential tool for releasing shipper to access the secondary market. To the extent that this option is chosen, the releasing shipper is accepting the expedited certainty of a prearranged release at the maximum rate without bidding, in lieu of the less timely and less certain possibility of receiving a rate higher than the Commission-approved rate cap. This option would also preclude any exercise of market power, because the shippers retain the option to accept or reject any prearranged releases, and because the prearranged release is accomplished at a FERC-approved cost of service rate.

D. NGSA Supports the Commission's Proposal to Exempt AMAs from the Requirements of Bidding and the Prohibitions Against Tying and Proposes Further Refinements and Clarifications.

The Commission correctly concludes that AMAs provide significant benefits to participants in the natural gas and electric industry¹³ and, given the significant and

¹² Under Commission rules, parties can negotiate a pre-arranged release of capacity that is not subject to bidding if the release is at the maximum tariff rate. Although the transaction is not subject to bid, a posting of the transaction is provided on the pipeline's EBB. Under NGSA's proposal herein, parties would retain the right to negotiate a pre-arranged release not subject to bidding at the maximum tariff rate and would continue to post the transaction on the pipeline's EBB.

¹³ *Id.* at ¶¶ 67-74. The benefits cited include the following: (AMAs allow LDCs to increase the utilization of facilities, lowers gas costs, provides the needed flexibility to customize arrangements to meet unique customer needs and maximizes the value of capacity through the synergy of interstate capacity and natural gas as a commodity.) *Id.* at ¶¶ 67-68 (AMAs provide a mechanism for capacity holders to use third party experts to manage their gas supply arrangements.) *Id.* at ¶ 69 (AMAs provide a mechanism for offsetting upstream transportation costs.) *Id.* at ¶ 70 (AMAs benefit entities other than LDCs, including electric generators and industrial users.) *Id.* at ¶ 71 (AMAs provide broad benefits to the marketplace in general by bringing 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

broad cross section of support for AMAs, such arrangements are in the public interest.¹⁴ By showing a willingness to foster market efficiencies and ensure that market participants have the best means available to meet their needs, the Commission has shown it is in tune with the needs of today's complex natural gas market. The added flexibility for AMAs proposed by the Commission will provide significant efficiencies for market participants, including end-users and ultimately consumers.

The Commission proposes that a pre-arranged release of capacity, within the context of a transaction that meets the definition of an AMA, will be exempt from bidding requirements and the prohibition against tying. The Commission proposes to define an AMA as follows:

any pre-arranged release that contains a condition that the releasing shipper may, on any day, call upon the replacement shipper to deliver to the releasing shipper a volume of gas equal to the daily contract demand of the released transportation capacity or the daily contract demand for storage withdrawals.

NGSA believes that this proposed definition should be modified in order to (1) allow the parties to an AMA to mutually determine their contractual obligations and fully optimize the use of the capacity associated with an AMA - thereby ensuring that the full benefits of an AMA are captured, and (2) recognize that a broader group of market participants, other than LDCs and end-users, have a need for, and could benefit from using an AMA. Also, the Commission should clarify the scope of the waiver of the rate cap as it relates to AMAs.

and services.) *Id.* at ¶ 72 (AMAs reduce consumer costs.)

¹⁴ *Id.* at ¶ 74 ("Based on this industry-wide support, the Commission believes that AMAs are in the public interest because they are beneficial to numerous market participants and the market in general.").

1. The Commission Should Revise the Definition of an AMA to Better Match the Recall Right with the Actual Incidence of Peak Demand.

The Commission should modify the proposed definition of AMA so that the full benefits of an AMA can be achieved by optimizing the capacity provided as part of an AMA. Due to seasonal variations and varying demands during the year, the supply requirements of a releasing shipper will be such that the shipper's full daily contract demand will only be needed during certain periods of the year. But, the releasing shipper currently has few options available to efficiently address this situation. It cannot permanently release this capacity because it will likely need the capacity on occasion to meet its own needs, and a series of shorter-term releases may not efficiently optimize the value of its capacity. Conversely, AMAs solve this dilemma by allowing the contracting parties the ability to mutually agree on the period of time during the term of the AMA that the releasing shipper will need to call upon the equivalent of the full daily contract demand of the released capacity.

This approach benefits both the releasing shipper and the asset manager by allowing each to plan and contract accordingly. The releasing shipper is assured that it can obtain its needed gas supplies by being able to call upon its full daily pipeline contract demand when needed. The replacement shipper is correspondingly able to optimize the value of the unneeded capacity and gas supply by providing services to other market participants.

But, as AMAs are currently defined in the NOPR, these full benefits will not be realized. Specifically, the use of the words "on any day" could be interpreted to require

the replacement shipper (*i.e.*, the asset manager) to stand ready – every day during the term of the AMA – to provide a volume of gas equal to the full daily contract demand of released capacity. The replacement shipper will not be able to optimize the use of the capacity and gas supply, because it will be required to make the equivalent of the full daily contract demand of the capacity available every day for recall. Such a recall right is wholly unnecessary during the vast majority of the term of an AMA, and it inherently reduces the value of the released capacity and gas supply in the marketplace. If an asset manager cannot optimize the value of the capacity and gas supply, then an AMA may be less attractive to that manager as a replacement shipper and there will be less market incentive for it to provide such services to releasing shippers and other market participants. Subsequently, releasing shippers will see less optimization of their supply and capacity.

To ensure that the benefits of an AMA are not lost, the Commission should change the phrase “may, on any day, call upon” to “may, as agreed upon by the parties, require.”¹⁵ This proposed modification to the AMA definition would still require that the releasing shipper have an absolute right to call on the equivalent of its full daily contract demand of released capacity when the releasing shipper needs that capacity

¹⁵ As more fully explained in the next section of NCSA’s comments, the Commission should revise the definition of an AMA as shown in the following red-lined version of the proposal: any pre-arranged release that contains a condition that the releasing shipper may, ~~on any day,~~ as agreed upon by the parties, require call upon the replacement shipper to deliver to (in the case of a release by a downstream entity) or accept delivery from (in the case of an upstream entity) the releasing shipper a volume of gas equal to the daily contract demand of the released transportation capacity or the daily contract demand for storage withdrawals.

during the term of the AMA, as mutually determined by the parties. The modification does not weaken the purposes of the AMA, nor the corresponding standard capacity release mechanisms. The proposed modification simply recognizes the market reality of periodic supply and demand variability, and allows the AMA parties to contractually structure their mutual rights and obligations without any prerequisite conditions.

NGSA's proposed modification to the Commission's definition: (i) still clearly differentiates AMAs from standard capacity release transactions,¹⁶ and (ii) does not create any opportunity for an exercise of market power by parties that freely negotiate mutually acceptable contract terms.

2. The Commission Should Expand the Proposed AMA Definition to Include Upstream AMAs.

In the NOPR, the Commission asks whether the definition of AMAs should be expanded.¹⁷ The answer is yes. The Commission should expand the definition of AMA to recognize that, in addition to local distribution companies ("LDCs") and end users, producers and other suppliers have the same need for AMAs. The use of AMAs by these additional market participants will promote the same objective as AMAs for LDCs and end-users: efficient use of pipeline capacity, without presenting the concerns associated with circumvention of the capacity release regulations. There is no reason to

¹⁶ A long-term release as part of an AMA is significantly different than a standard long-term release of capacity. In a non-AMA transaction, the releasing shipper releases the capacity on a long-term basis and receives nothing further – the capacity is released and there is no on-going relationship between the releasing and replacement shipper. In contrast, in an AMA there is an on-going relationship between the parties in which the continual service is provided, under a variety of terms and conditions, using the capacity provided as part of the AMA.

¹⁷ Capacity Release NOPR at ¶ 96.

deny upstream capacity holders the benefits of AMAs.¹⁸

While the NOPR focuses on downstream AMAs, *i.e.*, AMAs involving LDCs or end-users, an AMA involving an upstream holder of capacity has the same structure. Both the upstream and downstream AMAs are pre-arranged, and both the downstream AMA and the upstream AMA involve the purchase and sale of commodity gas. Finally, like the downstream AMA, there are times when a releasing shipper at the production end of the pipeline has a continuing, long-term need for the transportation of gas that precludes the shipper from simply releasing the capacity to a third-party when that party has no obligation to meet the releasing shipper's needs.

In all relevant respects, the upstream capacity holder's¹⁹ need mirrors the downstream shipper's need to supply specific markets with specific contracted supplies. On the supply end of the pipeline, the capacity holder needs firm transportation capacity to ensure that gas produced from a specific supply source can be transported away from that area, possibly to interconnect points with one or more other pipelines. The ability of the upstream party to release its firm capacity to an asset manager can assist the releasing shipper by relieving it of the need to administer the

¹⁸ In these comments, we generally discuss the concepts of "downstream" and "upstream" AMAs. "Downstream" AMAs refer to arrangements between an agent and a market area holder of firm pipeline capacity, such as LDCs and other end-users. "Upstream" AMAs refer to arrangements between an agent and a production area holder of firm pipeline capacity, such as producers, gas marketers, Canadian exporters and importers of LNG.

¹⁹ The sale of re-vaporized LNG is essentially comparable to a producer's sale of gas at the wellhead or in the field area. The prices, terms, and conditions of service for first sales of natural gas, including sales of imported LNG, have been deregulated by statute. The sale of natural gas from LNG terminal facilities would occur at, or downstream of, the tailgate of the LNG plant, where re-vaporized LNG would be delivered to a pipeline. These sales would compete with other sales of natural gas in a deregulated competitive commodity market. *Hackberry LNG Terminal, L.L.C.*, 101 FERC ¶61,294, 62,179-80 (2002).

capacity on a day-to-day basis. Thus, just as LDCs find AMAs a win-win prospect, upstream holders of pipeline capacity, including small producers, can utilize such transactions to avoid shut-in of production and to maximize the value of the reserves and associated pipeline capacity. At the same time, the asset manager gains the flexibility to manage the associated supply and capacity more efficiently as part of a larger portfolio.

As stated earlier, in a non-AMA transaction, the releasing shipper releases the capacity on a long-term basis and receives nothing further – the capacity is released and there is no on-going relationship between the releasing and replacement shipper. In contrast, in both a downstream as well as an upstream AMA, there is an on-going relationship between the parties in which the continual service is provided, under a variety of terms and conditions, using the capacity provided as part of the AMA.

Ultimately, upstream AMAs provide the same benefits to consumers as the downstream AMAs. They diversify the mix of capacity holders and customers served through the capacity release program, thereby enhancing liquidity and diversity in the market. In addition, they increase the overall efficiency of the interstate pipeline system.

Such benefits have real-world implications. For example, a Canadian exporter of natural gas will hold firm interstate capacity on a US pipeline to make deliveries in the US. For the reasons discussed above, as well as possible tax implications, some exporters may want to enter into an AMA with another party to deliver supply from the US border to the delivery point using the exporter's interstate capacity. In some

instances, the Canadian exporter may not have the option to permanently release its capacity to others, because it needs its firm capacity to deliver its supplies. In these instances, it may be more economically efficient for the exporter to allow a third party to use that capacity to make the deliveries on its behalf.

In some limited instances, the Commission has waived its regulations and the tying prohibition to allow the packaging of jurisdictional and non-jurisdictional transportation contracts, but only to permit the releasing shipper to exit the natural gas business.²⁰ The Commission has not granted similar waivers to permit the “packaging” of NGA-jurisdictional and Canadian transportation contracts in the context of a proposal to exit the Canadian gas business.²¹ In the circumstance described above, however, the Canadian producer is not seeking to exit the business. The Canadian producer seeks to facilitate the delivery of its Canadian production into the U.S. market. The producer is not seeking to force a replacement shipper to accept less desirable capacity in order to obtain more desirable capacity, another concern expressed in *GTN*.²²

As in the example discussed above, a producer typically seeks access to the most favorable markets, to maximize the value of its production and the associated capacity. It may also seek to be relieved of the need to manage daily transportation management

²⁰ See, e.g., *Duke Energy Marketing America, LLC*, 114 FERC ¶61,198 (2006), and *Northwest Pipeline Corporation*, 109 FERC ¶61,044 (2004).

²¹ *Gas Transmission Northwest Corp., Anadarko Petroleum Corp. and Anadarko Energy Service Co.*, 119 FERC ¶61,031, 61,100-01 (2007).

²² *Id.* at 61,101.

and marketing activities associated with its production.²³ Thus, it seeks to use the services of an asset manager. The producer's uses of an AMA accomplish the basic purposes of the Commission's capacity release regulations and its broader pro-competitive policy objectives. The releasing shipper has an incentive to ensure that its capacity is allocated to the entity that places the highest value on it. The releasing and the replacement shipper have a mutual incentive to move the gas to the highest-demand market, which would result in greater competition and greater assurance of the delivery of adequate supplies to the markets where those supplies are most needed. Thus, concerns that permitting upstream AMAs will lead to the same problems associated with the bundling of production and capacity prior to Order No. 636 are unwarranted. No party is being forced to take capacity with production or vice versa. Rather, through mutual agreement, through an AMA, a shipper is seeking the most efficient means whereby to handle its own needs.

²³ In much the same way an LDC might use an AMA to be relieved from management of its daily gas supply and capacity needs. NOPR at ¶ 21.

For these reasons, in order to ensure that upstream holders of firm pipeline capacity can release their capacity to asset managers in the same manner as downstream holders, the Commission should revise the definition of an AMA as follows:

any pre-arranged release that contains a condition that the releasing shipper may, ~~on any day~~, as agreed upon by the parties, require call upon the replacement shipper to deliver to (in the case of a release by a downstream entity) or accept delivery from (in the case of an upstream entity) the releasing shipper a volume of gas equal to the daily contract demand of the released transportation capacity or the daily contract demand for storage withdrawals.

By adding the phrase “or accept delivery from (in the case of an upstream entity)”, this definition would ensure that a supplier can arrange for the “take-away” of its supplies in the context of an AMA. Such arrangements could include, among others: (i) a producer releasing capacity to be used to transport gas production from the production area to a market hub; (ii) a Canadian producer arranging release of capacity on a U.S. pipeline that receives gas production from an upstream Canadian pipeline; or (iii) a gas marketer that has purchased gas in a supply area and seeks to release the firm capacity used to transport that gas away from the supply area, for essentially the same reasons the producer would seek to release the capacity. The Commission’s reporting regulations would require posting of the capacity release information, including disclosure that the release was part of an AMA, thus providing for monitoring.

3. The Commission Should Clarify the AMA Posting Requirements and the Scope of the Waiver of the Rate Cap as They Apply to AMA Releases.

In addition to revising the definition of AMAs, NGSAs requests clarification on

two issues. First, NGSAs request clarification that the posting of a capacity release in the context of an AMA should be the information normally posted for a typical release of capacity (*e.g.*, receipt and delivery points, term) along with a statement that acknowledges that this release is conducted as part of an AMA.²⁴

Second, NGSAs find it unclear in the NOPR as to whether the Commission intended to exempt the pipeline capacity portion of an AMA from the rate cap when such an arrangement includes the release of capacity for a period longer than one year. While the Commission states in the NOPR that it “is proposing changes to its policies and regulations to facilitate the utilization and implementation of AMAs,”²⁵ the NOPR could be read to not exempt AMAs that have capacity with a term exceeding a year from the price ceiling that the Commission proposes to apply to short-term capacity release transactions.²⁶ NGSAs request clarification that, the Commission is exempting pre-arranged releases in the context of an AMA from the rate cap that is otherwise imposed on capacity release transactions with a term of more than one year.

In an AMA, various revenues are exchanged between the parties, and assuming the revenues can be distinguished, it can be unclear which revenues should be counted against a rate cap.²⁷ An AMA consists of numerous mutually acceptable terms and

²⁴ At paragraph 89 of the NOPR, the Commission states that the “details of the release transaction must also be posted on the pipeline’s Internet web site ..., including any special terms and conditions applicable to the capacity release transaction.”

²⁵ NOPR at ¶ 74.

²⁶ The need for clarification arises because the Commission proposes to remove the rate cap for all short-term releases but at ¶ 63, the NOPR suggests that the release of capacity longer than a year cannot be above the rate cap even if such capacity is part of an AMA.

²⁷ *Petition for Clarification* filed October 20, 2006 in Docket No. RM91-11, et. al., at 23. As the petitioners

conditions negotiated between the parties. The release of pipeline capacity is just one part (but an integral part) of this transaction. Other payments, such as optimization or management fees, are not directly associated with the transportation component of the transaction alone. Rather, they are negotiated between the parties to present the value of the AMA as a whole. It is not clear if the Commission views these other payments as part of the agreement in its entirety, in which the parties determine the value of the full portfolio of services, or whether the Commission views the other payments as contributing to the transportation component of the transaction. However, if it is the latter, and “other payments” made in the context of an AMA are counted as part of the transportation component, parties could easily run afoul of the rate cap. In order to not venture into this territory, parties are likely to only do short-term AMAs or to no longer enter into AMAs.

Absent a clarification by the Commission that confirms that the capacity portion of an AMA does not include the other payments associated with an AMA, a price ceiling for releases of more than one year in the context of an AMA will create unwarranted obstacles for the management of supply and capacity in the context of an AMA. The Commission provided an exemption from the bidding process for pre-

said, the types of transaction fees that may be paid by the portfolio manager could include (i) a lump sum payment, (ii) an agreement by the portfolio manager to share net proceeds earned on incremental sales of gas to others, or (iii) a pricing formula for delivered gas that results in below-market commodity prices for the customer. The petitioners concluded that they could not locate a decision in which the Commission has “ruled squarely on the question whether, in the context of a maximum rate capacity release under a portfolio management agreement, a separate payment to the customer (the releasing shipper) of a fee by the portfolio manager (the replacement shipper) would cause the release rate to be deemed to exceed the pipeline’s maximum rate. *See also*, Capacity Release NOPR at ¶ 54 (setting forth the payments from the releasing shipper to the asset manager).

arranged releases transacted as part of an AMA because the “bidding requirement creates an unwarranted obstacle to the efficient management of pipeline capacity and supply assets” in the context of an AMA.²⁸ Therefore, we ask the Commission to confirm that, similar to the exemption it proposes for AMAs from the bidding requirement, it also will provide a related exemption from the rate ceiling, including transactions for periods of more than one year. Absent this clarification, parties will be hesitant to enter into AMAs with terms longer than one year and will face a “duration restriction” that is inconsistent with the Commission’s desire to remove constraints on such arrangements.

Providing this clarification is completely consistent with the Commission’s recognition that exemptions should be provided to allow AMAs to be fully effectuated for the timeframe desired by the parties. Alternatively, if the Commission did, in fact, intend to apply the price ceiling to AMAs with terms of longer than one year, we strongly urge reconsideration of that proposal.

In the NOPR, the Commission recognized that, in light of AMAs, it needed to permit exemptions from its capacity release program to make that program more efficient and flexible.²⁹ The term of an AMA can often exceed a year, however, and not exempting long-term AMAs from the price ceiling imposed on standard long-term releases could force market participants to enter into shorter-term transactions. Failure

²⁸ NOPR at ¶ 87.

²⁹ Capacity Release NOPR at ¶ 66 (“The goal of the changes proposed by the Commission herein is to make the capacity release program more efficient by bringing it in line with the realities of today’s secondary gas markets.”).

to exempt long-term AMAs from the price ceiling requirement could inhibit transactional flexibility, create unnecessary regulatory uncertainty, and reduce market efficiencies.³⁰

Moreover, removing the rate cap on long-term AMA capacity release transactions does not inherently impinge on or erode the Commission's standard capacity release mechanisms proposed under this rulemaking. As determined in the NOPR, the Commission has found that AMAs are fundamentally different from standard capacity release transactions, and therefore, it follows that the Commission's conclusion is not impacted by the term of the AMA. It is thus not inconsistent to limit the removal of the rate cap on standard capacity releases to a one year period, whereas AMAs can be structured in a manner that allows the benefits of those agreements to extend for longer periods of time, as determined by the contracting parties and any appropriate state jurisdictional authority.

Alternatively, at a minimum, the Commission should clarify that other payments that are made as part of an AMA, such as optimization or management fees, are not directly associated with the transportation component of the transaction. As such, those payments will not be considered additions to the transportation component when determining if the capacity is priced at the maximum tariff rate.

E. The Commission Should Allow a Releasing Shipper to Condition a Storage Release on the Sale or Repurchase of Gas in Storage.

³⁰ There is no need to create such uncertainty. As the Commission recognized, many AMAs are entered into as part of request for proposal process at the state level. As part of that process, such proposals are thoroughly vetted and the local distribution company must get approval from the state for the final agreement. Capacity Release NOPR at ¶ 55.

The Commission proposes, in the context of an AMA, a partial exemption from the prohibition against tying to require that the replacement shipper take assignment of storage capacity along with the gas currently in storage. NGSAs agree with that proposal.

Outside the context of an AMA, the Commission requests comments on whether it should allow the releasing shipper to condition a release of storage capacity on the sale and/or repurchase of gas in storage inventory. NGSAs support *allowing but not requiring* the releasing shipper the option to condition such releases in this fashion.

NGSAs recognize that the Commission has prohibited a releasing shipper from tying the release of capacity to an extraneous condition.³¹ But there is nothing extraneous about a releasing shipper addressing gas in storage at the time it releases storage capacity. Webster's defines the word "extraneous" as "not vital or essential,"

³¹ *Texas Eastern Transmission*, 120 FERC ¶ 61,199, 61,846 (2007) ("Texas Eastern"). The prohibition dates to Order No. 636-A. There the Commission stated:

Releasing shippers may include in their offers to release capacity reasonable and non-discriminatory terms and conditions to accommodate individual release situations, including provisions for evaluating bids. All such terms and conditions applicable to the release must be posted on the pipeline's electronic bulletin board and must be objectively stated, applicable to all potential bidders, and non-discriminatory. For example, the terms and conditions could not favor one set of buyers, such as end users of an LDC, or grant price preferences or credits to certain buyers. The pipeline's tariff also must require that all terms and conditions included in offers to release capacity be objectively stated, applicable to all potential bidders, and non-discriminatory. Order No. 636-A at ¶ 30,557.

In addition, the Commission reiterated that:

all terms and conditions for capacity release must be posted and nondiscriminatory, and must relate solely to the details of acquiring transportation on the interstate pipelines. Release of pipeline capacity cannot be tied to any other conditions. Order No. 636-A at ¶ 30,559.

“irrelevant.”³² Those terms do not apply to gas storage inventory because it is inherently linked to the storage capacity. A releasing shipper will likely need to address its gas in storage at the time of the release of storage capacity. Indeed, in the absence of the ability to deal with the gas associated with the storage capacity, the releasing shipper may be reluctant to release the capacity. Thus, such a condition would not be irrelevant, but would be essential to the release, and therefore not an extraneous condition. For this reason, the Commission should give the shipper the option to condition its release in this fashion.³³

Additionally, releasing shippers should be permitted to condition releases of storage capacity with the purchase of gas stored in that capacity at the end of the release term. Therefore, the prearranged replacement shipper, as a condition of the release, may agree to have the capacity filled to an agreed-upon level at the end of the release term and to sell that gas to the releasing shipper.

For example, many LDCs hold storage capacity that they draw upon in the winter months, but do not actively utilize in the summer months other than to accumulate gas for the following winter.³⁴ Holding the storage requires the LDCs to

³² *The Merriam -Webster Dictionary* 174 (11th ed. 2005).

³³ The Commission, however, should not mandate that the releasing shipper condition its release in this fashion. As in *Texas Eastern*, such a condition may not be necessary in all situations. *Texas Eastern*, 120 FERC at 61,846. The releasing shipper should be able to gauge the need for such a condition based on its individual situation -- and the possible response from the market -- and may also have other options available. For example, many releases of storage capacity are pre-arranged deals whereby two parties have negotiated storage gas as part of the overall package.

³⁴ Such capacity holders are unlikely to release their capacity to entities who will not return that capacity with gas in inventory because the capacity holder needs to have that gas in storage to meet its peak needs.

pay full monthly demand charges as well as purchase the gas to fill it, which generally requires an active procurement process. For the same reasons that LDCs find AMAs related to full requirements supply service to be advantageous, LDCs sometimes find it advantageous to release their storage capacity on a prearranged basis to gas suppliers during the summer, with the condition that the supplier return the storage at the end of the term with a certain quantity of gas in it – usually its full capacity. Gas suppliers are anxious to enter into such transactions because they can actively manage the storage, using injections and withdrawals to facilitate their ongoing business. As opportunities allow over the course of the summer months, they accumulate the necessary inventory to fill the storage to the level required by the LDC.

In short, the gas suppliers can more efficiently utilize the capacity than the LDC would. By entering into such an arrangement, the LDC can offset at least a portion of the demand charges and obtain the storage gas that it needs without the need to actively procure it.³⁵ With the ability to link prearranged storage releases with a purchase of gas, holders of storage capacity will be much more likely to release capacity, increasing the overall level of storage available to the market and making better and more efficient use of the nation's storage capabilities.

³⁵ Like AMAs, linking storage releases to purchases of gas “provides a mechanism for capacity holders to use third party experts to manage their gas supply arrangements.” (NOPR at ¶ 69)

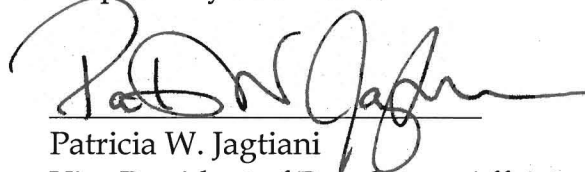
IV. CONCLUSION

NGSA has set forth its views above on the capacity release NOPR, including that it: (i) does not oppose lifting the rate cap on short-term releases as long as effective consumer safeguards are in place; (ii) proposes that AMAs not be bound by an absolute requirement for the agent to fulfill full contract commitments on all days of the term; (iii) supports broadening the definition of an AMA to include both upstream users as well as downstream users of pipeline capacity; (iv) supports clarification that AMAs are exempted from the capacity release price ceiling provisions; and (v) supports permitting storage capacity holders the option to condition a release of capacity on the sale and/or repurchase of gas in its storage inventory.

NGSA urges the Commission to act as timely as possible to issue a final rule so that industry participants can rely upon these more efficient arrangements as the spring injection cycle approaches.

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Respectfully Submitted,



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