

II. COMMUNICATIONS

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

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III. COMMENTS

NGSA supports the proposed rule to prohibit affiliate bidding for the purpose of “gaming” open seasons for pipeline capacity. The proposal to prohibit companies from submitting multiple affiliate bids for the purpose of obtaining a greater share of valuable capacity that will be allocated on a pro rata basis closes a loophole in the existing open season rules allowing for inappropriate and anti-competitive behavior as well as ensures that all interested parties have equal access to that capacity. Like the Commission, NGSA believes that regulations must be clear in order to ensure compliance. While the proposed rule does attempt to clarify the anti-competitive behavior FERC seeks to bar, NGSA requests additional explanation on what constitutes an “independent business reason” for purposes of bidding in an open season.

If shippers cannot quickly and reliably determine whether or not their bids would be deemed compliant with FERC’s proposed rules on affiliate bids, they will, out of an abundance of caution, not bid for and secure necessary capacity. Open seasons are generally short – many run for only days – so shippers must therefore decide quickly

whether they want to purchase capacity and whether their bid(s) would be compliant with FERC regulations. Under the proposed rules prohibiting affiliate bidding, shippers would need to coordinate with any affiliated companies to 1) determine which affiliates planned to bid for capacity, 2) assess whether each had an independent business reason to do so that would be deemed legitimate by FERC and 3) submit one or more bids, for capacity. Uncertainty over whether a company's specific business reason(s) would be deemed compliant with FERC policy would slow this process significantly, preventing many companies from submitting legitimate bids due to a desire to avoid compliance risk. FERC must therefore find a balance between prohibiting anti-competitive conduct and allowing shippers the flexibility to make legitimate bids for capacity. Policies and regulations which unnecessarily restrict such justifiable bidding could unintentionally serve to inhibit new business models and frustrate commercial ingenuity and creativity.

NGSA recognizes that the Commission has declined to give specific examples of what constitutes an independent business reason (NOPR footnote 11). However, there are several ways that FERC could provide further clarity and increase regulatory certainty without specifically listing examples of what would constitute an acceptable independent business reason. There are a number of options that FERC should consider that could increase the clarity of the rule and allow shippers to expeditiously make legitimate bids. For instance, FERC could:

- **Provide more detailed, objective criteria that prospective shippers could use to evaluate whether their affiliates had independent business reasons for bidding.** Objective criteria for evaluating independent business reasons would allow shippers to more accurately assess their compliance with affiliate bidding

rules. Criteria might include: whether the prospective affiliated shippers each had separate contracts to purchase or supply gas, whether the capacity was bid for in conjunction with new distinct load such as gas-fired generation, whether the bid was made in conjunction with a distinct retail provider obligation, whether the capacity bid was in conjunction with a distinct internal use, such as to serve a refinery, whether capacity is bid in conjunction with a specific new supply project, such as Marcellus shale or an LNG facility (import or export), whether the affiliates bidding operate out of different geographic locations or countries, such as Canadian and U.S. subsidiaries, or whether the bids were made by affiliates that have different primary receipt and/or delivery points, perhaps in conjunction with the above. This is not an exhaustive list. However, these suggestions might provide some criteria for the Commission to consider.

- **Create an expedited no-action process with a set time for guidance within the short open-season time frame.**
No-action letters from FERC are always available to industry participants and might be a source of greater guidance for what constitutes an independent business reason for purposes of affiliate bids on capacity. However, as stated earlier, open season time frames are usually quite short, which can prevent shippers from getting guidance before bidding for pipeline capacity is closed. An expedited no-action process where FERC staff could provide guidance to shippers on whether affiliates had legitimate independent business reasons would allow more shippers to expeditiously determine whether they could bid for needed capacity while remaining in compliance with FERC regulations.
- **Similar to the suggestion above, allow shippers to seek guidance through the Help Desk regarding appropriate affiliate bidding.**
FERC currently operates a Compliance Help Desk that was implemented to provide industry guidance regarding compliance with Commission regulations, which is already a familiar compliance resource for industry participants. Similar to the above suggestion, the Help Desk could expeditiously provide individual shippers with greater guidance on what constitutes an independent business reason for an affiliate bid. If the Help Desk were able to ensure expedited responses regarding compliant capacity bids, shippers would be more likely to be able to secure needed capacity.

NGSA is not suggesting the above options as the only possible means to achieve greater commercial clarity and certainty. Rather, NGSA offers these ideas as

suggestions for how FERC could provide industry with greater guidance on and ability to comply with the proposed regulations. NGSAs support effective methods to expedite needed guidance, particularly guidance that would create a public record, which could be used by industry generally. Shippers want to comply with FERC's regulations and they will seek to correctly identify whether they have independent business reasons for bidding in open seasons. Thus, as the Commission clarifies these new rules over time, FERC should also consider a shipper's good faith efforts to comply with the regulations as mitigating factors in any subsequent investigation of a possible violation.

IV. CONCLUSION

NGSA supports the Commission's proposed rule. It should serve to prevent inappropriate gaming of pipeline sales of constrained capacity. However, the implementation of the new rule could be enhanced through the addition of specific guidance or a means by which potential bidders can more readily determine whether an affiliate bid is supported by a legitimate, independent business reason. This current lack of clarity will frustrate legitimate bidding and the overall policy goals of the Commission. In the absence of shippers' ability to make otherwise legitimate bids under the proposed rule, parties with valid business purposes could be denied pipeline capacity and capacity could go to shippers who do not value it the most. In order to prevent this disruption of legitimate bids, FERC should provide a means to seek

clarification or more specific guidance on what would be considered an acceptable affiliate bid.

Respectfully Submitted,

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