DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 284

[Docket No. RM08–1–003, et al.; Order No. 712–B]

Promotion of a More Efficient Capacity Release Market

Issued April 16, 2009.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final rule; order on rehearing and clarification and terminating dockets.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is issuing an order addressing the requests for rehearing and clarification of Order No. 712–A [73 FR 72692, December 1, 2008]. Order No. 712 [73 FR 37058, June 30, 2008], as modified by Order No. 712–A, revised the Commission's regulations governing interstate natural gas pipelines to reflect changes in the market for short-term transportation services on pipelines and to improve the efficiency of the Commission's capacity release program. The orders lifted the maximum rate ceiling on secondary capacity releases of one year or less provided that such releases take effect within a year of the date that a pipeline is notified of the release. The revised regulations facilitated asset management arrangements (AMA) by relaxing the Commission's prohibition on tying and on its bidding requirements for certain capacity releases. The Commission further clarified in Order No. 712 that its prohibition on tying does not apply to conditions associated with gas inventory held in storage for releases of firm storage capacity. Finally, the Commission waived its prohibition on tying and bidding requirements for capacity releases made as part of state-approved retail access programs.

This Order denies rehearing and grants clarification in part and denies clarification in part of Order No. 712–A. This order also terminates Docket Nos. RM06–21–000 and RM07–4–000.

DATES: *Effective Date:* This order denying rehearing of the final rule will become effective May 21, 2009.

FOR FURTHER INFORMATION CONTACT:

William Murrell, Office of Energy Market Regulation, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, *William.Murrell@ferc.gov*, (202) 502–8703.

Robert McLean, Office of General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, *Robert.McLean@ferc.gov*, (202) 502–8156.

David Maranville, Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, *David.Maranville@ferc.gov*, (202) 502–6351.

SUPPLEMENTARY INFORMATION:

Order on Rehearing and Clarification and Terminating Dockets

1. On November 21, 2008, the Commission issued Order No. 712–A in which it denied rehearing and granted clarification in part of Order No. 712.[1] Order No. 712, as modified by Order No. 712–A, revised the Commission's regulations governing interstate natural gas pipelines to reflect changes in the market for short-term transportation services on pipelines and to improve the efficiency of the Commission's capacity release program. The orders lifted the maximum rate ceiling on secondary capacity releases of one year or less provided that such releases take effect within a year of the date that the pipeline is notified of the release. The revised regulations facilitated asset management arrangements (AMA) by relaxing the Commission's prohibition on tying and on its bidding requirements for certain capacity releases. The Commission further clarified in Order No. 712 that its prohibition on tying does not apply to conditions associated with gas inventory held in storage for releases of firm storage capacity. Finally, the Commission waived its prohibition on tying and bidding requirements for capacity releases made as part of state-approved retail access programs. This Order denies rehearing and grants clarification in part and denies clarification in part of Order No. 712–A, and terminates Docket Nos. RM06–21–000 and RM07–4–000.

2. Several parties seek clarification and/or rehearing of Order No. 712–A. The Marketer Petitioners seek clarification concerning an asset manager's delivery obligation when an AMA includes released capacity on upstream and downstream pipelines.[2] The National Grid Gas Delivery Companies[3] request clarification, and National Fuel Gas Distribution Corporation (National Fuel) requests clarification, rehearing, or a limited waiver, concerning what releases qualify as releases to a marketer participating in a state-regulated retail access program. Consolidated Edison of New York Inc., (Con Ed) and Orange and Rockland Utilities, Inc., (O&R) (filing collectively), Energy America, New York State Electric and Gas Corporation (NYSEG) and Rochester Gas and Electric Corporation (RG&E) (filing collectively) seek clarification of Order No. 712–A or alternatively request waivers on the same issue raised by National Grid and National Fuel. The New York State Energy Marketers Coalition (NYSEMC) moved to intervene out of time and filed comments opposing the requests for clarification and waivers sought by National Fuel others on the retail access issue. The Commission denies rehearing of Order No. 712–A and grants in part, and denies in part, clarification of Order No. 712–A. The clarification granted in this order moots the requests for waivers.

Upstream Pipeline Delivery Obligations

Request for Clarification

3. In Order No. 712, the Commission exempted capacity releases that were meant to implement AMAs from the Commission's prohibition against tying and its bidding requirements. As part of the definition of AMAs that would qualify for these exemptions, the Commission determined that there must be a significant delivery or purchase obligation on the replacement shipper to deliver gas to, or purchase gas from, the releasing shipper in order to distinguish AMAs from standard capacity releases.[4] Accordingly, the Commission required that the release contain a condition that the ''releasing shipper may call upon the replacement shipper to deliver to, or purchase, from, the releasing shipper a volume of gas up to 100 percent of the daily contract demand of the released transportation or storage capacity.

[1] *Promotion of a More Efficient Capacity Release Market,* 73 FR 37058 (June 30, 2008), *FERC Statutes and Regulations* ¶ 31,271 (2008), (Order No. 712), *order on reh'g,* Order No. 712–A, 73 FR 72692 (December 1, 2008), FERC Stats. & Regs. ¶ 31,284 (2008) (Order No. 712).

[2] For purposes of this request for clarification, the Marketer Petitioners include Shell Energy NorthAmerica (US), L.P., ConocoPhillips Company, Chevron U.S.A. Inc., Constellation Energy Commodities Group, Inc., Tenaska Marketing Ventures, Merrill Lynch Commodities, Inc., Nexen Marketing U.S.A. Inc., UBS Energy LLC, and Citigroup Energy Inc.

[3] The National Grid Gas Delivery Companies comprise The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery NY; KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery LI; Boston Gas Company, Colonial Gas Company, EnergyNorth Natural Gas, Inc., and Essex Gas Company, collectively d/b/a KeySpan Energy Delivery NE; Niagara Mohawk Power Corporation d/b/a National Grid; and The Narragansett Electric Company d/b/a National Grid, all subsidiaries of National Grid USA, (collectively National Grid).

[4] Order No. 712 at P 144–153.

* * *''[5] That obligation must apply for the greater of five months or five/twelfths of the term of the release.[6] In Order No. 712–A, the Commission also clarified the delivery/purchase obligation portion of the AMA definition in several respects not at issue here.[7]

4. In addition, the Commission denied a request by the Public Service Company of North Carolina, South Carolina Electric and Gas Company and Scana Energy Marketing, Inc., (collectively Scana) to clarify that in a situation where parties include released capacity on both an upstream and downstream pipeline in an AMA, the asset manager's delivery obligation only applies to the released capacity on the downstream pipeline that directly connects to the releasing shipper's delivery point.[8] The Commission explained that if the delivery obligation did not apply to the full amount of the upstream released capacity, the releasing shipper could include capacity in the upstream release that it does not need for its own legitimate business purposes during the term of the release. The Commission concluded that while Scana was correct that the delivery/purchase obligation is not cumulative of the capacity in a released chain of contracts that constitute a single capacity path, the asset manager must have a delivery/purchase obligation up to the contract demand of each specific contract released to it.[9]

5. The Commission also denied Scana's and BP Energy Company's (BP) request for clarification that where released storage and transportation capacity are combined in an AMA, the delivery/purchase obligations associated with the release only apply to the transportation contract. The Commission ruled again that while the delivery/purchase obligation is not cumulative of the released transportation and storage capacity, to qualify for the exemptions provided for AMAs an asset manager must have the necessary purchase/delivery obligation for each separate contract for released capacity.[10]

6. The Marketer Petitioners seek clarification of both these rulings. Marketer Petitioners argue that while the rulings reflect the Commission's intent to confirm that the releases at issue are associated with *bona fide* AMAs, they will lead to uncertainty about the ultimate contractual delivery/purchase obligation at any specific delivery or receipt points under an AMA contract. For example, they state that a releasing shipper may have sequential transportation contracts on interconnected pipelines to bring gas to a delivery point on the downstream pipeline at the releasing shipper's city gate. For various reasons, however, the contract demands of the contracts on the upstream pipeline(s) may exceed the contract demand on the downstream pipeline that directly connects to the releasing shipper's city gate. Marketer Petitioners assert that this could occur as a result of the need for a shipper to provide fuel and lost and unaccounted for gas (LAUF) to each transporting pipeline in the chain.[11] While the Marketer Petitioners recognize that Order No. 712–A stated that the asset manager's delivery obligation to the releasing shipper's city gate is not cumulative of the contract demands under each contract, they argue that Order No. 712–A could be read to suggest that the asset manager has the obligation to deliver to the releasing shipper's city gate a volume equal to the full amount of the contract demand on the upstream pipeline, even though that volume exceeds the contract demand on the downstream pipeline. They contend that such a result appears inconsistent with Order No. 712's intent to promote efficient AMAs.[12]

7. The Marketer Petitioners claim the same may be true where a releasing shipper has options for both (1) long haul transportation from the production area and (2) short haul transportation from market area storage that form a ''network'' whereby the releasing shipper can serve its needs at its city gate delivery point. According to the Marketer Petitioners, this may result in optional capacity paths for an asset manager to transport gas, or withdraw gas from storage, to meet the releasing shipper's city gate delivery point obligations. Marketer Petitioners assert that requiring the asset manager's delivery/purchase obligation to apply to the full contract demand under each capacity release in the transportation chain creates significant uncertainty as to the delivery obligation at the delivery points on the upstream pipelines and on the downstream pipeline at the releasing shipper's city gate.

8. The Marketer Petitioners posit an example in their pleading where the releasing shipper has capacity on upstream Pipelines A and B, and on downstream Pipeline C. Pipeline C connects with the releasing shipper's city gate. Both Pipelines A and B interconnect with Pipeline C at Point Y, which is the releasing shipper's receipt point on Pipeline C. (*See* Figure 1 below).[13] The releasing shipper has 1,000 Dth per day of short haul capacity on Pipeline A from market area storage to Point Y. The releasing shipper has 5,000 Dth per day of long haul capacity on Pipeline B from the production area to Point Y. The releasing shipper also has 5,000 Dth per day of capacity on Pipeline C from Point Y to its city gate. Thus the releasing shipper has the ability to transport 5,000 Dth from the production area over Pipelines B and C to its city gate. The releasing shipper also has the option to move 1,000 Dth per day from market area storage over Pipelines A and C to its city gate, if it is unable to obtain the full 5,000 Dth/day to fill pipeline B or because storage gas may be more economical on some days.

[5] 18 CFR 284.8(h)(3), as adopted by Order No. 712–A.

[6] *Id.*

[7] *See* Order No. 712–A at P 79–82.

[8] *Id.* P 86–87.

[9] *Id.* P 87.

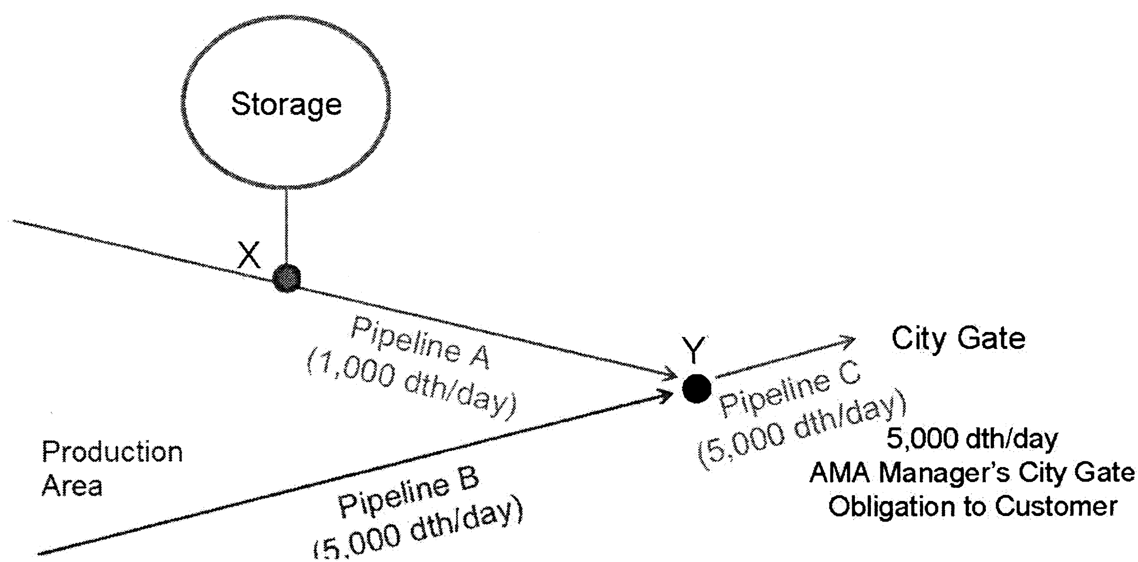
[10] *Id.* P 88.

[11] Marketer Petitioners' clarification request at 3.

[12] *Id.* at 4.

[13] *Id.* The example in Figure 1 substantially replicates the example filed by the Marketer Petitioners except that they included storage withdrawal right figures that we omit here.

Figure 1



9. The Marketer Petitioners state it is unclear in this situation if the asset manager's delivery obligation at the releasing shipper's city gate is equal to (1) the releasing shipper's 5,000 Dth contract demand on Pipeline C, or (2) the releasing shipper's 6,000 Dth total of the releasing shipper's 1,000 Dth contract demand on Pipeline A and 5,000 Dth contract demand on Pipeline B. Marketer Petitioners also question whether, if the delivery obligation is only 5,000 Dth at the city gate, the asset manager nevertheless has a 6,000 Dth delivery obligation at Point Y. Marketer Petitioners state that, without certainty as to the Commission's view of the location and amount of the required delivery obligation, it is unclear if all of the transportation and storage capacity is eligible for inclusion in an AMA.

10. Marketer Petitioners thus request clarification that the ruling that an asset manager's delivery/purchase obligation must apply to the full contract demand under each capacity release in a transportation chain is not intended to alter that asset manager's obligation at a particular point, or in other words, that it does not add additional delivery points to an AMA. Specifically, in the example described above, they request clarification that, while the asset manager may have a delivery obligation associated with the releases on Pipelines A, B, and C, of 1,000 Dth/day, 5,000 Dth/day, and 5,000 Dth per day, respectively, that would not alter the asset manager's contractual 5,000 Dth/day delivery obligation to the releasing shipper at its city gate. They claim that such a clarification would affirm the Commission's holding that it does not intend the delivery/purchase obligation under an AMA to be cumulative of the total contract demands associated with the capacity in a released chain and make clear that the Commission did not intend to allow AMA customers to use the Commission's rulings to enlarge their delivery/purchase entitlements at a particular receipt or delivery point under an AMA.

11. The Marketer Petitioners note that any concern that the Commission may have about "unneeded" capacity being included in an AMA could be addressed by the Commission clarifying that when an AMA encompasses capacity released on more than one pipeline, the posting should indicate that the AMA also involves capacity on other pipeline(s) and should be posted by all the pipelines involved. They assert that such a posting requirement would illuminate the totality of the release capacity to be included in the AMA.

Commission Determination

12. The Commission grants clarification in part and denies clarification in part. As we stated in Order No. 712–A, the asset manager's delivery/purchase obligation must apply to the full contract demand under each capacity release in the transportation chain.[14] In other words, each release to an asset manager is a separate capacity release that must have its own delivery/purchase obligation in order to qualify as an AMA. As we also noted in Order No. 712–A, in the situation where there is a capacity chain on several pipelines, the delivery purchase obligation need not be cumulative to the extent that gas delivered from the upstream pipeline to the downstream pipeline can be transported using the released capacity on the downstream pipeline.

13. The Commission grants clarification that the asset manager's delivery obligation at the releasing shipper's city gate need only be up to the contract demand of the released capacity on the downstream pipeline that interconnects directly with the releasing shipper's city gate. The fact the releasing shipper may have also released to the asset manager capacity on an upstream pipeline or pipelines with total contract demand exceeding the released capacity on the downstream pipeline does not increase the asset manager's required delivery obligation at the releasing shipper's city gate on the downstream pipeline. Thus, in the example set forth in Figure 1, the asset manager's delivery obligation at the releasing shipper's city gate would be equal to the 5,000 Dth/day released capacity on Pipeline C, despite the fact the released capacity on Pipelines A and B totals 6,000 Dth/day.

14. While a releasing shipper may release capacity to an asset manager on an upstream pipeline(s) that exceeds the released downstream capacity, the asset manager must have a delivery obligation

[14] Order No. 712–A at P 87.

under each such upstream capacity release up to the contract demand of that release. In the Figure 1 example, the asset manager's delivery obligations on Pipelines A and B must be 1,000 Dth/day and 5,000 Dth/day, respectively. Thus, to the extent the Marketer Petitioners seek clarification that an asset manager's delivery obligation at delivery points on upstream pipeline(s) cannot exceed its delivery obligation at the city gate delivery point on the downstream pipeline, the Commission denies that request. As the Commission held in Order No. 712–A, if the asset manager's delivery obligation on the upstream pipeline did not apply to the full amount of upstream released capacity, the releasing shipper could include capacity in the upstream release that it does not need for its own legitimate business purposes during the term of the release.

15. In such a situation, however, if the releasing shipper requires the asset manager to deliver volumes on the upstream pipelines that exceed the contract demand on the downstream pipeline, the releasing shipper would be required to take delivery of the excess volumes at points on the upstream pipeline or pipelines, and would also be responsible for transporting that excess gas away from those points. In the example in Figure 1, for instance, the releasing shipper could require the asset manager to deliver 6,000 Dth to Point Y. That releasing shipper, however, would have to take delivery of 1,000 Dth of that gas at Point Y and make its own additional arrangements to have the gas transported away from Point Y, since this quantity exceeds the asset manager's released capacity rights on the downstream pipeline. The releasing shipper could not require the asset manager to transport more than 5,000 Dth/day on Pipeline C from Point Y to the city gate. The asset manager could only be held responsible for transporting to the releasing shipper's city gate a volume up to the contract demand on the downstream pipeline.[15]

16. The Commission finds that this rule is straightforward, non-discriminatory and the most reasonable to administer for both parties and the Commission. It is also consistent with the Commission's clarification in Order No. 712–A that the delivery obligations for AMAs associated with a chain of upstream and downstream pipelines and contracts are not cumulative. Further, it minimizes the potential for parties to include unneeded upstream capacity in an AMA.[16]

Retail Access Programs

Requests for Clarification and/or Waivers

17. In Order No. 712, as affirmed in Order No. 712–A, the Commission determined that capacity releases by local distribution companies (LDC) to implement state-approved retail access programs should be granted the same blanket exemptions from the prohibition against tying and the bidding requirements as capacity releases made in the AMA context.[17] In order to qualify for the exemptions, the Commission determined that the released capacity must be used by the replacement shipper to provide the gas supply requirements of retail consumers pursuant to a retail access program approved by the state agency with jurisdiction over the LDC that provides delivery service to such retail consumers.[18] In Order No. 712–A, the Commission clarified that a marketer participating in a state-approved retail choice program can re-release its capacity to an asset manager that will fulfill the marketer's obligation under the state-approved program.[19] The Commission declined to grant a request for clarification, however, that a wholesale supplier who obtains capacity directly from an LDC as part of an unbundling program but who is not a marketer under the program nonetheless qualifies for the tying and bidding exemptions.[20] The Commission determined that such a clarification was not appropriate for this generic rulemaking proceeding because BP was requesting the Commission to approve a specific deal structure that does not meet the criteria under which the rule generally grants exemptions. The Commission noted that BP or any other parties are free to file separately on a case-by-case basis for approval of individual arrangements that it believes may merit a waiver of the Commission's bidding and tying strictures.[21]

18. Several parties seek clarification of that ruling. National Grid seeks clarification that an LDC releasing capacity as part of a state-approved retail access program may release directly to a marketer's asset manager as long as the asset manager has an identical obligation to supply gas to the marketer as the marketer's obligation to supply gas to the releasing LDC. National Grid asserts that certain marketers that participate in its state-approved retail access program are requesting that they be allowed to release directly to their asset manager so that the asset manager, not the marketer, will be the one who has to meet the creditworthiness standards of the pipeline. National Grid asserts that cutting out the middle man will enable marketers to avoid having to post scarce credit assurances.

19. National Grid also requests clarification that an LDC that releases to an asset manager can require the asset manager to release capacity to marketers serving under the retail choice program and that such a release will qualify for the exemptions. National Grid asserts that the need for this clarification arises from the fact that the number of customers participating in an LDC's retail choice program may change from time to time and thus the LDC may release to an asset manager only to find out that some sales customers have changed to transportation only service. National Grid claims this change necessitates a release by the LDC to the converting customers' marketers. National Grid stated that the requested clarification will allow for more efficient releases because the LDC could direct the asset manager to effectuate those new releases.

20. National Fuel seeks clarification that the prohibition against tying and the bidding requirements do not apply to releases by an LDC to a marketer when the marketer is acting as an agent of a retail access marketer pursuant to a state-mandated retail access program. It asserts the situation described by BP in BP's request for clarification of Order No. 712—where a wholesale entity receives releases as part of a state-approved program, for the purpose of selling gas to another retail marketer that makes sales directly to retail customers—is not a unique situation and should be the subject of the general rulemaking proceeding. National Fuel asserts that not all marketers participating in state-approved retail unbundling programs sell directly to

[15] The same analysis applies if the releasing shipper reserves storage withdrawal rights in excess of its contract demand on the interconnecting pipeline. See Marketer Petitioners' request for clarification at 5.

[16] The Commission's additional explanation of its rule should remove any uncertainty the Marketer Petitioners have concerning the need to reflect fuel and LAUF in the contracts on each pipeline in the chain. An asset manager may include the extra volumes necessary to cover fuel retention and LAUF charges at each interconnecting point in the pipeline chain. The customer may not, however, require that the asset manager deliver the cumulative volume to the most downstream delivery point. (See example on page 3 of the Marketer Petitioners' clarification request).

[17] Order No. 712 at P 199; Order No. 712–A at P 115.

[18] Order No. 712 at P. 200; Order No. 712–A at P 115.

[19] Order No. 712–A at P 118.

[20] *Id.* P 121–122.

[21] *Id.* P 122.

consumers. They claim that in New York, for example, the state choice program allows both the release of capacity to retail marketers selling directly to consumers and for the release of capacity to marketers that are contractually entitled to act as agents for the retail marketers selling to consumers.[22] National Fuel explains that the latter arrangements may occur because retail marketers may have difficulty acquiring all the releases necessary to meet their obligations under the program, often due to credit issues. National Fuel states that in the agency situation the retail marketer will enter into an agency agreement through which a second marketer becomes the first marketer's agent for purposes of acquiring the released capacity from the LDC. The agent marketer agrees to acquire the necessary capacity from the LDC and to sell gas to the retail marketer at the city gate for the purposes of fulfilling the retail marker's obligations under the program. According to National Fuel, this sort of arrangement does not raise the same concerns as that described by BP because of the ''agency'' relationship. National Fuel asserts that if the Commission does not grant clarification of the regulation, then it should amend the regulations to include both retail marketers in state-approved programs and their agents.

21. Alternatively, National Fuel seeks a limited waiver for the situation described above. It states the waiver would only apply under the following circumstances: (1) Releases to these marketers would occur only when there is a valid, written agency agreement between the retail marketer and the marketer receiving releases of capacity, requiring the marketer to act as agent for the retail marketer and obligating the agent to meet the retail marketer's gas supply needs; and (2) the marketer acting as agent must do so as part of a state-approved customer choice program and under published state-approved tariffs and/or procedures. National Fuel argues that the result would be fully consistent with both the goal of the exemptions for state choice programs and the non-discriminatory and efficiency goals of Order No. 712.

22. The New York State Public Service Commission (NYPSC) filed in support of both National Grid's and National Fuel's clarification requests. The NYPSC asserts that Order No. 712–A should be clarified to avoid ''hindering'' state retail access programs. It claims that the releases at issue are made to effect service to the very same customers for whose benefit the pipeline capacity was purchased by the releasing LDC and that without the exemptions provided by Order No. 712 it would be more difficult for marketers to provide service to their end use customers. The NYPSC further argues that requiring the issue to be resolved on a case by case basis does not foster the Commission's goals and harms state retail access programs.

23. Other LDCs located in New York also filed in support of National Grid's and National Fuel's requests. Con Ed and O&R assert that a release to a ''wholesale marketer acting as agent for a retail marketer participating in a state-approved retail choice program is equivalent to a capacity release directly to a retail marketer.'' [23] They assert that based on the principles of agency law the principal and agent are equally bound by the contract made by an agent acting within the scope of an agency relationship, and thus a wholesale marketer that obtains capacity as a replacement shipper, when acting as agent for the retail marketer, is obtaining capacity for the direct benefit of the retail marketer and state retail access program. They also support the arguments regarding the potential creditworthiness difficulties of the retail choice marketers. Con Ed and O&R seek company specific waivers in the event the Commission denies the clarification requests.

24. NYSEG and RG&E lend similar support to the clarification requests claiming that state retail access releases involve storage as well as transportation and that without the ability to use an agent to obtain the capacity and serve the retail load many retail marketers may not be able to participate in the program. They also seek a waiver in the event the Commission denies clarification.

25. Energy America filed support for the clarification requests stating that it has acted as agent for Direct Energy Services and other retail marketers with respect to sourcing needs and managing transportation and storage capacity. Energy America states that as agent, it signs an agency agreement with the LDC making clear that it is acting as an agent to provide service to the retail marketer under the retail access program. The LDC then releases capacity to the agent who transports and sells gas to the retail marketer at the city gate. Energy America asserts that without a clarification or waiver, retail marketers may be unable to participate in retail access programs.

26. The NYSEMC filed comments requesting that the Commission reject National Grid's clarification. It asserts that National Grid seeks a blanket exemption for all marketers acting as agents in retail choice programs, not a company specific waiver as suggested in Order No. 712–A. Further, NYSEMC takes issue with the claim that the Commission should grant the clarification because some marketers may not be able to meet the financial or technical requirements of interstate pipelines. It asserts that lack of financial capability is not a reason to expand the scope of exemptions granted by Order No. 712.

27. NYSEMC argues that granting a broad exemption as requested by the New York utilities that also operate in Pennsylvania and elsewhere would effectively result in a blanket waiver of the type denied in Order No. 712–A. It also argues that granting the requested relief would increase the risk of defaults by permitting less creditworthy suppliers access to systems they would not otherwise be able to obtain. It claims that it would not be in the public interest to allow circumvention of creditworthiness standards in the current credit climate and that relaxed credit requirements were actually one of the causes of the current economic situation. It further argues that the Commission would hinder the continued development of a viable and robust competitive market by affording certain marketers preferential credit treatment.

28. National Grid answers NYSEMC's comments, claiming that NYSEMC mischaracterizes National Grid's clarification request by framing it as a request for an open-ended exemption. National Grid asserts that it is requesting an exemption only where the wholesale marketer supplier advises the LDC that the marketer has an obligation to supply gas to the retail marketer that is equivalent to the retail marketer's obligation to supply gas to the releasing LDC's customers. National Grid claims such obligation could be created by an agency relationship or some other contractual framework. National Grid also states that NYSEMC's concerns about creditworthiness of small customers are misplaced because the wholesale supplier would still be required to meet the pipeline's creditworthiness standards. National Grid also notes that granting its clarification would provide retail customers with a greater choice of providers.

Commission Determination

29. The Commission clarifies that the exemptions from bidding and the prohibition against tying for releases to

[22] National Fuel request for clarification at 7.

[23] Con Ed/O&R support for clarification at 4.

marketers participating in state-regulated retail access programs apply to any release where the marketer replacement shipper is obligated to use the capacity to provide the gas supply requirement of retail consumers in the program. Even if the marketer does not itself make sales directly to the subject retail consumers, this condition can be satisfied so long as the marketer has a contractual obligation to use the full amount of the released capacity to supply gas to the retail access marketer and the retail access marketer is, in turn, obligated to supply that gas to the retail consumers pursuant to a state-regulated retail access program.

30. As stated above, in Order Nos. 712 and 712–A the Commission exempted from bidding releases ''to a marketer participating in a state-regulated retail access program as defined in paragraph (h)(4) of this section * * *.''[24] In section 284.8(h)(4) of the revised regulations, the Commission defined releases to a ''marketer participating in a state-regulated retail access program'' as ''any prearranged capacity release that will be utilized by the replacement shipper to provide the gas supply requirement of retail consumers pursuant to a retail access program * * *.''[25] This definition applies to any replacement shipper which is obligated to use the released capacity to transport gas which will be used to provide the gas supply requirement of the retail consumers, whether that shipper makes the retail sales itself or sells the gas to the retail marketer who then resells the gas to the retail consumers.[26] The Commission's rationale in Order No. 712 for granting the exemptions from the tying prohibition and bidding requirements for capacity releases by LDCs to implement state-approved retail access programs applies equally to the situation where an LDC releases capacity directly to the retail marketer or to another entity which is obligated to transport the gas on behalf of the retail marketer. The essential requirement is that the replacement shipper either (1) is itself the retail marketer or (2) has a contractual relationship with the retail marketer and/or the LDC requiring it to use up to the full amount of the released capacity to satisfy the retail marketer's obligations under the state-approved retail access program to provide the gas supply requirement of retail consumers.

31. The Commission rejects the argument that granting this clarification will allow circumvention of interstate pipeline creditworthiness standards. If a retail marketer is unable to satisfy these standards, the replacement shipper supplier will be required to satisfy the pipeline's creditworthiness criteria. If no party can meet these standards then the pipeline does not have to allow the release.

32. The Commission also grants National Grid's requested clarification that an LDC that releases to an asset manager can require the asset manager to release capacity to marketers serving under the retail choice program and that such a release will qualify for the exemptions from the tying prohibition and bidding requirements. This condition is one that can be addressed in the agreement between the releasing shipper and asset manager, and will allow LDCs and asset managers to operate efficiently to effectuate the goals of retail access programs.

33. The clarifications granted above render the various requests for waiver moot.

Termination of Dockets

34. The Commission initiated Docket Nos. RM06–21 and RM07–4 to address a petition filed by Pacific Gas and Electric Co. and Southwest Gas Corporation concerning the potential removal of the maximum rate ceiling on capacity release transactions and a petition filed by the Marketer Petitioners seeking clarification of the operation of the Commission's capacity release rules in the context of asset management services. The issues raised in the petitions have been fully addressed in the instant docket. Accordingly, the Commission hereby terminates Docket Nos. RM06–21 and RM07–4.

The Commission orders:

(A) The requests for rehearing of Order No. 712–A are denied and the requests for clarification of Order No. 712–A are granted in part and denied in part as discussed above.

(B) Docket Nos. RM06–21 and RM07–4 are hereby terminated.

By the Commission.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. E9–9111 Filed 4–20–09; 8:45 am]

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[24] See 18 CFR 284.8(h)(1).

[25] 18 CFR 284.8(h)(4).

[26] Some of the parties requesting clarification describe an ''agency'' relationship whereby the agent would obtain the released capacity and then sell gas to its principal, the retail marketer. *See* National Fuel's request at 7. This arrangement, as well as what we understand as a traditional agency arrangement, where the principal would continue to hold title to the capacity and the gas, and thus there would be no need for a ''resale'' to the retail marketer (principal), are both acceptable to the Commission as releases eligible for the exemptions from tying and bidding provided the ''agent'' is obligated to serve the retail marketer's needs as described above under the retail access program.

DEPARTMENT OF LABOR

Office of Labor-Management Standards

29 CFR Parts 403 and 408

RIN 1215–AB62

Labor Organization Annual Financial Reports

AGENCY: Office of Labor-Management Standards, Employment Standards Administration, Department of Labor.

ACTION: Final rule; delay of effective date and applicability date.

SUMMARY: This final rule delays the effective date and applicability date of regulations pertaining to the filing by labor organizations of annual financial reports required by the Labor-Management Reporting and Disclosure Act of 1959, as amended (LMRDA) that were published in the **Federal Register** on January 21, 2009. They revised Labor Organization Annual Report Form LM–2 and established a procedure whereby the Department may revoke, when warranted, a labor organization's authorization to file the simplified Labor Organization Annual Report Form LM–3. These regulations were to have gone into effect on February 20, 2009, but were delayed until April 21, 2009, by a final rule published on February 20, 2009 (74 FR 7814). This final rule postpones the effective date of the regulations from April 21, 2009, until October 19, 2009, and the applicability date of the regulations from July 1, 2009, until January 1, 2010. This will allow additional time for the agency and the public to consider a proposal to withdraw the January 21 regulations and, meanwhile, to permit unions to delay costly development and implementation of any necessary new accounting and recordkeeping systems and procedures, pending this further consideration. At the same time, the Department has published a Notice of Proposed Rulemaking elsewhere in this issue of the **Federal Register**, seeking public comment on its proposal to withdraw the regulations.

DATES: The effective date of the rule amending 29 CFR Parts 403 and 408, published January 21, 2009, at 74 FR 3678, is delayed until October 19, 2009, and its applicability date is delayed until January 1, 2010.

FOR FURTHER INFORMATION CONTACT: Denise M. Boucher, Director, Office of Policy Reports and Disclosure, Office of Labor-Management Standards, Employment Standards Administration, U.S. Department of Labor, 200