**DEPARTMENT OF ENERGY**

**Federal Energy Regulatory Commission**

**18 CFR Parts 330 and 385**

**[Docket No. RM99–5–001; Order No. 639–A]**

## Regulations Under the Outer Continental Shelf Lands Act Governing the Movement of Natural Gas on Facilities on the Outer Continental Shelf

Issued July 26, 2000.

**AGENCY:** Federal Energy Regulatory Commission.

**ACTION:** Order on rehearing of final rule.

**SUMMARY:** The Federal Energy Regulatory Commission (Commission) is addressing the requests for rehearing of its final rule, Order No. 639, issued on April 10, 2000, implementing regulations under the Outer Continental Shelf Lands Act (OCSLA).[1] The final rule was issued to ensure that natural gas is transported on an open and nondiscriminatory basis through pipeline facilities located on the Outer Continental Shelf (OCS). The regulations require OCS gas transportation service providers to make available information regarding their affiliations and the conditions under which service is rendered. This information will assist the Commission and interested persons in determining whether OCS gas transportation services conform with the open access and nondiscrimination mandates of the OCSLA. By rendering offshore transactions transparent, the regulations' reporting requirements should provide a sound basis for implementing the uniformly applicable open access and nondiscrimination mandates of the OCSLA, thus resulting in greater efficiencies in this marketplace. This order clarifies and amends the regulations to grant, in part, the requests for rehearing of Order No. 639.

**EFFECTIVE DATE:** The order on rehearing is effective October 2, 2000.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:**

[1] 43 U.S.C. 1301–1356.

**United States of America**

**Federal Energy Regulatory Commission**

[18 CFR Parts 330 and 385]

[Docket No. RM99–5–001]

Regulations under the Outer Continental Shelf Lands Act Governing the Movement of Natural Gas on Facilities on the Outer Continental Shelf.

*Order on Rehearing and Clarification*

Order No. 639–A

Issued July 26, 2000.

## I. Introduction

On April 10, 2000, the Federal Energy Regulatory Commission (Commission) issued a final rule, Order No. 639,[1] promulgating regulations under the Outer Continental Shelf Lands Act (OCSLA)[2] to ensure that natural gas is transported on an open and nondiscriminatory basis through pipeline facilities located on the Outer Continental Shelf (OCS).[3] The regulations require OCS gas transportation service providers to make available information regarding their affiliations and the conditions under which service is rendered. This information will assist the Commission and interested persons in determining whether OCS gas transportation services conform with the open access and nondiscrimination mandates of the OCSLA and will enable shippers who believe they are subject to anticompetitive practices to bring their concerns to the Commission. The transactional transparency that reporting will bring should provide a sound basis for ensuring open and nondiscriminatory access offshore and produce greater efficiencies in this marketplace. The Order No. 639 regulations do not eliminate or modify any existing regulations or Commission policies relating to the regulation of offshore facilities pursuant to the Commission's authority under the Natural Gas Act (NGA).[4]

## II. Background

Requests for rehearing and/or clarification of Order No. 639 were filed by Duke Energy Field Services Assets, LLC (Duke); El Paso Energy Corporation (El Paso); the Interstate Natural Gas Association of America (INGAA); the Independent Petroleum Association of America (IPAA);[5] the Natural Gas Supply Association (NGSA); OCS Producers; the Producer Coalition; and the Williams Companies, Inc. (Williams).[6]

Parties requesting rehearing endorse the expressed aim of the final rule—to ensure compliance with the OCSLA's open and nondiscriminatory access requirements. Producer interests generally support the Commission's means to this end—to require OCS service providers to report certain information on their affiliates and transactions—whereas pipeline interests generally oppose aspects of the new reporting requirements. In response to the concerns raised, for the reasons discussed below, we modify, clarify, and affirm the OCSLA reporting requirements set forth in Order No. 639.

## III. Requests for Rehearing and/or Clarification and the Commission's Response

### *A. Commission Authority To Require OCSLA Reporting*

1. Requests for Rehearing and/or Clarification

Duke, El Paso, INGAA, OCS Producers, and Williams claim that the Commission has failed to present an adequate legal foundation for promulgating new OCSLA reporting requirements. The parties stress that since the OCSLA's 1953 enactment, with but a handful of exceptions, the Commission has not relied on the OCSLA to ensure that gas is transported on or across the OCS on an open and nondiscriminatory basis.

Williams argues that the Commission should have, but did not, consult with the Attorney General prior to implementing a new rule.

Duke insists that other federal agencies—but not the Commission—can act under the OCSLA to enforce nondiscrimination by instituting a civil action in district court; therefore, the Commission's rule and its proposed enforcement are without foundation and invalid.

OCS Producers believe the Commission could employ other, less

[1] 65 FR 20354 (Apr. 17, 2000), FERC Stats. & Regs. ¶ 31,514 (2000).

[2] 43 U.S.C. 1301–1356.

[3] The OCS is defined as ''all submerged lands lying seaward and outside of the area of lands beneath navigable waters * * * and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control.'' 43 U.S.C. 1331(a). *See also* 43 U.S.C. 1301(a)(1), defining ''lands beneath navigable waters'' as ''all lands within the boundaries of each of the respective States.''

[4] 15 U.S.C. 717.

[5] Rather than submit separate comments, IPAA states that it endorses and adopts the Producer Coalition's submission as its own, including the relief specified therein. Accordingly, references to the Producer Coalition may be read as including the IPAA.

[6] We accept the requests for rehearing pursuant to Rule 713 of the Commission's Rules of Practice and Procedure. 18 CFR 385.713.

burdensome means to secure the benefits of OCSLA compliance and assert the Commission has not demonstrated that reporting is needed for effective OCSLA enforcement.

2. Commission Response

We acknowledge that we have not established an extensive record of reliance upon the OCSLA. It was not until 1988 that we found cause to issue a rule interpreting the Commission's responsibilities under the OCSLA.[7] Until then, the NGA had appeared fully adequate to the task of regulating offshore natural gas facilities and services. As offshore exploration and development has evolved, it has grown beyond our ability to regulate by relying exclusively on the NGA.

Initial offshore construction consisted of gas companies building lines out from existing onshore facilities to production areas on the shallow shelf close to shore, stepping incrementally further out as technological advances led to the development of fields in increasing water depths. Typically, these early offshore lines were used to attach production from a single well or single platform in a field that produced gas for the system supply of a single company. It has proved to be the case that where an offshore pipeline serves to provide long-term, firm transportation for the pipeline's owner, issues of access do not arise. Generally, these offshore systems were owned and operated by, and used to carry the gas of, interstate pipeline companies. Thus, the Commission's NGA jurisdiction over interstate transportation extended to these offshore systems, and we consequently found no cause to turn to the OCSLA to guarantee open and nondiscriminatory access on these pipelines.

By the late 1980s, the nature of offshore operations had started to shift. In 1988, in Order No. 491, we observed that the offshore infrastructure consisted of major trunkline systems interconnected via a ''proliferation'' of laterals, resulting in a grid with the ''flexibility to move offshore reserves from a variety of offshore locations via a number of pipeline facilities to onshore destinations.'' [8] We recognized that to take advantage of such flexibility, shippers were equally dependent on the physical capabilities of the facilities and ''the degree of access which shippers have to the transportation system.'' [9] Consequently, in order to ensure open and nondiscriminatory access, we required all offshore NGA-jurisdictional pipelines to obtain blanket certificates under Part 284 of our regulations, authorizing transportation on behalf of others on an open and nondiscriminatory basis.[10]

At that time, the offshore transportation grid was still largely subject to our NGA jurisdiction, so we found no need to implement a separate set of regulations under the OCSLA targeted at NGA-exempt OCS service providers.[11] During the past decade, however, the character of the offshore environment has again undergone significant change, particularly after the 1989 *EP Operating Company* v. *FERC (EP Operating)* decision,[12] which led the Commission to reclassify numerous offshore facilities from transmission to gathering.

Now a more significant portion (approximately half) of the offshore gas infrastructure is excluded from NGA oversight, thereby eroding the applicability and effectiveness of our earlier OCSLA rule. Further, we expect a continuation of the recent trend of pipelines' requesting reclassification of existing certificated offshore lines from transmission to gathering. We expect a greater portion of new construction to qualify as gathering as well.[13] In view of these factors, the OCSLA's competitive principles no longer can be met by mandating that offshore NGA pipelines adhere to our Part 284 open access requirements. Since we can no longer rely on this scheme of regulatory piggybacking, the new OCSLA reporting requirements are needed to adequately monitor the dynamic, expanding portion of the offshore infrastructure that is not subject to NGA oversight.

Williams contends the Commission neglected to consult with other federal agencies, as specified in OCSLA section 1334(f)(3),[14] prior to implementing the reporting regulations. This same issue was raised in response to the Notice of Proposed Rulemaking (NOPR),[15] referencing the separate but similar consultation requirement specified in OCSLA section 1334(e).[16] In the final rule, we explained our belief that the act of requiring reporting under the OCSLA did not trigger the consultation requirement, a position we maintain.[17]

The OCSLA section 1334(f)(3) consultation requirement applies in the event that ''specific conditions'' are ''included in any permit, license, easement, right-of-way, or grant of authority.'' The final rule's reporting requirements are not such a condition, as demonstrated by the fact that the reporting requirements apply not only to NGA-jurisdictional pipelines to which we have granted certificates, but also to NGA-exempt pipelines, to which we have granted no certificate or any other ''permit, license, easement, right-of-way, or grant of authority.'' Thus, our rule is predicated entirely upon the OCSLA's open and nondiscriminatory access requirements, which pertain regardless of whether an OCS service provider is operating under authority of any permit or certificate. As such, we

[7] Interpretation of Section 5 of the OCSLA, Order No. 491, 53 FR 14922 (Apr. 26, 1988), 43 FERC ¶ 61,006 (1988).

[8] 43 FERC ¶ 61,006 at 61,030.

[9] *Id.*

[10] *See* Interpretation of, and Regulations Under, Section 5 of the OCSLA Governing Transportation of Natural Gas by Interstate Natural Gas Pipelines on the OCS, Order No. 509, 53 FR 50925 (Dec. 19, 1988), FERC Stats. & Regs. ¶ 30,842 (1988), *order on reh'g,* Order No. 509–A, 54 FR 8301 (Feb. 28, 1989), FERC Stats. & Regs. ¶ 30,848 (1989).

[11] On rehearing of Order No. 509, parties asserted it was unreasonable and discriminatory for the Commission to limit its actions to NGA-jurisdictional pipelines. They argued for extending the Part 284 blanket transportation requirements to NGA-exempt OSC service providers as well. In response, we explained that our application of the already established NGA open access requirements to NGA facilities was a ''starting point'' and that we would look to other remedies, as needed, to cover other OCS facilities.

[12] 876 F.2d 46 (5th Cir. 1989). The court questioned the Commission's rationale for finding a 16-inch diameter, 51-mile long line, extending from a floating rig in deep water to a fixed platform on the shallow shelf, to be a transmission line. In response, the Commission modified the manner in which it determined the primary function of facilities located offshore, and subsequently found increasingly larger sets of offshore facilities to be gathering. *See, e.g.,* Amerada Hess Corporation, 52 FERC ¶ 61,268 (1990).

[13] Our 1996 Policy Statement established a rebuttable presumption that facilities located in deep water of 200 meters or more were engaged in production or gathering. Gas Pipeline Facilities and Services on the OCS—Issues Related to the Commission's Jurisdiction Under the NGA and the OCSLA, 74 FERC ¶ 61,222 (1996), *reh'g dismissed,* 75 FERC ¶ 61,291 (1996). Given that deep water prospects are predicted to provide substantial quantities of new offshore gas supplies, we expect additional pipeline construction in deep water areas.

[14] Specifically, Williams cites OCSLA section 1334(f)(3), which states that:

The Secretary of Energy and the Federal Energy Regulatory Commission shall consult with and give due consideration to the views of the Attorney General on specific conditions to be included in any permit, license, easement, right-of-way, or grant of authority in order to ensure that pipelines are operated in accordance with the competitive principles set forth in paragraph (1) of this subsection. In preparing any such views, the Attorney General shall consult with the Federal Trade Commission.

[15] Regulations under the OCSLA Governing the Movement of Natural Gas on Facilities on the OCS, 64 FR 37718 (July 17, 1999), FERC Stats. & Regs. ¶ 32,542 (1999).

[16] OCSLA section 1334(e) states, in part, that the Commission ''in consultation with the Secretary of Energy'' may, in certain circumstances, determine proportionate amounts of gas to be transported.

[17] We note that Williams and all federal agencies received public notice of this rulemaking proceeding, and but for the Department of the Interior's Mineral Management Service (MMS), those agencies elected not to comment on either the NOPR or the final rule.

conclude consultation with the Attorney General is not a prerequisite for promulgating this reporting rule.

Williams notes that in the Order No. 509 rulemaking, the Commission requested the views of other federal agencies. There is a material distinction between that rulemaking and this one: there, we told OCS service providers how to operate; here, we merely have OCS service providers tell us how they operate.

In Order No. 509, we imposed specific conditions on service providers. Although the conditions were contained in our NGA regulations and were applied only to offshore pipelines already subject to the NGA, these NGA conditions were applied in fulfillment of the OCSLA's transportation requirements, compelling OCS service providers to adopt and follow certain business practices as a specific condition of complying with the competitive principles of OCSLA section 1334(f)(1).[18] In this rule, while we exhort NGA-exempt OCS service providers to adhere to the same competitive principles that NGA-jurisdictional pipelines are subject to under our Part 284 open access regulations, the only requirement of Order No. 639 issued under the OCSLA is that service providers present information on their business practices. We impose no new conditions on those practices.

Duke takes the position that the Commission's authority under OCSLA section 1334(f)(3) to impose conditions on OCS service providers ''is not an independent grant of authority.'' Rather, Duke argues that section 1334(f)(3) only describes ''steps the Commission is required to take when exercising its authority under another statute such as the NGA.'' [19] We disagree. Duke reads too much into our decision in Order No. 509 to limit the rule's applicability to offshore pipelines already subject to the NGA and our reliance on the operating obligations contained in our NGA regulations to compel compliance with the provisions of the OCSLA.

As we emphasized in the order on rehearing of Order No. 509, ''the open-access mandate of the OCSLA applies to all pipeline operations on the OCS.'' [20] We might have gone further and exercised our OCSLA authority to impose specific open access regulatory requirements on all OCS facilities; instead, on rehearing of Order No. 509, we elected to ''consider appropriate measures for remedying discriminatory access to other [NGA-exempt] OCS facilities on a case by case basis.'' [21] Thus, our approach in Order No. 509 does not indicate, as Duke advocates, that our OCSLA authority applies in some derivative manner only after we have already first established our jurisdiction by means of another statute. We conclude that, though administering and enforcing the OCSLA involves coordination and a division of labor among several federal entities, the Commission's OCSLA authority stands apart and independent from our statutory responsibilities under the NGA.

Duke is correct that several federal agencies can institute OCSLA enforcement actions. However, this sharing of responsibility does not preclude the Commission, as an independent agency, from acting without the assistance of other responsible federal agencies to oversee and enforce open and nondiscriminatory access. The Commission's capacity to compel open and nondiscriminatory access under the OCSLA is discussed in *Shell Oil Company* (*Shell*).[22] At issue in *Shell* was an offshore oil pipeline's refusal to serve a new customer. The Commission exercised its authority under section 1334(f) of the OCSLA to order the oil pipeline to accept and transport the new customer's volumes.[23] When the court issued its decision in *Shell,* the oil pipeline complied with the Commission's order to interconnect. Thus, issues relating to cooperative agency action were not reached. We note, however, that if the Commission finds it necessary to seek the imposition of monetary civil penalties for any OCS service provider's violation of the reporting requirements, as opposed to physical remedies to force open and nondiscriminatory access, the Commission expects to rely on the Secretary of the Interior's authority to ''assess, collect, and compromise any such penalty,'' in accordance with section 1350(b) of the OCSLA.

*B. Regulatory Conflict and Accord*

1. Requests for Rehearing and/or Clarification

Duke, El Paso, INGAA, and Williams maintain it is inequitable to subject separate sets of offshore facilities to separate regulatory regimes. They stress that even if the new OCSLA reporting requirements diminish the difference between operating under the OCSLA as opposed to the NGA, OCS service providers subject exclusively to the OCSLA will still retain a competitive advantage over those also subject to the NGA.

INGAA proposes all offshore facilities be declared gathering, *i.e.*, exempt from the NGA under section 1(b), thereby leaving all offshore facilities and services subject exclusively to the OCSLA. Williams implicitly endorses this approach.

El Paso urges the Commission to rescind the new reporting requirements and regulate offshore activities as it has to date, by relying on the NGA in conjunction with complaints under the OCSLA.

OCS Producers caution that exploration, development, and production are properly the regulatory domain of the MMS, and the Commission risks clashing with MMS if it fails to plainly put these activities beyond its reach.

2. Commission Response

Concerns regarding the impacts of existing laws—*e.g.,* whether the statutory regime in place offshore favors one type of entity or activity over another—are appropriately directed to Congress rather than to this Commission. In the onshore context, we have been confronted with analogous allegations of commercial advantage conferred as a consequence of operating subject to state versus federal regulation. Weighing the comparative benefits and burdens of operating under one statute versus another, however, is beyond our purview.

We are charged with, and our authority extends only to, enforcing each statute as it applies; hence, we are

[18] Specifically, Order No. 509 granted all NGA-regulated OCS pipelines Part 284, Subpart G, blanket transportation certificates, then mandated these pipelines file tariffs to implement their blanket certificates, and pursuant to their certificates, required that the offshore lines provide firm and interruptible transportation on an open and nondiscriminatory basis to owner and nonowner shippers. The rule had no impact on NGA-regulated pipelines onshore, as onshore entities retained the option to forego seeking a blanket transportation certificate.

[19] Duke's Request for Reconsideration and Rehearing at 4 (May 10, 2000).

[20] Order No. 509–A, 54 FR 8301 (Feb. 28, 1989), FERC Stats. & Regs. ¶; 30,848 at 31,334 (1989).

[21] *Id.*

[22] 47 F.3d 1186 (D.C. Cir. 1995). We note that in addition to enforcement action by federal agencies, OCSLA section 1349 provides for citizens suits, and the Shell case was initiated as such by a private party. Duke cites this case to stress that Congress granted original jurisdiction to the district courts of the United States for suits, cases, and controversies arising out of OCS operations. We concur, but note that the parties in the Shell case initially sought administrative relief from this Commission in Bonito Pipe Line Company, 61 FERC ¶ 61,050 (1992), prior to judicial review.

[23] The Commission determined that the oil pipeline had excess capacity sufficient to accommodate the maximum projected new volumes, and therefore found no need to act under OCSLA section 1334(e) to adopt an allocation methodology.

not at liberty to contemplate the equities and impacts of the existing regulatory regime on competitors' operations. We observe that here, if anything, the enhanced transactional transparency to be gained by OCSLA reporting will diminish the differences between OCS service providers now operating under joint NGA/OCSLA jurisdiction and those subject only to the OCSLA. We would not characterize the new reporting requirements as another layer of regulation, as does INGAA; rather, given the OCSLA's applicability to all OCS facilities and services, we view reporting as the foundation for implementation of a uniform, light-handed regulatory regime offshore.

We will not pursue INGAA's proposal that we find all offshore facilities gathering, and thereby remove them from our direct NGA oversight, since the application of our test for determining whether facilities are performing primary a gathering or transportation function [24] is not at issue in this rulemaking proceeding. However, as discussed in the NOPR and final rule, part of our motive for acting to enhance the availability of information about offshore operations is the development of the *Sea Robin* proceeding and the guidance offered by the court concerning the application of our primary function test to offshore facilities. That decision prompted us to review and revise our criteria for determining the primary function of offshore facilities, resulting in a determination that portions of Sea Robin's system, which had always been regulated under the NGA as transmission, should be reclassified as gathering.[25] While this result calls into question whether other offshore facilities that have traditionally been regulated as NGA transmission lines might be performing primarily a gathering function, we believe the proper approach is to examine such facilities individually, on a case-by-case basis, in separate proceedings.

If, in the wake of *Sea Robin,* additional offshore facilities are declared gathering, and are thereby pushed out from under the umbrella of the regulatory protections that the NGA provides, the NGA's scope will shrink, making it less effective as a means to check market power abuses.[26] Under these circumstances, we expect complaints brought under the OCSLA will play an increasingly significant role.

We have recently revised our complaint procedures to permit more efficient processing,[27] and where before a general allegation of wrongdoing might be deemed adequate to pursue a complaint, under the revised regulations, specific allegations must be presented that measure up to a more rigorous minimum criterion before the Commission will proceed. As discussed in the final rule, we expect it will be difficult for a shipper or service provider to fashion a sustainable complaint absent the availability of information about the business practices of service providers.

Setting forth the particulars of an alleged OCSLA violation by an NGA-regulated service provider can be straightforward, given the wealth of information regarding jurisdictional interstate pipelines' actions. However, while the NGA's disclosure requirements are arguably adequate to allow for a complaint-driven enforcement regime, the same cannot now be said regarding possible OCSLA violations by NGA-exempt entities, since without the data contained in the new OCSLA reports, we question whether a description of alleged violations could be set forth in sufficient detail to sustain a complaint. Because we believe the data that will be generated by OCSLA reports is necessary to effectively monitor NGA-exempt OCS service providers, we reject El Paso's proposal to rescind the OCSLA reporting requirement.

We envision no pending conflict with the MMS. First, offshore, traditionally, several federal agencies have simultaneously exercised overlapping duties without inducing intractable conflict. Second, as discussed below, production facilities are generally exempt from the OCSLA reporting requirements.

*C. Reporting Requirements*

1. Requests for Rehearing and/or Clarification

Duke, El Paso, OCS Producers, and Williams contend public disclosure will reveal commercially sensitive, confidential, and proprietary information, to the detriment of the reporting entities.

The Producer Coalition has the opposite apprehension, expecting service providers will request privileged and confidential treatment for most of the information they report. Therefore, to ensure transactional transparency, the Producer Coalition advocates eliminating such treatment and making all data public.

The final rule directs an OCS service provider to file a report on the first day of each quarter, describing its status as of the first day of the previous quarter. The Producer Coalition, OCS Producers, and NGSA are concerned that the filed report may omit the immediately preceding quarter's intra-quarter changes, *i.e.,* a change on October 2 will be omitted from the January 1 report, and only picked up in the April 1 report. The parties suggest this is too long.

The Producer Coalition proposes requiring that additional details be reported regarding rates and conditions of service. For example, the Producer Coalition requests we revise § 330.2(b) to clarify that the primary receipt and delivery points include both the points listed as primary receipt or delivery points in each contract and any other receipt or delivery points that are actually used for service under the contract during the reporting period. The Producer Coalition explains this clarification will discourage the practice of listing primary points in contracts, and then in fact flowing gas through other points. Further, the Producer Coalition believes it would be easier to find receipt and delivery points if the service provider designated them not just by meter identification numbers but by geographic location as well.

OCS Producers request clarification concerning events triggering the reporting requirement and an itemization of the conditions of service to be reported. NGSA notes that the regulations request a detailed description of the derivation of non-cost-based rates and ask whether it is sufficient to simply state that such rates were derived by negotiation.

OCS Producers suggest the affiliate reporting requirement be modified as

[24] The Commission's ''primary function'' test was articulated in Farmland Industries, Inc. (Farmland), 23 FERC ¶ 61,063 (1983).

[25] We note that the result of our review was to split Sea Robin's system, retaining as transmission a 36-inch diameter, 66-mile long line to shore, but reclassifying as gathering Sea Robin's remaining 372 miles of 4-to 30-inch diameter pipe. 87 FERC ¶ 61,384 (1999), *reh'g pending.*

[26] NGSA speculates that the NGA's effectiveness as a means to check market power abuses may also diminish if the currently applicable NGA reporting requirements are later trimmed back. If and when modifications to our NGA regulations are proposed, NGSA, other interested parties, and the Commission will have ample opportunity to consider the potential impacts on NGA-regulated OCS service providers and the implications for monitoring and ensuring compliance with the OCSLA. Such a future NGA rulemaking proceeding is the appropriate forum to consider these issues.

[27] *See* 18 CFR 385.206, Complaint Procedures, Order No. 602, 64 FR 17087 (Apr. 8, 1999), FERC Stat. & Regs. ¶ 31,071 (1999), 86 FERC ¶ 61,324 (1999), *order on reh'g and clarification,* Order No. 602–A, 64 FR 43600 (Aug. 11, 1999), FERC Stats. & Regs. ¶ 31,076 (1999), 88 FERC ¶ 61,114 (1999), order on reh'g, Order No. 602–B, 64 FR 53595 (Oct. 8, 1999), FERC Stats. & Regs. ¶ 32,545 (1999), 88 FERC ¶ 61,249 (1999).

follows: eliminate the need to identify gas consumer affiliates, since such affiliates are numerous, change often, and have little impact on upstream offshore operations; list only those affiliates that are active on the OCS; and add gas gathering affiliates to those that must be reported. El Paso would restrict named affiliates to those engaged in gas operations within the US and adjacent water bodies.

NGSA requests that the Commission specify a format, establish procedures for electronic filing, and make the filed information Internet accessible.

2. Commission Response

Reporting is not intended to force the revelation of commercially sensitive, confidential, or proprietary information immaterial to ensuring compliance with the OCSLA. That said, reporting will nonetheless compel OCS service providers to make public aspects of their operations that they have heretofore been permitted to keep private. While we appreciate companies' preference to withhold certain information, we note that the wide applicability of the new OCSLA reporting requirements, like the wide applicability of the existing NGA reporting requirements, serves to place competitors on a more consistent regulatory footing.

We intend to continue the current practice under § 388.112 of our regulations of considering requests for privileged treatment of information on a case-by-case basis. Because the outcome of each request typically turns on the specific facts presented, we are unable to make broad declarations on what information qualifies for such treatment. Accordingly, we reject the Producer Coalition's proposal that we generically declare no information can qualify for privileged treatment. However, we do not intend to extend privileged treatment to information that is necessary to determine whether service providers are operating in accord with the OCSLA, *e.g.,* a § 330.2 report that failed to state the actual rates charged would have no utility.

To date, in the context of exercising our non-OCSLA authority, we have been able to give adequate attention to individual requests for privileged treatment and expect to be able to do the same with respect to requests related to OCSLA reporting. Over time, the Commission has determined what types of data might be exempt from the mandatory disclosure requirements of the Freedom of Information Act,[28] and these past decisions can be expected to guide our assessment of requests for privileged treatment of information in OCSLA reports.

If circumstances arise that prompt the Commission, on its own initiative, to question a non-reporting OCS service provider's conformity with the OCSLA, we may deem it appropriate, initially, to permit the service provider to submit information to the Commission confidentially. If we subsequently determine the service provider does not qualify for an exemption, we would expect to then direct that reporting commence pursuant to § 330.2 of the regulations. Duke urges we expand upon this by revoking the reporting requirements and handling all OCSLA access disputes on a confidential basis. As noted, we expect there will be some cases where some portion of the information needed to resolve a dispute will be withheld from public view. However, because there is now no adequate repository of information regarding NGA-exempt OCSLA activities, there is now no straightforward means to gauge service providers' adherence to the OCSLA. Duke's proposal would preclude establishing a database sufficient to this task.

In the NOPR, we suggested that OCS service providers notify the Commission every time a change in affiliates or services took place, and to do so within 15 days of any such change. Comments in response painted the picture of a large, dynamic OCS service provider, compelled to make daily filings to keep the record up to date with ongoing changes to its system. To avoid burdening a service provider with perpetual filings, we modified our approach, foregoing ongoing updating in favor of quarterly reporting.

Because data's utility is a function of its accuracy, we share the concerns expressed that the reported data not be stale. Therefore, we will modify § 330.3(c) of the regulations. We will change the scheduled reporting date from the first day of a calender quarter to 15 days after the close of a calender quarter. However, a report must now reflect a service provider's status as of the *last* day of the preceding quarter and describe all changes to a service provider's affiliates, customers, rates, conditions of service, and facilities that have occurred during the course of that quarter. Thus, reports, when required, are due on April 15, July 15, October 15, and January 15.

In the final rule, we set October 1 as the due date for the initial § 330.2 reports. We revise that here. Reports will be due on October 15, 2000, and are to contain a description of activities during the third calender quarter of this year. However, because October 15, 2000 falls on a Sunday, pursuant to § 385.2007 of our rules of Practice and Procedure, reports are to be filed on Monday, October 16, 2000. This first OCSLA report will set a baseline specifying service providers' status; subsequent reports will look back to this baseline to determine what future changes merit reporting.

An exempt OCS service provider may become subject to reporting by virtue of taking on another shipper or as a result of a Commission decision that a shipper was denied service without good cause. Currently, § 330.3(b) gives such a service provider 90 days from the date it loses its exemption to file a report. We will modify this time frame so that if an exempt service loses its exemption during a calender quarter, it must file a § 330.2 report on the 15th day of the subsequent quarter. Where an exemption is lost due to serving another shipper, the date such service commences will be the date exempt status ends.[29] Where an exemption is lost due to a refusal to serve, the date the Commission determines the denial of service was unjustified is the date exempt status ends. In reaching such a determination, we note we may elect to alter this default date.

In the final rule, we stated that if an OCS service provider's operations are identical quarter to quarter, the service provider need not submit a report. Concerns were raised that this could entice a service provider to make intraquarter changes, while arranging to revert to an apparent static state in time to be able to claim no quarter-to-quarter change took place. We clarify that although reports need only be filed once per quarter, this report is to be a cumulative record of all changes that have taken place during the calender quarter covered. If there is no change during a given quarter, then there is no need to file a report on the 15th day of the subsequent quarter.

OCS Producers request clarification of §§ 330.3(a)(1) and (a)(2) of the regulations, which state that single-shipper and owner-shipper exemptions end when either the service provider agrees to serve another customer, or when a new customer requests service, is denied, and the Commission determines the denial is unjustified. Discussions with prospective shippers do not jeopardize an existing

[28] 5 U.S.C. 552.

[29] Although we identify service to a new shipper as ending an exemption and triggering the requirement to report, we note that for an exempt owner-shipper, changes in ownership or shipping rights may have the same effect.

exemption.[30] We are persuaded that the date parties reach an accord for future service should not be, as is now, the event that triggers the reporting requirement. Precedent agreements for future service may schedule long lead times before going into effect; actions that take place between the time the agreement is signed and service starts may void the agreement. Therefore, rather than make reaching an agreement to serve the reporting trigger, we will require actual service, and so modify §§ 330.3(a)(1) and (a)(2) to designate the time the Gas Service Provider ''commences service'' as the event that eliminates a reporting exemption.

Currently, §§ 330.3(a)(1) and (a)(2) state that an exempt service provider's denial of service can trigger reporting if the Commission finds the denial unjustified and the denied shipper objects. OCS Producers persuades us that there is little to be gained by requiring that the denied shipper contest a refusal to serve. In investigating a denial of service, the Commission will have the opportunity to weigh the legitimacy and the merits of both the shipper's request and the service provider's refusal. Thus, we find no need for the denied shipper to present the Commission with the circumstances of its denial, again, following a finding that the denial was unwarranted. We will modify §§ 330.3(a)(1) and (a)(2) accordingly.

This is a first effort at obtaining information under the OCSLA. Nothing has changed since the final rule, where in response to a request for a more detailed OCSLA report we explained that ''[g]iven the complexities of offshore operations, the array of entities offshore, and the fact that we have not heretofore collected the information described in §§ 330.2 and 330.3(b) and (c), we feel it premature to fix the manner of presentation or filing format of an OCSLA report at this time.'' [31] If early rounds of OCSLA reports prove the information collected to be deficient, excessive, extraneous, redundant, inconsistent, or otherwise ineffective, we may then describe a more rigorous format and content for the reports. As is, we anticipate the information specified in our OCSLA regulations, as modified herein, will be adequate to enable interested parties to compare rates, conditions of service, and affiliate treatment among a pipeline's various customers and among various pipelines. Therefore, we deny rehearing requests to add details to the parameters of the OCSLA report.

For reporting to be effective, interested persons must be able to compare costs to ship gas between specific points. To address the Producer Coalition's apprehension that service providers might post rates between primary receipt and delivery points, then actually ship gas between other sets of points, we will revise our regulations. Sections 330.2(b)(5) and (b)(6), directing service providers to list their primary receipt and delivery points, remains unchanged. Section 330.2(b)(7) is expanded to require service providers to report ''Rates between each pair of primary receipt and delivery points and each pair of any other points served.''

We concur with the Producer Coalition that it would be easier to find receipt and delivery points if the service provider designated them not just by meter identification numbers but by geographic location as well. We encourage service providers to do so.

Section 330.2(b) of the regulations presents two reporting alternatives and asks service providers to file either copies of contracts or a description of the conditions of service that includes an explanation of the rates charged. The Producer Coalition proposes that we emphasize the alternative nature of this filing requirement by changing the format, but not the substance, of the regulations. We will do so, to avoid any possible confusion regarding the information to be submitted, as follows.

Section 330.2(b) is revised to read: ''A Gas Service Provider must file with the Commission its conditions of service, consisting of the information specified in this paragraph (b), or alternatively, the information specified in paragraph (c). Under paragraph (b), a Gas Service Provider must submit, for each shipper served * * *.'' Section 330.2(b)(8) now concludes after ''Gas Service Provider.'' Section 330.2(b)(9) is redesignated as § 330.2(c) and reads: ''As an alternative to the above paragraph (b) requirements, a Gas Service Provider may file a statement of its rules, regulations, and conditions of service that includes * * *.'' Sections 330.2(b)(9)(i), (ii), (iii), and (iv) are redesignated as § 330.2(c)(1), (c)(2), (c)(3), and (c)(4), respectively.

In the final rule, we expressed the expectation ''that, with limited exceptions, all filings by regulated entities will be made in electronic form.'' [32] We retain this expectation, but for the reasons noted above, believe it would be premature to attempt to establish the format, content, and procedural protocol for electronic filing of OCSLA reports before the experience of a single round of reporting. The reports, filed as paper copies, will be available in the Commission's Public Reference Room and may be accessed remotely via the Internet through the FERC Home Page (*http://www.ferc.fed.us*) using the Records and Information Management System (RIMS) link or the Energy Information OnLine icon.

We will expand the § 330.2(a)(6) definition of affiliate to include gathering affiliates and restrict it to affiliates engaged in gas operations within the US and adjacent water bodies. The omission of gathering affiliates was an oversight. We do not expect foreign affiliates will have any significant impact on OCS service providers' operations.

We will not adopt OCS Producers' proposal to further narrow the affiliate category to only those doing business on the OCS, as we can envision instances where onshore affiliates, *e.g.,* an affiliate owner of a processing plant, might influence an OCS service provider to modify the volumes or path of gas transported. We will adopt OCS Producer's proposal to omit identification of affiliate gas consumers, and modify § 330.2(a)(6) accordingly. Given end user's location at the far end of the wellhead-to-burnertip gas path, we do not expect consumer affiliates to exert an undue influence on upstream offshore operations.

If shippers are charged negotiated rates, NGSA asks whether additional information beyond this fact needs to be submitted. Section 330.2(b) itemizes the reporting requirements. Reports should enable interested persons, particularly prospective and existing shippers, to compare the rates and terms of service they might receive or are receiving, with that of other shippers. Thus, simply stating that all rates are negotiated will not do. As noted in *NorAm Gas Transmission Company,* a negotiated rate formula must be stated with ''sufficient specificity to permit easy calculation of the actual negotiated rate, charge, and rate component for each transaction,'' [33] to enable a shipper to estimate the rate it would be charged to transport gas between specific points in

[30] Similarly, conversations with existing shippers concerning possible changes to rates or terms of service may continue in private indefinitely. Only when the results of such discussions are put into actual practice is the submission of a revised report required.

[31] 65 FR 20354 at 20366, FERC Stats. & Regs. ¶ 31,514 at 31,535.

[32] *Id.,* note 64.

[33] 75 FERC ¶ 61,091 (1996), *order on reh'g,* 77 FERC ¶ 61,011 at 61,037 (1996).

order to compare its hypothetical rate with the actual rates of other shippers.

*D. Reporting Exemptions*

1. Requests for Rehearing and/or Clarification

Williams would lift the single-shipper and owner-shipper reporting exemptions, claiming such exemptions make it difficult for a shipper to determine if it has been denied access or subject to discrimination. Duke is similarly concerned that reporting exemptions will produce an ''information asymmetry,'' whereby nonreporting OCS service providers may exploit the public record to gain a competitive advantage over their reporting rivals.

El Paso urges that all reporting exemptions, other than the exemption for offshore pipelines subject to the NGA, be eliminated as a means of leveling the regulatory playing field.

El Paso, OCS Producers, and Williams expect existing effective offshore arrangements will be upset as service providers structure their business organization and facilities to come within the reporting exemptions.

OCS Producers would expand the reporting exemptions by (1) treating affiliates of the same corporate family as if they were one entity; (2) considering parties engaged in a common financial transaction, such as a sale and leaseback, as a single or joint owner; (3) applying the owner-shipper exemption to a jointly-owned pipeline that receives gas from multiple fields, even though all pipeline owners do not hold interests in each of the attached fields; (4) treating each owner of a pipeline with undivided ownership interests as if each were an individual pipeline (*i.e.,* a pipe within a pipe); (5) extending the shared ownership exemption of a single pipeline crossing multiple fields to include multiple pipelines crossing multiple fields; and (6) declaring that gas volumes shipped in conjunction with the MMS' royalty-in-kind program will not void the single-shipper or shipper-owner exemptions.

OCS Producers argue that production platforms, and facilities upstream thereof, should be exempt from reporting (effectively broadening the ''feeder-line'' exemption). NGSA would establish a rebuttable presumption that all production facilities and services qualify for the feeder-line exemption.

2. Commission Response

Adopting proposals to eliminate some or all of the reporting exemptions would admittedly meet our aim of producing a broader and more complete picture of offshore operations. However, we seek only the minimal information necessary to be able to verify that OCS service providers are operating in compliance with the OCSLA's open and nondiscriminatory access mandates. We continue to believe that an entity that serves a single customer, or that transports only its own gas, has little opportunity or motive to contravene these OCSLA mandates. Thus, we do not find it necessary to employ reporting to monitor such entities.

Given that adding a new customer will void the single-shipper or owner-shipper reporting exemption, it seems futile for an exempt service provider to offer prospective shippers discriminatory terms, since the service provider's first filing following termination of its exemption will advertise the disparity between new and existing customers' conditions of service and invite action contesting the disparity. Similarly, a Commission determination that a denial of service is unjustified informs the rejected shipper, without the need for any further inquiry, that the rejected shipper has cause to complain. Therefore, while a reporting exemption may place a service provider at an advantage in negotiating with prospective shippers, acting on this advantage will be ultimately self-defeating, since any impropriety will come to light in a first filing. In view of the above, we do not expect the single-shipper or owner-shipper reporting exemptions will be used to exploit shippers, as Williams worries, since discrimination or an unwarranted refusal to serve inevitably will be revealed and rectified.

Duke is correct that the cure for ''information asymmetry'' is a wider application of the transactional transparency that OCSLA reporting provides. However, an exempt service provider that is able to make use of the public record to enable it to add a new customer or entice one away from a competitor, will lose its reporting exemption by adding that shipper. Because reporting will end the ''information asymmetry,'' the problem Duke identifies should prove largely self-correcting. To the extent we find evidence that this is not the case—*i.e.,* as Duke warns, the partial transparency produced by allowing reporting exemptions reduces competition and economic efficiency in the OCS marketplace—we will reevaluate the operation and outcome of the OCSLA reporting regime.

Duke asserts that OCS producers, when compared to OCS service providers, ''often have superior market knowledge,'' [34] and thus enjoy an advantage when weighing offers for transportation services. This advantage, coupled with a producer's capability to construct its own gathering and transportation facilities, leads Duke to conclude that the ultimate leverage holder and decision maker is the offshore producer. We find this assertion unpersuasive. Individual producers are compelled to publically disclose to the MMS a significant amount of information about their OCS leaseholdings, including their estimates of gas and oil reserves, exploration and development plans, information on deepwater discoveries, and data on production, existing and planned wells, structures, platforms and rigs, geographic mapping, and royalty relief. Although some of the producer-specific or lease-specific data is not publically available, enough is to permit OCS service providers to evaluate OCS producers' ongoing activities. Given this we do not expect that requiring some service providers to make certain information public to tip the competitive balance between producers and the pipelines that carry their gas. Both service providers and producers should be positioned to adequately monitor one another and reach rational accord on the merits of contracting for capacity versus constructing proprietary pipeline facilities.

El Paso would eliminate the single-shipper, owner-shipper, and feeder-line reporting exemptions in the interests of leveling the competitive playing field. As discussed, we do not expect the first two exemptions to confer any sustainable competitive benefit; therefore, we believe these exemptions can be retained without distorting offshore operations. With respect to the feeder-line exemption, as discussed in the final rule, feeder line facilities are typically owned and operated by the same entity that holds the right to produce gas from a particular field and are found upstream of a point where gas leaves a platform or platforms on its way from a producing field to shore. We do not expect issues of access or discrimination to arise with respect to such facilities, since where the same entity owns or leases both the mineral rights and the facilities necessary to draw gas from its own reservoirs.

OCSLA section 1334(f)(2) states the ''Commission may, by order or regulation, exempt from any or all of the [open and nondiscriminatory access] requirements * * * any pipeline or class of pipelines which feeds into a

[34] Duke's Request for Rehearing, Appendix C, Affidavit at 2 (May 10, 2000).

facility where oil and gas are first collected or a facility where oil and gas are first separated, dehydrated, or otherwise processed.'' We exercised this option, stating in § 330.3(a)(3) of the regulations that the reporting requirements would not apply to ''[s]ervices rendered over facilities that feed into a facility where natural gas is first collected, separated, dehydrated, or otherwise processed.''

OCS Producers and NGSA stress that the statute provides for an exemption for pipelines feeding into facilities where gas is first collected *or* into facilities where gas is first separated, dehydrated, or otherwise processed. They argue that because we eliminated the ''or'' between the point of first collection and the point of first separation, dehydration, or other processing, we restrict the exemption so that it holds only up to the first point where any of the specified activities occurs. OCS Producers maintain this excludes ''the majority of production-related facilities'' from qualifying for the feeder-line exemption, citing the example of a subsea manifold adjacent to wellbores as a potential point of first collection.

This was not our intention. In fact, we view our regulatory exemption as an expansive application of what OCSLA section 1334(f)(2) allows. However, to preclude any interpretative ambiguity, we will more explicitly follow the wording of the statute, and modify § 330.3(a)(3) to read ''[a]ny pipeline or class of pipelines which feeds into a facility where gas is first collected or a facility where gas is first separated, dehydrated, or otherwise processed.''

We decline OCS Producers' and NGSA's invitations to categorically exempt all production-related facilities. Without reviewing the configuration of offshore facilities, we cannot be satisfied that a pipeline's location upstream of a processing platform guarantees it serves as a feeder line and not as a transportation line, or that a platform is being used to support production activities rather than, for example, serving to collect, redistribute, and boost the pressure of gas already in transit en route to shore. Therefore, we will retain the feeder-line exemption, but will not broaden it.

We recognize that by providing reporting exemptions, we invite OCS service providers to organize their operations so as to come within these exemptions. For example, Williams anticipates exempt service providers, in contemplating expansions, may be motivated to deliberately undersize new capacity to be able to claim to be physically incapable of serving additional customers.

In the final rule, in response to this same example, we observed it would be economically irrational to reject the receipt of the additional revenues that new customers confer in favor retaining a reporting exemption. We do not believe the administrative convenience of not reporting will outweigh service providers' motivation to maximize profit. As we also observed in the final rule, ''[g]iven that exempt and non-exempt service providers must ultimately abide by the same OCSLA nondiscrimination provisions, we do not expect opting out of reporting will confer a noticeable commercial advantage.'' [35] We do not expect legitimate efforts to obtain or retain exempt status will impede or distort offshore development, or have any significant adverse impact the offshore's competitive transportation markets, or upset offshore investments. Therefore, we will permit regulated entities to arrange their affairs with an eye to the regulatory impact thereof.

We do not intend, however, to let exempt form trump exempt substance, which leads us to reject OCS Producers' proposals to treat exemptions expansively. Specifically, our standard practice is to treat separate business entities as distinct, regardless of affiliation, and we will continue to do so. Thus, for the purposes of applying the single-shipper exemption, two affiliated shippers count as two shippers, and consequently could not both be served under the single-shipper criteria. Also, where a pipeline is jointly owned by more than one entity, each with an undivided interest in the line, the single-shipper exemption will only apply as long as one and only one party ships its gas through the pipeline.

In the same manner, we expect to rely on the formalities of financial arrangements, and treat entities engaged in a common financial transaction as separate parties. Thus, while OCS Producers propose treating entities engaged in a sale and leaseback as a single or joint owner, we view each participant as a separate actor. Accordingly, if individual entities wish to be treated as a collective joint owner, they should execute agreements to that effect, and not count on this Commission to examine the depth of their financial ties, affiliate status, or other indicia of intimacy in order to construe them to be a constructive joint owner.

[35] 65 FR 20354 at 20365, FERC Stats. & Regs. ¶ 31,514 at 31,534.

We clarify that where the same parties own a pipeline and all the gas flowing through it, if such parties contract with a third party as their agent to operate the pipeline, or manage other transportation matters on their behalf, the owner-shipper exemption remains intact. This same principle applies to the single-shipper exemption.

We presume that service providers serving themselves will not deny access to or discriminate against themselves, hence the owner-shipper exemption. Section 330.3(a)(2) states this exemption applies where a service provider's owners hold interests in a pipeline and the gas from the ''field or fields connected to a single pipeline.'' OCS Producers suggest, and we agree, that the intent is clarified by changing ''a single pipeline'' to ''that single pipeline.'' OCS Producers also suggest changing the reference from ''that single pipeline'' to ''that pipeline or pipelines'' in order to cover a configuration where laterals that gather gas from a production area feed into a trunkline. We will also adopt this change, but note this owner-shipper exemption holds only as long as all the same parties share ownership interests in all the pipeline facilities and in all the gas supplies transported by those facilities.

We recognize that, as a practical matter, due to arrangements such as production balancing agreements, an owner-shipper pipeline may not always flow gas volumes in constant proportion to the ownership interests in the production field. We clarify that as long as all the same parties share ownership interests in the pipeline and in all production attached to that line, the owner-shipper exemption will apply.

OCS Producers would expand the owner-shipper exemption to permit parties that are not shippers to hold interests in a pipeline. A premise of the owner-shipper exemption is that where all parties share the same ultimate interest, the self-dealing of one will be the self-dealing of all. Introducing non-shipping pipeline owners, introduces third parties that do not necessarily share interests in common with shipper-owners. This undermines our assumption that parties engaged in a single enterprise will have little motive to exploit one another; therefore, we will not broaden the shipper-owner exemption in the proposed manner.

We clarify that the fact that upstream laterals and/or extensions of a pipeline system qualify for reporting exemptions is not determinative of whether the downstream segments of the same pipeline system are exempt. For example, consider an offshore pipeline system configured in the form of an

inverted ''Y,'' owned and operated by gas producers A, B, and C. Gas flows in separate paths along the left and right legs, merging into a single stream that moves along the trunk of the ''Y.'' Assuming the legs are the only lines connecting to the trunk, if producer A owns and ships all the gas in the left leg, and producers B and C own and ship all of the gas in the right leg, then each leg qualifies for a reporting exemption. The left leg comes under the single-shipper exemption and the right leg under the shipper-owner exemption. In addition, because all gas flowing along the trunkline portion of the pipeline system is owned by the same parties that own that line, the trunkline would also qualify for the shipper-owner exemption. We note that if the trunkline were owned by only one or two of the three producers, the trunkline could not qualify for this exemption. The legs leading into the trunkline retain their exempt status regardless of the ownership of the trunkline.

We clarify that transporting gas on behalf of MMS under its royalty-in-kind program will be considered to be service for a separate shipper—but only if gas is actually moving under such an arrangement.[36] In theory, MMS royalty-in-kind gas could flow in every offshore pipeline. In practice, at present, only minimal amounts of such gas are actually flowing. In the final rule, we rejected MMS' suggestion that we treat its potential participation as a second shipper as voiding the single-shipper and owner-shipper exemptions. Here, we reject OCS Producers' contrary suggestion that we carve out an exception to retain those same exemptions where MMS participates as a shipper. Recognizing the provisional nature MMS' royalty-in-kind collection program, we reaffirm the wait-and-see approach of the final rule: ''in the event MMS moves beyond its present royalty-in-kind pilot program and begins to collect a significant portion of royalty payments as gas volumes, we may be inclined to revisit the applicability of the reporting exemptions.'' [37]

*E. Rate Regulation*

1. Requests for Rehearing and/or Clarification

Williams urges the Commission to state that it does not intend to use the OCSLA to impose cost-based rates.

Duke and Williams are concerned that potential allegations of rate discrimination will create the need to renegotiate existing contracts every time a new customer is signed up under different terms.

Duke and Williams are concerned that the reporting requirements will compel pipelines to forego individually-tailored offerings in favor of uniform rates and services.

2. Commission Response

We recognize that the OCSLA contains no provision for the imposition of cost-based rates and clarify that it is not our intention to apply a full NGA cost-of-service review to non-NGA OCS entities. Our focus under the OCSLA is open and nondiscriminatory access, not ratemaking methodology. Thus, as long as an OCS service provider charges its customers compatible rates, and assuming there is no rate inequity, then under the OCSLA we would have no cause for further inquiry regarding the rates' derivation. Of course, if an OCS service provider is subject to the NGA, its rates would be scrutinized and authorized as just and reasonable under the NGA.

The prospect that OCSLA reporting might place a straightjacket on OCS service providers was raised and responded to in the final rule. There we rejected such speculation, stating that ''we see no bar to a service provider offering different shippers different terms—provided the variation in the terms of service either reflect differences in costs incurred to provide service or reflect differences among the shippers served,'' [38] a position we reaffirm here. We clarify that our review of a service provider that charges a lower rate to one customer and a higher rate to another would not necessitate scrutiny of the service provider's full cost of service data. Rather, the service provider would only need to provide that data and other information material to justify the higher rate.

We reiterate that we will neither oblige an OCS service provider to offer identical rates and terms to all customers to meet the OCSLA's nondiscrimination mandate nor oblige comparable OCS service providers to offer identical rates and terms of service. Provided an OCS service provider can justify variable conditions of service among its customers, we may find such customers are not in fact similarly situated. Additionally, if comparable service providers can articulate an acceptable reason for differences in their rates and terms of service, we may accept the differences as reasonable reflections of distinctive business conditions and practices.[39]

Duke and Williams are correct to suggest that offering service to a new customer under terms at odds with those of existing customers may give rise to suspicions of discrimination. However, such suspicions may be set aside if the service provider demonstrates a legitimate reason for such treatment, *e.g.,* a disparity in new and existing customer reserve commitments. Thus, while a service provider may seek safe harbor by establishing a uniform tariff applicable to all customers, we do not interpret the OCSLA as requiring this. To clarify, we do not read the OCSLA's nondiscrimination requirement as a most-favored-nations clause; where an OCS service provider can present an acceptable rationale for offering its customers different rates and terms, we can find different conditions of service acceptable.

Duke asserts that reporting will lessen competition by reducing the business alternatives now available to offshore service providers, which will lead to diminished OCS investment. This conflicts with the premise of Order No. 639 that ''the free flow of information

[36] This applies regardless of whether MMS holds title to the gas or the gas is transported under the name of another shipper on behalf of MMS.

[37] 65 FR 20354 at 20361, FERC Stats. & Regs. ¶ 31,514 at 31,526.

[38] 65 FR 20354 at 20358, FERC Stats. & Regs. ¶ 31,097 at 31,522.

[39] With this in mind, § 330.2(b)(8) solicits ''[o]ther conditions of service deemed relevant by the Gas Service Provider.'' The Producer Coalition suggests the Commission spell this out, maintaining that without requiring specific information, rates and terms that superficially appear the same can mask discrimination. As an example, the Producer Coalition posits a service provider that charges a shipper a rate that includes recovery of costs incurred to build new facilities to serve that shipper, and then charges that same rate to a second shipper, but differently than the first shipper, the second shipper pays upfront for the new facilities needed for its service. The Producer Coalition asserts that unless the service provider is made to report and display this underlying disparity, it appears both shippers are subject to the same rate. The Producer Coalition would prevent this by revising § 330.2(b)(8) to require reporting of ''other economically and operationally material conditions of service, including contract volumes, the effective and expiration date of the contract, dedication of gas supply, responsibility for construction of interconnection facilities, and any other economically or operationally material term of service (such as gas quality standards, scheduling priorities, imbalance provisions and billing and payment) that sets the subject contract apart from other contracts on Gas Service Provider's system.'' Although some of the itemized information may be relevant to determining whether a service provider is complying with the OCSLA, some of it may not. Without an explicit need for more data, we are reluctant to increase the reporting burden. In the case of the above example, we are not convinced the second shipper needs the additional information the Producer Coalition proposes to be alerted to the possibility that it may not be signing up for service under a rate reflecting the same set of conditions as the rate charged the first shipper. Accordingly, we place upon the service provider the responsibility of determining what information to report as relevant under § 330.2(b)(8) while reminding shippers of the need to remain alert to signs of service providers' sins of omission.

regarding offshore gas activities is critical to the successful creation of a competitive and efficient marketplace.'' [40] We are unclear which particular business practices depend on remaining closeted to remain viable. We stress that this new rule imposes no new obligations on how OCS service providers conduct business; it is the OCSLA that obligates OCS service providers to conduct business premised on open and nondiscriminatory access.

As discussed above, we do not intend for reporting to force all OCS service providers to adhere to one rigid tariff. We see no reason that the flexibility, variety, and experimentation reflected in existing offshore agreements and practices cannot be sustained under this new reporting regime, provided these business arrangements conform to the OCSLA's longstanding open and nondiscriminatory access requirements. Thus, reporting should neither diminish the number of legitimate business alternatives nor diminish offshore investments.

*F. Gas and Oil Asymmetry*

1. Requests for Rehearing and/or Clarification

Duke points out that the OCSLA applies with equal force to oil and gas transportation and asks why the new reporting requirements are confined to gas.[41]

2. Commission Response

Here we are concerned solely with offshore natural gas operations, and while this leads us to also consider other statutes' impact on such operations (principally the NGA), we find no cause to consider OCSLA provisions affecting oil operations. In the final rule, we explained to Duke that in this proceeding we have elected to confine our considerations to gas matters, given that we have found rates for transportation on oil pipelines to be just and reasonable,[42] but have made no such finding for rates for transportation on NGA-exempt OCS gas pipelines. Thus, to protect gas shippers using NGA-exempt OCS facilities from discriminatory, exorbitant charges, we look to the OCSLA. We do not rule out the future implementation of similar reporting requirements for offshore oil service providers, but that possibility is outside our present purpose.

*G. Administrative Burdens*

1. Requests for Rehearing and/or Clarification

OCS Producers expect the Commission to be inundated with requests for declarations that production-related facilities and services qualify for a reporting exemption.

2. Commission Response

We are unable to predict the number of petitions that might be presented with respect to OCSLA reporting status; however, we intend to give prudent consideration to the issues raised in each request and process all requests as expeditiously as our resources permit. Initial uncertainties about how to assess whether exemptions apply should recede with each declaratory order addressing the merits of the OCSLA exemptions. As discussed in the final rule, we entrust OCS service providers with undertaking a good faith analysis of whether they qualify for one of the reporting exemptions, *i.e.,* service providers need not obtain prior Commission permission in order to lay claim to a reporting exemption.

We expect requests for a review of an entity's OCSLA reporting status will follow the pattern we are familiar with for requests of an entity's NGA jurisdictional status, namely, the Commission sees primarily those cases where the circumstances give rise to doubts about results reached. In the far more numerous cases where the facts lead to a reasonably unambiguous outcome, unless a company seeks reassurance that its own analysis is correct, the Commission's own assessment is rarely requested.

*H. Offshore Development*

1. Requests for Rehearing and/or Clarification

NGSA suggests that service providers be permitted to reserve capacity for their own future use and offer such capacity to third parties until needed. NGSA points out that NGA-regulated pipelines can reserve capacity for future use, and is apprehensive that unless NGA-exempt OCS pipelines can do the same, shippers seeking access to a service provider's facilities could disrupt a development plan between an OCS service provider and producer. NGSA also suggests OCS service providers be required to enlarge capacity when prospective shippers agree to bear the cost of the expansion.

2. Commission Response

We endorse the idea of sizing facilities to match anticipated transportation needs. Particularly offshore, where developing a producing field may entail extensive time and expense, we recognize the practicality of coordination, whereby a producer incrementally bringing additional volumes on line can be assured that when the field's extraction reaches its zenith, pipeline facilities will be in place with the capacity to take away and transport all gas volumes. Although such coordination, ultimately, is efficient, there can be a period of underutilization between the time a large diameter line is completed and the field it serves reaches full production.

Under such circumstances, we believe it is appropriate to compel the service provider to allow other shippers to interconnect, at their own expense, with the underutilized line. However, given that the primary purpose of the new line is to pick up gas at a particular production platform, as the volumes available at that production platform increase with the development of the field, these other shippers may be curtailed. This is appropriate, given that such shippers will have elected to enter into contracts for service on an interim basis, *i.e.,* between the time the line is placed in operation and the time excess capacity on the line is needed by the producer-shipper. We will permit a service provider to reserve its own capacity, as NGSA requests, provided (1) potential shippers' transportation requirements are taken into consideration in designing the new line, (2) shippers willing to bear the economic costs of moving gas on an until-as-needed basis are allowed access to reserved but unused capacity, and (3) the service provider does not shift costs associated with the underutilization of its own reserved capacity onto other customers.

NGSA requests we mandate expansions. Our authority to do so is contained in OCSLA section 1334(f)(2)(B), which states that:

Upon the specific request of one or more owner or nonowner shippers able to provide a guaranteed level of throughput, and on the condition that the shipper or shippers

[40] 65 FR 20354 at 20364, FERC Stats. & Regs. ¶ 31,514 at 31,531.

[41] Duke also argues that in amending the OCSLA in 1978—an amendment that added the nondiscrimination mandate to the existing open access requirement—Congress was preoccupied with potentially anticompetitive activities of oil companies, not gas. This insight into the legislative history of the OCSLA, however, does not alter the fact that the plain language of the statute, as Duke points out, does not distinguish between oil and gas. Thus, the competitive principles of OCSLA section 1334(f) apply with equal force to OCS oil and gas service providers.

[42] *See* Revision to Oil Pipeline Regulations Pursuant to the Energy Policy Act of 1992, 58 FR 58753 (Nov. 4, 1993), FERC Stats. & Regs. ¶ 30,985 (1993). Whether this presumption of just and reasonable oil rates applies to oil lines located wholly on the OCS has yet to be affirmed by judicial review.

requesting such expansion shall be responsible for bearing their proportionate share of the costs and risks related thereto, the Federal Energy Regulatory Commission may, upon finding, after a full hearing with due notice thereof to the interested parties, that such expansion is within technological limits and economic feasibility, order a subsequent expansion of throughput capacity of any pipeline for which the permit, license, easement, right-of-way, or other grant of authority is approved or issued after the date of enactment of this subparagraph [enacted Sept. 18, 1978]. This subparagraph shall not apply to any such grant of authority approved or issued for the Gulf of Mexico or the Santa Barbara Channel.

We have yet to exercise our authority under this section of the OCSLA, and until we are faced with a case of first impression covering our mandatory expansion authority, we believe it would be imprudent to speculate on how we might exercise that authority.

*I. Applicability of the Rule*

1. Requests for Rehearing and/or Clarification

OCS Producers point to instances where the Commission's applies its rule to ''OCS service providers'' and ''facilities'' used to ''move'' gas. OCS Producers believes these words designate categories that are improperly broad given that the OCSLA, by its own terms, applies to ''pipelines'' that ''transport'' gas.

2. Commission Response

The OCSLA, by its own terms, applies to the exploration, development, or production of OCS minerals—defining ''production'' to include the ''transfer of minerals to shore;'' [43] ''minerals'' being defined as including gas.[44] This is a broader regulatory sweep than the NGA. For example, NGA section 1(b) excludes production and gathering facilities, whereas the OCSLA contains no such limitations.

For this reason, rather than refer to an OCS ''pipeline,'' which risks being associated with the narrower NGA usage, we deliberately refer to an OCS ''service provider.'' Similarly, ''transportation,'' as a term of art under the NGA, carries connotations and limitations that we seek to sidestep. Our reference to facilities that ''move'' gas is no more expansive than the OCSLA's section 1331(q) description of ''transportation,'' which covers everything between a wellhead and shore.

We clarify that we do not intend to cross reference common OCSLA and NGA terms. Thus, the OCSLA's use of the terms ''pipeline'' and ''transportation'' is to be interpreted by exclusive reference to the OCSLA. NGA definitions are relevant to the OCSLA only to the extent that NGA-regulated interstate transportation facilities are exempt from OCSLA reporting.

OCS Producers request we refine the § 330.1(b) definition of an OCS gas service provider to explicitly exclude production and explicitly include gathering. The OCSLA contains an expansive view of ''production,'' quoted above. Rather than attempt to define production more rigorously, we find the more prudent approach is to make use of our OCSLA authority to exclude feeder line facilities from compliance with the competitive principles of section 1334(f). This should have the effect of removing the bulk of production activities from the OCSLA reporting requirements. All other OCS facilities and services, unless they fall under the single-shipper, owner-shipper, or NGA-regulated exemption, remain subject to the reporting requirements.

**IV. Effective Date**

The amendments to our regulations adopted in this order on rehearing will become effective October 2, 2000. As discussed above, since October 15, 2000 is a Sunday, OCS service providers' initial reports will be due on October 16, 2000.

**List of Subjects in 18 CFR 330**

Natural gas, Pipelines, Reporting and record keeping requirements.

By the Commission.

**David P. Boergers,**

*Secretary.*

In consideration of the foregoing, the Commission denies rehearing in part, grants rehearing in part, and clarifies Order No. 639. The Commission amends Part 330, Title 18, Code of Federal Regulations, as follows.

## PART 330—CONDITIONS OF SERVICE REPORTING REQUIREMENTS

1. The authority for Part 330 continues to read as follows:

**Authority:** 43 U.S.C. 1301–1356.

2. In § 330.2, paragraphs (a)(6), (b) introductory text, (b)(7), and (b)(8) are revised; the introductory text of paragraph (b)(9) is removed and paragraphs (b)(9)(i), (ii), (iii), and (iv) are redesignated, respectively, as paragraphs (c)(1), (c)(2), (c)(3), and (c)(4), and paragraph (c) is revised to read as follows:

**§ 330.2 Reporting requirements.**

(a) * * *

(6) For all entities affiliated with the Gas Service Provider and engaged in the exploration, development, production, processing, gathering, transportation, marketing, or sale of natural gas within the boundaries of the United States and the water bodies immediately adjacent thereto: the names and state of incorporation of all corporations, partnerships, business trusts, and similar organizations that directly or indirectly hold control over the Gas Service Provider, and, the names and state of incorporation of all corporations, partnerships, business trusts, and similar organizations directly or indirectly controlled by the Gas Service Provider (where the Gas Service Provider holds control jointly with other interest holders, so state and name the other interest holders).

(b) A Gas Service Provider must file with the Commission its conditions of service, consisting of the information specified in this paragraph (b), or alternatively, the information specified in paragraph (c) of this section. Under this paragraph (b), a Gas Service Provider must submit, for each shipper served:

* * * * *

(7) Rates between each pair of primary receipt and delivery points and each pair of any other points served, and;

(8) Other conditions of service deemed relevant by the Gas Service Provider.

(c) As an alternative to the requirements in paragraph (b) of this section, a Gas Service Provider may file a statement of its rules, regulations, and conditions of service that includes:

(1) The rate between each pair of receipt and delivery points, if point-to-point rates are charged;

(2) The rate per unit per mile, if mileage-based rates are charged;

(3) Any other rate employed by the Gas Service Provider, with a detailed description of how such rate is derived, identifying customers and the rate charged to each customer;

(4) Any adjustments made by the Gas Service Provider to the rates charged based on gas volumes shipped, the conditions of service, or other criteria, identifying customers and the rate adjustment applicable to each customer.

3. In § 330.3, paragraphs (a)(1), (a)(2), (a)(3), (b), and (c) are revised to read as follows:

**§ 330.3 Applicability of reporting requirements.**

(a) * * *

(1) A Gas Service Provider that serves exclusively a single entity (either itself

[43] 43 U.S.C. 1331(m). The OCSLA refers to, but does not define, ''gathering'' and ''transportation.''

[44] 43 U.S.C. 1331(q).

or one other party), until such time as the Gas Service Provider commences service to serve a second shipper, or the Commission determines that the Gas Service Provider's denial of a request for service is unjustified;

(2) A Gas Service Provider that serves exclusively shippers with ownership interests in both the pipeline operated by the Gas Service Provider and the gas produced from a field or fields connected to that single pipeline or pipelines, until such time as the Gas Service Provider commences service to a non-owner shipper, or the Commission determines that the Gas Service Provider's denial of a request for service is unjustified;

(3) Any pipeline or class of pipelines which feeds into a facility where gas is first collected or a facility where gas is first separated, dehydrated, or otherwise processed; and

* * * * *

(b) A Gas Service Provider that makes no filing pursuant to §§ 330.3(a)(1) or (a)(2) becomes subject to the § 330.2 reporting requirements at any time that it no longer meets the §§ 330.3(a)(1) or (a)(2) criteria. A Gas Service Provider that becomes subject to reporting during any calender quarter must submit a § 330.2 report on the 15th day of the following quarter. Gas Service Providers must comply with the § 330.2 reporting requirements as directed by the Commission.

(c) When a Gas Service Provider subject to the § 330.2 reporting requirements alters its affiliates, customers, rates, conditions of service, or facilities during any calender quarter, it must then file with the Commission, on the 15th day of the following quarter, a revised report describing all alterations occurring during the previous quarter.

[FR Doc. 00–19426 Filed 8–1–00; 8:45 am]

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

### 21 CFR Part 884

**[Docket No. 00P–1282]**

## Obstetrical and Gynecological Devices; Classification of the Clitoral Engorgement Device

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is classifying the clitoral engorgement device into class II (special controls). The special control that will apply is a guidance document entitled: ''Guidance for Industry and FDA Reviewers: Class II Special Controls Guidance Document for Clitoral Engorgement Devices.'' The agency is taking this action in response to a petition submitted under the Federal Food, Drug, and Cosmetic Act (the act) as amended by the Medical Device Amendments of 1976, the Safe Medical Devices Act of 1990, and the FDA Modernization Act of 1997. The agency is classifying the clitoral engorgement device into class II (special controls) in order to provide a reasonable assurance of safety and effectiveness of the device.

**DATES:** This rule is effective September 1, 2000.

**FOR FURTHER INFORMATION CONTACT:** Colin M. Pollard, Center for Devices and Radiological Health (HFZ–470), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–1180.

**SUPPLEMENTARY INFORMATION:**

### I. Background

In accordance with section 513(f)(1) of the act (21 U.S.C. 360c(f)(1)), devices that were not in commercial distribution before May 28, 1976, the date of enactment of the Medical Device Amendments of 1976 (the amendments), generally referred to as postamendments devices, are classified automatically by statute into class III without any FDA rulemaking process. These devices remain in class III and require premarket approval, unless and until the device is classified or reclassified into class I or II or FDA issues an order finding the device to be substantially equivalent, in accordance with section 513(i) of the act, to a predicate device that does not require premarket approval. The agency determines whether new devices are substantially equivalent to previously marketed devices by means of premarket notification procedures in section 510(k) of the act (21 U.S.C. 360(k)) and part 807 (21 CFR part 807) of FDA's regulations.

Section 513(f)(2) of the act provides that any person who submits a premarket notification under section 510(k) of the act (21 U.S.C. 360(k)) for a device that has not previously been classified may, within 30 days after receiving an order classifying the device in class III under section 513(f)(1) of the act, request FDA to classify the device under the criteria set forth in section 513(a)(1) of the act. FDA shall, within 60 days of receiving such a request, classify the device by written order. This classification shall be the initial classification of the device. Within 30 days after the issuance of an order classifying the device, FDA must publish a notice in the **Federal Register** announcing such classification.

In accordance with section 513(f)(1) of the act, FDA issued an order on April 25, 2000, classifying the Urometrics EROS–Clitoral Therapy Device into class III because it was not substantially equivalent to a device that was introduced or delivered for introduction into interstate commerce for commercial distribution before May 28, 1976, or to a device that was subsequently reclassified into class I or class II. On April 27, 2000, FDA filed a petition submitted by Urometrics, requesting classification of the Urometrics EROS–Clitoral Therapy Device into class II under section 513(f)(2) of the act.

After review of the information submitted in the petition, FDA determined that the Urometrics EROS–Clitoral Therapy Device can be classified in class II with the establishment of special controls. This device is indicated for use in women with female sexual arousal disorder, which can present with symptoms of diminished vaginal lubrication, diminished clitoral and genital engorgement, lowered sexual satisfaction, and a reduced ability to achieve orgasm. FDA believes that class II special controls, in addition to the general controls, will provide reasonable assurance of the safety and effectiveness of the device.

FDA has identified the following risks to health associated specifically with this type of device: Unknown effects of extended use, and improper use of the device due to misplacement, or use of the device over compromised tissue. In addition to the general controls of the act, this type device is subject to the following special control: A special controls guidance document entitled ''Guidance for Industry and FDA Reviewers: Class II Special Controls Guidance for Clitoral Engorgement Devices.''

Section 510(m) of the act provides that FDA may exempt a class II device from the premarket notification requirements under section 510(k) of the act, if FDA determines that premarket notification is not necessary to provide reasonable assurance of the safety and effectiveness of the device. FDA has determined that premarket notification is necessary to provide reasonable assurance of the safety and effectiveness of this type of device and, therefore, the device is not exempt from premarket notification requirements. FDA review of key design features, data sets from