

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission****18 CFR Part 284**

[Docket No. RM01-6-000; Order No. 892]

Before Commissioners: Pat Wood, III, Chairman; William L. Massey, Linda Breathitt, and Nora Brownell; Assignment of Firm Capacity on Upstream Interstate Pipelines

November 21, 2002.

AGENCY: Federal Energy Regulatory Commission, Department of Energy.**ACTION:** Final rule.

SUMMARY: The Federal Energy Regulatory Commission is amending its regulations to remove Subpart H of Part 284 which requires interstate natural gas pipelines to assign to their firm shippers capacity the pipelines hold on other interstate pipelines. This requirement was a necessary part of the unbundling of interstate pipelines' gas sales from their gas transportation service required in Order No. 636. On December 14, 2000, the Commission announced a new policy under which it would no longer require pipelines to give up their capacity on other pipelines but would allow them to acquire and hold capacity on other pipelines without prior Commission approval. Since Subpart H no longer reflects the Commission policy with respect to pipelines' holding capacity on other pipelines, the Commission is removing the regulation.

EFFECTIVE DATE: Removal of these regulations becomes effective January 3, 2003.

FOR FURTHER INFORMATION CONTACT: Cecilia Desmond, Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502-8695.

SUPPLEMENTARY INFORMATION:**I. Introduction**

1. The Federal Energy Regulatory Commission (Commission) is amending its regulations by removing subpart H of part 284 (18 CFR 284.241 and 284.242) which requires interstate natural gas pipelines to assign to their firm shippers capacity the pipelines hold on other interstate pipelines. The policies embedded in these regulations have been overtaken by subsequent policy developments, most particularly the Commission's December 14, 2000 announcement of a new policy allowing unbundled open access pipelines to acquire and hold capacity on other pipelines without prior Commission

approval.¹ Subpart H was promulgated in Order No. 636² and was a necessary part of the unbundling of interstate gas sales from transportation. However, all natural gas companies have implemented Order No. 636 and the Commission now allows unbundled open access pipelines to acquire capacity on other pipelines as can any other shipper without seeking prior Commission approval. Since Subpart H is inconsistent with current Commission policy, the Commission is removing Subpart H from its regulations.

II. Discussion

2. In Order No. 636, the Commission required interstate gas pipelines to unbundle the sale of gas from the sale of transportation and to assign their upstream capacity to their firm shippers.³ The Commission found that pipelines' access to upstream capacity needed to provide bundled gas sales gave them an undue competitive advantage over other gas merchants since the upstream capacity gave pipelines access to more gas suppliers. The Commission also found that a pipeline's holding upstream capacity inhibited the goal of a competitive national market because the downstream gas purchasers would not be able to access the production areas and gas merchants reached by the downstream pipeline through its upstream capacity.

3. The Commission adhered to that policy for several years during the individual pipelines' Order No. 636 restructuring proceedings. Then, in *Texas Eastern Transmission Corporation (Texas Eastern)*, the Commission determined that Order No. 636 did not create a *per se* rule precluding restructured pipelines from entering into contracts for transportation or storage capacity on other pipelines (offsystem capacity).⁴ The Commission reasoned that pipelines had completed the unbundling of gas sales and transportation service required by Order No. 636 and that the market had become sufficiently competitive to allow

pipelines to hold capacity on other pipelines. Therefore, the Commission said it would decide whether to allow pipelines to acquire offsystem capacity on a case-by-case basis.

4. Two pipelines appealed the *Texas Eastern* requirement for case-specific approval, claiming that it discriminated against pipelines because non-pipeline shippers could acquire capacity without prior approval.⁵ They also argued that the Commission's blanket certificate and capacity release regulations, which require pipelines to make transportation services available on a nondiscriminatory basis under Commission-approved open access tariffs, were sufficient to control unduly discriminatory or anticompetitive actions that might arise when a pipeline acquires offsystem capacity. The court agreed and remanded the case.

5. On December 14, 2000, the Commission issued its Order on Remand in the *Texas Eastern* proceeding. In that order, the Commission announced a new policy that unbundled open access pipelines will no longer be required to seek Commission approval before acquiring offsystem capacity, that existing safeguards provide the necessary protection against discriminatory and anticompetitive actions with respect to acquired offsystem capacity, and that pipelines will be at-risk for the costs of any such capacity. Before transporting gas for others on any acquired offsystem capacity, the Commission required a pipeline to seek a blanket waiver of the shipper-must-hold-title policy by amending its tariff to include a general statement that it will only transport for others on offsystem capacity pursuant to its existing open access tariff and rates.⁶

6. On April 10, 2002, the Commission issued a Notice of Proposed Rulemaking (NOPR)⁷ proposing in this docket to amend the Commission's regulations by removing Subpart H of Part 284.⁸ In the NOPR, the Commission noted that the natural gas marketplace has fundamentally changed since the issuance of Order No. 636. The Commission stated that, in the *Texas Eastern* series of orders, the Commission developed and modified its policy with respect to pipelines' acquiring capacity on other pipelines in light of these

¹ *Texas Eastern Transmission Corp.*, 93 FERC ¶ 61,273 (2000); *reh'g denied*, 94 FERC ¶ 61,139; *reh'g denied*, 95 FERC ¶ 61,056 (2001).

² Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations, Order No. 636, 57 FR 13267 (Apr. 16, 1992), FERC Stats & Regs., Regulations Preambles, January 1991-June 1996 ¶ 30,939 (Apr. 8, 1992).

³ The Commission allowed pipelines to retain upstream capacity for operational management and balancing purposes and no-notice transportation service.

⁴ 74 FERC ¶ 61,074 (1996); 78 FERC ¶ 61,277 (1997); *order on remand*, 93 FERC ¶ 61,273 (2000); *reh'g denied*, 94 FERC ¶ 61,139; *reh'g denied*, 95 FERC ¶ 61,056 (2001).

⁵ See *Colorado Interstate Gas Co. v. FERC*, 146 F.3d 889 (D.C. Cir. 1998).

⁶ See *Texas Eastern*, 95 FERC ¶ 61,056 (2001).

⁷ Assignment of Firm Capacity on Upstream Interstate Pipelines, 67 FR 19136 (Apr. 18, 2002), FERC Stats. & Regs. ¶ 32,549.

⁸ The Commission received one comment in response to the NOPR from Williston Basin Interstate Pipeline Co. which supports the proposal to remove Subpart H of Part 284.

changes. Since the requirement to assign upstream capacity contained in § 284.242 was specific to the implementation of Order No. 636, all interstate pipelines had implemented Order No. 636, and the Commission now allows pipelines to acquire capacity on other pipelines as can any other shipper without seeking prior Commission approval, the Commission stated, Subpart H is no longer necessary.

7. However, as the Commission stated in the NOPR, the removal of the regulation will not modify the Commission's *Texas Eastern* policy under which the appropriateness of a pipeline's acquisitions of capacity on other pipelines is subject to review in a subsequent general section 4 rate proceeding or the Commission's requirement that the shipper must hold title to any gas being shipped through the acquired capacity.

III. Environmental Analysis

8. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.⁹ The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment.¹⁰ No environmental consideration is necessary in this instance since the final rule is clarifying, corrective, or procedural and affects transportation of natural gas that requires no construction of facilities.¹¹

IV. Regulatory Flexibility Impact Statement

9. The Regulatory Flexibility Act of 1980 (RFA)¹² generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. The Commission is not required to make such analysis if a rule would not have such an effect.¹³

10. The Commission does not believe that this rule removal would have such an impact on small entities. The removal of these regulations would have an impact only on interstate pipelines, which generally do not fall within the RFA's definition of small entity.¹⁴

⁹ Order No. 486, Regulations Implementing the National Environmental Policy Act, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs. Preambles 1986-1990 ¶ 30.783 (1987).

¹⁰ 18 CFR 380.4.

¹¹ See 18 CFR 380.4(a)(2)(ii), 380.4(a)(27).

¹² 5 U.S.C. 601-612.

¹³ 5 U.S.C. 605(b).

¹⁴ 5 U.S.C. 601(3), citing to section 3 of the Small Business Act, 15 U.S.C. 632. Section 3 of the Small Business Act defines a "small business concern" as

Accordingly, pursuant to section 605(b) of the RFA, the Commission certifies that the removal of the regulations will not have a significant economic impact on a substantial number of small entities.

V. Information Collection Statement

11. The Office of Management and Budget's (OMB) regulations require that OMB approve certain information collection requirements imposed by agency rules.¹⁵ However, this final rule contains no information reporting requirements, and therefore is not subject to OMB approval.

VI. Document Availability

12. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (<http://www.ferc.gov>) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5 p.m. Eastern time) at 888 First Street, NE., Room 2A, Washington, DC 20426.

13. From FERC's Home Page on the Internet, this information is available in the Federal Energy Regulatory Records Information System (FERRIS). The full text of this document is available on FERRIS in PDF and WordPerfect format for viewing, printing, and/or downloading. To access this document in FERRIS, type the docket number excluding the last three digits of this document in the docket number field.

14. User assistance is available for FERRIS and the FERC's website during normal business hours. Please contact FERC Online Support at FERCOnlineSupport@ferc.gov or toll-free at (866) 208-3676, or for TTY, contact (202) 502-8659.

VII. Effective Date

15. This Final Rule will take effect January 3, 2003.

16. The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of OMB, that this rule is not a "major rule" as defined in Section 351 of the Small Business Regulatory Enforcement Fairness Act of 1996.

List of Subjects in 18 CFR Part 284

Continental Shelf, Natural gas, Reporting and recordkeeping

a business which is independently owned and operated and which is not dominant in its field of operations.

¹⁵ 5 CFR Part 1320.

requirements, Incorporation by reference.

By the Commission.

Magalie R. Salas,
Secretary.

In consideration of the foregoing, the Commission amends Part 284, Chapter I, Title 18, *Code of Federal Regulations*, as follows.

PART 284—CERTAIN SALES AND TRANSPORTATION OF NATURAL GAS UNDER THE NATURAL GAS POLICY ACT OF 1978 AND RELATED AUTHORITIES

1. The authority citation for part 284 continues to read as follows:

Authority: 15 U.S.C. 717-717w, 3301-3432; 42 U.S.C. 1331-1356.

Subpart H—[Removed and Reserved].

2. In part 284, remove and reserve subpart H, consisting of §§ 284.241 and 284.242.

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DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 117

[CGD07-02-145]

Drawbridge Operation Regulations; Atlantic Avenue Bridge (SR 806), Atlantic Intracoastal Waterway, Mile 1039.6, Delray Beach, Palm Beach County, FL

AGENCY: Coast Guard, DOT.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, Seventh Coast Guard District, has approved a temporary deviation from the regulations governing the operation of the Atlantic Avenue bridge (SR 806), across the Atlantic Intracoastal Waterway, mile 1039.6, Delray Beach, Palm Beach County, Florida. This deviation allows the bridge owner or operator to keep a single-leaf of the drawbridge in the closed position. A double-leaf opening is available if at least 12 hours notice is provided to the bridge tender. This deviation is necessary to facilitate repairs to the bridge.

DATES: This deviation is effective from 8 p.m. on December 9, 2002, until 11:59 p.m. on December 31, 2002.

ADDRESSES: Materials received from the public, as well as documents indicated