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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Chapter I

[Docket Nos. RM05–2–000, RM97–7–000]

Policy for Selective Discounting by Natural Gas Pipelines

November 22, 2004.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice of inquiry.

SUMMARY: The Federal Energy Regulatory Commission is seeking comments on its policy for selective discounting by natural gas pipelines. Specifically, the Commission is asking parties to submit comments and respond to specific inquiries regarding whether the Commission's practice of permitting pipelines to adjust their ratemaking throughput downward in rate cases to reflect discounts given by pipelines for competitive reasons is appropriate when the discount is given to meet competition from another natural gas pipeline.

DATES: Comments are due January 31, 2005.

ADDRESSES: Comments may be filed electronically via the eFiling link on the Commission's Web site at *http://www.ferc.gov*. Commenters unable to file comments electronically must send an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street, NE., Washington, DC 20426. Refer to the Comment Procedures section of the preamble for additional information on how to file comments.

FOR FURTHER INFORMATION CONTACT: Ingrid M. Olson, Office of the General Counsel, 888 First Street, NE., Washington, DC 20426, (202) 502–8406.

SUPPLEMENTARY INFORMATION:

1. In this Notice of Inquiry, the Commission is seeking comments on its policy regarding selective discounting by natural gas pipeline companies. Specifically, the Commission is asking parties to submit comments and respond to the specific inquiries set forth below regarding whether the Commission's practice of permitting pipelines to adjust their ratemaking throughput downward in rate cases to reflect discounts given by pipelines for competitive reasons is appropriate when the discount is given to meet competition from another natural gas pipeline.

I. The Development of the Commission's Discount Policy

A. Order No. 436

2. As part of Order No. 436, which commenced the transition to open access transportation, the Commission adopted regulations permitting pipelines to engage in selective discounting based on the varying demand elasticities of the pipeline's customers.[1] Specifically, the Commission adopted regulations requiring pipelines to file maximum and minimum transportation rates for both firm and interruptible service and to charge rates to customers within the maximum and minimum range.[2] Under these regulations, the pipeline is permitted to discount, on a nondiscriminatory basis, in order to meet competition. For example, if a fuel-switchable shipper were able to obtain an alternate fuel at a cost less than the cost of gas including the transportation rate, the Commission's policy permits the pipeline to discount its rate to compete with the alternate fuel, and thus obtain additional throughput that otherwise would be lost to the pipeline. In Order No. 436, the Commission explained that these selective discounts would benefit all customers, including customers that did not receive the discounts, because the discounts would allow the pipeline to maximize throughput and thus spread its fixed costs across more units of service. The Commission further stated that selective discounting would protect captive customers from rate increases that would otherwise ultimately occur if pipelines lost volumes through the inability to respond to competition.

3. In *Associated Gas Distributors* v. *FERC (AGD I)*,[3] the court upheld the regulations permitting selective discounting adopted in Order No. 436. The court found that, as a general matter, the Commission could permit pipelines to offer differing discounts depending upon the differing demand characteristics of their customers. The court agreed that such discounts could benefit captive customers by enabling pipelines to obtain demand elastic customers who would ''mak[e] a contribution to fixed costs that otherwise would not be made at all.''[4] However, the court also stated, ''This is not to say, of course, that the Commission is free to uphold every price distinction based on different demand elasticities. It has long been contended that rate differentials based on competition between transporters with similar cost functions may end up forcing captive customers to bear disproportionate shares of fixed costs without any offsetting gain in efficiency.''[5] The court stated, however, that this contention is not self-evidently true, explaining ''if the demand of buyers with access to competing carriers is at all price elastic, the price reductions they enjoy will raise their demand close to the competitive level.''[6] In any event, the court concluded that the Commission could properly defer its ultimate resolution of these issues to another proceeding.

4. The court also addressed an argument presented by some pipelines that the Commission's policy might lead to the pipelines under-recovering their costs. The court set forth a numerical example showing that the pipeline could under-recover its costs, if, in the next rate case after a pipeline obtained throughput by giving discounts, the Commission nevertheless designed the pipeline's rates based on the full amount of the discounted throughput, without any adjustment. However, the court found no reason to fear that the Commission would employ this ''dubious procedure,''[7] and accordingly rejected the pipelines' contention.

[1] *See* Regulations of Natural Gas Pipelines After Partial Wellhead Decontrol, FERC Stats. & Regs., Regulations Preambles (1982–1985) ¶ 30,665 at 31,543–45 (1985).

[2] 18 CFR 284.10 (2004).

[3] 824 F.2d 981, 1010–12 (D.C. Cir. 1987).

[4] *Id.* at 1011.

[5] *Id.* at 1010–1012.

[6] *Id.* at 1012.

[7] *Id.*

B. The Discount Adjustment

5. In the 1989 Rate Design Policy Statement,[8] the Commission sought to adopt a rate design methodology that would prevent the subsidization of the discounts by nondiscounted customers and, at the same time, achieve the goal of Order No. 436 of maximizing throughput. Thus, the Commission held that if a pipeline grants a discount in order to meet competition, the pipeline is not required in its next rate case to design its rates based on the assumption that the discounted volumes would flow at the maximum rate, but may reduce the discounted volumes so that the pipeline will be able to recover its cost of service. The Commission explained that if a pipeline must assume that the previously discounted service will be priced at the maximum rate when it files a new rate case, there may be a disincentive to pipelines discounting their services in the future to capture marginal firm and interruptible business. The policy of permitting discount adjustments is consistent with the discussion of the court in *AGD I* suggesting that discount adjustments should be permitted.

6. Since the Rate Design Policy Statement, the issue of adjusting rate design volumes to account for discounts has been litigated in a number of general section 4 rate cases.[9] In these cases, the Commission has again explained that discounts benefit all customers, including captive customers who do not receive discounts, because the discounts allow the pipeline to maximize throughput and thus spread its fixed costs across more units of service. Therefore, in order to avoid a disincentive to discounting, the Commission has held that the pipeline need not design its rates in the next rate case on the assumption that the discounted volumes would flow at the maximum rate, and has permitted the pipelines to reduce the discounted volumes used to design its rates so that, assuming market conditions require it to continue giving the same level discounts when the new rates are in effect that it gave during the test period, the pipeline will be able to recover 100 percent of its cost of service.

7. In order to obtain such a discount adjustment in a rate case, the pipeline has the ultimate burden of showing that its discounts were required to meet competition. However, the Commission has distinguished between the burden of proof the pipeline must meet, depending upon whether a discount was given to a non-affiliate or an affiliate. In the case of discounts to non-affiliated shippers, the Commission has stated that it is a reasonable presumption that a pipeline will always seek the highest possible rate from such shippers, since it is in the pipeline's own economic interest to do so. Therefore, once the pipeline has explained generally that it gives discounts to non-affiliates to meet competition, parties opposing the discount adjustment have the burden of producing evidence that discounts to non-affiliates were not justified by competition. To the extent those parties raise reasonable questions concerning whether competition required the discounts given in particular non-affiliate transactions, then the burden shifts back to the pipeline to show that the questioned discounts were in fact required by competition.

8. The Commission has disallowed discount adjustments with respect to some non-affiliated transactions involving discounts for long-term firm service. Thus, in Iroquois Gas Transmission System, L.P.[10] and Trunkline Gas Co.,[11] the Commission disallowed a discount adjustment with respect to discounts given to non-affiliates. In both cases, the discounts were given to long-term, firm customers. The Commission found that the parties opposing the discount adjustment had raised enough questions about the circumstances in which those long-term discounts were given to shift the burden back to the pipeline to justify the discount. The Commission then found that, when a pipeline gives a long-term discount, the Commission would expect that the pipeline would make a thorough analysis whether competition required such a long-term discount, and in both these cases the pipeline had failed to present any evidence of such an analysis.

9. In contrast to its treatment of non-affiliate discounts, the Commission has consistently held that the pipeline has a heavy burden to show that competition required discounts to affiliates. Thus, in Panhandle Eastern Pipe Line Co,[12] the Commission held that the pipeline had not met its burden to show that its discounts to its affiliates were required by competition. While the pipeline did show that it had granted some non-affiliates similar discounts, the Commission held that this was not sufficient. Rather, the Commission stated that the pipeline should have identified the specific competitive alternatives the affiliate had, which required giving the discount. In addition, in Williams Natural Gas Co.[13] and Trunkline Gas Co.,[14] the Commission also disallowed a discount adjustment in connection with a discount to an affiliate on similar grounds.

C. Order No. 636

10. In Order No. 636, the Commission began to move away from the monopolistic selective discounting model to a competitive model, particularly for the secondary market. The institution of capacity release created competition between shippers and the pipeline with respect to unused capacity. Rather than having to rely on the timing and vagaries of the pipeline rate cases and the discount adjustment, shippers would be able to capture the revenue from their own unused capacity by releasing that capacity themselves. But at the same time, the competition engendered by capacity release forced the pipeline to compete with prices set in a more competitive market. The Commission recognized that the imposition of capacity release would significantly reduce both the pipelines' interruptible volume as well as the rates the pipeline could charge for interruptible service.[15] Thus, even with respect to gas-on-gas competition in the secondary market, competition from capacity release will require pipelines to discount their interruptible and short-term firm capacity or suffer the potential loss of such sales to releasing shippers.

[8] 47 FERC ¶ 61,295, *reh'g granted,* 48 FERC, ¶ 61,122 (1989).

[9] *See, e.g.,* Southern Natural Gas Co., 65 FERC ¶ 61,347 at 62,829–62,833 (1993), *reh'g denied,* 67 FERC ¶ 61,155 at 61,456–61,460 (1994); Williston Basin Interstate Pipeline Co., 67 FERC ¶ 61,137 at 61,377–61,282 (1994); Panhandle Eastern Pipe Line Co., 71 FERC ¶ 61,228 at 61,866–61,871 (1995) (Opinion No. 395); Northwest Pipeline Corp., 71 FERC ¶ 61,253 at 62,007–61,009 (1995); Panhandle Eastern Pipe Line Co, 74 FERC ¶ 61,109 at 61,399–61,408 (1996) (Opinion No. 404); Williams Natural Gas Co, 77 FERC ¶ 61,277 at 62,205–61,207 (1996), *reh'g denied,* 80 FERC ¶ 61,158 at 61,189–61,190; Iroquois Gas Transmission System, L.P., 84 FERC ¶ 61,086 at 61,478 (1998), *reh'g denied,* 86 FERC ¶ 61,261 (1999); Williston Basin Interstate Pipeline Co., 84 FERC ¶ 61,266 at 61,401–61,402(1998); Northwest Pipeline Corp, 87 FERC ¶ 61,266 at 62,077 (1999); and Trunkline Gas Co., 90 FERC ¶ 61,017 at 61,084–61,096 (2000).

[10] 84 FERC ¶ 61,086 at 61,476–61,478 (1998), *reh'g denied,* 86 FERC ¶ 61,261 (1999).

[11] 90 FERC ¶ 61,017 at 61,092–95 (2000).

[12] 74 FERC ¶ 61,109 at 61,401–02 (1996).

[13] 77 FERC ¶ 61,277 at 62,206–61,207 (1996), *reh'g denied,* 80 FERC ¶ 61,158 (1997).

[14] 90 FERC ¶ 61,017 at 61,096 (2000).

[15] Order No. 636–A, FERC Stats. & Regs. Regulations Preambles ¶30,950, at 30,562 (1992), reh'g granted, Order No. 636–B, 61 FERC ¶61,272, at 61,999 (1992) (capacity release ''may affect the rates charged for interruptible transportation since the competition from released capacity might require the pipelines to offer greater discounts for interruptible transportation than they had in the past'').

D. Gas-on-Gas Competition

11. Since *AGD I* and the Rate Design Policy Statement, the issue of ''gas-on-gas'' competition, *i.e.*, where the competition for the business is between pipelines as opposed to competition between gas and other fuels, has been raised in several Commission proceedings. In these proceedings, certain parties have questioned the Commission's rationale for permitting selective discounting, *i.e.*, that it benefits captive customers by allowing fixed costs to be spread over more units of service. These parties have contended that, while this may be true where a discount is given to obtain a customer who would otherwise use an alternative fuel and not ship gas at all, it is not true where discounts are given to meet competition from other gas pipelines. In the latter situation, these parties have argued, gas-on-gas competition permits a customer who must use gas, but has access to more than one pipeline, to obtain a discount. But, if the two pipelines were prohibited from giving discounts when competing with one another, the customer would have to pay the maximum rate to one of the pipelines in order to obtain the gas it needs. This would reduce any discount adjustment and thus lower the rates paid by the captive customers.

12. In *Southern Natural Gas Co.,*[16] the Commission rejected the argument made by one of Southern's customers, Mississippi Valley Gas Co., that no discount adjustment should be permitted with respect to gas-on-gas competition. The Commission stated, ''in light of the dynamic nature of the natural gas market, the Commission believes any effort to prohibit interstate gas pipelines from discounting to meet gas-on-gas competition would inevitably result in a loss of throughput to the detriment of all their customers.''[17] The Commission explained that the pipeline faced competition from intrastate pipelines not subject to the Commission's jurisdiction, so that the Commission could not prohibit gas-on-gas competition altogether. The Commission also stated that discounts given to meet gas-on-gas competition are not readily distinguishable from discounts given to meet competition from alternative fuels. For example, the Commission stated, discounts that on the surface appear to be given to meet gas-on-gas competition may also serve to reduce a customer's transportation costs sufficiently to minimize the incentives for many gas purchasers to make necessary investment to use alternate fuel. As a result, the Commission stated, given the difficulties in distinguishing between the two types of discounts, prohibiting the first type might discourage the pipeline from offering needed discounts to meet alternative fuel competition for fear that such discounts would be challenged as improper. Mississippi Valley sought review of these holdings, but the court found Mississippi Valley's appeal not ripe for review, because the severed proceeding was still ongoing.[18] Subsequently, the case settled.

13. The issue was also raised by the Illinois Municipal Gas Agency (IMGA) in a petition for rulemaking in Docket No. RM97–7–000. In its petition, IMGA alleged that the impact of the Commission's practice of adjusting ratemaking throughput downward to reflect discounts given by pipelines for competitive reasons causes rates to captive customers to be higher than they would be if the Commission did not adjust throughput for gas-on-gas competitive discounts and causes captive customers to subsidize customers receiving the discounts. IMGA asked the Commission to adopt a rule of general applicability that the pipelines' maximum rates will be based on estimates of the pipelines' total throughput without regard to discounts given for gas-on-gas competition with other jurisdictional pipelines.

14. Parties also raised this issue in Order No. 637, and again argued that a discount adjustment is not appropriate in a subsequent rate case for discounts given to meet gas-on-gas competition. When the Commission declined to address the issue in Order No. 637, IMGA raised the issue on appeal. In *INGAA* v. *FERC*, 285 F.3d 18, 43–44 (D.C. Cir. 2002), the court concluded that the Commission did not err in deciding not to address this issue as part of its Order No. 637 rulemaking. However, the court did indicate that the Commission should not delay resolution of the issue indefinitely.

II. Discussion

15. The Commission seeks comments on its policy of permitting selective discounting and how that policy affects the pipeline's captive customers, *i.e.*, those customers that do not receive discounts. In particular, the Commission is interested in exploring the effects of the policy of permitting a discount adjustment in a rate case for all selective discounts, including those given to meet gas-on-gas competition as well as on the specific questions set forth below:

(1) *Effect of the Current Policy on Captive Customers.* As explained above, the purpose of the Commission's policy is to allow pipelines to discount to meet competition so as to obtain greater throughput over which to spread fixed costs. The policy is based on the view that the increased throughput obtained through discounting will benefit captive customers and lower their rates in the next rate case. The Commission requests comments on the following issues related to how its current policy has worked in practice.

(a) Has the Commission's current discount policy helped captive customers by enabling pipelines to obtain increased throughput over which to spread fixed costs, or hurt captive customers by causing tariff rates to increase with no net increase in throughput?

(b) In several cases, the Commission has rejected pipelines' requests for discount adjustments given in connection with long-term firm contracts on the ground that the pipeline had not shown that competition required such discounts.[19] Have the discount adjustments approved in pipeline rate cases been based primarily on discounts given for interruptible and short-term firm transportation? Provide examples of any pipeline rate cases where discounts in long-term firm transportation contributed significantly to any allowed discount adjustment in the overall volumes used to design the pipeline's rates.

(c) The Commission has also rejected pipelines' requests for discount adjustments for discounts given to affiliates where the pipeline failed to show that the discount was given to meet competition. Provide examples of any pipeline rate cases where discounts given to affiliates contributed significantly to any allowed discount adjustment.

(d) Has the heavy burden that the Commission has placed on pipelines to justify discounts to affiliates been sufficient to assure that discounts to affiliates are in fact given to meet competition? The Standards of Conduct for Transmission Providers provide that a pipeline must post on its website any offer of discount and must include the name of the customer involved in the discount and whether that customer is

[16] 67 FERC ¶61,155 (1994).

[17] *Id.* at 61,458.

[18] *Mississippi Valley Gas Co.* v. *FERC*, 68 F.3d 503 (D.C. Cir. 1995).

[19] Iroquois Gas Transmission System, 84 FERC ¶61,086 at 61,476–61,478 (1998); Trunkline Gas Company, 90 FERC ¶61,017 at 61,092–61,095 (2000).

an affiliate of the pipeline; the posting must also include the rate offered, the maximum rate, the time period for which the discount would apply, the quantity of gas scheduled to be moved, the delivery points and any conditions or requirements applicable to the discount. 18 CFR 358.5(d) (2004). Have these requirements been sufficient to assure that discounts are offered in a non-discriminatory manner?

(e) IMGA has asserted that 75 percent of discounts are given to meet competition from other interstate pipelines. We request comment from IMGA and others as to the basis for this determination and whether this is a reliable estimate. Further, has the level of discounts given to meet gas-on-gas competition varied significantly from pipeline to pipeline? Has the practice of giving discounts to meet gas-on-gas competition been widespread through the industry or has it generally been limited to only a small portion of interstate pipelines?

(f) Please provide specific examples of rate cases where a significant portion of the discounts underlying the discount adjustment was given to meet gas-on-gas competition.

(g) Provide examples of rate cases where the Commission's current policy concerning selective discounts has helped captive customers and has resulted in lower rates for those customers.

(h) Pipelines are no longer required to file periodic rate cases and many pipelines have not filed a rate case for a number of years. How has the Commission's policy affected captive customers in the absence of a section 4 rate case filing?

(2) *Elimination of the Discount Adjustment for Discounts to Meet Gas-on-Gas Competition.* As discussed above, the issue of ''gas-on-gas'' competition has been raised in several Commission proceedings and it has been argued that the rationale behind the discount policy does not apply when discounts are given to demand inelastic customers to meet competition from other gas pipelines. The Commission requests comments on the following issues concerning the impact of a change in current Commission policy to eliminate the discount adjustment for gas-on-gas competition and how the Commission would implement and monitor this change in policy.

(a) What problems would there be in implementing a policy of not allowing a discount adjustment for gas-on-gas competition and in determining whether a shipper would buy transportation if a discount were not given? Would it be possible to distinguish between discounts to meet gas-on-gas competition and discounts given for other reasons, and if so how? As the Commission pointed out in the Southern case, discounts given to meet gas-on-gas competition are not readily distinguishable from discounts given to meet competition from alternative fuels. For example, discounts that on the surface appear to be given to meet gas-on-gas competition may also serve to reduce a customer's transportation costs sufficiently to minimize the incentives for many gas purchasers to make the necessary investment to use alternate fuel.

(b) Are customers to whom pipelines have given discounts to meet gas-on-gas competition sufficiently demand inelastic that they would have taken the same level of service without the discount? For example, if an electric generator were negotiating with two pipelines for a discount, it is not necessarily the case that the generator is demand inelastic and would buy transportation if neither pipeline granted it a discount. Given the demand elasticity of the electric market, the electric generator might not build the generator at all if the discount were not given and the potential additional gas and transportation volumes would be lost. If customers currently receiving discounts due to gas-on-gas competition are predominantly demand elastic, would eliminating the throughput adjustments for such discounts actually hurt the captive customers?

(c) How would elimination of a discount adjustment for discounts given to meet gas-on-gas competition affect the ability of pipelines with higher maximum rates to compete with pipelines with lower maximum rates, and would it penalize the captive customers on the higher rate pipelines by making it more difficult for those pipelines to obtain additional customers over which to spread their fixed costs?

(d) Competition between the pipeline's sale of its capacity and its firm shippers' capacity release may be viewed as gas-on-gas competition. How would the effect of competition from capacity release be factored into a determination of whether the discount adjustment should be permitted? Should the Commission permit a discount adjustment for discounts given in competition with capacity release, regardless of the approach it takes generally with respect to discounts given to meet gas-on-gas competition?

(e) As a result of capacity release, the value of transportation between two points is related to the commodity price differential between those two points, for example the difference in the price of gas in the production basin and at the city gate. This basis differential can be a limit on the rate the pipeline can charge. How would elimination of the discount adjustment for gas-on-gas competition affect the pipeline's revenues if they were discouraged from giving the discounts necessary to reduce their rates to the basis differential?

(f) To what extent is gas commodity market competition between different producing regions dependent on pipeline's discounting? One of the Commission's goals in Order No. 636 was to promote competition between different producing regions and to permit customers to access different producing regions. If the Commission prohibited an adjustment for discounts given to meet gas-on-gas competition, would this adversely affect the pipeline's ability to bring its rates down to the basis differential level? Would this have an adverse impact on producers, markets, and customers?

(g) As the Commission explained in the Southern decision discussed above, an inability to discount to meet competition from intrastate pipelines would lead to a loss of throughput by the interstate pipeline. Should interstate pipelines be permitted to have an adjustment for discounts given to meet competition from intrastate pipelines?

(h) Would a prohibition against discount adjustments for discounts given to meet gas-on-gas competition discourage pipeline expansions into areas to compete with existing service in that area?

(3) *Alternative Policy Choices.* The Commission is requesting comments on what alternative changes in the Commission's discount adjustment policy could be considered to minimize any adverse effects on captive customers.

(a) Should the Commission eliminate the presumption that discounts given to non-affiliates are given to meet competition and require the pipelines to justify all discounts and show that the discounts are not given simply to meet gas-on-gas competition? Should it eliminate the presumption only for long-term sales of pipeline capacity?

(b) Should the Commission adopt procedures in addition to those set forth in the Standards of Conduct for Transmission Providers, 18 CFR 358.5(d) (2004), to assure that any discounts given to affiliates are made available to non-affiliates in a non-discriminatory manner?

(c) Are the incentives for giving discounts to affiliates sufficiently different from the incentive to give discounts to non-affiliates that the

Commission should prohibit all affiliate discounts?

III. Procedure for Comments

16. The Commission invites interested persons to submit comments, and other information on the matters, issues and specific questions identified in this notice. Comments are due 60 days from the date of publication in the **Federal Register**. Comments must refer to Docket No. RM05–2–000, and must include the commentor's name, the organization they represent, if applicable, and their address. The Commission will consider all the comments in Docket No. RM05–2–000 and will terminate the proceeding in Docket No. RM97–7–000 because the issues included in Docket No. RM05–2–000 include all the issues raised in the Docket No. RM97–7–000 proceeding.

17. To facilitate the Commission's review of the comments, commentors are requested to provide an executive summary of their position. Commentors are requested to identify each specific question posed by the Notice of Inquiry that their discussion addresses and to use appropriate headings. Additional issues the commentors wish to raise should be identified separately. The commentors should double space their comments.

18. Comments may be filed on paper or electronically via the eFiling link on the Commission's Web site at *http://www.ferc.gov*. The Commission accepts most standard word processing formats and commentors may attach additional files with supporting information in certain other file formats. Commentors filing electronically do not need to make a paper filing. Commentors that are not able to file comments electronically must send an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street, NE., Washington, DC 20426.

19. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commentors are not required to serve copies of their comments on other commentors.

IV. Document Availability

20. 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 the Commission's home page (*http://www.ferc.gov*) and in the Commission'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.

21. From the Commission's home page on the Internet, this information is available in the Commission's document management system, eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number (excluding the last three digits) in the docket number field.

22. User assistance is available for eLibrary and the Commission's Web site during normal business hours. For assistance, please contact the Commission's Online Support at 1–866–208–3676 (toll free) or 202–502–6652 (e-mail at *FERCOnlineSupport@ferc.gov* or the Public Reference Room at 202–502–8371, TTY 202–502–8659 (e-mail at *public.referenceroom@ferc.gov*).

By direction of the Commission. Commissioner Brownell concurring with a separate statement attached.

Linda Mitry,

Deputy Secretary.

Brownell, Commissioner, *concurring:* This NOI seeks comment on all potential issues that could be raised about the Commission's discounting program: (a) Whether discounting should be allowed; (b) Whether a discount adjustment should be allowed for discounts; (c) If discounting adjustments are allowed, what types of discounts warrant a discount adjustment; (d) The adequacy of the posting and reporting requirements; and (e) What is the interplay between discounting and the absence of a section 4 rate case filing requirement. I am concerned that we are again creating market uncertainty with the specter of regulatory intervention, on a generic basis, in a discounting program that works well, promotes competition, provides regulatory safeguards and ultimately benefits gas consumers.

The impetus for this NOI is the Illinois Municipal Gas Agency's (IMGA) petition requesting that the Commission develop a rule of general applicability that a pipeline's maximum rates can not reflect a discount adjustment for discounts given for gas-on-gas competition with other jurisdictional pipelines. IMGA does not challenge discounting for alternative fuel competition; discounts to compete with intrastate pipelines; the posting and reporting requirements; or the relevancy of the lack of a section 4 rate case filing. IMGA deserves an answer, but given the legal precedent, actual experience and our regulatory actions over nearly twenty years, I would have hoped that we could have limited our inquiry to the specific issue raised by IMGA.

In *Associated Gas Distributors* v. *FERC (AGD I),* [20] the court upheld the regulations permitting selective discounting and indicated that a discount adjustment in setting maximum rates would be appropriate to prevent a pipeline from underrecovering its costs. However, in order to obtain a discount adjustment, the pipeline must file a rate case and must show that the discount was necessary to meet competition. The issue of adjusting rate design volumes to account for discounts has been litigated in a number of cases. Based on the particular facts of the case, the Commission has both allowed and disallowed discount adjustments. I see nothing broken in this general process. Moreover, even with regard to the specific issues of discounting adjustments for gas-on-gas competition, while I am open to seeing the comments we receive, I also recognize that the Commission has already opined on this issue. In *Southern Natural Gas Co.*, [21] the Commission addressed the issue of a discount adjustment for gas-on-gas competition. The Commission stated, ''in light of the dynamic nature of the natural gas market, the Commission believes any effort to prohibit interstate gas pipelines from discounting to meet gas-on-gas competition would inevitably result in a loss of throughput to the detriment of all their customers.'' [22] The Commission explained that a pipeline faces competition from intrastate pipelines, so all gas-on-gas competition could not be prohibited. Moreover, the Commission stated that the distinction between gas-on-gas discounts and discounts for alternative fuel competition is not so simplistic. For example, the Commission noted that a gas-on-gas discount could reduce a customer's transportation costs enough that it is uneconomic to invest in alternative fuel capability.

Why are the Commission's findings in *Southern Natural Gas Company* not still applicable? I can also see other situations where the purpose of the discount is not readily apparent. For example, how should one categorize a discount to a generator negotiating to locate a generating plant on one of two pipelines, who is unwilling to take service on either pipeline unless it receives a discount rate? Or discounts to a new gas customer with the choice between two pipelines? I am also concerned that gas-on-gas discounting is a necessary by-product of our capacity release program. How do you have a robust secondary market with competition between the pipeline services and released capacity without gas-to-gas discounts? I hope that when commenters respond to the NOI, they will consider these questions as well.

Finally, the expansive nature of the NOI seems to me to be a search for a problem. I would contrast our action here with our inaction in the Policy Statement on Electric Creditworthiness that we also issue today. As I state in my dissent in that proceeding, we are faced with a very real problem of lack of transparency and potential undue discrimination. Yet, the best we can do is issue a guidance order that requires little if anything to remedy the problem.

[20] 824 F.2d 981, 1010–1012 (D.C. Cir. 1987).

[21] 67 FERC ¶61,155 (1994).

[22] 67 FERC at 61,458.

For these reasons, I respectfully concur.

Nora Mead Brownell,

Commissioner.

[FR Doc. 04–26535 Filed 12–1–04; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 165

[Docket No. 2004N–0416]

Beverages: Bottled Water

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is proposing to amend its bottled water quality standard regulations by revising the existing allowable level for the contaminant arsenic. As a consequence, bottled water manufacturers would be required to monitor their finished bottled water products for arsenic at least once each year under the current good manufacturing practice (CGMP) regulations for bottled water. Bottled water manufacturers would also be required to monitor their source water for arsenic as often as necessary, but at least once every year unless they meet the criteria for the source water monitoring exemptions under the CGMP regulations. This proposed rule, if finalized, will ensure that the minimum quality of bottled water, as affected by arsenic, remains comparable with the quality of public drinking water that meets the Environmental Protection Agency's (EPA's) standards.

DATES: Submit written or electronic comments by January 31, 2005.

ADDRESSES: You may submit comments, identified by Docket No. 2004N–0416, by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- Agency Web site: *http://www.fda.gov/dockets/ecomments*. Follow the instructions for submitting comments on the agency Web site.
- E-mail: *fdadockets@oc.fda.gov*. Include Docket No. 2004N–0416 in the subject line of your e-mail message.
- FAX: 301–827–6870.
- Mail/Hand delivery/Courier [For paper, disk, or CD-ROM submissions]: Division of Dockets Management, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

Instructions: All submissions received must include the agency name and Docket No. for this rulemaking. All comments received will be posted without change to *http://www.fda.gov/ohrms/dockets/ohrms/dockets/default.htm*, including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process, see section VIII in the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to *http://www.fda.gov/ohrms/default.htm* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or the Division of Dockets Management, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Jennifer A. Burnham, Center for Food Safety and Applied Nutrition (HFS–306), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 301–436–2030.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of January 22, 2001 (66 FR 6976), EPA published the arsenic rule to address potential public heath effects from the presence of arsenic in drinking water. This rulemaking finalized a proposed rule that EPA published in the **Federal Register** of June 22, 2000 (65 FR 38888).

Arsenic is an element that occurs naturally in rocks, soil, water, air, plants, and animals. In addition to the numerous natural sources of arsenic, human activities may also introduce arsenic into food and drinking water. Major present and past sources of arsenic include wood preservatives, agricultural uses, industrial uses, mining and smelting. The human impact on arsenic levels in water depends on the level of human activity, the distance from the pollution sources, and the dispersion and fate of the arsenic that is released. Because arsenic is naturally occurring, the entire population is exposed to low levels of arsenic through food, water, air, and contact with soil. Studies have shown long-term exposure to inorganic arsenic in drinking water may result in increased risk of cancer (e.g., skin, bladder, lung, kidney, liver, prostate, and nasal passage) and is associated with noncancer effects, such as alterations in gastrointestinal, cardiovascular, hematological (e.g., anemia), pulmonary, neurological, immunological, and reproductive/developmental function (66 FR 6976 at 7001 through 7003).

National primary drinking water regulations (NPDWRs) are issued by EPA to protect the public health from the adverse effects of contaminants in drinking water. NPDWRs specify maximum contaminant levels (MCLs) or treatment techniques for drinking water contaminants. In addition, at the same time that it issues NPDWRs, EPA publishes maximum contaminant level goals (MCLGs), which are not regulatory requirements but rather are nonenforceable health goals that are based solely on considerations of protecting the public from adverse health effects of drinking water contamination.

In the arsenic rule, EPA issued an NPDWR containing an MCL of 0.01 milligram per liter (mg/L)[1] or 10 parts per billion (ppb) and an MCLG of zero for arsenic. EPA based the MCL on total arsenic, because drinking water contains almost entirely inorganic forms, and the analytical methods for total arsenic are readily available and capable of being performed by certified laboratories at an affordable cost. EPA's effective date of March 23, 2001, for this rule was temporarily delayed for 60 days to a new effective date of May 22, 2001, in accordance with the memorandum of January 20, 2001, from the Assistant to the President and Chief of Staff, entitled ''Regulatory Review Plan'' (66 FR 7702, January 24, 2001). On May 22, 2001, EPA announced that it would further delay the effective date for the rule until February 22, 2002, to allow time to complete a reassessment of the information on which the revised arsenic standard is based. On February 22, 2002, the arsenic MCL of 0.01 mg/L in public drinking water rule became effective and water systems must comply with the new standard for arsenic in public drinking water by January 23, 2006.

Under section 410(b)(1) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 349(b)(1)), not later than 180 days before the effective date of an NPDWR issued by EPA for a contaminant under section 1412 of the Safe Drinking Water Act (SDWA) (42 U.S.C. 300g-1), FDA is required to issue a standard of quality regulation for that contaminant in bottled water or make a finding that such a regulation is not necessary to protect the public health because the contaminant is contained in water in public water systems but not in

[1] As discussed in section II of this document, on March 25, 2003 (68 FR 14502 at 14503), EPA revised the rule text to express the MCL as 0.010 mg/L.