UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Northwest Pipeline Corporation
Duke Energy Trading and Marketing, L.L.C.

Docket No. RP04-575-000

ORDER GRANTING WAIVERS

(Issued October 8, 2004)

1. On September 1, 2004, Northwest Pipeline Corporation (Northwest) and Duke Energy Trading and Marketing, L.L.C. (DETM) filed a joint petition for expedited grant of limited waiver of Northwest's capacity release tariff provisions and the Commission's Order No. 636-A policy regarding the tying of gas delivery contracts to released transportation capacity.[1] These waivers are requested to effectuate the permanent transfer of DETM's Northwest transportation capacity and dependent gas delivery contracts to DETM's prearranged replacement shipper. The Commission will grant the limited

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[1] Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, Order No. 636, 57 Fed. Reg. 13,267 (April 16, 1992), FERC Stats. and Regs., Regulations Preambles (January 1991 - June 1996) ¶ 30,939 at 30,446-48 (April 8, 1992); *order on reh'g*, Order No. 636-A, 57 Fed. Reg. 36,128 (August 12, 1992), FERC Stats. and Regs., Regulations Preambles (January 1991 - June 1996) ¶ 30,950 (August 3, 1992); *order on reh'g*, Order No. 636-B, 57 Fed. Reg. 57,911 (December 8, 1992), 61 FERC ¶ 61,272 (1992); *reh'g denied*, 62 FERC ¶ 61,007 (1993); *aff'd in part and remanded in part*, United Distribution Companies v. FERC, 88 F.3d 1105 (D.C. Cir. 1996); *order on remand*, Order No. 636-C, 78 FERC ¶ 61,186 (1997).

waivers, with modifications, as discussed below. This order benefits the public by allowing a shipper to sell its capacity and exit the gas marketing business in an orderly fashion in accordance with our capacity release posting requirements.

Background

2. According to the filing, DETM is an energy marketer that purchases natural gas and provides energy-related services to customers throughout the United States, including customers connected to Northwest's system. In 2003, the joint venture owners of DETM (Duke Energy Corporation and Exxon Mobil Corporation) decided to reduce the scale and scope of DETM's activities. The joint venture owners set up what they term a "data-room" process to offer DETM's assets for sale.[2] The assets were segmented into pieces consisting of geographically-related transportation and storage capacity (both interstate and intrastate), associated supply contracts, and related dependent delivery and asset management commitments (*i.e.*, delivery gas contracts to local distribution companies, power plants, industrial end users, and others).

3. Northwest/DETM state that DETM has completed its data-room bidding process for its Northwestern Regional Book which consists of 174 transportation contracts between Northwest and DETM or its affiliate, ANGI Gas Services Company (ANGI), five associated and dependent delivery commitments (with three counterparties), and two Kern River Pipeline transportation contracts. The transportation contracts on Northwest's system include: (1) seven base contracts with DETM under Rate Schedule TF-1 for a total of 133,458 Dth per day of long-term, maximum rate capacity; (2) 165 temporary capacity release replacement contracts, as amended with DETM or its affiliate ANGI resulting from maximum rate segmented releases of DETM's base contracts;[3] and two temporary capacity release replacement contracts with DETM

[2] Although the term "data room" is not described in the filing, this process essentially consisted of receiving offers from other parties who were willing to take over DETM's capacity and supply commitments.

[3] These include 19 long-term, maximum rate, temporary capacity release replacement contracts that were amended to reserve, in aggregate, 50,000 dth per day of Columbia Gorge Expansion Project capacity subject to a reservation surcharge.

resulting from maximum rate releases of capacity from other shippers. These transportation contracts, along with DETM's associated and dependent gas contracts, comprise its "Northwest Assets."[4]

4. Northwest/DETM assert that interested parties were allowed to examine and bid upon DETM's portfolio of business assets upon execution of appropriate non-disclosure agreements. Northwest/DETM assert that the data-room process was successful and that DETM intends to execute a Purchase and Sale Agreement (PSA), including a binding Prearranged Capacity Release Agreement, with the Prearranged Replacement Shipper, a large and sophisticated national energy marketer who is a qualified, creditworthy third party that is not affiliated with DETM, its parents, or Northwest.

5. Northwest/DETM state that the Prearranged Capacity Release Agreement calls for the Northwest Assets to be permanently transferred to the Prearranged Replacement Shipper en masse and intact, with no change in contract rates or terms. As consideration for the Prearranged Replacement Shipper acquiring the contracts at Northwest's maximum tariff rates for the remaining terms of the contracts, the Purchase and Sale Agreement includes a commitment by DETM to make a payment to the Prearranged Replacement Shipper. DETM has requested that Northwest post the prearranged transaction for competing bids in a reverse auction process with the bids being evaluated on the basis of which shipper will require the smallest payments by DETM to the shipper.

Proposal

6. Northwest/DETM state that a number of waivers may be necessary to effectuate the transfer of DETM's Northwest Assets under Northwest's capacity release mechanism in the proposed manner. First, a limited waiver of the capacity release provisions of Northwest's tariff is needed to accommodate: (1) the permanent release of temporary capacity release replacement contracts or contracts encumbered with temporary releases of their underlying contract rights; (2) the *en masse* permanent release of contracts; and (3) the reverse auction bidding/awarding process contemplated by DETM.

[4] Northwest/DETM state that the only contracts with Northwest not included in the Northwest Assets package are DETM's Gray's Harbor Lateral capacity and the associated Evergreen Expansion Capacity, which will be retained by a creditworthy entity, either DETM or an affiliated credit qualified shipper. They assert that these contracts would provide gas to the Gray's Harbor generation project which has been suspended indefinitely. According to the filing, DETM may seek to terminate both contracts, either through a capacity turnback process with Northwest or via a permanent release to a creditworthy third-part generation project or to a DETM generation affiliate.

7. Second, Northwest/DETM request that the Commission waive, to the extent necessary, its generic "tying prohibition" set forth in Order No. 636-B to effectuate the open competitive bidding for the Northwest Assets under Northwest's capacity release tariff provisions. The Prearranged Replacement Shipper (or any successful third-party bidder) will execute a PSA with DETM wherein it will agree to acquire DETM's Northwestern Regional Book in its entirety, including the gas contracts as well as the transportation contracts.

Public Notice

8. Public notice of Northwest/DETM's filing was issued on September 7, 2004, with protests due as provided in section 154.210 of the Commission's regulations (18 C.F.R. § 154.210 (2004)). The timely motions to intervene are granted pursuant to Rule 214 of the Commission's Rules of Practice (18 C.F.R. § 385.214 (2004)). Any motions to intervene out-of-time filed before the date of this order are granted pursuant to 18 C.F.R. § 385.214(d) (2004), since the Commission finds that granting intervention at this stage of the proceeding will not disrupt this proceeding or place additional burdens on existing parties. A late protest was filed by Western Gas Resources, Inc. (Western). Western argues that the proposal is contrary to the Commission's capacity release policies because it raises barriers to participation in the capacity release bidding process, reduces competition contrary to Order No. 636, and frustrates price transparency. DETM filed an answer to Western's protest on September 21, 2004. Answers to protests are not permitted under the Commission's regulations unless otherwise ordered. (18 C.F.R. §385.213(2) (2004). The Commission finds that DETM's answer is not necessary to the rendering of a decision in this instance.

Discussion

9. The Commission will grant the requested waivers, as modified herein. The requested waivers are necessary to permit DETM to effect a permanent release of its collection of Northwest contracts in one package. Northwest and DETM have generally proposed an open and transparent auction process for DETM's assets; therefore, because of the transparency of the auction process proposed and because of the unique circumstances concerning DETM's attempt to exit the natural gas market in the Northwest in an orderly fashion, the Commission will grant the requested waivers to modify Northwest's electronic bidding process to: (1) permit the permanent releases of capacity even as encumbered with temporary releases; (2) post the subject contracts as a single package; (3) permit bidding based on confidential disclosures; and (4) permit replacement shippers to assume permanently released contracts as proposed in the instant application. As requested, the Commission will also grant any other waivers necessary to implement the proposed reverse auction process as modified below.

A. <u>Reverse Auction</u>

10. Northwest and DETM state that DETM's Prearranged Replacement Shipper will pay Northwest's maximum tariff rates for the full terms of the released contracts, and therefore section 22.3(b) which provides that "the Prearranged Replacement Shipper shall be awarded the released capacity without the necessity of waiting for competing bids to be submitted" would normally apply. However, DETM has requested that Northwest hold a competitive bidding open season to determine whether any other potential replacement shipper is willing to accept a maximum rate permanent release with a lower payment from DETM to the shipper than DETM’s Prearranged Replacement Shipper is willing to accept.

11. DETM and Northwest propose that this competitive open season take the form of a reverse auction bidding procedure under which the replacement shippers agree to take a permanent release of capacity at the maximum rate, but then submit bids setting forth the amount that DETM will have to pay the shipper in order to take the release. In other words, the bidding is designed to determine whether any replacement shipper is willing to accept a lower payment from DETM than DETM's Prearranged Replacement Shipper is willing to accept. Therefore, in order to implement DETM and Northwest’s proposal, the parties request a waiver of the above mentioned sections of Northwest’s tariff.

12. The reverse auction procedure is a method by which the value of transportation capacity to the shipper may be ascertained. In general terms, the releasing shipper proposes to release the pipeline capacity it holds to a replacement shipper for the maximum rate. The pipeline then conducts a reverse auction for the releasing shipper. In the reverse auction, the potential replacement shippers bid the amounts that they are willing to receive from the releasing shipper to take the releasing shipper’s capacity at maximum rate. The replacement shipper willing to take the least amount of money from the releasing shipper is the winner of the capacity under the reverse auction.

13. Northwest and DETM have stated that DETM's Prearranged Replacement Shipper will pay Northwest's maximum tariff rates for the full terms of the released contracts, and therefore section 22.3(b) which provides that "the Prearranged Replacement Shipper shall be awarded the released capacity without the necessity of waiting for competing bids to be submitted" would normally apply. The Commission has determined that capacity obtained under the reverse auction methodology is to be considered discount capacity, because the replacement shipper is receiving payment from the releasing shipper and

therefore is not truly paying the maximum rate for the capacity.[5] Therefore, Northwest and DETM are correct in stating that such capacity, even if subject to a prearranged deal, must be subject to the bidding requirements.

14. In the Commission's view, the reverse auction procedure provides a transparent manner in which the value of the transportation capacity to a replacement shipper may be ascertained. The Commission will grant the requested waiver of the bidding requirement by Northwest and DETM for good cause shown. Based on the waiver request, it appears that: (1) Northwest has agreed to conduct and be bound by the reverse auction; (2) the reverse auction is to be conducted in an open and transparent manner consistent with the Commission's capacity release regulations; (3) the auction is open to any shipper qualified to bid under Northwest's existing tariff requirements; and (4) the payment to be paid to the releasing shipper is made in a lump sum form.[6] Under these conditions the Commission will permit the reverse auction, because such an auction is an open and transparent manner in which to determine the value of the capacity released by DETM.[7]

15. The Commission will, therefore, grant the requested waivers of section 22 of Northwest's tariff provisions, with one qualification. Northwest and DETM apparently are requesting a waiver to permit DETM to "permanently transfer" capacity, which

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[5] Pacific Gas Transmission Co. and Southern California Edison Co., 82 FERC ¶ 61,227 (1998).

[6] Under the requested waiver, Northwest and DETM have stated that a payment will be made by DETM to the winning bidder. The payment terms are not disclosed. However, under the reverse auction, DETM's capacity rights will terminate at the completion of the auction, and the winning bidder will assume the capacity. In these circumstances, a lump sum payment will finalize DETM's involvement with the capacity and the parties to this transfer. The Commission would be concerned about any bids that involve a form of payment over time, because such bids would be difficult for the pipeline and the Commission to monitor and enforce, since DETM will no longer be a shipper on the pipeline.

[7] The Commission's acceptance of the reverse auction in this case is based on satisfaction of the four conditions discussed above, which will ensure that the reverse auction is conducted in an open, transparent matter. The Commission is not determining whether any deviations from these provisions will be acceptable; pipelines seeking to deviate from these conditions must request and receive authorization from the Commission of such deviations in order to conduct a reverse auction on their systems.

DETM is using through a temporary capacity release.[8] In other words, DETM has acquired this capacity through the release program from another shipper which holds the primary underlying firm contract. While DETM can permanently release its own primary firm capacity, it cannot release capacity for which another shipper holds the primary capacity contract.[9] However, unless prohibited by the terms and conditions of the capacity release transaction, DETM can re-release such capacity on a temporary basis, pursuant to the terms of the original release contract.[10]

16. Western argues that the payment to the releasing shipper as proposed in the instant filing represents a “rebate” and asserts that “such a rebate would be unlawful, whether made as a direct payment to a pre-arranged shipper who is only acquiring released capacity or made as an after the fact price adjustment granted on a related commodity supply agreement that is tied to released capacity.”[11] However, as explained above, the Commission has examined such payments before and determined that capacity obtained under the reverse auction methodology is to be considered as discounted capacity, because the payment by the releasing shipper to the replacement shipper results in a price that is less than the maximum tariff rate for the capacity.[12] Thus, while a reverse auction does not qualify as a transaction at the maximum rate, and must be posted for bidding, the

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[8] Northwest and DETM describe a portion of DETM’s Northwest Book which DETM would “permanently transfer” as “(iii) 2 temporary capacity release replacement contracts with DETM resulting from maximum rate releases of capacity from other shippers.” Application at 4.

[9] In addition, Northwest and DETM describe a portion of DETM’s Northwest Book which DETM would “permanently transfer” as “(ii) 165 temporary capacity release replacement contracts, as amended, with DETM or its affiliate ANGI Gas Services Company resulting from maximum rate segmented releases of DETM’s base contracts.” Application at 4. A permanent transfer of primary firm capacity encumbered with a capacity release is permissible; however, such a release does not invalidate the rights of the capacity release holder.

[10] 18 C.F.R. § 284.12 (a)(1)(v), NAESB WGQ Standard 5.3.19 (requiring the re-release of capacity on the same terms and conditions as the primary release). *See* Transcontinental Gas Pipe Line Corp., 87 FERC ¶ 61,120, at 61,486 (1999).

[11] Western Protest at 5-6.

[12] Pacific Gas Transmission Co. and Southern California Edison Co., 82 FERC ¶ 61,227 (1998).

rebate is not considered unlawful, as Western alleges. The reverse auction proposed by Northwest/DETM satisfies the requirements of the Commission's regulations that discounted released capacity be subject to a valid bidding procedure.

B. Capacity Aggregation

17. DETM and Northwest propose to aggregate 174 Northwest transportation contracts and require shippers to bid on the package of capacity. In addition, they also seek to require shippers to acquire two Kern River Pipeline (Kern River) transportation contracts. They assert that these Kern River assets will be released under Kern River's capacity release mechanism. Northwest and DETM assert that to ensure that DETM's entire package is sold to a single party, DETM will post, as a condition of its release on Northwest, a requirement that bidders for the Northwest assets must bid simultaneously on the Kern River assets and be the successful bidder for both sets of assets. DETM and Northwest assert that this proposal does not fun afoul of the "tying prohibition" because this requirement relates solely to the details of acquiring transportation on interstate pipelines.

18. Western objects to this aggregation. Western asserts that it has no interest in acquiring released capacity on Kern River as a condition to acquiring one or more of the segments of released transportation capacity on Northwest and states that under Order No. 636 and the provisions of Northwest's tariff it would normally not be required to bid on transportation capacity which it does not desire in order to bid for released capacity that it does desire. Western also argues that to package all the released capacity into one unit inhibits competition because few parties can bid on the whole package and the transparency of the capacity release marketplace is destroyed because it denies the parties from determining the value that the market places on each specific piece of released transportation capacity. Western argues that this is contrary to the objectives of Order No. 636 and the Commission's concerns regarding the improved transparency of wholesale natural gas commodity prices.

19. Western also objects to the condition that shippers must acquire the Kern River contracts. Western asserts that it has no interest in acquiring released capacity on Kern River as a condition to acquiring one or more of the segments of released transportation capacity on Northwest and states that under Order No. 636 and the provisions of Northwest's tariff it would normally not be required to bid on transportation capacity which it does not desire in order to bid for released capacity that it does desire. Order No. 636 permitted the packaging of transportation contracts in certain situations where such aggregation would enhance the marketability of the contracts for release. In Order No. 636-A, the Commission stated, "The Commission finds nothing in the regulations promulgated by Order No. 636 that would prevent firm capacity holders from aggregating firm capacity *on the same or different* pipelines to enhance its marketability

for release (emphasis added)."[13] Allowing the capacity aggregation of DETM's Northwest contracts as part of the reverse auction procedure providesan open and transparent procedure for reallocating DETM's Northwest capacity. The Commission also finds that the proposal to require the joint purchase of the Northwest capacity and two Kern River capacity contracts is reasonable in that it allows DETM to craft a capacity release package that permits DETM a reasonable and orderly method of exiting from a series of gas and capacity transactions it no longer wants to support. The Commission emphasizes that it is not deciding here whether all aggregations of unrelated capacity on different pipelines are justified and would provide the kinds of efficiencies envisioned by the Commission in Order No. 636-A. Any such aggregation of cross-pipeline contracts must be considered based upon the circumstances involved.

C. Tying Prohibition Relating to Gas Delivery Contracts

1. Northwest/DETM's Position

20. Under the proposal, DETM will execute a purchase and sale agreement wherein a Prearranged Replacement Shipper agrees to acquire DETM's Northwestern Regional Book which consists of 174 Northwest transportation contracts and five gas delivery contracts. Northwest and DETM acknowledge that this arrangement appears to conflict with the Commission's "tying prohibition." As they assert, in 1992, the Commission responded to entreaties from certain industrial end-users and markets regarding the potential for abuses by releasing shippers in "tying the release of capacity to other compensation paid to the releasing shipper" or "by requiring compensation outside of the reassignment process" by stating in Order No. 636-A:

> The Commission reiterates that all terms and conditions for capacity release must be posted and nondiscriminatory, and must relate solely to the details of acquiring transportation on the interstate pipelines. Release of pipeline capacity cannot be tied to any other conditions. Order No. 636-A at 30,559.

[13] Order No. 636-A, at 30,558. The Commission also indicated that shippers could create a pool of capacity on different pipelines, with the only caveat being whether the average price for the pool would exceed the pipeline's maximum rate. *Id*. at 30,557. Here, none of the capacity will be released above Northwest's maximum rate; indeed, under the reverse auction, it will be released at a discounted rate.

21. DETM and Northwest recognize that this language would appear to block DETM's proposal to release its Northwest capacity and dependent delivery contracts together, as a package. Therefore, DETM and Northwest request that the Commission waive this "tying prohibition."

22. In support of their request, DETM and Northwest state that in prohibiting the tying of capacity releases to other conditions the Commission was apparently concerned with the potential undermining of the capacity release market by unposted, extraneous conditions which are not present under its proposal. DETM claims that it is seeking to release its Northwest capacity in an open and transparent manner, wherein the subject gas contracts will be identified and described in DETM's posting, and unredacted copies of the contracts will be made available for inspection and review to all interested bidders. DETM states that it will also post a complete copy of its pro forma Purchase and Sale Agreement, containing all of the applicable terms and conditions associated with the transfer of its Northwestern Regional Book to its Prearranged Replacement Shipper.[14] DETM states that it will then afford all interested bidders an extended, ten-day evaluation period in which to submit bids.

23. Northwest and DETM also state that DETM's proposal to release its Northwest transportation contracts and associated gas delivery contracts as a package is motivated by reasonable business considerations. Northwest and DETM argues that DETM's gas delivery contracts are entirely dependent upon its Northwest capacity and that if it is forced to offer its transportation contracts for release without the dependent gas contracts, it could be placed in the position of losing all of the capacity it currently uses to provide gas service under the related gas contracts. Moreover, Northwest and DETM states that because DETM is winding down as an entity, it cannot acquire new capacity to serve those contracts, even if substitute capacity were otherwise available. Northwest and DETM argue that DETM's gas service customers have demanded that their contracts be assigned to a qualified supplier and that service be continued under the terms of their contracts. Northwest and DETM asserts that DETM's proposal to release its Northwest transportation contracts and dependent gas delivery contracts as a package satisfies these diverse interests.

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[14] DETM emphasizes that after a nation-wide search it has reached an arms-length agreement with a large and sophisticated, non-affiliated, Prearranged Replacement Shipper which has the technical and financial capability and expertise to step into DETM's shoes and continue to perform DETM's obligations.

24. Northwest and DETM also point out that at the time the Commission stated this prohibition the Commission had formulated a capacity release regime but had not yet approved any pipeline's implementing tariffs. The secondary market for capacity release did not yet exist, and the Commission was rightly concerned that its new initiative could be undermined at its incipiency by improper practices (such as "under-the-table" tying arrangements) among capacity holders. Northwest and DETM argue that the situation today is quite different in that most of the interstate pipelines' capacity release tariff provisions have been in place for almost eleven years, and that the capacity release markets have evolved and matured dramatically during that time.

25. Moreover, Northwest and DETM point out that as the capacity release markets evolved, the Commission permitted additional flexibility in allowing capacity holders to release their capacity "in whole or in part on a permanent or short-term basis, without restriction on the terms and conditions of the release" (18 C.F.R. § 284.8 (2004)), and has provided releasing shippers wide latitude in setting "reasonable and non-discriminatory terms and conditions to accommodate individual release situations." *Mojave Pipeline Co*., 62 FERC ¶ 61,195 at 62,370 (1993).[15] Therefore, Northwest and DETM request that the Commission waive, to the extent necessary, its "tying prohibition" such that DETM may post for release its Northwest Assets as a package.

26. Finally, Northwest and DETM request that the Commission consider and grant the requested waivers on an expedited basis, no later than 30 days from the date of the instant filing. They argue that such approval is necessary to enable DETM to conduct its ten-day bidding period and then finalize all aspects of release and assignment of its Northwest Assets in time for a November 1, 2004 transfer date. Second, and just as important, the capacity release postings on Northwest and Kern River will reflect a valuation as of November 1, 2004. They argue that any delay in the release past that date will likely result in a significant change in the valuation of the Northwestern Regional Book which may be prejudicial to some of the parties.

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[15] Northwest and DETM also asserts that the Commission has reiterated that releasing shippers should have the ability "to develop terms and conditions that will maximize the efficiency of their capacity releases in all the varied releasing situations." Transwestern Pipeline Co., 61 FERC ¶ 61,332 at p. 62,233 (1992).

2. Commission Decision

27. In Order No. 636-A the Commission stated that:

> Releasing shippers may include in their offers to release capacity reasonable and non-discriminatory terms and conditions to accommodate individual release situations, including provisions for evaluating bids. All such terms and conditions applicable to the release must be posted on the pipeline's electronic bulletin board and must be objectively stated, applicable to all potential bidders, and non-discriminatory. For example, the terms and conditions could not favor one set of buyers, such as end users of an LDC, or grant price preferences or credits to certain buyers. The pipeline's tariff also must require that all terms and conditions included in offers to release capacity be objectively stated, applicable to all potential bidders, and non-discriminatory. Order No. 636-A at 30,557.

28. However, in response to concerns that releasing shippers might attempt to add terms and conditions which tied the release of capacity to other compensation paid to the releasing shipper, such as an LDC requiring the potential replacement shipper to pay a certain price for local gas transportation service or a producer conditioning the release of capacity on the purchase of the producer's gas, the Commission added the language to which DETM and Northwest refer, which stated that "all terms and conditions for capacity release must be posted and nondiscriminatory, and must relate solely to the details of acquiring transportation on the interstate pipelines. Release of pipeline capacity cannot be tied to any other conditions."[16] Moreover, the Commission stated that it would not tolerate deals undertaken to avoid the notice requirements of the regulations.

29. In the instant proceeding, the releasing shipper presents a unique case not contemplated by the Commission as it attempted to set forth transparent and non-discriminatory rules for the release of capacity in order that a vibrant market for such capacity might be created. Here, a shipper has proposed to release capacity in an open and transparent manner consistent with the Commission's rules of capacity release, and in an attempt to exit the gas transportation business in an orderly manner, has proposed to include its release of pipeline capacity packaged with its gas delivery contracts.

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[16] Order No. 636-A at 30,559.

30. The Commission will grant the requested waiver for good cause shown as modified below. Although Western argues that the tying of gas contracts to the release of the transportation capacity raises a barrier to participation in the capacity release bidding process, the Commission finds that since the releasing shipper is attempting to exit the gas transportation business, it should, within certain limitations, be permitted to exit in a rational and orderly fashion, if such action is open and will not unduly discriminate against other shippers.

31. In essence, DETM is attempting to find other providers for its gas delivery customers before it leaves the business. Given these circumstances, this is a valid reason for DETM to package its gas delivery contracts with its permanent release of capacity. As noted above, in prohibiting tying arrangements, the Commission was primarily concerned with supply related tying arrangements such as an LDC requiring the potential replacement shipper to pay a certain price for local gas transportation service or a producer conditioning the release of capacity on the purchase of the producer's gas. Here, because the contracts in question are delivery contracts, the Commission's concerns with the tying arrangement are somewhat alleviated and balanced by the fact that DETM's gas delivery customers will receive the benefit of their bargain and their gas deliveries will be maintained even as DETM exits the business in a complete and orderly fashion.

32. In addition, as discussed in Order No. 636-A, the process DETM is proposing for the reverse auction establishes "reasonable and non-discriminatory terms and conditions to accommodate individual release situations, including provisions for evaluating bids."[17] DETM asserts that the subject gas contracts will be identified and described in DETM's posting, and unredacted copies of the contracts will be made available for inspection and review to all interested bidders and that it will also post a complete copy of its pro forma Purchase and Sale Agreement, containing all of the applicable terms and conditions associated with the transfer of its Northwestern Regional Book to its Prearranged Replacement Shipper. DETM states that it will then afford all interested bidders an extended, ten-day evaluation period in which to submit bids.

33. The Commission finds that this aspect of DETM's proposal is an attempt to craft an open and transparent auction process under which the release of capacity will be awarded to the shipper that values it the most. For the most part, DETM's proposal is adequate, however, the Commission finds that the ten-day evaluation period suggested by DETM is insufficient for potential shippers to review 174 transportation contracts, five associated and dependent delivery contracts (with three counterparties) and two Kern River transportation contracts. DETM did not specify in its waiver request how long its

[17] Order No. 636-A at 30,559.

potential prearranged shippers took to review the proffered capacity and the subject gas delivery contracts under its “Data Room Process,” however, in the Commission’s view, in order to achieve a fair process under which potential bidders against the prearranged shipper might receive adequate time to fully assess the value of the released capacity and the associated contracts, DETM must permit the potential shippers at least a 20-day period. This will still permit DETM to complete the reverse auction prior to November 1, 2004, as it requests.

The Commission orders:

The Commission grants the requested waivers, as modified, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.