

169 FERC ¶ 61,034
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

RRI Energy Services, LLC
Morgan Stanley Capital Group Inc.

Docket No. RP19-872-001

ORDER ON REHEARING

(Issued October 17, 2019)

1. In an April 18, 2019 order, the Commission denied a request by RRI Energy Services, LLC (RRI) and Morgan Stanley Capital Group Inc. (Morgan Stanley) (collectively, Petitioners) seeking temporary, limited waiver of the Commission's capacity release regulations and policies and the related tariff provisions of Kern River Gas Transmission Company (Kern River) implementing those policies.¹ RRI sought rehearing of the April 2019 Order. For the reasons discussed below, we deny rehearing.

I. Background

2. RRI is an indirect, wholly-owned subsidiary of GenOn Holdings, LLC. RRI states that the GenOn corporate family emerged from Chapter 11 bankruptcy in December 2018. As part of that bankruptcy proceeding, RRI assumed a transportation service agreement (TSA) with Kern River for firm service under Rate Schedule KRF on its Original System.² That TSA has a remaining term of at least seven years.

3. The Commission has authorized Kern River to charge separate levelized rates for different groups of shippers under Rate Schedule KRF, depending upon which expansions of Kern River's system each group participated in. Each shipper group pays

¹ *RRI Energy Services, LLC*, 167 FERC ¶ 61,060 (2019) (April 2019 Order).

² The TSA is listed on Kern River's Tariff as Rate Schedule KRF-1 Contract No. 20021. Kern River, FERC NGA Gas Tariff, Gas Tariff, Part II, Section 2.20, RRI Energy Contract No. 20021, 04/19/17, 4.0.0 (TSA).

progressively lower rates over three different periods: (1) the 10-year or 15-year term of the firm shippers' initial contracts (Period One); (2) the period from the expiration of those contracts to the end of Kern River's assumed depreciable life (Period Two); and (3) the period thereafter (Period Three). RRI currently pays an Alternate Period Two rate applicable to Original System shippers established in a settlement approved by the Commission in 2016.³ Section 30.1(d) of Kern River's tariff General Terms & Conditions (GT&C) defines the shippers eligible to pay Period Two rates as "[a] shipper (or its successor, assignee, or permanent replacement shipper) that has paid the maximum applicable levelized rate for a full 10-year or 15-year Period One contract term" and met certain other conditions.⁴ Kern River's Rate Schedule KRF also includes a higher maximum recourse rate for shippers who are not eligible to participate in the levelized rate structure described above, i.e., shippers who did not participate in the original construction or subsequent expansions of Kern River's system or obtain their capacity through a permanent capacity release from an eligible shipper (Rate Schedule KRF Maximum Recourse Rate).

4. RRI seeks to permanently release its TSA with Kern River as part of RRI's winding down and exit from the natural gas marketing business following bankruptcy.⁵ Section 284.8(b)(2)⁶ of the Commission's regulations provides that the rate for a release of more than one year may not exceed the applicable maximum rate. In addition, section 284.8(c) through (e) requires the releasing shipper to post the capacity release for bidding on the pipeline's website, subject to certain exemptions including for "a release for more than one year at the maximum tariff rate."⁷ Here, in lieu of posting on Kern River's website for bids up to the applicable maximum rate, RRI has selected Morgan Stanley (or its designee) as a prearranged replacement shipper. RRI states that it identified and contacted natural gas marketers serving markets on Kern River's system and provided an opportunity to submit their proposed pricing for the anticipated transfer.⁸ Morgan Stanley was selected because it offered the greatest compensation.⁹ Specifically,

³ *Kern River Gas Transmission Co.*, 158 FERC ¶ 61,078, at P 2 n.3 (2017).

⁴ Kern River Tariff, GT&C section 30.1(d).

⁵ Petition at 4.

⁶ 18 C.F.R. § 284.8(b)(2) (2019).

⁷ 18 C.F.R. § 284.8(h)(1)(iii).

⁸ Petition at 4.

⁹ *Id.* at 9.

Morgan Stanley agreed to pay (1) to Kern River, the maximum applicable Alternate Period Two rate listed in the TSA, and (2) to RRI, “an upfront lump-sum payment reflective of the difference in present value over the remaining contract term of the market value of [the TSA] less the revenue generated under the Alternate Period Two Rate.”¹⁰ RRI contends that this process was the result of a competitive bidding process.¹¹

5. In order to implement this transaction, Petitioners sought waiver of (i) the Commission’s prohibition against tying the release of pipeline capacity to extraneous conditions; (ii) the Commission’s capacity release rules in section 284.8 of the Commission’s regulations; (iii) the capacity release related tariff provisions of Kern River’s FERC Gas Tariff, subject to the requirement that Applicants ensure that Kern River is financially indifferent to the proposed transaction; (iv) the shipper must have title rule; and (v) the prohibition of buy-sell transactions.¹² Petitioners also sought waiver of the applicable requirements to allow them to enter into the proposed transaction with a prearranged replacement shipper using its proposed pricing structure, without posting for bidding.¹³

6. In the April 2019 Order, the Commission denied the request for waiver. The Commission stated that, because the TSA was the only asset being transferred to Morgan Stanley as part of the instant transaction, the capacity release at issue was not part of a complex, integrated deal involving the transfer of other assets of the type for which the Commission has granted waiver of the capacity release regulations.¹⁴ The Commission recognized it has also granted waiver of the capacity release regulations where such waiver is necessary to allow a shipper to permanently release a firm transportation contract by rendering the pipeline financially indifferent to the permanent

¹⁰ *Id.* at 5.

¹¹ *Id.* at 10.

¹² *Id.* at 8.

¹³ *Id.* at 5.

¹⁴ April 2019 Order, 167 FERC ¶ 61,060 at P 9 (citing *Macquarie Cook Energy, LLC*, 126 FERC ¶ 61,160 (2009) (*Macquarie*); *Viruvian II Woodford, LLC*, 158 FERC ¶ 61,120 (2017) (*Viruvian II*); *CenterPoint Energy Services, Inc.*, 157 FERC ¶ 61,224 (2016) (*CenterPoint*); *Chesapeake Energy Mktg., L.L.C.*, 150 FERC ¶ 61,015 (2015) (*Chesapeake*); *Exelon Generating Co., LLC*, 148 FERC ¶ 61,242 (2014) (*Exelon*); *Direct Energy Business, LLC*, 144 FERC ¶ 61,231 (2013); *Delta Energy, LLC*, 141 FERC ¶ 61,042 (2012); *Total Gas & Power N. Am., Inc.*, 131 FERC ¶ 61,023 (2010); *Calpine Energy Servs., L.P.*, 131 FERC ¶ 61,261 (2010); *EnergyMark, LLC*, 130 FERC ¶ 61,059 (2010)).

release.¹⁵ However, the Commission stated it was only necessary to grant such a waiver when the releasing shipper was paying a rate in excess of the maximum rate, and waiver of the maximum rate for long-term capacity releases was necessary to allow the replacement shipper to pay the same rate as the releasing shipper. The Commission found that no such waiver was necessary here, because RRI was paying the applicable Rate Schedule KRF-1 maximum rate. Rather, RRI was seeking waiver of the maximum rate so that Morgan Stanley could pay it a lump sum payment in excess of the applicable maximum rate. The Commission found that this was not necessary to render Kern River economically indifferent to a permanent release, and the Commission had previously held that it is not willing to waive its capacity release regulations simply for the purpose of allowing the releasing shipper to make additional profits on its release.¹⁶

7. The Commission also rejected RRI's contention that Morgan Stanley's lump sum payment would be less than the present value of the difference between Kern River's applicable maximum recourse rate and the reservation rate specified in the TSA over its remaining term. The Commission explained that, under Kern River's tariff, the maximum rate applicable to the TSA is the Alternate Period Two Rate for 15-year rolled-in rate, original system shippers.¹⁷ The Commission stated that the Alternate Period Two Rate is the maximum rate applicable to both RRI and any permanent replacement shipper. Kern River's separate, higher Rate Schedule KRF Maximum Recourse Rate, referred to by RRI, is only for shippers not eligible to participate in the levelized rate structure and thus does not apply to the TSA.¹⁸ The Commission concluded that the fact that the lump sum payment arguably would not violate a maximum recourse rate applicable to other types of transactions is irrelevant to the issue of whether a waiver of the capacity release regulations should be granted in this case.

¹⁵ *Id.* P 10 (citing *Transcontinental Gas Pipe Line Co., LLC*, 133 FERC ¶ 61,242 (2010) (*Transco*); *EdgeMarc Energy Holdings, LLC*, 165 FERC ¶ 61,036 (2018) (*EdgeMarc*)).

¹⁶ April 2019 Order, 167 FERC ¶ 61,060 at P 12 (citing *Transco*, 133 FERC ¶ 61,242 at PP 6-7; *Louis Dreyfus Energy Services, L.P.*, 114 FERC ¶ 61,246, at P 16 (2006) (*Louis Dreyfus*) (“the waivers the Commission has granted have been limited to permitting the releasing shipper to release at a rate up to the rate it was paying the pipeline; the Commission has not permitted the releasing shipper to profit from the release of capacity by allowing it to release capacity at a rate higher than the rate it was paying the pipeline”)).

¹⁷ *Id.* P 12.

¹⁸ *Id.*

II. Discussion

A. Departure from Precedent

1. Rehearing Request

8. Petitioners contend that the Commission's denial of their waiver request is an unexplained departure from the Commission's precedent granting waivers to allow entities to exit from their natural gas businesses.¹⁹ Petitioners argue that the April 2019 Order does not discuss the fact that the Commission has already issued an order granting waiver of capacity release regulations and associated tariff provisions to facilitate transfer of several of RRI's assets, including jurisdictional transportation agreements, which were also part of the wind-down of RRI's natural gas business.²⁰ Petitioners argue that in *RRI-Kestrel*, the Commission granted waiver of its capacity release regulations and associated tariff provisions to allow RRI to transfer three Commission-jurisdictional firm interstate natural gas transportation agreements with Texas Eastern Transmission, LP, and thus it would be an error to deny the instant request for waiver which is merely a continuation of RRI's post-bankruptcy process.²¹

9. Petitioners argue that if it were to release its TSA in a long-term capacity release at RRI's contractual rate it would forfeit the current value of the contract and Morgan Stanley would receive an undeserved windfall.²²

10. Moreover, Petitioners argue that the Commission improperly relied upon *Louis Dreyfus* in the April 2019 Order, because *Louis Dreyfus* involved a temporary release of capacity, not a permanent release, as RRI seeks here.²³ Petitioners further claim that the Commission did not differentiate between Louis Dreyfus' attempt to use a waiver to extricate itself from a bad commercial decision and RRI's exit from the business due to its emergence from bankruptcy.²⁴ Petitioners state that the Commission stated in *Louis*

¹⁹ Rehearing Request at 4.

²⁰ *Id.* at 6.

²¹ *Id.* at 7 (citing *RRI Energy Services, LLC and Kestrel Acquisition, LLC*, 163 FERC ¶ 61,107 (2018) (*RRI-Kestrel*)).

²² *Id.* at 10.

²³ *Id.* at 5.

²⁴ *Id.*

Dreyfus that a different result would have been obtained if a shipper was attempting to exit the natural gas business in a rational and orderly fashion.²⁵

11. Petitioners further contend that in *GenOn Wholesale Generation*²⁶ the Commission recognized that a flexible application of the Commission's policies is needed when a large corporate family of energy companies experiences a bankruptcy in order to facilitate the best outcome for each of the interested parties.²⁷ Petitioners state that the Commission failed to recognize that good cause warrants granting the requested waivers in this case.²⁸

12. Petitioners also argue that the Commission failed to provide a reasoned explanation for its conclusion that the transfer only involves one asset, and thus is not part of a complex, integrated deal involving the transfer of other assets such as production properties, supply contracts, and business units of the type for which the Commission has granted waiver of the capacity release regulations.²⁹ Petitioners contend that this finding is incorrect because the transaction is part of the restructuring effort following the GenOn corporate family's emergence from bankruptcy.³⁰ Petitioners argue that in any event, the Commission did not explain how the number of assets involved and the consideration exchanged between buyer and seller in their transaction are materially different from other transactions that have been granted the same types of waivers.³¹ Petitioners contend that the Commission has previously granted waivers where the only asset being transferred is a single, jurisdictional transportation agreement.³²

²⁵ *Id.* (citing *Louis Dreyfus*, 114 FERC ¶ 61,246 at P 21).

²⁶ *GenOn Wholesale Generation, LP*, 167 FERC ¶ 61,113 (2019) (*GenOn*).

²⁷ Rehearing Request at 6.

²⁸ *Id.* at 6-7.

²⁹ *Id.* at 7.

³⁰ *Id.* at 8.

³¹ *Id.*

³² *Id.* at 4.

13. As a result of the denial of waiver, RRI contends that the only way to realize the market value of the TSA is to remain in business for the existing 7-year term of the TSA (potentially up to 22 years, if the extension of the TSA has value), and temporarily release the TSA for market value in transactions of one year or less. RRI claims the Commission should have explained why its rationale for denying the waiver outweighs RRI's need to exit its business.³³

2. Commission Determination

14. We find that the Commission's denial of RRI's request for waiver is consistent with Commission policy and precedent. The Commission has granted waiver of its capacity release policies for permanent release transactions in two general situations, neither of which is applicable here. First, the Commission has granted waiver where the relevant permanent capacity release transaction is part of a complex, integrated deal involving the transfer of other assets, such as production properties, supply contracts, and business units.³⁴ Second, the Commission has granted waiver where the relevant permanent capacity release involves a negotiated rate agreement that is either above or potentially above the applicable maximum recourse rate and waiver is necessary to render the pipeline financially indifferent to a permanent release of that negotiated rate agreement.³⁵ In the second situation, the Commission has only granted waiver to allow the replacement shipper to pay the same rate the releasing shipper was paying, not to allow the releasing shipper to make a profit on its release.³⁶

³³ *Id.* at 10.

³⁴ See, e.g., *Request for Clarification of Policy Regarding Waivers of Applicable Requirements to Facilitate Integrated Transfers of Marketing Businesses*, 127 FERC ¶ 61,106 (2009); *Macquarie*, 126 FERC ¶ 61,160; *Viruvian II*, 158 FERC ¶ 61,120; *CenterPoint*, 157 FERC ¶ 61,224; *Chesapeake*, 150 FERC ¶ 61,015; *Exelon*, 148 FERC ¶ 61,242; *Direct Energy Business, LLC*, 144 FERC ¶ 61,231; *Delta Energy, LLC*, 141 FERC ¶ 61,042; *Total Gas & Power N. Am., Inc.*, 131 FERC ¶ 61,023; *Calpine Energy Servs., L.P.*, 131 FERC ¶ 61,261; *EnergyMark, LLC*, 130 FERC ¶ 61,059.

³⁵ *Transco*, 133 FERC ¶ 61,242; *EdgeMarc*, 165 FERC ¶ 61,036.

³⁶ See, e.g., *Transco*, 133 FERC ¶ 61,242 at P 7; *Columbia Gas Transmission, LLC*, 154 FERC ¶ 61,162, at P 7 (2016) (*Columbia Gas*).

15. As the Commission explained in the April 2019 Order, RRI's transaction with Morgan Stanley does not fit the first situation described above. Petitioners themselves state that the TSA is the only asset being transferred from RRI to Morgan Stanley as part of the instant transaction.³⁷ Thus, the capacity release at issue is not part of a complex, integrated deal involving the transfer of other assets, such as production properties, supply contracts, and business units.

16. Petitioners assert that, in making this finding, the Commission failed to recognize that RRI's permanent capacity release transaction with Morgan Stanley is part of its process of exiting the natural gas business, and the Commission has already granted waivers both to it and its affiliate for other transactions that are part of their wind-down of their natural gas business.³⁸ However, those were separate transactions involving different parties from the RRI-Morgan Stanley transaction at issue here, and they are distinguishable from the RRI-Morgan Stanley transaction, because both those transactions involved not only the transfer of transportation service agreements, but also the transfer of other assets. In *RRI-Kestrel*, RRI and its affiliate sold a natural gas-fired generation facility to Kestrel Acquisition, LLC, together with a portfolio of natural gas purchase and transportation contracts used to supply that facility with natural gas. In *GenOn*, RRI's affiliate also transferred a natural gas-fired generation facility, along with two natural gas transportation contracts. The mere fact that a company is in the process of exiting the natural gas business does not justify exempting every transaction it may enter into as part of that process from the capacity release regulations, regardless of their characteristics.

17. Petitioners assert, however, that the Commission has granted waiver of the capacity release regulations for transactions that only involved the transfer of a single natural gas transportation agreement, without the transfer of any other assets, citing *EdgeMarc*.³⁹ We agree that the Commission has granted waiver for transactions involving the transfer of natural gas transportation agreements without the transfer of any other assets, but such waivers have only been granted in the second situation described above – where a negotiated rate agreement was either above or potentially above the applicable maximum recourse rate and waiver to allow the replacement shipper to pay the same rate as the releasing shipper was necessary to render a pipeline financially indifferent to a permanent release of that negotiated rate agreement.

³⁷ Petition at 11.

³⁸ Rehearing Request at 6-7 (citing *RRI-Kestrel*, 163 FERC ¶ 61,107; *GenOn*, 167 FERC ¶ 61,113).

³⁹ *EdgeMarc*, 165 FERC ¶ 61,036.

18. *EdgeMarc* involved just such a situation. There, the parties sought waiver of the capacity release regulations to permit a permanent release of a negotiated rate agreement. The Commission granted the waiver, stating, “[w]here, as here, ‘the releasing shipper is paying a negotiated rate [potentially] in excess of the maximum rate, waiver of the maximum rate is necessary to render the pipeline financially indifferent to the release.’”⁴⁰ In addition, the Commission expressly set forth its policy of only granting waiver in this situation to allow the replacement shipper to pay the same rate the releasing shipper was paying and no more. The Commission stated:

[T]here is no reason to post this release for third parties to submit higher bids because the Commission would not waive the applicable maximum rate to permit a release at a rate in excess of the negotiated rate the releasing shipper is currently paying. The Commission is only willing to waive the maximum rate as necessary to render the pipeline economically indifferent to the permanent release, and thereby avoid inhibiting the permanent release. Allowing the release to take place at an even higher negotiated rate than the releasing shipper is currently paying is unnecessary for that purpose.⁴¹

19. The circumstances that justified waiver of the capacity release regulations in *EdgeMarc* are not present in this case. The contract RRI seeks to release is not a negotiated rate contract with a rate in excess of the applicable maximum rate. To the contrary, RRI’s contract is at the applicable Alternate Period Two maximum rate. In this circumstance, waiver of the maximum rate to allow RRI to receive a lump sum payment in excess of the applicable maximum rate is not necessary to render Kern River economically indifferent to a permanent release. Rather, as Petitioners state, granting waiver of the maximum rate “would allow RRI to realize the market value of [the TSA] through the Proposed Transfer.”⁴² As the Commission stated in *EdgeMarc*, the Commission is not willing to waive its capacity release regulations simply for the purpose of allowing the releasing shipper to make additional profits on its release.⁴³

⁴⁰ *Id.* P 7 (quoting *North Baja Pipeline, LLC*, 128 FERC ¶ 61,082, at P 14 (2008)).

⁴¹ *Id.* P 8.

⁴² Petition at 10.

⁴³ See also *Transco*, 133 FERC ¶ 61,242 at P 7 and *Columbia Gas*, 154 FERC ¶ 61,162 at P 7.

20. In the April 2019 Order, the Commission also cited *Louis Dreyfus* for the proposition that the Commission is unwilling to waive its capacity release regulations for the purpose of allowing the releasing shipper to make additional profits on its release.⁴⁴ The Petitioners seek to distinguish that case on the ground that it involved a temporary release by a company that was not seeking to exit the natural gas business. Regardless of whether *Louis Dreyfus* is distinguishable on that ground, as Petitioners recognize, *EdgeMarc*, *Transco*, and *Columbia Gas* did involve companies making permanent releases as part of winding down their natural gas business, and those orders set forth the same policy. Thus, our policy of not waiving the capacity release regulations to permit a releasing shipper to make additional profits on a release applies whether or not the releasing shipper is making a temporary or permanent release or seeking to exit the natural gas business.

21. Petitioners contend that the Commission has not explained why it refuses to waive the capacity release regulations in order to allow a releasing shipper to make a profit when it permanently releases a single transportation agreement, but the Commission is not similarly concerned about the potential profits a releasing shipper may make in an integrated deal transferring a transportation service agreement together with other assets such as production properties or natural gas generating facilities. Petitioners state that, when a releasing shipper sells transportation service agreements to another party together with other assets, the other party pays a purchase price for those assets, just as Morgan Stanley is making a lump sum payment to RRI for its transportation service agreement. However, the Commission does not investigate whether any portion of the purchase price paid in an integrated deal may compensate the releasing shipper above the maximum rate in the transportation agreements.

22. The Commission has explained that it waives its capacity release requirements for integrated transactions because the capacity release mechanism is not suited for complex, integrated deals “that do not permit the disaggregation of assets.”⁴⁵ In an integrated deal, the purchase price paid by the party acquiring the assets is for the entire package of assets, including both non-jurisdictional assets and transportation service agreements, and there is no identifiable agreement among the parties as to what portion of that purchase price is being paid for the transportation service agreements versus the other assets. Therefore, it is not possible to determine what value the parties to the transaction have placed on the transportation agreements and how that value compares to the applicable maximum rate. In these circumstances, the Commission has held that, on a case-by-case basis, it would grant waivers exempting such integrated deals entirely from the capacity

⁴⁴ *Louis Dreyfus*, 114 FERC ¶ 61,246 at P 16,

⁴⁵ *Macquarie*, 126 FERC ¶ 61,160 at P 14.

release mechanism. As the Commission explained, “Order No. 636 adopted the capacity release program in order to permit shippers to ‘reallocate unneeded firm capacity’ to those who need it and promote efficient load management by the pipeline and its customers.” But the Commission “did not contemplate that the capacity release posting and bidding requirements would necessarily apply in the cases of the merger or sale of entire business units as part of a corporate restructuring”⁴⁶

23. By contrast, when a shipper permanently releases a single (or several) transportation service agreements, and no other assets are included in the transaction, that is precisely the type of transaction for which the capacity release program was intended. Such a permanent release “reallocate[s] unneeded firm capacity” to those who need it, as intended by Order No. 636.⁴⁷ Moreover, because the transaction only involves transportation agreements, it is possible to know exactly what value the parties have placed on those agreements. There is thus less reason to grant a blanket waiver of all elements of the capacity release mechanism for such transactions, as the Commission does for integrated deals. Rather, as in *EdgeMarc*, discussed above, in this situation the Commission has only granted limited waivers for the purpose of rendering the pipeline financially indifferent to the permanent release so as to enable the release to take place consistent with the purpose of allowing the reallocation of unneeded capacity. For this purpose, it is only necessary to waive the applicable maximum rate to the extent necessary to allow the pipeline to collect the same rate from the replacement shipper as it previously collected from the releasing shipper, not to allow the releasing shipper to make a profit from the transaction.

24. RRI contends it should be permitted to make a profit on its permanent release by requiring Morgan Stanley to make a lump sum payment to it, in addition to agreeing to pay Kern River the applicable maximum rate. RRI asserts that the lump sum payment represents the additional market value of the capacity during the future period after the

⁴⁶ *Id.* P 8 (citing *Promotion of a More Efficient Capacity Release Market*, Order No. 712, 123 FERC ¶ 61,286, *order on reh’g*, Order No. 712-A, 125 FERC ¶ 61,216, at P 119 & n.119 (2008), *order on reh’g*, Order No. 712-B, 127 FERC ¶ 61,051 (2009)).

⁴⁷ *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, FERC Stats. & Regs. ¶ 30,939, at 30,418 (cross referenced at 59 FERC ¶ 61,030), *order on reh’g*, Order No. 636-A, FERC Stats. & Regs. ¶ 30,950, (cross referenced at 60 FERC ¶ 61,102) *order on reh’g*, Order No. 636-B, 61 FERC ¶ 61,272 (1992), *order on reh’g*, 62 FERC ¶ 61,007 (1993), *aff’d in part and remanded in part sub nom. United Distribution Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996), *order on remand*, Order No. 636-C, 78 FERC ¶ 61,186 (1997).

permanent release above the applicable maximum rate. However, in Order No. 712, the Commission determined that it would continue to impose a maximum rate on releases for more than one year, such as RRI's release, despite removing the maximum rate for releases of one year or less.⁴⁸ The Commission explained that removing the price cap only for short-term transactions allows a more efficient market-driven allocation of capacity during a brief peak demand period, and provides more detailed price signals to the market on the value of peak capacity, while retaining valuable consumer protections provided by the price ceiling for longer term transactions. The Commission stated that there was no evidence that price ceilings on longer term transactions cause significant allocative inefficiencies or market failures.

25. Consistent with Order No. 712, the Commission found in the April 2019 Order that there is no policy reason to waive the maximum rate applicable to long-term capacity releases so as to allow RRI to obtain the future market value of its released capacity by requiring Morgan Stanley to make a lump sum payment in excess of the applicable Alternate Period Two maximum rate.⁴⁹ Such a waiver is not necessary to allow the permanent release to take place, thereby reallocating capacity no longer needed by RRI to Morgan Stanley consistent with the purpose of the capacity release program. Nor would such a waiver help avoid any other allocative inefficiency.

26. As stated in the April 2019 Order, the Commission will not waive its regulations simply to allow a party to gain from its release.⁵⁰ By denying the waiver request, the Commission is not depriving RRI of the ability to leave the natural gas market, as it contends, nor is it mandating that RRI remain in operation for several years. The parties are free to negotiate a capacity release that is consistent with the Commission's regulations and policies. They have not done so here.

B. Maximum Recourse Rate Comparison

1. Rehearing Request

27. Petitioners make an alternative argument that the maximum rate applicable to RRI's permanent release to Morgan Stanley is not the Alternate Period Two Rate paid by RRI, but is the higher Rate Schedule KRF Maximum Recourse Rate. Based on this

⁴⁸ Order No. 712, 123 FERC ¶ 61,286 at PP 78-80.

⁴⁹ April 2019 Order, 167 FERC ¶ 61,060 at P 11.

⁵⁰ *Id.*

contention, Petitioners assert that Morgan Stanley's lump sum payment does not violate the maximum rate applicable to the RRI's permanent long-term capacity release.

28. Petitioners claim that the Commission failed to adequately justify its determination that the permanent release of RRI's capacity to Morgan Stanley should be limited to the Alternate Period Two rate applicable to the RRI TSA as opposed to Kern River's higher Rate Schedule KRF Maximum Recourse Rate.⁵¹ Petitioners contend that permanently releasing capacity as detailed in the purchase agreement will not result in revenues to RRI in excess of those under the Rate Schedule KRF Maximum Recourse Rate because the present value of future payments of the difference between the Alternate Period Two Rate and the Maximum Recourse Rate would far exceed the purchase payment.⁵²

29. Petitioners further argue that the Commission compared the consideration exchanged between Morgan Stanley and RRI as part of the transaction against the rate paid by RRI, but the Commission should have instead compared it to the rate for new shippers on Kern River.⁵³ Petitioners argue that the Alternate Period Two Rate is only available to shippers who subscribed for Period One service, "not a third party walk-up replacement shipper."⁵⁴

30. Petitioners point out that the Commission has held that replacement shippers obtaining capacity through permanent releases after an expansion on an incrementally priced system are similarly situated to expansion shippers, not to pre-expansion releasing shippers. Therefore, Petitioners state, the Commission established a policy that the maximum rate applicable to such replacement shippers should be the incremental rate applicable to the expansion shippers, not the pre-expansion rate applicable to the releasing shipper. Petitioners claim that the Commission explained that it would be discriminatory and economically inefficient to price new construction capacity and the permanent release of existing capacity differently.⁵⁵ Petitioners argue that, accordingly, it is appropriate for RRI to permanently release at rates and/or revenues above the Period Two rate, up to the highest stated Maximum Recourse Rate allowed under Rate Schedule

⁵¹ Rehearing Request at 12.

⁵² *Id.* at 14.

⁵³ *Id.* at 12.

⁵⁴ *Id.* at 14.

⁵⁵ *Id.* at 13.

KRF-1.⁵⁶ Petitioners also state that Kern River has authorized it to state that Kern River agrees with this assertion.

2. Commission Determination

31. RRI's contentions concerning the Commission's policy as to what maximum rate should apply to permanent releases do not justify granting rehearing of our denial of its request for waiver. Kern River's tariff currently on file with the Commission provides that the maximum rate applicable to RRI's permanent release to Morgan Stanley is the same Alternative Period Two Maximum Rate applicable to RRI. Section 30.1(d) defines the shippers eligible to pay Period Two rates as "[a] shipper (or its successor, assignee, or permanent replacement shipper) that has paid the maximum applicable levelized rate for a full 10-year or 15-year Period One contract term" and met certain other conditions.⁵⁷ Thus, Kern River's existing tariff allows permanent replacement shippers to qualify for the same Period Two rates as their releasing shippers.

32. We need not consider in this order whether the Commission policies described by RRI would permit Kern River to modify its tariff to make permanent releases by shippers participating in Kern River's levelized rate structure subject to the Rate Schedule KRF Maximum Recourse Rate. Even if RRI's permanent release to Morgan Stanley was subject to the Rate Schedule KRF Maximum Recourse Rates, the transaction between RRI and Morgan Stanley would violate the Commission's capacity release regulations, and we would not grant waiver to allow that transaction to take place. Increasing the maximum rate applicable to a permanent release by RRI would allow Kern River to collect a higher rate from the permanent replacement shipper. However, the Commission's capacity release regulations would not permit RRI to receive any portion of that higher rate.

33. Although section 284.8(f) of the Commission's regulations requires the pipeline to credit the net proceeds from a capacity release to the releasing shipper's reservation charge, the Commission has held that capacity release credits apply only to temporary releases, and not to permanent releases.⁵⁸ When a releasing shipper permanently releases any portion of its capacity, the pipeline agrees to relieve the releasing shipper of any

⁵⁶ *Id.* at 13-14 (citing *PG&E Gas Transmission, Northwest Corp.*, 82 FERC ¶ 61,289, at 62,126 (1998), *aff'd*, *Washington Water Power Co. v. FERC*, 201 F.3d 497 (D.C. Cir. 2000)). Kern River Gas Transmission Company, FERC NGA Gas Tariff, Gas Tariff, [Sheet No. 5A, Statement of Rates, Firm Incremental Service, 21.0.0.](#)

⁵⁷ Kern River Tariff, GT&C section 30.1(d) (emphasis added).

⁵⁸ *Rockies Express Pipeline LLC*, 121 FERC ¶ 61,130, at P 30 (2007).

further liability under its contract, and “the replacement shipper then effectively has replaced the releasing shipper as the shipper under the contract.”⁵⁹ A permanent release thus severs the contractual relationship between the pipeline and the releasing shipper. Because there is no longer any contractual relationship between the pipeline and releasing shipper, there is no basis under which to require the pipeline to give any credits to the releasing shipper on amounts collected from the replacement shipper.

34. Accordingly, if Kern River’s tariff were to be modified to increase the maximum rate applicable to permanent releases to the Rate Schedule KRF Maximum Recourse Rate, Morgan Stanley could be required to pay Kern River up to that maximum rate for the released capacity, without the need for any waiver of the capacity release regulations. However, there would be no basis to grant waiver to allow some portion of those payments to be diverted to RRI through a lump sum payment of the net present value of those payments. Once RRI permanently releases the capacity, it no longer has any interest in, or liability for, the capacity.

35. The only purpose of granting RRI’s requested waiver would appear to be to allow RRI to financially gain through obtaining a lump sum in the transaction. But as we stated in the April 2019 Order, the Commission will not permit the use of its waiver policies simply for the releasing party to financially gain.⁶⁰

C. Alleged Benefit to Kern River

1. Rehearing Request

36. On rehearing, Petitioners argue the Commission erred by stating that granting the requested waiver would not provide Kern River any economic benefit.⁶¹ Petitioners argue that, although the rate paid to Kern River following the transaction would be the same, the creditworthiness of the shipper holding Kern River capacity is a material factor that must be reviewed in determining whether Kern River is financially indifferent to a transaction.⁶² Petitioners argue that the creditworthiness of the new shipper is important

⁵⁹ *Transwestern Pipeline Co.*, 61 FERC ¶ 61,332, at 62,253 (1992).

⁶⁰ April 2019 Order, 167 FERC ¶ 61,060 at P 11. *See also Duke Energy Marketing America, LLC*, 114 FERC ¶ 61,198, at P 29 (2006).

⁶¹ Rehearing Request at 17.

⁶² *Id.*

because, if the shipper defaults on obligations under the TSA, Kern River could remain in a revenue shortfall, which in turn it could pass along to other shippers, increasing the rates remaining shippers will pay.⁶³ Petitioners contend that the Commission has previously considered credit concerns relevant to waivers of capacity release regulations and tariff provisions, and should do so here.⁶⁴ Petitioners request that the Commission recognize the material credit-related benefits the proposed transaction would provide to Kern River and other shippers.⁶⁵

2. Commission Determination

37. We find that the Morgan Stanley's creditworthiness does not justify granting waiver of the Commission's capacity release regulations in order to permit Morgan Stanley to make a lump sum payment to RRI, thereby allowing RRI to profit from the fact the subject capacity has a market value in excess of the applicable maximum lawful rate. We recognize that having a creditworthy shipper who will not default on its payment obligations is a benefit to Kern River. Indeed, that is why the Commission allows a pipeline to consider creditworthiness when determining whether it is financially indifferent to a permanent release of capacity.⁶⁶ However, RRI has not shown why allowing it to profit from its permanent release, contrary to the Commission policies described above, is necessary to enable Kern River to have a creditworthy shipper for this capacity. There is nothing to indicate that RRI is not currently creditworthy or is unable to make timely payments to Kern River for this capacity. In any event, the fact that the subject capacity appears to have a market value in excess of the applicable maximum rate suggests that RRI should be able to arrange a permanent release to a creditworthy shipper in a transaction that satisfies the Commission's capacity release regulations and policies. For the same reason, even if a default should take place, there appears no reason why Kern River should have difficulty remarketing such valuable capacity.

⁶³ *Id.* at 17-18.

⁶⁴ *Id.* at 18.

⁶⁵ *Id.* at 12.

⁶⁶ *Texas Eastern Transmission Corp.*, 83 FERC ¶ 61,073, at 61,445-50 (1998).

The Commission orders:

The Commission hereby denies Petitioners' request for rehearing, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.