

169 FERC ¶ 61,148
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Cheniere Energy, Inc.

Docket No. RP18-851-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued November 22, 2019)

1. On May 25, 2018, Cheniere Energy, Inc. (Cheniere) submitted a Petition for Declaratory Order requesting that the Commission find that certain proposed transactions would not violate the Commission’s buy/sell prohibition or any related capacity release rule, regulation, or policy. Alternatively, Cheniere seeks a limited waiver of the Commission’s buy/sell prohibition and, if necessary, any related capacity release rule, regulation, or policy. As discussed below, the Commission cannot find that the proposals set forth by Cheniere do not violate the Commission’s prohibition against buy/sell arrangements. However, the Commission finds that good cause has been shown to grant a limited waiver of the buy/sell prohibition in the circumstances set forth by Cheniere.

Background

2. Cheniere states that it is a full-service liquefied natural gas (LNG) provider offering customers the option to load LNG onto their vessels at its Corpus Christi LNG terminal or its Sabine Pass LNG terminal. Cheniere states that it is responsible for acquiring the natural gas, managing the logistics to and from the liquefaction terminals, and processing the natural gas into LNG. Cheniere holds firm capacity on various interstate natural gas pipelines for the purpose of transporting natural gas from production areas to its LNG terminals. Cheniere asserts that its business model allows LNG customers to access United States (U.S.) LNG without the need to set up a U.S.-based natural gas business to contract and manage transportation capacity and natural gas purchases.

3. Cheniere states that it is currently evaluating the use of a commercial structure that includes two principal agreements pursuant to which Cheniere would purchase pipeline quality natural gas from a third party (Supplier) at a point located in the U.S. or Canada pursuant to a “Gas Contract” and sell LNG to either the Supplier or the Supplier’s affiliate on a free onboard (FOB) basis at either of Cheniere’s terminals pursuant to an “LNG Contract.” Cheniere refers to this arrangement as the Proposed Transaction. Cheniere states that once it purchases natural gas from the Supplier pursuant to the Gas Contract, it has a number of options for the transportation, re-sale and/or consumption of such natural gas because the natural gas it purchases under the Gas Contract as part of

any Proposed Transaction is not dedicated to a particular customer at the time it is purchased. Cheniere maintains that pursuant to its Proposed Transaction, the counterparties to the Gas Contract and the LNG Contract may be the same entity or affiliated entities, and the contracts may contain provisions that commercially link the two agreements (*e.g.*, pricing, cross-default and termination provisions). Cheniere maintains that the provisions of the contracts would not require it to utilize any interstate pipeline capacity to fulfill its obligations to purchase natural gas or to sell LNG. Cheniere states that, because of this feature, a Proposed Transaction would not constitute a commercial arrangement under which Cheniere is required to use its interstate pipeline capacity to provide a transportation service to the Supplier in contravention of the Commission's capacity release rules, regulations, and policies.

4. Cheniere states that some LNG export project developers employ a "tolling" model as an operational structure. Cheniere states that under this transactional model, the LNG export terminal developer provides a variety of processing, liquefaction, storage, and loading services for a fee, and the entities that utilize this service retain title to both the natural gas delivered to the LNG export terminal and to the LNG that is manufactured in the facility. Cheniere maintains that under this arrangement customers often hold pipeline capacity upstream of the LNG export terminal or purchase gas from third parties at or near the inlet of the LNG export terminal. After the gas is liquefied and loaded onto the vessels, these customers either transport the LNG to international destinations or sell the cargo to a buyer at the outlet of the LNG terminal.

5. Cheniere states that it does not use the tolling model but instead manages the full requirements of each of its LNG terminals. According to Cheniere, this requires it to (1) own and transport feedstock natural gas supply; (2) own and manage the use of intrastate and interstate pipeline and storage capacity to transport natural gas to the terminal for liquefaction; (3) manage all aspects of the LNG terminal and related facilities operations; (4) negotiate agreements to sell Cheniere's LNG that is manufactured at its facilities; and (5) schedule vessel loadings to facilitate such LNG offtake arrangements.

6. Cheniere states the reason its operations do not follow the steady state of a tolling model is that the quantity and timing of gas coming to its LNG export terminal and LNG leaving the terminal is in constant flux, and Cheniere must balance its natural gas and capacity portfolio to ensure the various components are available when necessary to manufacture LNG to deliver to offtake customers. Cheniere asserts that it uses multiple nomination cycles on multiple pipelines each gas day to manage hourly flows of natural gas to the LNG export terminal to ensure that sufficient natural gas supplies arrive when needed.

7. Cheniere states that its export model requires it to be responsible for managing natural gas supplies for the terminals to ensure that it can meet its contractual commitments to provide LNG to its offtake customers. Cheniere asserts that it must coordinate the delivery of natural gas supplies required for LNG production with

shipping schedules, and sell to third parties the natural gas that it does not use for LNG production. Cheniere also states that, under its model, if natural gas supplies do not arrive at the LNG export terminal, Cheniere must still fulfill its commitments to its LNG customers. As a result, Cheniere asserts its gas and capacity portfolio is constantly changing and evolving to keep up with market demand for LNG, as well as the constraints and maintenance of upstream natural gas pipelines. In contrast, Cheniere explains that under the tolling model, if a customer fails to deliver natural gas to the LNG export terminal, the customer typically does not have the right to take LNG.

8. Cheniere requests that the Commission confirm that future transactions with the characteristics of the Proposed Transaction, as described above, would not violate the Commission's prohibition on buy/sell arrangements, nor would it violate any related capacity release rule, regulation, or policy. In the alternative, Cheniere requests that the Commission grant a limited waiver of its buy/sell prohibition; its capacity release rules, regulations, and policies; and any other waivers to the extent necessary to permit Cheniere to enter into future agreements with counterparties that reflect the commercial structure of the Proposed Transaction. Cheniere states that good cause exists to grant a limited waiver because its Proposed Transactions would not harm the already robust capacity release market. In addition, Cheniere requests that the Commission confirm that a variation of the Proposed Transaction, where the Gas Contract and the LNG Contract would be wholly independent and would not include any contractual provisions that link the two agreements, would not violate the Commission's buy/sell prohibition.

Notice of Filing, Interventions and Comments

9. Public notice of Cheniere's filing was issued on May 31, 2018, with comments due on June 25, 2018. Pursuant to Rule 214,¹ all timely-filed motions to intervene and any unopposed motions to intervene out-of-time filed before the issuance date of the instant order are granted. Further, the Commission finds that granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties. Several entities filed comments in support of Cheniere's request.² Additionally numerous United States Congressional representatives from Louisiana and

¹ 18 C.F.R. § 385.214 (2019).

² Entities filing in support of Cheniere's request include the following: Chief Oil & Gas LLC; Sempra LNG & Midstream, LLC; BP Energy Co.; Range Resources-Appalachia, LLC; Natural Gas Pipeline Co. of America LLC and Tennessee Gas Pipeline Co., L.L.C.; Transcontinental Gas Pipe Line Co., LLC; Progress Energy Canada Ltd.; Center for Liquefied Natural Gas; EQT Energy, LLC; and TransCanada Corp.

Texas filed in support of Cheniere's petition.³ No protests or adverse comments were filed.

Discussion

10. As set forth by Cheniere, the Proposed Transaction on its face appears to constitute a prohibited buy/sell arrangement. As described in its petition, Cheniere would buy natural gas, transport it over firm interstate transportation capacity held by Cheniere to its terminal, and then resell the natural gas or LNG to an entity that may be the original owner of the gas. As a result, we are unable to grant Cheniere's request for a declaration that the Proposed Transaction would not constitute a prohibited buy/sell transaction. However, the Commission finds that there is value in fostering a robust marketplace for LNG and therefore, as discussed below, we grant Cheniere a limited waiver of the prohibition on buy/sell arrangements the extent necessary to enter into future Proposed Transactions. In light of this waiver, it is unnecessary to grant waiver of any capacity release regulations.

A. The Commission's Prohibition on Buy/Sell Arrangements

11. The Commission adopted its capacity release program as part of the restructuring of natural gas pipelines required by Order No. 636 to create a transparent program for the reallocation of interstate pipeline capacity to complement the unbundled, open access environment created by Order No. 636.⁴ The Commission also envisioned this program as increasing the availability of unbundled firm transportation capacity by permitting firm

³ Those include Senator Bill Cassidy, Senator John Kennedy, Congressman Clay Higgins, Congressman Brian Babin, Congressman Ralph Abraham, Congressman John Abney Culberson, Congressman Mac Thornberry, Congressman Randy K. Weber, Congressman Vincente Gonzalez, and Congressman Mike Johnson.

⁴ *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 (cross-referenced at 59 FERC ¶ 60,030), *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). ("After a pipeline's capacity release mechanism goes into effect, no new buy/sell deals may be executed after that date and thereafter all allocations of interstate pipeline capacity must be done under the capacity releasing mechanism.").

shippers to release their capacity to others when they were not using it.⁵ The Commission reasoned that the capacity release program would promote efficient load management by the pipeline and its customers and would, therefore, result in the efficient use of firm interstate pipeline capacity throughout the year. Further the Commission concluded that, “because more buyers will be able to reach more sellers through firm transportation capacity, capacity reallocation comports with the goal of improving nondiscriminatory, open access transportation to maximize the benefits of the decontrol of natural gas at the wellhead and in the field.”⁶

12. In Order No. 636 and a companion order in *El Paso Natural Gas Co.*,⁷ the Commission adopted several safeguards to ensure that the requirements of its capacity release program were not evaded. One critical safeguard was a prohibition against shippers engaging in buy/sell arrangements.⁸ In Order No. 636, the Commission described buy/sell arrangements as those where an “LDC [Local Distribution Company]

⁵ In brief, under the Commission’s current capacity release program, a firm shipper (releasing shipper) sells its capacity by returning its capacity to the pipeline for reassignment to the buyer (replacement shipper). The pipeline contracts with, and receives payment from, the replacement shipper and then issues a credit to the releasing shipper. The rate for releases of more than one year is capped at the pipeline’s maximum rate. 18 C.F.R. 284.8(e) (2018). The results of all releases are posted by the pipeline on its Internet web site. *Promotion of a More Efficient Capacity Release Market*, Order No. 712, 123 FERC ¶ 61,286, at n.4 (2008), *order on reh’g*, Order No. 712-A, 125 FERC ¶ 61,216 (2008), *order on reh’g*, Order No. 712-B, 127 FERC ¶ 61,051 (2009).

⁶ Order No. 636, FERC Stats. & Regs. ¶ 30,939 at 30,418.

⁷ 59 FERC ¶ 61,031, *reh’g denied*, 60 FERC ¶ 61,117 (1992) (*El Paso*).

⁸ In addition to the buy/sell prohibition, the Commission also sought to protect its capacity release program by requiring that shippers must have the title to the gas they ship on the pipeline. As the Commission subsequently explained in Order No. 637, “the capacity release rules were designed with [the shipper-must-have-title] policy as their foundation,” because, without this requirement, “capacity holders could simply transport gas over the pipeline for another entity.” *Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services*, Order No. 637, FERC Stats. & Regs. ¶ 31,091, at 31,300 (cross-referenced at 90 FERC ¶ 61,109), *clarified*, Order No. 637-A, FERC Stats. & Regs. ¶ 31,099, (cross-referenced at 91 FERC ¶ 61,169), *reh’g denied*, Order No. 637-B, 92 FERC ¶ 61,062 (2000), *aff’d in part and remanded in part sub nom. Interstate Natural Gas Ass’n of America v. FERC*, 285 F.3d 18 (D.C. Cir. 2002), *order on remand*, 101 FERC ¶ 61,127 (2002), *order on reh’g*, 106 FERC ¶ 61,088 (2004), *aff’d sub nom. American Gas Ass’n v. FERC*, 428 F.3d 255 (D.C. Cir. 2005).

will purchase gas in the production area from an end-user or a merchant designated by an end-user” and then “the LDC will ship the gas on its own firm capacity and sell the gas to the end-user at the retail delivery point.”⁹ In Order No. 636-B, the Commission clarified that the buy/sell prohibition applied to all firm capacity holders, including producers and marketers, as well as LDCs.¹⁰ The Commission also found that permitting buy/sell arrangements outside its capacity release program “would provide a major loophole potentially inviting substantial circumvention of the capacity release mechanism.”¹¹

13. This action by the Commission prohibited arrangements whereby a shipper holding interstate pipeline capacity would buy natural gas at the direction of, on behalf of, or directly from another entity (*e.g.*, an end-user), ship that natural gas through its interstate pipeline capacity, and then resell an equivalent quantity of natural gas to the downstream entity at the delivery point.¹² This prohibition prevents a capacity holder with priority to pipeline capacity from acting as a broker of transportation capacity or assigning transportation capacity to end-use customers. Such practices, if permitted, would be a barrier to open access transportation on interstate pipelines and would allow entities to access firm interstate pipeline capacity without having to compete with other shippers that might place greater value on the capacity.¹³

B. Cheniere’s Petition

14. Cheniere submits that the Commission’s prohibition on buy/sell transactions applies to:

a commercial *arrangement* where a shipper holding interstate pipeline capacity buys gas at the direction of, on behalf of, or directly from another entity (*e.g.*, an end-user), *ships that gas* through its interstate pipeline capacity, and then *resells an*

⁹ Order No. 636, FERC Stats. & Regs. ¶ 30,939 at 30,416.

¹⁰ Order 636-B, 61 FERC at 62,002. *See also, In re: BP Energy Co.*, 121 FERC ¶ 61,088, at P 14 (2007) (*BP Energy*).

¹¹ *El Paso*, 59 FERC at 61,080.

¹² *See Williams Energy Marketing & Trading Co.*, 92 FERC ¶ 61,219, at 61-715-16 (2000).

¹³ Order No. 636, FERC Stats. & Regs. ¶ 30,939 at 30,416 -17; *El Paso*, 59 FERC ¶ 61,031.

*equivalent quantity of gas to the downstream entity at the delivery point.*¹⁴

15. Cheniere asserts that under the Proposed Transaction, it would not purchase gas for the purpose of fulfilling a specific LNG customer contract. Rather, it states that it would maintain an aggregate natural gas consumption target for each of its LNG terminals, and purchase natural gas from multiple suppliers pursuant to numerous contracts. Therefore, Cheniere maintains that the natural gas it would purchase is not dedicated to a particular customer at the time it is purchased. Cheniere asserts that this lack of customer dedication for the purchased natural gas demonstrates that any future Proposed Transaction would not constitute a commercial “*arrangement*” under which Cheniere purchases natural gas, ships that natural gas through its interstate pipeline capacity, and resells an equivalent quantity of natural gas at the delivery point. Instead, Cheniere argues that the natural gas it purchases is an independent transaction that contributes to Cheniere’s overall natural gas supply portfolio.

16. Moreover, Cheniere argues that before liquefaction, the natural gas that reaches Cheniere’s LNG terminals is commingled, and certain components of the gas are stripped out for separate use. In addition, Cheniere asserts that all LNG is commingled in the LNG tanks before loading. Cheniere argues that this reflects that Cheniere would not ship “*that gas*” for resale as LNG to the supplier or the supplier’s affiliate.

17. Cheniere also argues that any Proposed Transaction would not involve an equivalent quantity of gas and LNG because if the gas it purchases is used to make LNG, it would first need to be processed and, therefore, some losses of the natural gas would occur. Moreover, Cheniere asserts that due to the delivery windows in a typical LNG contract, the purchase of natural gas and the sale of LNG under the LNG contract would not match up because the gas would be nominated for delivery ratably over a specified period of time, whereas LNG deliveries would be effected in bulk cargoes loaded over one to two days with the cargo delivery schedule established up to one year in advance. Therefore, Cheniere concludes that it would not be reselling “*an equivalent quantity*” of gas. Moreover, Cheniere argues that any delivery of the natural gas would not be at a “*delivery point*” on a section of interstate pipeline capacity, but rather any subsequent delivery and sale of LNG would be to a Natural Gas Act (NGA) section 3 LNG terminal facility, not to the interconnected NGA section 7 pipeline.

18. Cheniere states that these features of its Proposed Transaction render it different from previous Commission orders regarding its prohibition on buy/sell arrangements. Cheniere states that in *El Paso* the Commission considered a commercial arrangement where the purchase, transportation, and sales of gas were interrelated and dependent on the other components of the overall transaction. Cheniere asserts that in its Proposed

¹⁴ Petition at 11 (citing, *BP Energy*, 121 FERC ¶ 61,088 at PP 14-17 (Emphasis supplied by Cheniere)).

Transaction, the execution of a Gas Contract to purchase natural gas would not automatically result in a sale of LNG. Nor would the execution of a Gas Contract to purchase natural gas automatically result in the transportation of that natural gas to a Cheniere LNG terminal along a dedicated, releasable interstate capacity path. Cheniere maintains that under its Proposed Transaction each action – the purchase of the natural gas, the transportation of the natural gas, and the sale of LNG – can stand on its own and is not dependent on the existence and/or execution of other transactions.

C. Commission Determination

19. The Commission denies Cheniere’s request for a declaration that any future Proposed Transactions like the ones described in its Petition would not constitute prohibited buy/sell transactions. As described by Cheniere, its Proposed Transaction “includes two principal agreements pursuant to which Cheniere . . . would purchase pipeline quality gas (‘Gas’) from a third party (‘Supplier’) at a point located in the United States or Canada pursuant to a ‘Gas Contract,’ and sell liquefied natural gas (‘LNG’) to either the Supplier or the Supplier’s affiliates on an FOB basis at the [Corpus Christi or Sabine Pass LNG Terminals] pursuant to an ‘LNG Contract.’”¹⁵ Cheniere holds firm pipeline capacity connecting the points at which it would purchase the natural gas to its LNG terminals.

20. These facts satisfy all the prerequisites for a prohibited buy/sell transaction. Cheniere would enter into two contemporaneous contacts under one of which it would purchase natural gas from a Supplier at an upstream point and under the second of which it would sell LNG to the Supplier or its affiliate at a downstream LNG terminal. Because Cheniere holds firm pipeline capacity connecting the upstream purchase point and the downstream LNG terminal, the transaction could have been carried out by Cheniere releasing its firm pipeline capacity to the Supplier or its affiliate. Moreover, Cheniere’s sale of the LNG to the Supplier or its Affiliate is not some unusual or unexpected happenstance, which the parties did not plan as part of the original agreement under which Cheniere purchases natural gas from the Supplier. In fact, as described by Cheniere, the two purchase and sale agreements were entered into as part of the same “Proposed Transaction.”

21. The Commission recognizes that Cheniere makes various contentions seeking to distinguish its Proposed Transaction from other specific transactions which the Commission has previously found constituted prohibited buy/sell transactions, such as the transaction described in *BP Energy*. However, as described below, if the Commission accepted Cheniere’s contentions, it would so narrow the definition of prohibited buy/sell transactions as to render that prohibition ineffective at accomplishing its goal of avoiding evasion of the capacity release program. Any large marketer of natural gas with numerous sales customers and large packages of firm capacity on multiple interstate

¹⁵ Petition at 2.

pipelines could make similar arguments as to why its purchases and resales of natural gas to the same customer did not constitute buy/sell transactions, thus enabling evasion of the capacity release program.

22. Cheniere argues that under its proposed transaction there is no “*arrangement*” under which Cheniere purchases natural gas, ships that natural gas through a dedicated portion of its interstate pipeline capacity, and resells an equivalent quantity of natural gas at the delivery point. Cheniere argues that the natural gas it purchases is an independent transaction that contributes to Cheniere’s overall natural gas supply portfolio. Cheniere contends that the purchase and sale would not require the use of any specific interstate pipeline capacity and that the natural gas purchased under the Gas Contract that is part of any future Proposed Transaction would not be dedicated to a particular LNG sale customer at the time it is purchased.

23. We disagree with Cheniere’s characterization that there is no “*arrangement*” under the Proposed Transaction because the natural gas it purchases is not dedicated to a particular customer at the time it is purchased. Although Cheniere, similar to natural gas marketers, purchases natural gas from various suppliers as part of a large portfolio, under the Proposed Transaction it accumulates gas from entities and then uses its firm interstate pipeline capacity to ship the gas to the LNG terminal wherein it potentially resells the gas, as LNG, to the entities from which it originally acquired the gas. While Cheniere claims that the natural gas it purchases is not designated for a particular customer at the time it is purchased, Cheniere acknowledges that one of its “*options*” is that it would be delivered to the original supplier or the supplier’s affiliate.¹⁶ Indeed, the fact that Cheniere enters into a contract to sell LNG to the supplier or its affiliate contemporaneously with entering into a contract to purchase natural gas from the supplier demonstrates an intent to sell LNG to the supplier or its affiliate as part of the overall “*Proposed Transaction.*” Given this fact, the transaction would be a prohibited buy/sell whether or not the particular molecules of natural gas purchased from the supplier were intended to be included in the LNG sold that supplier.

24. Moreover, despite Cheniere’s contention that there is no dedicated transportation path for the Proposed Transaction, it appears clear that there would be a transportation path or paths on one or more interstate natural gas pipelines from the point where Cheniere purchased the natural gas from the supplier to the LNG terminal. As discussed above, one of the key objectives of preventing capacity brokering is to ensure that all market participants have fair access to the interstate pipeline grid. Exempting a transaction from the buy/sell prohibitions simply because a shipper has multiple transportation paths over which it could transport the seller’s natural gas, rather than a single dedicated path, would circumvent that objective because it would effectively permit marketers with multiple packages of pipeline capacity to give customers

¹⁶ Petition at 2.

preferential access to their firm interstate pipeline capacity, without having to compete with other shippers for that capacity.

25. Cheniere also argues that before liquefaction, the gas that reaches Cheniere's LNG terminals is commingled, and certain components of the gas are stripped out for separate use and that all LNG is commingled in the LNG tanks before loading. Therefore, Cheniere argues that this reflects that Cheniere would not ship the same gas it accumulated back to the original owner; in essence it maintains that the gas that is returned to the original owner is not the same gas. Moreover, Cheniere argues that any Proposed Transaction would not involve an *equivalent quantity* of gas and LNG because if the gas it purchases is used to make LNG it would first need to be processed and, therefore, some losses of the gas would occur.

26. The Commission's definition of a prohibited buy/sell as set forth in Order No. 636 does not require that the natural gas delivered to the original owner be the "same" gas. In fact, it is well established that entities cannot track natural gas molecules, and thus, the natural gas that a shipper puts into the pipeline at a receipt point and the natural gas that a pipeline delivers to that shipper at the delivery point, is not the same gas. Indeed, the Commission has found previously that it is impossible for interstate pipelines to return the same gas to the original owners after transportation:

The pressure of the "line pack", which keeps the pipeline filled, is maintained by both the pressure of the gas feeding into the system and by compression along the system's route. *Thus, any gas leaving the system is not identifiable with any gas entering the system. There is no tracing of molecules from buyer to seller.* The transportation service becomes one of preserving line pack and pressure in the system so that withdrawals of gas by customers can be maintained. Displacement of gas in the system is what effectuates transportation, not the actual movement of specific molecules of gas from receipt point to delivery point.¹⁷

27. Moreover, the Commission's definition of a prohibited buy/sell does not contemplate that it must entail an "equivalent quantity" of natural gas. For example, if an entity purchased 100 dekatherms (Dth) of natural gas from an end-user, used its capacity to transport and deliver 25 Dth of that gas to an entity that was not the purchasing entity, and transported the remaining 75 Dth on its capacity to the original seller, that transaction would still constitute a prohibited buy/sell arrangement. Additionally, the Commission cannot find that a buy/sell arrangement was not in place because an *equivalent quantity* of gas was not returned to the original entity because of gas losses due to processing and/or

¹⁷ *National Fuel Gas Distribution Corp.*, 93 FERC ¶ 61,276, at 61,899 (2000) (emphasis added).

fuel use for transportation. These are common usages of natural gas in any natural gas pipeline transportation scenario, and thus not unique to Cheniere's Proposed Transaction.

28. Lastly, Cheniere argues that under its Proposed Transaction any delivery of the gas would not be at a "*delivery point*" on a section of interstate pipeline capacity, but rather any subsequent delivery and sale of LNG would be within the NGA section 3 LNG terminal facility. The Commission's concern here relates to the fact that Cheniere owns firm transportation between its receipt of gas and its re-delivery of the gas or LNG to the owner whether the gas is returned at an interstate delivery point or a point within the NGA section 3 terminal. Although Cheniere points out that the gas would not be returned at an interstate delivery point, the Commission cannot find that because the gas was delivered to an NGA section 3 facility that such action would relieve Cheniere of the prohibition against a buy/sell arrangement. The Commission's concern with buy/sell arrangements is that such arrangements may threaten the Commission's capacity release program and the Commission's fostering of an open access environment for the transportation of natural gas. This concern is not alleviated because the shipper's resale of the natural gas to the original supplier takes place at a downstream point beyond the shipper's interstate natural gas pipeline capacity, including an NGA section 3 facility. The natural gas would be transported on open access firm transportation held by the shipper from its receipt point to the point it was redelivered to the facility where the resale to the original supplier took place. This firm transportation, regardless of its final destination, is the very feature that the Commission desired to protect with the subject prohibition.

29. Cheniere also argues that its Proposed Transaction would differ from the buy/sell arrangements examined by the Commission in *BP Energy* and *El Paso*. While the *BP Energy* order cited by Cheniere does discuss the Commission's prohibition on buy/sell arrangements, the definition of such arrangements relied on by Cheniere from that order only describes the prohibition in a shorthanded and concise manner. As discussed more fully above, it does not entail a comprehensive definition that encompasses all situations that may constitute a prohibited buy/sell arrangement as established in Order No. 636 and *El Paso*. Although the transactions may not be similar in all forms, the Commission remains concerned that restricting the definition of prohibited buy/sell transactions in a manner that would exclude the Proposed Transaction would threaten the Commission's capacity release and open access policies. This is because it would likely enable any large marketer of natural gas with a significant amount of firm pipeline capacity to engage in buy/sell transactions that would allow their customers to receive the benefits of that capacity without having to compete with other entities in the capacity release market to obtain the marketer's firm capacity for themselves.

30. Accordingly, for the reasons discussed above, we find that the Proposed Transaction, as described by Cheniere in its petition, would constitute a buy/sell arrangement that would violate the Commission's prohibition on such transactions.

D. Request for Waiver

31. Cheniere requests that, should the Commission find that Cheniere's Proposed Transaction would violate the Commission's capacity release rules and prohibition against buy/sell arrangements, as we have here, in the alternative the Commission grant it limited waiver of the Commission's capacity release rules, regulations, and policies, and prohibition against buy/sell arrangements for any future Proposed Transaction. In support of its request, Cheniere asserts that its Proposed Transactions would foster the development of existing gas supply opportunities to meet growing demand for natural gas and LNG, and would help move natural gas that is at risk of being stranded to meet global LNG demand.

32. The Commission finds that there is value in fostering a robust marketplace for LNG and therefore, as discussed below, we grant Cheniere a limited waiver of the prohibition on buy/sell arrangements to the extent necessary to enter into future Proposed Transactions, i.e., transactions in which Cheniere enters into (1) an agreement to purchase natural gas from a supplier and (2) an agreement to sell LNG to that supplier or its affiliate at the Corpus Christi or Sabine Pass LNG Terminals.

33. Cheniere asserts that many of the suppliers seeking to enter into its Proposed Transactions have no interest in holding U.S. interstate pipeline capacity, and therefore under its proposal, Cheniere would not be withholding pipeline capacity from other parties that wish to obtain it. Cheniere also maintains that market participants would not be harmed by a future Proposed Transaction because instead of withholding capacity from another party that values the capacity, Cheniere's Proposed Transaction would further the movement of gas production to markets with greater demand without the need for additional LNG terminal development. Cheniere also claims that its proposal would promote the development of natural gas supplies, which would increase U.S. economic welfare, deepen and diversify the market for U.S. produced natural gas, and stimulate local, regional, and national economics.

34. Cheniere states that under its proposal it must manage the full requirements of its LNG terminals, including the coordination of its gas supply portfolio, the use of its interstate pipeline capacity, its liquefaction facilities, and sales of LNG produced at its LNG terminals. Cheniere asserts that its portfolio is constantly evolving and changing to keep up with market demands, and that it remains essential for Cheniere to be able to ensure that the components can be made available when necessary. Cheniere argues that it needs to be able to manage the relatively choppy timing of LNG demand and the ratable flow of natural gas. Therefore, Cheniere asserts that it is necessary for it to manage its own natural gas supplies and transportation capacity.

35. Cheniere states that the Commission has granted broad waivers of the application of its buy/sell prohibition in other similar situations such as asset management

arrangements (AMA),¹⁸ which reflects that the Commission will order a general waiver of the prohibition on buy/sell transactions rather than requiring parties to request a case-by-case waiver when the facts and circumstances warrant it.

36. We agree with Cheniere that future Proposed Transactions may help foster an efficient, transparent international market for natural gas based upon diverse national sources of supply. The Commission has previously granted waivers of its related policy prohibiting tying capacity releases to extraneous conditions for the purpose of allowing interstate pipeline and LNG terminal capacity to be transferred to importers or exporters of LNG for terms of up to 20 years.¹⁹ The Commission has found such waivers to be in the public interest because the import and export of LNG brings greater flexibility to the natural gas markets in the United States.

37. Although those prior waivers were for specific transactions, the Commission finds it reasonable to extend the instant waiver to any transaction in which Cheniere enters into (1) an agreement to purchase natural gas from a supplier and (2) an agreement to sell LNG to that supplier or its affiliate at the Corpus Christi or Sabine Pass LNG Terminals. This limits the waiver to transactions which enable Cheniere's interstate pipeline capacity to be used for the same purpose for which Cheniere originally purchased that capacity: to transport natural gas to its LNG terminal for export to an international customer.

38. As Cheniere points out, the Commission in Order No. 712 sought to facilitate the development of AMAs so that it might enhance the capacity release program by aligning it with the realities of the secondary gas marketplace.²⁰ To achieve that end, the Commission found that it would exempt all transactions that qualified as AMAs from its buy/sell prohibition.²¹ The Commission found that its exemption would not undercut the Commission's goal of preventing circumvention of the capacity release program because

¹⁸ Petition at 26 (citing Order No. 712, 123 FERC ¶ 61,286 at PP 27, 144-153 (exempting delivery AMAs from the buy/sell prohibition); *Rice Energy Marketing LLC*, 153 FERC ¶ 61,048, at P 30 (2015) (exempting supply AMAs from the buy/sell prohibition)).

¹⁹ See, e.g., *Statoil Natural Gas LLC*, 128 FERC ¶ 61,240 (2009); *Statoil Natural Gas LLC*, 130 FERC ¶ 61,110 (2010); and *ExxonMobil LNG Supply LLC*, 151 FERC ¶ 61,002 (2015).

²⁰ Order No. 712, 123 FERC ¶ 61,286 at P 26.

²¹ The Commission also granted a blanket waiver of its buy/sell prohibition applicable to all interstate service provided by intrastate pipelines pursuant to section 311 of the Natural Gas Policy Act of 1978. *Capacity Transfers on Intrastate Pipelines*, 133 FERC ¶ 61,065, at P 19 (2010).

the capacity releases to an asset manager differ from other releases, because the releasing shipper is not releasing unneeded capacity, but capacity that will continue to be used to serve its own supply function during the term of the release.²²

39. As set forth before the Commission in the instant request, Cheniere originally obtained firm transportation to bring gas to its LNG Terminal. Under its Proposed Transactions the same capacity will be used to accomplish that same function. As described by Cheniere, the Proposed Transactions for which we are waiving the buy/sell prohibition will be used solely to purchase natural gas from a supplier and sell LNG to that supplier or its affiliate at Cheniere's LNG terminals. Therefore, throughout the Proposed Transaction, Cheniere will continue to be the beneficiary of its interstate capacity because the capacity will be used to meet Cheniere's own requirements.

40. The Commission, consistent with its determination in regard to its enhancement of the capacity release market, also determines that the interstate open access grid and its capacity release regulations will not be undercut by the buy/sell arrangement inherent in the Proposed Transaction and that Cheniere's proposal may foster a robust LNG market. According to Cheniere, its Proposed Transactions will foster the development of existing gas supply opportunities to help meet growing domestic and global demand for both natural gas and LNG. Cheniere states that the Proposed Transactions will also enhance Cheniere's acquisition and transportation of natural gas for the purpose of guaranteeing a consistent and timely source of feedstock for its LNG processes. Given these objectives, the Commission finds that the transactions are sufficiently tailored so that the Commission may grant the requested waiver without undue concern that doing so would risk potential harm to the national pipeline grid and its capacity release program. Accordingly, the Commission grants Cheniere limited waiver of the prohibition against buy/sell transactions to the extent necessary for Cheniere to enter into future Proposed Transactions.

41. In order to monitor the impact of the waiver granted by this order, the Commission requires Cheniere to submit the following reports to the Commission. On or before March 1 of 2021, 2022, and 2023, Cheniere must report to the Commission the total annual volume of natural gas that it purchased during the preceding calendar year from sellers who also buy LNG from Cheniere.

The Commission orders:

(A) Cheniere's request for a Declaratory Order finding that future Proposed Transactions as set forth in its petition will not violate the Commission's prohibition on buy/sell arrangements is denied.

²² *Id.* P 167.

(B) Cheniere's request for a waiver of the Commission's prohibition on buy/sell arrangements is granted to the extent necessary for Cheniere to enter into future Proposed Transactions as described in Cheniere's petition.

(C) On or before March 1 of 2021, 2022, and 2023, Cheniere must report to the Commission the total annual volume of natural gas that it purchased during the preceding calendar year from sellers who also buy LNG from Cheniere.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.