

153 FERC ¶ 61,049
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Philip D. Moeller, Cheryl A. LaFleur,
Tony Clark, and Colette D. Honorable.

Coordination of the Scheduling Processes of Interstate Natural Gas Pipelines and Public Utilities Docket No. RM14-2-002

ORDER ESTABLISHING DEFAULT INTERPRETATIONS FOR CAPACITY
RELEASE CONTRACTS

(Issued October 15, 2015)

1. Order No. 809 revised the Commission's regulations relating to the scheduling of transportation service on interstate natural gas pipelines to better coordinate the scheduling practices of the wholesale natural gas and electric industries, as well as to provide additional scheduling flexibility to all shippers on interstate natural gas pipelines.¹ Among other things, Order No. 809 incorporated by reference into the Commission's regulations certain modified standards developed by the North American Energy Standards Board (NAESB) that revised the standard nomination timeline for interstate natural gas pipelines, including expanding the number of intraday nomination cycles from the current two to three. Order No. 809 established an implementation date of April 1, 2016.

2. On May 28, 2015, the American Gas Association, the American Public Gas Association, and the Interstate Natural Gas Association of America (collectively, Associations) filed a request for clarification relating to the timing of implementation as well as interpretations of recall rights under certain existing capacity release contracts in light of the transition from two to three intraday nomination cycles. In particular, the Associations proposed default interpretations of recall rights to be applied to capacity release contracts that span the transition period between the existing and revised standards.

¹ *Coordination of the Scheduling Processes of Interstate Natural Gas Pipelines and Public Utilities*, Order No. 809, 80 Fed. Reg. 23197 (Apr. 24, 2015), FERC Stats. & Regs. ¶ 31,368 (cross-referenced at 151 FERC ¶ 61,049 (2015)).

3. On July 31, 2015, the Commission issued an order granting clarification with respect to the timing of implementation and requesting comments on the Associations' proposal regarding transitioning capacity release contracts.² The Natural Gas Supply Association (NGSA) and the Associations filed comments.

4. As discussed below, the Commission provides default interpretations to apply to capacity release transactions that span the transition.

I. Background

5. On April 16, 2015, the Commission issued Order No. 809, which revised the Commission's regulations relating to the scheduling of transportation service on interstate natural gas pipelines to better coordinate the scheduling practices of the wholesale natural gas and electric industries, as well as to provide additional scheduling flexibility to all shippers on interstate natural gas pipelines. Among other things, the Commission revised its regulations to incorporate by reference the modified NAESB Wholesale Gas Quadrant (WGQ) Business Practice Standards, which revised the standard nomination timeline for interstate natural gas pipelines.

6. Under the prior set of standards, shippers had two opportunities to submit intraday nominations (nominations during the current natural gas day). The revised standards adopted in Order No. 809 provided an additional intraday nomination opportunity. The current and revised nomination timelines are as follows:

| All times Central Clock Time (CCT) | | Current NAESB Standards | Revised NAESB Standards |
|------------------------------------|---------------------|-------------------------|-------------------------|
| Timely | Nomination Deadline | 11:30 AM | 1:00 PM |
| | Start of Gas Flow | 9:00 AM | 9:00 AM |
| Evening | Nomination Deadline | 6:00 PM | 6:00 PM |
| | Start of Gas Flow | 9:00 AM | 9:00 AM |
| Intraday 1 | Nomination Deadline | 10:00 AM | 10:00 AM |
| | Start of Gas Flow | 5:00 PM | 2:00 PM |
| | IT Bump Rights | Bumpable | Bumpable |
| Intraday 2 | Nomination Deadline | 5:00 PM | 2:30 PM |
| | Start of Gas Flow | 9:00 PM | 6:00 PM |
| | IT Bump Rights | no bump | Bumpable |
| Intraday 3 | Nomination Deadline | | 7:00 PM |

² *Coordination of the Scheduling Processes of Interstate Natural Gas Pipelines and Public Utilities*, 152 FERC ¶ 61,095 (2015) (Order on Clarification).

| All times Central Clock Time (CCT) | | Current NAESB Standards | Revised NAESB Standards |
|------------------------------------|-------------------|-------------------------|-------------------------|
| | Start of Gas Flow | | 10:00 PM |
| | IT Bump Rights | | no bump |

The Commission required interstate natural gas pipelines to implement the revised NAESB standards beginning on April 1, 2016.

7. Under Commission regulations,³ shippers (releasing shipper) can release their capacity to other shippers (replacement shippers) needing that capacity. The releasing shippers may include special terms and conditions as part of their release.⁴ A very common release condition is for the releasing shipper to reserve the right to recall its capacity at one or more of the nomination cycles.

8. As relevant here, on May 28, 2015, as supplemented on June 26, 2015, the Associations filed a request to clarify the recall rights under existing capacity release contracts in light of the transition from two to three intraday nomination cycles. The Associations' concern was that recall conditions might be unclear for capacity release transactions with the right to recall capacity that spans a period before and after April 1, 2016. The Associations proposed that the Commission establish default interpretations covering such transactions unless the parties to a transaction agreed to alternative recall rights. In the absence of mutual agreement to the contrary, the Associations proposed the following default rights:

- If the transaction specifies that recalls are permitted at the Intraday 1 Nomination Cycle and the Intraday 2 Nomination Cycle, then for periods that include April 1, 2016, and thereafter, recalls will be permitted at the Intraday 1 Nomination Cycle, Intraday 2 Nomination Cycle and Intraday 3 Nomination Cycle.
- If the transaction specifies that recalls are permitted only at the Intraday 1 Nomination Cycle, then for periods that include April 1, 2016, and thereafter, recalls only will be permitted at the Intraday 1 Nomination Cycle.

³ 18 C.F.R. § 284.8 (2015).

⁴ Under the Commission's regulations, the pipeline contracts with, and receives payment from, the replacement shipper and then issues a credit to the releasing shipper. The results of all releases are posted by the pipeline on its Internet web site and made available through standardized, downloadable files.

- If the transaction specifies that recalls are permitted only at the Intraday 2 Nomination Cycle, then for periods that include April 1, 2016, and thereafter, recalls will be permitted at the Intraday 2 Nomination Cycle and Intraday 3 Nomination Cycle.

9. The Associations proposed that shippers releasing capacity for periods that straddle April 1, 2016 notify the pipeline by way of a letter in advance of that date if they do not want the proposed default rights to apply to the transaction and indicate the mutual agreement of the releasing and replacement shippers. In the absence of such a letter, they proposed that recall rights should transition according to the default rights. The Associations also proposed that the releasing shipper should have the ability to recall capacity under a transaction's existing provisions if it wished to terminate the transaction, even if the releasing shipper and the replacement shipper were unable to reach agreement on a non-default recall transition.

10. In the Order on Clarification, the Commission stated that it saw value in establishing a default interpretation of capacity release contractual recall provisions to assist parties in effectuating the transition between the two intraday and three intraday nomination schedules.⁵ The Commission, however, found that the request went beyond merely clarifying the implementation date adopted in Order No. 809 and should be subject to notice and comment. The Commission stated that commenters should address the following issues:

1. The merits of establishing a default approach or propose an alternative approach;
2. Whether the default should apply to all agreements into which the parties have entered before April 1, 2016 (as proposed by the Associations), or should only apply to releases entered into by an earlier date, such as the date of issuance of Order No. 809;
3. Whether the default that should apply when the transaction specifies that recalls are permitted only at the Intraday 2 Nomination Cycle should be that recalls are permitted at both Intraday 2 and 3 (as proposed by the Associations) or only at Intraday 3; and
4. The proposal that "the releasing shipper should have the ability to recall capacity under a transaction's existing provisions if it wishes to terminate the transaction, even if the releasing shipper and the replacement shipper

⁵ Order on Clarification, 152 FERC ¶ 61,095 at PP 13-14.

are unable to reach agreement on a non-default recall transition,”⁶ including how this provision would operate and why the general default interpretations should not apply to a contract in dispute if the parties are unable to reach agreement (and have not sought Commission resolution of the dispute).

11. Initial and Reply Comments were due 20 and 30 days, respectively, from the date of the Order on Clarification.

II. Comments

12. NGSA argues that when the new gas nomination timeline is implemented, a default interpretation will not be necessary to effectuate the transition, as the parties are much better served by resolving contract issues that may arise between themselves without involving the Commission. NGSA does not believe there are any special circumstances here that warrant Commission involvement in the renegotiation of recall provisions between two commercial parties, given that renegotiation of contract terms is not an uncommon occurrence in the industry.

13. NGSA states that, because the circumstances surrounding each capacity release transaction with recall rights vary, it would be inappropriate for the Commission to arbitrarily establish a default determination. NGSA states that the Commission recently supported this position in *Cost Recovery Mechanisms for Modernization of Natural Gas Facilities*, 152 FERC ¶ 61,046, at P 20 (2015) when it stated “the issue of cost responsibility for modernization costs during the term of a capacity release is a contractual issue between the relevant parties, and that issue cannot be resolved on a generic basis.” Consistent with that determination, NGSA states that the Commission should leave the transition of the few impacted contracts as a business decision between the parties.

14. The Associations maintain that their proposal is reasonable. They continue to believe that specifying default outcomes in the absence of the parties’ agreement would assist the parties to these transactions in defining the capacity release recall rights that will be available on April 1, 2016, and thereafter, and smooth the transition to the new scheduling timeline. They believe that their proposal appropriately balances the intent of parties that agree with the default recall rights with parties that disagree with the default recall rights.

⁶ Associations’ Supplemental Filing at 3.

15. The Associations state that the Commission should establish a default interpretation that applies to all capacity releases that span April 1, 2016, as opposed to only releases entered into prior to the issuance of Order No. 809. The Associations state that while it is known that the Intraday 3 Nomination Cycle will be added as of April 1, 2016, the pipelines will not provide until April 1, 2016 an electronic mechanism permitting shippers to specifically designate the recall rights applicable to releases under the three intraday nominations. They state that pipelines likely will not have their computer systems set up to implement Order No. 809 until the April 1, 2016 implementation date.

16. The Associations state that for all capacity releases that span April 1, 2016, it is reasonable to expect shippers to advise their pipeline(s) by letter, indicating mutual agreement, if they do not want the default to apply. They state that this is reasonable since a releasing shipper with recall rights that has not reached an agreement with its replacement shipper could resolve the matter itself by recalling the capacity prior to April 1, 2016.

17. The Associations state that, if the Commission decides not to establish default capacity release recall rights, it will create unnecessary administrative burdens and inefficiencies. They state that, without the default, many releasing shippers likely will decide to recall and re-release potentially thousands of capacity releases on the April 1, 2016 implementation date in order to establish Intraday 3 recall rights in a new release. They state that these additional capacity releases would result in an enormous burden for the pipeline administrator and shippers at this busy time, a burden that largely would be eliminated by the proposed default interpretation.

III. Commission Determination

18. The Commission permits releasing shippers to specify whether releases are recallable and select which nomination cycles are subject to recall rights. Prior to Order No. 809, a releasing shipper could agree to recall capacity at the Intraday 1 Nomination Cycle at 10:00 a.m. CCT or the Intraday 2 Nomination Cycle at 5:00 p.m. CCT, or both. Following Order No. 809, and beginning April 1, 2016, a releasing shipper will have three intraday opportunities to recall capacity instead of two: (1) the Intraday 1 Nomination Cycle at 10:00 a.m. CCT; (2) the Intraday 2 Nomination Cycle at 2:30 p.m. CCT; and (3) the Intraday 3 Nomination Cycle at 7:00 p.m. CCT. Given the changes in the intraday cycles, and in the absence of the parties' agreement otherwise, it will be unclear what intraday recall rights a releasing shipper has on April 1, 2016 if the capacity release transaction spans a period before and after April 1, 2016.

19. Based upon our review of the record, we see value in interpreting in advance the contractual recall provisions in capacity release transactions that span a period before and after April 1, 2016. Interpreting in advance such provisions will assist parties in effectuating the transition from two to three intraday cycles and reduce the burden of

negotiation on those parties satisfied with those interpretations. We agree with NGSAs that the parties to a capacity release transaction could agree to resolve any issues regarding ambiguous recall rights between themselves. However, the default interpretation provides all parties with a reasonable method of proceeding, without the need for further action on their part. If the parties disagree with the default interpretation, the Commission will interpret the intent of the parties pursuant to the procedures established below. However, providing a reasonable default interpretation should reduce the number of written requests to the pipelines as well as the number of potential complaints filed with the Commission pursuant to those procedures.

20. Accordingly, absent the parties' agreement otherwise, we find that the most reasonable interpretation of the parties' intent with respect to intraday recall rights on April 1, 2016 and thereafter is as follows:⁷

- If the transaction spans a period before and after April 1, 2016 and specifies that recalls are permitted at both the Intraday 1 and Intraday 2 Nomination Cycles, then for April 1, 2016 and thereafter recalls will be permitted at the Intraday 1, Intraday 2, and Intraday 3 Nomination Cycles. If the parties agreed to allow recall rights at both of the then-existing intraday cycles, we think it is the most reasonable interpretation to allow recall at all of the intraday cycles available on April 1, 2016.
- If the transaction spans a period before and after April 1, 2016 and specifies that recalls are permitted only at the Intraday 1 Nomination Cycle, then for April 1, 2016 and thereafter recalls only will be permitted at the Intraday 1 Nomination Cycle. Because the deadline for making an Intraday 1 nomination did not change as a result of Order No. 809, we find this is the most reasonable interpretation of the parties' intent.
- If the transaction spans a period before and after April 1, 2016 and specifies that recalls are permitted only at the Intraday 2 Cycle, then for April 1, 2016 and thereafter recalls will be permitted only at the Intraday 3 Nomination Cycle. We find that the most reasonable interpretation of the parties' intent in this situation is that the parties intended to permit recalls only at the last intraday nomination cycle, and the Intraday 3 Nomination Cycle is closest in time to the 9:00 p.m. CCT gas flow time under the existing Intraday 2 Nomination Cycle. While this interpretation is at variance with that proposed by the Associations, we find that, as a default, the most reasonable interpretation of an Intraday 2 only nomination is

⁷ See, e.g., *Consol. Gas Transmission Corp. v. FERC*, 771 F.2d 1536, 1544 (D.C. Cir. 1985) (stating that a contract "is ambiguous when it is 'reasonably susceptible to different constructions or interpretations'") (citations omitted).

that the parties intended the replacement shipper to lock-in its pro rata quantity of gas flow before the last intraday nomination opportunity.⁸

21. In the Order on Clarification, we pointed out that as of the April 16, 2015 issuance of Order No. 809, parties should have been on notice that the nomination schedule would change as of April 1, 2016. The Associations replied stating that prior to April 1, 2016, pipelines will not have a simple electronic election mechanism to specify recall rights for the new intraday schedules. Nonetheless, even prior to April 1, 2016, shippers could have specified special recall provisions for the period on and after April 1, 2016 in the special terms and conditions section of the transaction agreement. To the extent that parties have made such provisions, we expect the pipelines to honor them. However, when the parties have been silent, we find that establishing a default interpretation is reasonable. Releasing and replacement shippers, of course, can always notify the pipelines if they do not want to avail themselves of the defaults. If the parties agree to alternative recall rights, those rights will apply in place of the default interpretation.

22. The Associations request that, if the parties cannot reach agreement, the releasing shipper should have the right to recall capacity under a transaction's existing provisions if it wishes to terminate the transaction. While the releasing shipper would have the right to exercise all recall conditions in the release agreement, we will not provide the releasing shipper exercising those recall rights with the additional right to terminate the release transaction prior to its expiration date (unless that is specified in the agreement).

23. We trust that the parties to capacity release transactions will be able to resolve any issues between themselves. However, in order to establish a reasonable approach for processing any possible complaints, we expect that if parties to a capacity release transaction are unable to agree on alternative recall rights, the releasing shipper must

⁸ Under the standards prior to April 1, 2016, a capacity release transaction with an Intraday 2 only recall condition would allow the replacement shipper to reserve natural gas flow from the beginning of the gas day at 9:00 a.m. CCT to 9:00 p.m. CCT, the start of gas flow for an Intraday 2 nomination. Under the revised Intraday 3 cycle, the replacement shipper could reserve natural gas flow until 10:00 p.m. CCT, the start of gas flow for an Intraday 3 nomination, which is only one hour later. In contrast, under the Associations' proposal, the replacement shipper would lose three hours of natural gas flow, because its flow could be reserved only until 6:00 p.m. CCT, the start of gas flow for a revised Intraday 2 nomination. We also note that allowing the releasing shipper to recall its capacity during the new Intraday 2 cycle would permit it to bump flowing interruptible service, an additional benefit which it had not reserved when it agreed to an Intraday 2 only recall condition under the standards in effect before April 1, 2016. We therefore find that translating an Intraday 2 only recall condition to an Intraday 3 only recall condition better approximates the parties' intent.

notify the applicable pipeline and the replacement shipper by November 13, 2015 that the parties do not agree on alternative recall rights and specify what it believes should be the alternative recall rights.⁹ In the absence of any such notification by the releasing shipper, our interpretations above will control on April 1, 2016. If the replacement shipper disagrees with the releasing shipper's designation of alternative recall rights, the replacement shipper should file a complaint with the Commission by December 14, 2015, providing transaction specific justifications for adopting a different contractual interpretation than that designated by the releasing shipper.¹⁰ If the replacement shipper does not file a complaint in this situation, the releasing shipper's designation of alternative recall rights will apply. For any releases taking place after November 13, 2015, the default interpretations will control unless the parties specify different provisions in the special terms and conditions of their release or notify the pipeline through other procedures.

The Commission orders:

(A) The Commission provides default interpretations to apply to capacity release transactions that span a period before and after April 1, 2016, as discussed in the body of this order.

⁹ Releasing shippers should be the party proposing such alternatives since they perform a jurisdictional function in releasing capacity. *See* 18 C.F.R. § 284.8(g) (2015) granting releasing shippers blanket certificates to release capacity. *See also United Distribution Companies v. FERC*, 88 F.3d 1105, 1152 (D.C. Cir. 1996) (citing *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations, Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol and Order Denying Rehearing in Part, and Clarifying Order No. 636*; Order No. 636-A, FERC Stats. & Regs. ¶ 30,950, at 30,551 (1992)) (“By controlling such capacity, the assignors are effectively determining by whom, and under what circumstances, gas will be transported and are using the pipeline's facilities as if they were the assignors' facilities.”).

¹⁰ The Commission's ability to respond by April 1, 2016 to any complaints filed depends on the number of complaints we receive. While the Commission will act on complaints filed after December 14, 2015, the Commission will give priority to processing complaints filed by December 14, 2015 in an effort to resolve them before April 1, 2016. In the event the Commission is unable to act on a complaint prior to April 1, 2016, the pipeline should proceed with the releasing shipper's interpretation of the recall rights as long as the releasing shipper made its required notification to the applicable pipeline and the replacement shipper by November 13, 2015 as discussed above.

(B) Releasing shippers are directed to notify the applicable pipeline and replacement shippers by November 13, 2015 if the parties do not agree on alternative recall rights and specify what the releasing shipper believes should be the alternative recall rights, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.