UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Georgia Public Service Commission Docket No. RP04-92-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued April 15, 2004)

1. On November 19, 2003, as supplemented on December 22, 2003, Georgia Public Service Commission (GPSC) filed a Petition for Declaratory Order (GPSC Petition) requesting that the Commission address the following question:

> Whether the FERC would preempt the Georgia Commission if the Georgia Commission adopted a plan that provided for the permanent assignment of the interstate capacity assets currently held by Atlanta Gas Light Company to certificated natural gas marketers and placed conditions upon that assignment of the interstate capacity assets.[1]

2. As discussed below, we answer the GPSC's question in the affirmative. However, we provide guidance on the application of the Commission's policies and direct Atlanta to file a capacity release rate schedule with the Commission. This order benefits customers by allowing capacity to go to those users that place the highest value on the capacity without regard to where the user is geographically located.

[1] GPSC Petition at 1. According to Scana Energy Marketing, Inc. (Scana), the Atlanta Gas Light Company (Atlanta) "assets" at issue in this proceeding consist of firm storage and firm long-haul transportation contracts with Southern Natural Gas Company (Southern) and Transcontinental Gas Pipe Line Corporation (Transco) made under Part 284 of the Commission's regulations. See Scana's Comments at 3.

Background

3. In 1997, the State of Georgia enacted the Natural Gas Competition and Deregulation Act (Deregulation Act).[2] If a GPSC-jurisdictional natural gas company elects to become subject to the Deregulation Act (as an "electing distribution company"), it is required to " . . . continue to be responsible for acquiring and contracting for the interstate capacity assets necessary for gas to be made available on its system, whether directly or by assignment to marketers . . . unless determined otherwise by the [GPSC] . . . ."[3] In addition, the Deregulation Act requires the GPSC to approve a capacity supply plan for the electing distribution company that includes the "array of interstate capacity assets . . . to meet [firm customer] requirements" and the "portion of the interstate capacity assets which must be retained and utilized by the electing distribution company to manage and operate its system."[4] In 1997, Atlanta[5] elected to become an electing distribution company by unbundling its gas distribution services from its gas sales services. Concurrently, a number of gas marketing companies received certificates of authority from the GPSC to sell gas to retail customers in Georgia through Atlanta's distribution system. To the extent, however, that as part of this election Atlanta releases interstate pipeline capacity, it remains subject to Natural Gas Act (NGA) jurisdiction and its blanket NGA capacity release certificate.[6] The GPSC's efforts to regulate Atlanta's implementation of its unbundling through the control of interstate capacity "assets" were rejected in a series of orders which we discuss below.

4. On May 1, 1998, Atlanta sought waiver of the Commission's policy that shippers must hold title to gas transported and stored under services provided by interstate pipelines (the "shipper must have title" rule), as part of Atlanta's Incremental Bundled Storage Service (IBSS) rate schedule filed with the GPSC. The waiver would allow gas transported or stored under Atlanta's firm contracts with interstate pipelines to be owned by marketers on Atlanta's system, while Atlanta would remain the shipper for its upstream capacity on those interstate pipelines under both Parts 284 and 157 of the Commission's regulations. Atlanta also requested a waiver of the prohibition against rollover of pre-arranged, one-month capacity releases at less than maximum rates without

[2] Georgia Code Ann. § 46-4-150 et seq. (2002).

[3] Georgia Code Ann. § 46-4-155(e)(2) (2002).

[4] Georgia Code Ann. § 46-4-155(e)(6) (2002).

[5] Atlanta is a Hinshaw Pipeline generally exempt from NGA jurisdiction to the extent that it engages in transportation of natural gas in Georgia that is consumed in Georgia, and generally subject to the jurisdiction of the GPSC.

[6] See 18 C.F.R. § 284.8(g) (2003).

compliance with the notice and bidding procedures of section 284.243(h)(2) of the Commission's regulations, effective at the time. Atlanta stated that waiver of section 284.243(h)(2) would enable it to make consecutive monthly pre-arranged releases to marketers of its Part 284 capacity under a discounted transportation arrangement with Southern.

5. On July 31, 1998, the Commission conditionally granted the waivers requested by Atlanta for a period of one year from the latter of November 1, 1998, or the date service began under the proposal, subject to further orders of the Commission.[7] Finding that it, not the GPSC, had NGA jurisdiction over the matter, the Commission also granted Atlanta a limited jurisdiction blanket certificate, pursuant to section 7(c) of the NGA, to perform the interstate services set forth in Rate Schedule IBSS, for the one-year period of the waivers. While acknowledging that protesting parties had raised serious concerns regarding the potential impact of Atlanta's proposals on interstate competition, the Commission found that a one-year waiver would permit Atlanta to begin its unbundling program on schedule by November 1, 1998. The waiver would also give real-world experience to consider the issues raised by Atlanta's implementing the program.

6. On July 30, 1999, the Commission granted Atlanta an extension of the waiver and authorizations until March 31, 2001, but denied Atlanta's request for a waiver of the posting and bidding requirements for any future discounted and negotiated rate arrangements.[8] The Commission explained that:

> The main issue presented by Atlanta's request is the potential effect on competition in the interstate market of waivers of generic open access rules and policies to accommodate the design of a specific [local distribution company] LDC unbundling program. The Commission's open access rules were designed to facilitate the ability to move gas across the interstate grid. The ability to move gas easily across the interstate grid increases competition for gas supplies and for pipeline capacity thereby leading to lower prices for consumers.
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> Additionally, the open-access rules are designed to efficiently allocate pipeline capacity by allowing the capacity to go to those users that place the highest value on the capacity without regard to where the user is geographically located.
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> Given these underlying purposes, requests for waivers or deviations from the

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[7] Atlanta Gas Light Co., 84 FERC ¶ 61,119, reh'g denied, 84 FERC ¶ 61,323 (1998).

[8] Atlanta Gas Light Co., 88 FERC ¶ 61,150 (1999).

> generic open access rules need to be carefully examined to see whether or how they will affect the movement of gas across the interstate grid.[9]

The Commission also established a technical conference to provide the parties with the opportunity to examine three issues: (1) the impact of the waivers and the Georgia retail unbundling program on the interstate gas market; (2) alternatives to the waivers and the limited jurisdiction certificate; and (3) other issues, including allegations of affiliate abuse.

7. A December 15, 2000 Order following the technical conference found that the waivers and limited jurisdiction certificate for the Rate Schedule IBSS service did not have an adverse impact on the interstate gas market and that no abuse between Atlanta and its marketing affiliate had been shown.[10] In addition, the Commission decided not to consider alternatives to special authorizations since Atlanta had represented that it would not seek a further extension of the waivers and certificate authority after their expiration on March 31, 2001. In response to Atlanta's comment that the ultimate disposition of its interstate assets was a matter for local concern subject to Georgia law, the Commission stated that "[t]o the extent Atlanta seeks to make its interstate assets available to Georgia retail marketers in the future, it must do so pursuant to Commission authorization."[11]

8. Prior to the expiration of Rate Schedule IBSS on April 1, 2001, Atlanta filed a Park and Redelivery Services (PRS) rate schedule with the GPSC to replace Rate Schedule IBSS as a means of allocating the remaining upstream services to the marketers. Through this rate schedule, marketers could park gas with Atlanta, who, in turn, would store the gas on upstream pipelines' facilities under its various storage contracts, for later redelivery back to the marketers. In addition, Atlanta provided a balancing service (MARS) using its upstream pipeline capacity. Despite the termination of its NGA certificate authority on April 1, 2001, Atlanta continued to utilize its FERC-jurisdictional upstream storage and transportation "assets" to provide PRS and MARS services to its customers.

9. On July 18, 2002, the Commission issued an order addressing a petition filed by several marketers, including Scana, requesting clarification whether the PRS or MARS services could be implemented under the GPSC authority to the extent they involve the reallocation of capacity that Atlanta holds on interstate pipelines.[12] The Commission

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[9] Id. at 61,510-11.

[10] Atlanta Gas Light Co., 93 FERC ¶ 61,288 (2000).

[11] Id. at 61,968, n.13.

[12] Atlanta Gas Light Co., 100 FERC ¶ 61,071 (2002).

held that as the disposition or acquisition of rights to upstream capacity on interstate pipelines is subject to FERC jurisdiction, the GPSC has no jurisdiction to regulate access to that capacity. Therefore, neither the Rate Schedule PRS nor MARS services could be implemented under the GPSC authority to the extent they involve the reallocation of capacity that Atlanta holds on interstate pipelines. The Commission added that the "capacity release rules cannot be circumvented by the device of having Atlanta 'hold title' to the gas while it is in the interstate system if the clear purpose of the transaction is to allocate interstate capacity to a marketer."[13]

10. A March 27, 2003, Order found that Atlanta's use of its upstream pipeline capacity to render service under rate schedule PRS is a jurisdictional use of interstate pipeline facilities.[14] In addition, the Commission found that these services require Commission certificate authorization – regardless of the fact that Atlanta did not "allocate" or "assign" the upstream capacity to the marketers, or the location of the receipts and deliveries of the gas being parked and redelivered under rate schedule PRS.

GPSC's Petition

11. In its Petition at issue here, the GPSC states that in 2002, the Georgia legislature enacted the Natural Gas Consumers' Relief Act (Georgia Relief Act) which obligated the GPSC to hold a hearing to consider plans for the assignment of interstate capacity assets held by the electing distribution company, Atlanta.[15] Specifically, § 46-4-155(e)(13) of the Georgia code states, in part, that:

> After such hearing, the commission may adopt a plan for assignment of interstate capacity assets held by the electing distribution company, except for those interstate capacity assets reasonably required for balancing. If adopted, the plan shall provide for interstate capacity assets to be assigned to certificated marketers who desire assignment and who are qualified technically and financially to manage interstate capacity assets. Marketers who accept assignment of interstate capacity assets shall be required by the commission to use such assets primarily to serve retail customers in Georgia and shall be permitted to use such assets outside Georgia so long as the reliability of the system is not compromised.

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[13] Id. at P 24.

[14] Atlanta Gas Light Co., 102 FERC ¶ 61,323 (2003).

[15] Georgia Code Ann. § 46-4-155(e)(13) (2002).

12. The GPSC states that, in order to adopt a plan of assignment, the GPSC is required to make the following findings that are found in Georgia Code Ann. § 46-4-155(e)(14) (2000):

> Any order eliminating the responsibility of the electing distribution company for acquiring and contracting for interstate capacity assets . . . and any plan for assignment of interstate capacity assets . . . shall, at a minimum, ensure that:
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> (A) Shifts in market share are reflected in an orderly reassignment of interstate capacity assets;
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> (B) Marketers hold sufficient interstate capacity assets to meet the needs of [Georgia] retail customers;
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> (C) Before any such assignment is authorized, the assignee demonstrates to the [GPSC] that such assignment will result in financial benefits to firm [Georgia] retail customers;
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> (D) Before any marketer discontinues service in the Georgia market, it assigns its contractual rights for interstate capacity assets used to serve Georgia retail customers in a manner designated by the [GPSC];
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> (E) In the event that the commission imposes temporary directives in accordance with Code section 46-4-157, interstate capacity assets assigned to marketers are subject to reassignment by the [GPSC] to protect the interests of [Georgia] retail customers; and
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> (F) Any other requirement that the commission finds to be in the public interest is imposed upon assignees as a condition of the assignment of interstate capacity assets.

13. A GPSC June 2003, hearing considered two plans for the assignment of Atlanta's interstate capacity. One plan was a Joint Plan proposed by Atlanta, the GPSC Staff, the Consumers' Utility Counsel Division of the Governor's Office of Consumer Affairs, and all certified gas marketers operating in Georgia with the exception of Scana.[16] The GPSC states that, under the Joint Plan, Atlanta would "continue to release Part 284 capacity to

[16] The participating gas marketers were ACN Energy, Inc., Coweta-Fayette EMC Natural Gas, Energy America, LLC, Infinite Energy, Inc., PS Energy Group Inc d/b/a/ GasKey, Shell Energy Services Company L.L.C., Southern Company Gas, Southstar Energy Services, LLC d/b/a Georgia Natural Gas and Walton EMC Natural Gas.

marketers consistent with the FERC's capacity release rules."[17] It states that, under the Joint Plan: (1) Atlanta would allocate and release capacity to marketers in accordance with market share; and (2) participating marketers would take assignment of that capacity subject to the recall rights of Atlanta.[18]

14. Under a second plan, proposed by Scana, Atlanta would essentially permanently release all of its interstate capacity to Scana (or another Georgia marketer that might opt into this plan) and that marketer would exercise all contract rights with respect to such released interstate capacity. Specifically, the Scana plan proposed that 95 percent of the assignable contracts be assigned to the participating Georgia marketers with the remaining 5 percent continuing to be released on a month-by-month basis by Atlanta to Georgia marketers. The 5 percent buffer would serve to accommodate shifts in market share so long as a marketer's market share does not drop by more than 5 percent.

15. In response to concerns that if the marketer were leaving the State, were unable to pay its bills, or were to file for bankruptcy such that Atlanta could not recall the capacity and the GPSC could not force the marketer to return the capacity, Scana alternatively proposed that the GPSC could amend the marketer's individual certificate of authority to require the marketer to assign its interstate capacity contract to another Georgia marketer, Atlanta, or the GPSC. Alternatively, Scana also proposed that Scana (or a marketer opting into Scana's plan of assignment) could execute with the GPSC an agreement whereby the marketer would agree to "voluntarily reassign interstate capacity assets . . . to any third party designated by the [GPSC]" upon occurrence of certain prescribed events (e.g., if a drop in market share depletes the buffer).

16. In July 2003, the GPSC ultimately adopted the Joint Plan "in its entirety, as a reasonable, fair, and workable interstate capacity assignment resolution which addresses

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[17] According to Atlanta, Atlanta had been releasing Part 284 interstate capacity, subject to recall, to marketers on a monthly and long-term basis based on the respective marketer's market share of the Georgia retail sales market. See Atlanta's Comment at 5.

[18] According to the GPSC's Final Order issued in its Docket No. 16682-U, In Re Proceeding to Consider Plans for the Assignment of Interstate Capacity Assets as Required by O.C.G.A. § 46-4-155(e)(13), issued August 6, 2003, (GPSC Final Order), at p. 7, the key elements of the Joint Plan improved on Atlanta's "current capacity allocation method by:" (1) reducing long-term capacity released from 70 percent to 50 percent, (2) limiting long-term recalls to the affected marketer, (3) reducing the term of a long-term release from 36 months to 12 months, (4) changing the marketer's recalibration period of capacity and, (5) limiting Atlanta's ability to recall capacity as a result of marketer's failure to fully schedule its customers' Daily Supply Requirement.

the concerns of market participants, Georgia consumers, and the requirements of the [Deregulation] Act . . . ."[19] In rejecting Scana's proposal, the GPSC stated:

> The [GPSC] finds and concludes that the Scana plan fails to offer a solution to the difficulties arising from the conflicts between the FERC jurisdiction and the [GPSC's] obligations . . . to ensure that capacity is reassigned back to Georgia upon the exit of a marketer from this State, and its duty to ensure that it can impose temporary directives to reassign capacity to protect Georgia consumers. The [GPSC] is troubled by the suggestion that either it or a marketer could run an interstate capacity assignment program outside of the FERC's capacity release mechanism. The [GPSC] is also troubled by the potential for losing its ability to enforce its directives, as it is required to do by statute. The [GPSC] regulates [Atlanta] and Scana has not demonstrated sufficiently how the [GPSC] would be able to enforce its directives once [Atlanta] ceases to be the contract party and loses its ability to recall capacity pursuant to its [GPSC-] approved tariff.[20]

The GPSC's Final Order rejected Scana's attempts to distinguish its plan of "assignments" from the FERC's capacity release program. The GPSC found that the terms "assignment" and "release" are largely interchangeable, with "assignment" focusing on the contract being transferred and "release" focusing on the capacity underlying the contract.

17. The GPSC is concerned that Scana's proposed plan is inconsistent with the FERC's capacity release mechanism and may have significant impact on Georgia consumers. If so, adoption of Scana's plan may result in the GPSC losing its ability to enforce its directives as required by statute. The GPSC states that the issues raised in Scana's proposed plan concerning the GPSC's jurisdiction are not settled and may be

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[19] GPSC Final Order at p. 22.

[20] GPSC Final Order at 11. To support these findings, the GPSC cited to <u>Gulf South Pipeline Co.</u>, 103 FERC ¶ 61,129 (2003) (<u>Gulf South</u>), where the Commission rejected a Gulf South tariff provision that would have provided end-users or LDCs that did not hold firm transmission capacity the opportunity to assume contracts that had been suspended or terminated. <u>Gulf South</u>, 103 FERC ¶ 61,129 at P 70. The Commission held that such a provision was unjust and unreasonable and would result in the allocation of capacity in a discriminatory manner, contrary to the NGA and to Commission policy, and that granting parties the opportunity to assume capacity contracts in order to assure continued service "outside the capacity release process" would unlawfully "create two groups of customers, those who are subject to capacity release and those who are exempt." <u>Id</u>. at P 73.

raised again. Therefore, the GPSC requests that the FERC issue a declaratory order to remove uncertainty as to the determination between GPSC's and FERC's jurisdiction over conditions placed on the assignment of interstate capacity.

Notice of Filing, Interventions and Comments

18. Public notice of the filing was issued on December 5, 2003. Interventions and protests were due as provided in section 154.210 of the Commission's regulations. Pursuant to Rule 214 (18 C.F.R. § 385.214 (2003)), all timely filed motions to intervene and any motions to intervene out-of-time filed before the issuance date of this order are granted. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties.

19. In its comments, Scana requests that the Commission determine that Scana's proposed plan of assignment conditions is consistent with the FERC's pro-competitive policies and capacity release rules and that this Commission will not preempt the ability of the GPSC to enforce those conditions.

20. First, Scana argues that the Commission's regulations and policies present no barrier to a voluntary assignment of capacity by a marketer under a requirement promulgated by the GPSC to which that marketer has previously agreed. Scana states that, under its plan, following an assignment by Atlanta to a marketer, if the marketer did not want to renew the contract, or if a specified event required the marketer to assign back its capacity (e.g., a market share drop), the marketer would assign the contract to a party designated by the GPSC. Scana asserts that such assignment is authorized under 18 C.F.R. § 284.8(b) and (g) (2003). According to Scana, those provisions mean capacity contracts can be assigned back and forth voluntarily and freely between Atlanta and the marketers, or between certificated marketers, under the interstate pipeline company's existing Commission-approved tariff without any further authorization, so long as those assignments are made prior to the expiration or termination of the contracts. Scana claims that only when a contract expires or is terminated "and that capacity is then free to be used by anyone in the interstate market," do the Commission's rules on the disposition of capacity apply.[21] Scana states that, because its proposed condition on the marketer's certificate (as well as the proposed separate marketer/GPSC contract) simply requires capacity assignment to a designated party in specified circumstances prior to the expiration of the contract, there would be no basis for Commission preemption.

21. Second, Scana argues that if Atlanta were to retain capacity under Part 157 certificates or under a Part 284 authorization naming it as the shipper, while providing the marketers with the beneficial use of the capacity, such arrangements either would violate the terms of a certificate, the shipper-must-have-title rule, the proscription against non-grandfathered buy/sell arrangements, or the rule against rebundling of the merchant and

[21] Citing 18 C.F.R. § 284.221(d) (2003).

transportation functions. Nor, it argues, is short-term capacity release a viable option, because short-term release keeps all marketers anti-competitively locked into the same upstream, Atlanta-arranged, capacity cost structure and prevents marketers from aligning their gas supply purchasing strategy with their upstream capacity strategy. Scana asserts that its plan has "very limited reassignment conditions" that are allegedly consistent with the Commission's pro-competition policies.

22. Third, Scana argues that, if the GPSC and a marketer voluntarily enter into a contract for a required assignment at a future date, and the marketer later refuses to comply with that requirement, the GPSC should be allowed to enforce the contract. Scana asserts that the condition requiring marketers to assign capacity on the occurrence of certain conditions is like any other voluntary, up-front commitment made by a capacity holder with respect to capacity it will own. Furthermore, it asserts that Federal courts and the Commission have recognized that the State commissions and this Commission each play roles in the regulation of the natural gas industry, and that the proper exercise of State authority need not necessarily prompt Federal preemption.[22] Quoting from Zia Natural Gas Company v. Raton,[23] Scana asserts that the Commission would not prescribe how such an allocation should be done. Scana also quotes an excerpt from El Paso Natural Gas Co., et al.,[24] where the Commission, in rejecting State-sanctioned buy/sell arrangements, recognized that State regulatory agencies may be given authority under State law to regulate interstate capacity allocation, including whether and to what extent an LDC should assign its interstate capacity rights. Scana states that its plan of assignment provides an orderly opportunity for Atlanta to transfer its upstream interstate capacity as a part of the retail restructuring, thereby avoiding stranded costs issues and addressing Georgia's reliability mandate. Finally, Scana asserts that its reassignment conditions will be implemented not only by the GPSC certificate condition but also contractually and that the Commission traditionally has afforded contracts great deference.[25] Scana concludes by asserting that its plan of assignment is consistent with the provisions of the current Southern and Transco tariffs.

23. In contrast, Atlanta argues that the GPSC's ability to provide for permanent assignment of Atlanta's interstate capacity assets and place conditions upon such

[22] Citing, e.g., Northwest Central Pipeline Corp. v. State Corp. Commission of Kansas, 489 U.S. 493, 510 (1989).

[23] 102 FERC ¶ 61,249, reh'g denied, 103 FERC ¶ 61,313 (2003) (Zia).

[24] 60 FERC ¶ 61,117 (1992) (El Paso).

[25] Citing United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332, 344 (1956); FPC v. Sierra Pacific Power Co., 350 U.S. 348, 355 (1956).

assignment is limited by the FERC's requirement that allocations of interstate capacity be accomplished under the FERC's capacity release mechanism.

24. Atlanta states that under interstate pipeline tariffs such as Southern's, when a shipper (i.e., Atlanta) releases its capacity to the acquiring shipper via a permanent assignment of the capacity contract, the releasing shipper (i.e., Atlanta) retains only the responsibility with respect to such contract to pay for charges incurred prior to the release.[26] It states that the releasing shipper, such as Atlanta, retains no ability to recall such capacity. Thus, it asserts, the marketer receiving such assignment would thereby step into Atlanta's shoes and exercise all contract rights with respect to such released interstate capacity.

25. Atlanta states Order No. 636, et al., announced that individual capacity assignment mechanisms would no longer be authorized,[27] but that "[u]nder capacity releasing, all offers must be put on the pipeline's electronic bulletin board and contracting is done directly with the pipeline."[28]

26. Atlanta cites to several cases[29] that found assignment plans similar to Scana's, which assign capacity outside the capacity release program, were unlawful. However well-intended, Atlanta argues such assignment plans were contrary to the Commission's capacity release mechanism as the assignments would occur outside of such mechanism, and that they would "create two groups of customers, those who are subject to capacity release and those who are exempt."[30]

27. Atlanta requests that the Commission declare that the GPSC has no authority to impose the types of conditions described in Scana's plan that Scana might again propose

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[26] Citing Southern Natural Gas Company, FERC Gas Tariff, Seventh Revised Volume No. 1, General Terms and Conditions section 22.3(a).

[27] Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations, III FERC Stats & Regs. ¶ 30,950, Order No. 636 at 30,418, order on reh'g, Order No. 636-A (1992).

[28] Order No. 636 at 30,420.

[29] Citing Natural Gas Pipeline Company of America, 102 FERC ¶ 61,355 at 62,192 (2003); Gulf South Pipeline Company LP, 103 FERC ¶ 61,129 (2003); Northern Illinois Gas Co., et al., 70 FERC ¶ 61,099 (1995).

[30] Citing Gulf South Pipeline Company LP, 103 FERC ¶ 61,129 at P 73.

in a future proceeding.

Discussion

A. Petition For Declaratory Order

28. We will grant the GPSC's petition for declaratory order asking whether the Commission will preempt the GPSC if the GPSC were to adopt Scana's proposed plan which would provide for the permanent assignment of the interstate capacity assets currently held by Atlanta to Scana and/or other certificated natural gas marketers and place conditions upon that assignment of the interstate capacity. We answer in the affirmative.

29. Consistent with our previous findings involving interstate capacity that serves the Georgia retail market, we find that adoption of Scana's plan would require FERC authorization because the plan would allow the GPSC to regulate access to capacity on interstate pipelines which is within FERC's exclusive jurisdiction. Further, as such authorization would be contrary to Commission policy and precedent, it must be rejected, as discussed below.

1. Jurisdiction

30. We reject Scana's claim that the Commission lacks jurisdiction over the transportation and storage capacity that Atlanta holds on upstream interstate pipelines under Part 284 of the FERC's regulations. Atlanta's capacity is subject to section 7(c) of the NGA since such capacity is utilized to perform the transportation of natural gas in interstate commerce. In order to discharge its statutory mandate, the Commission must regulate access to such interstate pipeline capacity, including storage capacity. Further, contrary to the GPSC's claim that Atlanta is only regulated by the GPSC, Atlanta's release of its interstate capacity is subject to the FERC's exclusive NGA jurisdiction pursuant to a blanket NGA capacity release certificate issued under section 7 of the NGA.[31] Thus, Atlanta, as well as Georgia marketers who obtain released capacity from Atlanta, is subject to the FERC's regulations and policies on capacity release whenever they release their interstate capacity. Although Atlanta's activities as a Hinshaw pipeline are exempt from Commission regulation under section 1(c) of the NGA and are regulated by the GPSC, the GPSC has no jurisdiction to regulate access to capacity on interstate pipelines, including access to released capacity. For example, the GPSC's requirements restricting access to such released capacity is inconsistent with section 284.8(b) of our regulations, which states that: "Firm shippers must be permitted to release their capacity, in whole or in part, <u>on a permanent or short-term basis, without restriction on the terms or</u>

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[31] <u>See</u> 18 C.F.R. § 284.8(g) (2003). <u>See also</u> United Distribution Cos. v. FERC, 88 F.3d 1105, 1148-1157 (D.C. Cir. 1996).

condition of the release." (emphasis added). Only the shippers may voluntarily impose conditions on a release and then only such conditions that are not unduly discriminatory, anti-competitive, or otherwise unjust and unreasonable under the NGA. Our previous orders involving interstate capacity that serves the Georgia retail market clearly emphasized that the use of Atlanta's interstate pipeline capacity by Georgia retail marketers in the future would require Commission authorization.[32]

31. Zia, and El Paso on which Scana relies should not be read as a concession that the Commission lacks authority over the release of interstate pipeline capacity where a State law prescribes LDC allocation of capacity or that it will never assert such authority. To the extent that Zia or El Paso suggests otherwise, that was inadvertent and not intended. Zia made reference to a part of the 1992 order in El Paso describing an argument of one of the parties who claimed that the Commission had previously conceded that it lacked jurisdiction over the allocation of interstate capacity by LDCs and that such determination is left to the States. In response to this argument, the Commission stated its disagreement with the commenter, distinguished the case cited, and indicated: "In no way were we relinquishing our jurisdiction over access to interstate pipeline capacity."[33]

32. El Paso, issued during the transition to capacity release mechanisms, rejected various "buy/sell" programs established by a California LDC, pursuant to order of the California Public Utilities Commission (CPUC). Under a buy/sell program, the LDC was directed by the CPUC to buy gas from entities who did not hold firm capacity on the LDC, and then use their own firm capacity rights on the interstate pipeline to get the gas transported into California where the LDC would resell the gas back to the original owner, thereby effectively accomplishing a capacity release outside of the FERC's sanctioned capacity release mechanism. To prevent any pipeline or firm shipper from achieving an undue advantage over other firm shippers or pipelines, FERC must mandate generally uniform national capacity allocation mechanisms.

> [T]o permit new buy/sell transactions to utilize interstate pipeline capacity after the capacity release mechanism goes into effect will frustrate this nationally uniform program. To allow any new buy/sell arrangements to be

[32] See supra notes 7, 8, 10, 12 and 14.

[33] El Paso, 60 FERC at 61,383. The commenter in El Paso had cited, as support for its claim, a 1989 order in Texas Eastern Transmission Corp., 48 FERC ¶ 61,378 at 62,551 (1989). However, the quoted excerpt of that 1989 order on which the commenter purportedly relied actually was an argument of one of the parties in the "Comments" portion of the order, rather than a Commission finding found later in the Commission's "Discussion" section of the order. Compare 48 FERC at 62,550-51 (comments) with 48 FERC at 62,551-53 (discussion).

> negotiated totally outside of the capacity release mechanism at that time would provide a major loophole, potentially inviting substantial circumvention of the capacity release mechanism. It is, therefore, necessary for us to exercise our exclusive jurisdiction over access to interstate pipeline capacity to prohibit all new buy/sell transactions entered into after the time a pipeline's capacity release mechanism goes into effect.[34]

33. The Commission rejected these buy/sell arrangements despite recognizing that State agencies may be required by State law to allocate interstate capacity of LDCs in ways designed to promote the State's own interests.[35] By asserting jurisdiction over State-required buy/sell programs, which were effectively capacity release programs, the Commission exercised its exclusive jurisdiction over the release of interstate pipeline capacity, including jurisdiction over who obtains such capacity and in what manner in which they can obtain it. For example, in Algonquin Gas Transmission Co., et al.,[36] where the Commission stated:

> Because the section 284.243 capacity release mechanism requires that capacity be released to the open market, in which all potential shippers have an equal chance to bid for released space rather than to the shipper of the assigning customer's choosing, by operating in tandem with the other components of Order No. 636 it will further promote the Commission's overriding objective of protecting the natural gas consumer by promoting competition and efficiency in the natural gas commodity and transportation markets. (emphasis added.)

34. Indeed, in Zia, the Commission found that an LDC's assignment of its interstate capacity pursuant to a settlement the LDC entered into with the State regulatory agency "impermissibly intrudes into our exclusive jurisdiction over the interstate transportation of natural gas."[37] Likewise, for example, in Fitchburg Gas and Electric Light Company,[38]

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[34] El Paso, 60 FERC ¶ 61,117 at 61,383 (footnote omitted).

[35] In the El Paso order, the Commission clarified that an example of the type of issue left to the states to decide was whether an LDC should be directed to hold another open season in connection with its California buy/sell program. See El Paso 60 FERC at 61,383-84. If the Commission hadn't rejected the state buy/sell program, then the details of procedures to be followed to implement the program would have been left to the CPUC's discretion.

[36] 59 FERC ¶ 61,032 at 61,095 (1992).

[37] Zia, 102 FERC ¶61,249 at P 69.

the Commission asserted jurisdiction and rejected a request to waive a pipeline's capacity release tariff provisions where the requester sought to comply with capacity release requirements of a Massachusetts State unbundling plan. The Commission stated that:

> [A]ssignment of capacity on interstate pipelines is subject to the Commission's capacity release regulations, and the Commission's regulations do not permit direct assignment to shippers on a monthly basis. Under the Commission's regulations, capacity can be released for a period of less than 31 days without going through the required posting and bidding process. However, any continuation or rollover of such a release becomes subject to the posting and bidding requirements of the Commission's regulations.[39]

35. Although the Commission has exclusive jurisdiction over allocation of interstate pipeline capacity, including capacity release, it does allow shippers and State agencies a certain amount of leeway in facilitating the coordination of State unbundling programs with Federal regulation. In particular, the Commission generally will not intercede in decisions shippers may make in exercising their rights under their blanket NGA certificates to release capacity, provided that the decisions made, whether voluntary or pursuant to a State agency mandate, do not interfere with FERC's policies and regulations. But allowing such leeway is not a concession of a lack of FERC jurisdiction. We will reject any attempts by shippers to implement State-required restrictions on access to released capacity that are unduly discriminatory, anti-competitive, or otherwise unjust and unreasonable, just as the Commission did in El Paso. Indeed, our exercise of jurisdiction here is consistent with each of the precedent Atlanta decisions wherein the Commission exercised jurisdiction over earlier iterations of the instant GPSC program that attempted to mandate allocation of Atlanta's capacity on interstate pipelines, including its Part 284 capacity. It is appropriate to assert our authority over access to interstate pipeline capacity in the present circumstances.[40]

2. Consistency with Commission Policies

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[38] 94 FERC ¶ 61,006 (2001).

[39] Fitchburg Gas and Electric Light Company, 94 FERC ¶ 61,006 at 61,011-12 (2001).

[40] We defer to the GPSC's interpretation of its obligations under the relevant Georgia statutes and to its findings in the Final Order regarding whether and to what extent the Scana Plan and the Joint Plan conform to the requirements of the relevant state statutes.

36. We find that the restriction on the use of interstate capacity under Scana's plan is at odds with the Commission's pro-competition, open-access regulatory policies by allowing Atlanta, or whomever the GPSC designates, to control disposition of interstate capacity solely to benefit Georgia consumers. As Scana states that, under its plan, following an assignment by Atlanta to a Georgia marketer, if the marketer did not want to renew the contract, or if a specified event required the marketer to assign back its capacity (e.g., a market share drop), the marketer would be required to assign the capacity back to a party designated by the GPSC, i.e., another Georgia marketer servicing only Georgia customers. Because under Scana's plan the interstate capacity generally in such situations would be used to benefit Georgia consumers, Scana's plan removes that capacity from the interstate market, contrary to the Commission's pro-competitive and open access policies that favor granting the capacity to shippers who value it the most. In Order No. 636, the Commission required interstate pipelines to restructure their services in order to improve the competitive structure of the natural gas industry. The regulatory changes were designed "to ensure that all shippers have meaningful access to the pipeline transportation grid so that willing buyers and sellers can meet in a competitive, national market to transact the most efficient deals possible."[41] Scana's plan, which assigns Atlanta's capacity to Scana and/or other Georgia certified marketers,[42] would restrict access to that interstate capacity only to other Georgia marketers or Atlanta. This would occur outside of Commission authorized capacity assignment procedures which require access to that capacity be made available to shippers serving other markets on the national transportation grid. As such, Scana's restrictions would deny shippers other than other Georgia marketers or Atlanta meaningful access to this capacity.

37. Contrary to Scana's arguments, its plan would result in the release of capacity outside the FERC's capacity release program. That such releases would occur within the original term of Atlanta's contract with the interstate pipeline or pursuant to a contract between GPSC and the shipper does not give the State or the shipper, carte blanche to mandate allocation of the released capacity only to shippers using the capacity to serve Georgia customers. Nor is the Scana plan "voluntary," as it asserts. Rather, it would contractually enforce the State mandated requirements limiting access to and use of the subject interstate capacity with which potential shipper-marketers must comply. Order No. 636 ended authorization of individual capacity assignment mechanisms; "Under capacity releasing, all offers must be put on the pipeline's electronic bulletin board and contracting is done directly with the pipeline."[43] To this end, the Commission has

[41] Order No. 636 at 30,393.

[42] In this regard we agree with the GPSC that it makes no difference regarding either jurisdiction, or conflict with the FERC's regulations and policies, that Scana uses the term "assignment" rather than "release."

[43] Order No. 636 at 30,420.

rejected plans, similar to Scana's, which assign capacity outside the capacity release program pursuant to State unbundling programs.[44] Finally, contrary to Scana's claim, the Commission does not give blind deference to State plans for contracts relating to allocation of interstate pipeline capacity. Any such contracts that violate the NGA or the FERC's open access policies such as those at issue in the earlier Atlanta cases, are unenforceable and are not given any deference.

3. Conclusion

38. We recognize that Atlanta and the GPSC are under obligations imposed by the Georgia Relief Act to restrict interstate access to the subject released capacity. However, such obligations appear to conflict with, and be preempted by, the Commission's exclusive jurisdiction under the NGA and its policies thereunder regarding access to and use of interstate pipeline transportation capacity. Therefore, we grant the GPSC's petition for declaratory order to the extent that we find that if the GPSC were to implement Scana's plan or any plan that places restrictions on the use of interstate pipeline capacity as reflected in the Georgia Consumer Relief Act, this Commission would preempt the GPSC and reject the plan, as discussed above. Our agreement with the GPSC and rejection of the Scana plan does not, therefore, imply acceptance of the GPSC's jurisdiction over and approval of the Joint Plan or of conditions on capacity release apparently currently imposed on Atlanta.

B. Guidance

39. Although the Commission has granted the GPSC's petition, the Commission believes that Scana's proposal was headed in the right direction insofar as it appeared to be intended to provide added flexibility to Georgia marketers to obtain efficiencies and flexibility unobtainable under the required capacity pool and temporary release mechanisms of the Joint Plan approved by the GPSC. Accordingly, the Commission believes that it should provide guidance to Scana, as well as Atlanta and the GPSC, as to how to achieve the flexibility it seeks while, at the same time, being consistent both with appropriate State retail unbundling initiatives and the Commission's policies. In providing guidance on these issues, we will include general observations about Atlanta's revised GPSC tariff which reflects the new capacity allocation procedures approved by the GPSC. To help ensure that this guidance leads to a resolution of these long-standing issues, and to permit the Commission to review a concrete proposed resolution first hand, we will direct Atlanta to file a capacity release rate schedule that reflects this guidance.

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[44] See, e.g., cases cited, supra, note 29.

40. Before providing specific guidance, however, it would be helpful at this juncture to review certain principles underlying the Commission's capacity release program and, indeed, its open access system of regulation under the NGA and Part 284 of the Commission's regulations. The guiding principle underlying the Commission's regulation is open and non-discriminatory access to and use of jurisdictional interstate pipeline capacity by all shippers on the interstate pipeline grid. This capacity must be allocated on this basis to the shipper who values it the most. Hence, the Commission's pro-competitive capacity release regulations incorporate the feature that, generally, released capacity must be available to the entire natural gas transportation grid through posting and bidding. The Commission has provided two exceptions, however. Prearranged releases of greater than 31 days may be made without posting and bidding on the open secondary market, provided that the replacement shipper must pay the pipeline's maximum rate for the capacity. Releases of 31 days or less avoid the posting requirements, and may be made at discounted rates, but have no rollover rights. Further, it is the policy of the Commission that no restrictions be placed on shippers on their release or recall of such capacity,[45] provided that such releases and recalls are not on an unduly discriminatory basis or otherwise violate the NGA.[46] Capacity release serves the purpose of allowing shippers to recoup part of the reservation charges owing to the pipeline for capacity the shipper temporarily does not need and provides a secondary market for capacity in competition with the pipeline. The Commission's policy on recalls recognizes the need of the releasing shipper to recall capacity if and when it needs the capacity to serve its customers and for other legitimate reasons such as the bankruptcy of the replacement shipper. Finally, because the Commission has exclusive jurisdiction over access to and use of interstate pipeline capacity, and the release of capacity involves a jurisdictional pipeline function, the release and recall of such capacity is subject to a blanket Part 284 NGA section 7 capacity release certificate. In order to prevent circumvention of the Commission's capacity release regulations, the Commission

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[45] 18 C.F.R. § 284.8(b) (2003); Texas Eastern Transmission Corp., 62 FERC ¶ 61,015 at 61,104 (1993) ("any provision relating to recall rights must not operate to impede the ability of releasing shippers to employ recall provisions as terms and conditions of their releases.").

[46] <u>See</u>, <u>e.g.</u>, United Distribution Cos. v. FERC, 88 F.3d 1105, 1150 (D.C. Cir. 1996) (holders of excess firm capacity rights "may establish <u>nondiscriminatory</u> conditions on the sale, including a minimum price and any terms under which the release may continue.") (emphasis added); Southern California Edison Co. v. FERC, 172 F.3d 74, 75 (D.C. Cir. 1999) (in reviewing complaint raising issue of market power abuse of a releasing shipper, FERC has jurisdiction over and, therefore, may consider whether capacity releases constitute unjust and unreasonable, unduly discriminatory, or preferential practices in violation of the NGA, despite the claim that no regulation was violated).

requires the shipper to hold title to the gas in transit in the interstate pipeline and has rejected "buy-sell" arrangements as in El Paso, supra. However, the Commission also has stated that it intends to encourage an environment which will allow State commissions and local distribution companies to implement retail unbundling and, to this end, stated that it is willing to consider limited departures from its regulations and policies that may be necessary to achieve retail unbundling at the State level.[47]

41. A review of section 13 of Atlanta's GPSC tariff reflects the GPSC's efforts to provide capacity allocation procedures that are in accord with the Commission's policies.[48] Under its GPSC tariff, Atlanta allocates its interstate pipeline capacity rights, above what it needs for operational purposes and supplier of last resort obligations, to capacity pools from which Georgia marketers who hold marketing certificates from the GPSC are allocated capacity.[49] Allocations of long-term (12 months) and monthly capacity are from released capacity pools based on the marketer's share of the local Georgia market and are modified periodically based on changes in market share.[50] Atlanta must release 50 percent of its long-term capacity for 12 months and the remainder on a monthly basis.[51] Atlanta continues to buy gas at the wellhead and then resells excess gas supplies not needed to serve Georgia customers not served by a marketer at cost to the marketers at the wellhead. The allocation of such wellhead supplies is based on the allocated released capacity the marketers hold on the interstate pipelines.[52] The gas is tendered at receipt points chosen by Atlanta on the interstate pipelines and ultimately delivered by Atlanta at delivery points of the marketers' choosing in Georgia.[53] The marketers, thus, own the gas being transported by the interstate pipelines and are responsible for scheduling, and so forth, as shippers. Using their allocated capacity on

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[47] Atlanta Gas Light Co., 84 FERC ¶ 61,119 at 61,638 (1998).

[48] Atlanta's GPSC tariff filing to implement the Joint Plan went into effect September 1, 2003. See Atlanta Gas Light Company GPSC Tariff section 13.

[49] Atlanta GPSC Tariff sections 13.4 and 13.5.

[50] Atlanta GPSC Tariff sections 1.77 and 13.5.

[51] Atlanta GPSC Tariff section 13.6.

[52] Atlanta GPSC Tariff sections 13.13, 13.14, and 13.15. Atlanta, a Hinshaw Pipeline, is subject to a blanket marketer certificate under section 284.402 of the Commission's regulations to the extent it sells gas to Georgia marketers for resale in interstate commerce under its state program. See 18 C.F.R. § 284.402 (2003).

[53] Atlanta GPSC Tariff section 13.14.

Atlanta, they sell the gas to their own customers pursuant to their Georgia marketer certificate at delivery points off of Atlanta's system and the local distribution and delivery thereof are subject to Atlanta's GPSC tariff regarding such service. Thus, Atlanta's GPSC tariff purports to regulate capacity release and marketer sales of natural gas for resale in interstate commerce that are subject to the exclusive jurisdiction of the Commission.

42. The GPSC has authority to mandate how much interstate pipeline capacity Atlanta or a Georgia marketer should hold. Thus, for example, it can order Atlanta to obtain more capacity if needed, or to relinquish unneeded capacity so that Georgia consumers do not have to pay for such unneeded capacity. The same holds true for the GPSC's regulation of Georgia marketers. However, the GPSC's regulation of access to, use of, and recall or reversion of such interstate pipeline capacity appears to intrude on the Commission's exclusive jurisdiction over such matters.[54] The GPSC, through its regulation of Atlanta and Georgia marketers, appears to be essentially regulating who interstate pipelines may serve, where such service may be provided, and for what levels of service.

43. Turning to some of the specific conditions on the release, use, and recall of capacity under Atlanta's GPSC tariff, the tariff requires releases to be pursuant to prearranged deals at the pipeline's maximum rate. By itself, this would appear to be consistent with the Commission's regulations. However, the tariff also provides an exception that the rate "will not exceed the rate charged [Atlanta] as of the date of the [release]." If the rate in effect was a discounted rate, then this provision would appear to violate the Commission's regulation and, in that event, the capacity would be required to be made available to the interstate market through posting and bidding.[55] Further, Atlanta's tariff provides for the allocation of short-term (31 day or less capacity) and it is unclear whether the Commission's regulation prohibiting the rollover of monthly releases without posting and bidding by the interstate market would be violated. The tariff has conditions on the re-release of capacity by the marketers, including conditions, which appear to be reasonable, such as the requirement that capacity may not be "diverted" from use for service to the marketer's retail Georgia customers if it is necessary to serve those customers. Another condition of the tariff which appears to be reasonable requires that, if a marketer sells or otherwise transfers all or part of its Georgia customer base to another marketer, the marketer must release all or part of its assigned capacity in the same

[54] See Order No. 636-B, 61 FERC ¶ 61,272 at p. 62,003 (1992)(Commission has exclusive preemptive jurisdiction over access to interstate pipeline capacity).

[55] In earlier proceedings involving the GPSC's efforts to control the allocation of interstate capacity held by Atlanta, it was the Commission's understanding that Atlanta held 102,100 Dth/day of firm capacity on Southern at discounted rates. See Atlanta Gas Light Co., 84 FERC ¶ 61,119 at 61,636 (1998).

percentage to that other marketer.

44. The tariff also has a number of capacity recall conditions, some of which appear reasonable and consistent with the policy that the releasing shipper, Atlanta, should be able to recall capacity in the event that it needs the capacity for operational reasons, when the marketer is bankrupt, or is failing to schedule gas as needed. Other conditions appear to give too much discretion to Atlanta or the GPSC. For example, the tariff provides, simply, that capacity may be recalled by order of the GPSC, with no description of the standards or circumstances attendant with such recalls.[56]

45. Consistent with the discussion above regarding Scana's proposal, the Commission is concerned that the status quo, i.e., the Joint Plan implemented in Atlanta's GPSC Tariff, may unduly restrict access to and use of interstate pipeline released capacity in violation of the Commission's capacity release policies and, further, may unduly restrict the flexibility of marketers like Scana to most effectively obtain and use released interstate pipeline capacity. The GPSC-approved tariff appears to unduly discriminate against interstate markets by placing what may be an overly broad and potentially unduly discriminatory and anti-competitive restriction on the release, use, and recall of interstate pipeline capacity if the capacity is to be used to serve other markets outside of Georgia irrespective of the needs of Atlanta to serve its customers, who are the same customers of the marketers. On the other hand, the Commission recognizes the general right under the Commission's capacity release program of the shipper to release capacity to replacement shippers of its choosing at the maximum rate and the right to recall such capacity when the releasing shipper needs the capacity. Further, in the case of Atlanta, unlike in the typical situation envisioned by the Commission's capacity release policies, Atlanta is required to release all of its capacity normally used to serve its customers, even capacity it needs. This capacity, in turn, is released to marketers who perform the retail sales function in Georgia formerly performed by Atlanta as part of its traditional Hinshaw Pipeline role. Thus, but for the obligation to release to marketers who serve Atlanta's customers, the capacity generally might not be released at all. To reconcile the tension between the need to require interstate pipeline capacity to be available on a non-discriminatory basis to all markets in the national pipeline grid with the need of a Hinshaw Pipeline like Atlanta to maintain the reliability of upstream interstate pipeline capacity to serve its customers under the State's retail unbundling initiatives, all restrictions on the release, use, and recall of Atlanta's interstate pipeline Part 284 capacity should be framed in terms of Atlanta's need for the capacity, rather than a wholesale discrimination against other markets. Further, consistent with one of the features of Scana's proposal rejected by the GPSC, it appears reasonable that Georgia marketers should be free to acquire interstate pipeline capacity on their own outside of the capacity available in the relevant Georgia capacity pool. The GPSC cannot bar access to interstate

[56] Atlanta GPSC Tariff sections 13.17.7 and 13.17.11.

pipeline capacity. Finally, the requirement of Atlanta's GPSC Tariff that the marketer must use interstate pipeline receipt points of Atlanta's choosing appears to unduly restrict the flexibility of marketers to efficiently use flexible point rights as well as their right to access to other pipelines.

46. In comparing the GPSC's approved program with unbundling in other States, such as New York, the Commission finds that the GPSC program appears to exert too highly a detailed set of procedures both on Atlanta and the marketers. In New York, for example, LDCs each have their own programs involving non-recallable released capacity which programs appear to be designed to serve their own needs with little direct involvement by the State in the capacity allocation process.[57] Allowing the LDC the discretion to voluntarily tailor release programs to their own needs appears to be preferable to more direct command and control oversight by the State or, indeed, by the Commission.

47. We emphasize, however, that the foregoing discussion is intended to provide general guidance only. The Commission must be presented with a concrete proposal by Atlanta on how its capacity release program should operate. Atlanta is directed to file a proposed capacity release rate schedule with the Commission within 30 days of this order which sets forth proposed capacity allocation procedures consistent with the foregoing guidance.

The Commission orders:

(A) The GPSC's petition for declaratory order is granted, to the extent as discussed above.

(B) Atlanta is directed to file a proposed capacity release rate schedule within 30 days of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

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[57] See Order Revising Pipeline Capacity Requirements For Marketers, New York Public Service Commission Case 97-G-1380 (Issued and Effective August 28, 2000).