

3. For the reasons discussed below, the Commission denies FGT's request for rehearing, Florida Cities' request for clarification, and Florida Cities' request for rehearing.

4. In the February 26 Order, the Commission directed FGT to file revised tariff sheets in this proceeding to permit shippers, subject to available capacity, to segment within or outside their contractual paths. This order accepts FGT'S compliance filing in principle, subject to the company filing actual tariff sheets in lieu of the pro forma tariff sheets filed by FGT.

I. Requests For Rehearing

FGT and Florida Cities' respective requests for rehearing are discussed below.

A. FGT

5. FGT has requested rehearing of the Commission's February 26 Order in this proceeding.² It claims that the Commission erred in requiring that FGT allow segmentation outside of a shipper's primary path on a secondary basis. FGT contends that the Commission failed to articulate a rationale for this action in the February 26 Order itself, but relied on its order in Centerpoint Energy-Mississippi River Transmission Corporation (MRT).³ It asserts that in MRT, the Commission did not cite any language from Order No. 637-A where the Commission held that a shipper must be allowed to segment capacity outside of the primary receipt and delivery points in its contract on a secondary basis.

6. FGT also takes issue with the Commission's explanation that when a pipeline performed bundled sales service, the pipeline could have engaged in such transactions, and as a consequence, a firm shipper should have the same flexibility in the use of the firm capacity for which it is paying. It maintains that the Commission never explains how bundled sales service formerly provided by pipelines in any way resembles the Commission's requirement for segmenting outside of the primary receipt and delivery points in a shipper's contract. FGT claims that bundled sales service was provided to the delivery points specified in the contract.

² 102 FERC ¶ 61,217 (2003).

³ 102 FERC ¶ 61,216 (2003).

7. FGT argues that the Commission's view that segmenting applies beyond a shipper's primary path is contrary to Order No. 637,⁴ which it claims only applied segmentation to the capacity between the primary receipt and delivery points in a shipper's contract. It contends that the requirement to allow segmentation outside the primary path is in direct conflict with the language set forth in Order Nos. 637 and 637-A in which the Commission indicated that a shipper could segment only those capacity rights existing in its contract, which extend from primary receipt point to primary delivery point.

8. FGT asserts that permitting a shipper to segment outside its primary path would afford a segmenting shipper an unduly discriminatory advantage over non-segmenting shippers with respect to the use of secondary receipt or delivery points outside the primary path. It explains that under its tariff, a shipper is permitted to use a secondary point outside of its primary transportation path only to the extent that it does not exceed its contract entitlement to maintain capacity at all delivery points in aggregate and receipt points in aggregate. In other words, FGT argues that if a shipper desires to nominate at a secondary delivery point, then its volume nominated at its primary delivery point must be reduced by the nomination at the secondary point. It observes that a non-segmenting shipper that uses its existing secondary point rights to move to a secondary point outside the primary path must remain within its total contract entitlement at all points in aggregate, while a shipper segmenting by using secondary points outside the primary path would gain additional contract entitlement at the secondary points, but pay the same reservation rate.

9. FGT claims that requiring segmentation outside a shipper's primary path on a secondary basis will unlawfully expand the rights of certain shippers beyond the amount of capacity under contract and adversely impact a pipeline's sales of capacity. It

⁴ Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services, FERC Statutes and Regulations, Regulation Preambles July 1996-December 2000 ¶ 31,091 (2000), order on reh'g, Order No. 637-A, FERC Statutes and Regulations, Regulations Preambles July 1996-December 2000 ¶ 31,099 (2000); order on reh'g, Order No. 637-B, 92 FERC ¶ 61,062 (2000), aff'd in part and remanded in part, *Interstate Natural Gas Association of America v. FERC*, 285 F. 3d 18 (D.C. Cir. 2002), Order on Remand, 101 FERC ¶ 61,127 (2002), order denying reh'g 106 FERC ¶ 61,088 (2004).

maintains that under the Mobile-Sierra⁵ doctrine, while neither a pipeline nor a shipper has the right to unilaterally modify their transportation contract, the Commission's action imposes additional business and financial risks on the pipeline that were not contemplated when the contract was executed. In addition, it claims that the additional contract rights to capacity provided in violation of Mobile-Sierra will reduce the pipeline's ability to sell capacity that it had the right to sell prior to such contract modification.

10. Finally, FGT maintains that it will have to implement a number of computer systems changes to accommodate segmentation outside of shippers' primary paths, including requiring that shippers path all nominations. It estimates that the costs involved in the analysis, design, development, testing, and implementation of such changes will be approximately \$250,000, and contends that the imposition of such costs on the pipeline through an action that is arbitrary and capricious does not reflect reasoned decisionmaking.

11. FGT appears to suggest that the Commission improperly relied on its discussion in MRT to support its decision to allow segmentation outside of a shipper's primary path on a secondary basis. However, the Commission specifically stated that the explanation for its action in the instant case was articulated in MRT, which was issued contemporaneously with the February 26 Order. There was nothing untoward or unusual for the Commission to reference a discussion in a substantially similar case without replicating that discussion in a subsequent order.

12. In any event Order Nos. 637 and 637-A do require pipelines to permit shippers to segment the capacity between their primary receipt and delivery points. The requirement in Order No. 637 that pipelines permit segmentation built upon Order No. 636's requirement that pipelines permit shippers to use all points on the part of the system for which they pay reservation charges on a secondary basis.⁶ This meant that, even though the primary path of a shipper on a straight line system such as Florida Gas might extend only from the middle of an upstream zone to the middle of a downstream zone, the

⁵ United Gas Pipeline Company v. Mobile Gas Service, 350 U.S. 332 (1956); Federal Power Commission v. Sierra Pacific Power Company, 350 U.S. 348 (1956).

⁶ Order No. 636-A, FERC Stats & Regs. Regulations Preambles ¶ 30,950 at 30,585 (1992). Texas Eastern Transmission Corp., 102 FERC ¶ 61,198 at P 15-19 (2003).

shipper could schedule a transaction from a secondary receipt point at the upstream-most point of the upstream zone to a secondary delivery point at the downstream-most point of the downstream point. This was because the shipper was paying reservation charges for service throughout the zones. Accordingly, in implementing segmentation in Order No. 637, the Commission recognized that shippers already had this right to use outside-the-path secondary points, and therefore should have the same right in segmented transactions. As the Commission expressly stated in Order No. 637-A, “the shipper has the right to segment outside its path because it is paying the full rate for the [zone], and, therefore, has the right to use all points within the [zone] for which it pays.”⁷

13. In arguing that Order No. 637 did not require pipelines to permit outside-the-path segmentation, Florida Gas relies on the fact that § 284.7(d) of the Commission's regulations, as adopted by Order No. 637, requires pipelines to “permit a shipper to make use of the firm capacity for which it has contracted by segmenting that capacity into separate parts for its own use or for the purpose of releasing that capacity to replacement shippers to the extent such segmentation is operationally feasible.” Florida Gas interprets the reference to the “firm capacity” for which the shipper has contracted as meaning only the capacity between its primary receipt and delivery points. Florida Gas also cites similar language at various places in the preamble to Order No. 637.

14. The Commission did not intend, by the use of the phrase “firm capacity” to refer only to a shipper's primary firm capacity, but rather to all of a firm shipper's rights to use the pipeline's capacity obtained pursuant to its firm service agreements, including their rights to ship gas from and to secondary points throughout the zones for which they pay. As the Commission has previously held,⁸ pipeline pro forma service agreements uniformly contain provisions incorporating the terms and conditions in the pipeline's tariff into the service agreement. Accordingly, when the Commission in Order No. 636 required pipelines to modify the terms and conditions in their tariff to permit firm shippers to use all the points in the rate zones for which they pay on a secondary basis, that right was incorporated in the firm shippers' contracts. The Commission has always treated firm shippers' secondary firm rights as part of their firm service, giving firm transactions using secondary point rights priority over interruptible

⁷ Order No. 637-A, FERC Stats & Regs. Regulations Preambles ¶ 31,091 at 31,592.

⁸ See, e.g. Order on Remand, 101 FERC ¶ 61,127 at P 45-53.

service and requiring that such service be curtailed on an equal basis with all other firm service. Therefore, the reference to shippers' "firm capacity" in § 284.7(d) includes not only primary firm, but also secondary firm capacity.

15. The Commission concludes that FGT's attempt to limit the scope of Order Nos. 637 and 637-A is unpersuasive. The Commission evinced a clear policy to extend the benefits of segmentation beyond the circumscribed boundaries it suggests, as shown by the explicit statement in Order No. 636-A that to the extent operationally feasible, a shipper has the right to segment outside its path, since it has the right to use all points within the zone for which it is paying.⁹

16. The Commission implemented flexible point rights, capacity release, and segmentation rights at least in part to create more competition in the transportation market, including competition between capacity release and the pipelines' sale of interruptible and short-term service.¹⁰ Giving shippers the opportunity to engage in segmented transactions throughout the portion of the system for which they are paying, including outside their primary path where operationally feasible as here, is consistent with that goal. Such transactions increase the number of capacity alternative for shippers and gives them more supply alternatives

17. Giving shippers this flexibility also enables them to make the most efficient use of their capacity. In MRT, the Commission stated that, when pipelines performed bundled sales service before Order No. 636, they had the ability to use capacity flexibly, through the use of flexible point rights and segmentation, and the Commission sought to give firm shippers the same flexibility that the pipeline had. FGT contends that the Commission has not explained how pipelines had such flexibility when they performed bundled sales service, since deliveries to their firm sales customers were made at specified delivery points. However, the Commission did not mean that pipelines had flexibility in

⁹ Order No. 637-A, ¶ 31,099 at p. 31,592.

¹⁰ INGAA v. FERC, 285 F.3d 18, 38 (D.C. Cir. 2002) ("We have long taken the view that the Commission may use this power to apply 'whatever pro-competitive policies are consistent with the agency's enabling act.' As a general matter, INGAA simply fails to make the case that the flexibility on which the Commission insists (subject to operational feasibility concerns) is not necessary for reasonable pursuit of the Commission's policy of enhancing competition by increasing the flexibility of capacity releases." [citations omitted])

performing under a particular service agreement with a specific firm customer to make deliveries to that customer at some alternate downstream point. Rather, the Commission meant that, to the extent firm customers were not taking gas under their contracts, the pipeline had flexibility to use the capacity made available in any manner it chose, including in multiple interruptible transactions that used any points on the system where capacity was available. The pipeline also had the flexibility to obtain the gas sold to its firm sales customers through multiple transactions using receipt points anywhere on the system. In like manner, firm transportation customers today should have the flexibility, when they do not require the firm capacity for which they are paying, to release that capacity to others, including in multiple segmented release transactions. Also, when firm shippers are using their own capacity, they should have similar flexibility to ship gas, in multiple segmented transactions from any receipt point on the portion of the system for which they are paying to whatever delivery points they desire to use, subject to availability of capacity.

18. FGT's claims that allowing segmentation outside a shipper's primary path on a secondary basis will unlawfully expand the rights of shippers beyond the amount of capacity under contract and adversely affect a pipeline's sales of capacity is also without merit. FGT's service agreements with its firm shippers specify the Maximum Daily Transportation Quantity (MDTQ) the shipper is entitled to transport on FGT's mainline. The service agreements also specify the Maximum Daily Quantity (MDQ) which the shipper is entitled to use at the receipt and delivery points listed in the contract. However, these provisions only define the shipper's guaranteed firm rights to service from the primary receipts listed in their contracts along the mainline to the primary delivery points listed in their contracts. The contracts also contain provisions incorporating the terms and conditions in FGT's tariff into the contracts. Accordingly, the requirement that FGT modify its tariff to include giving the shippers the right to use their secondary point rights to enter into segmented transactions outside their primary path but within the rate zones for which they are paying does not change their contracts. It does not impose on FGT the obligation to provide firm primary service beyond that set forth in the contracts with its firm shippers or in any way change the MDTQ and MDQ

listed in their contracts. It only provides the shippers secondary firm rights through the terms and conditions of the tariff, which are incorporated in the shippers' existing contracts.¹¹

19. Moreover, the Commission has placed several limitations on a shipper's right to segment outside its primary path. First, within-the-path transactions are given a scheduling priority over outside-the-path transactions. Consequently, any segmented transactions that are outside a shipper's primary path can only be scheduled to the extent mainline capacity is not being used by shippers for primary and secondary within-the-path transactions.¹² In addition, any segmentation by a shipper is subject to the rule against overlaps in excess of contract demand. The Commission explicitly stated in MRT that "[a] pipeline is not required to permit segmentation in a situation where the nominations by a shipper or a combination of releasing and replacement shippers exceed the contract demand of the underlying contract on any segment."¹³ Consequently, if a releasing shipper releases a segment outside its primary path to a replacement shipper, it is reducing its own rights to use secondary points outside its path to the extent the replacement shipper uses the released capacity.

20. There are additional limitations to the segmentation outside the path requirement. The Commission has permitted pipelines to limit outside-the-path segmentation on systems which are reticulated or on which for other reasons it is difficult to define a physical path. In Colorado Interstate Gas Company,¹⁴ the Commission approved a provision that segmentation would only be permitted as long as the segmented transaction's receipt or delivery point is within the primary contract path, based on CIG's operational complexities. However, neither is the case here. FGT has not claimed that its system configuration or any operational complexity would preclude effective

¹¹ Order on Rehearing of Order on Remand, 106 FERC ¶ 61,088 at p. 57-59. For the same reason, FGT's contention that the Commission's action erroneously modifies transportation contracts in violation of the Mobile-Sierra doctrine is without merit. As discussed above, the Commission has not modified the shippers' contracts. It has simply acted under NGA Section 5 to modify the terms and conditions in the tariff, which are automatically incorporated into the parties' contracts.

¹² 102 FERC at 61,627.

¹³ Id.

¹⁴ 95 FERC ¶ 61,321 (2001).

segmentation outside of the shipper's primary path. In fact, the only adverse impact claimed by FGT is the additional expense of implementing computer system changes to accommodate segmentation outside of shippers' primary paths. The estimated \$250,000 expense is not a sufficient justification to thwart the implementation of outside-the-path segmentation.

B. Florida Cities

21. Florida Cities request clarification, or in the alternative, rehearing, seeking assurance that any effectuation of the within-the-path capacity allocation methodology will not occur until FGT and its shippers have had a meaningful opportunity in the context of FGT's next rate case to make and implement changes to FGT's rate design and/or service terms and conditions to ameliorate the effects of the within-the-path requirement. They request confirmation from the Commission that the revised tariff sheets reflecting a within-the-path priority methodology that FGT has been directed to file in this docket on or before October 1, 2003, are intended to be merely pro forma in nature, and that the question of when such sheets will be made effective is to be reserved for further determination, based on the developments in the upcoming rate case.

22. In the February 26 Order, the Commission denied requests for rehearing which alleged that the Commission erred by requiring FGT to implement a within-the-path allocation methodology for secondary point allocation purposes, rather than allowing FGT to retain its current pro rata allocation methodology.¹⁵ However, the Commission delayed the implementation of the within-the-path methodology until the filing of FGT's next general NGA Section 4 rate case, which FGT filed on October 1, 2003.

23. Florida Cities states that they have explained at length why FGT's presently-effective Market Area rate zone and a within-the-path scheduling priority for secondary point nominations are fundamentally inconsistent. They observe that by deferring the effectiveness of the with-the-path methodology to the next rate case, the Commission appears to be trying to equip FGT and its customers with an opportunity to alter the existing zonal rate structure to more fairly match value of service with cost of service. Florida Cities contend that if FGT elects to take the initiative and propose in its Section 4 filing an altered rate structure in which distance of primary haul within the Market Area becomes a factor in determining the maximum applicable tariff rate, it may be appropriate to allow the within-the-path scheduling priority to take effect along with that

¹⁵ 102 FERC at 61,637.

change in rate design. On the other hand, they maintain that if FGT proposes no material change in its postage stamp rate design for Market Area shippers, any change in that regard could only occur prospectively, after a Section 5 finding.

24. Florida Cities explain that they are most concerned about the possibility that the within-the-path scheduling priority allocation methodology might be incorporated into FGT's tariff before the affected customers have been given a fair chance to defend themselves under Section 5. They point out that this would occur if the Commission treats the October 1, 2003 general rate filing as capable of being accepted and assigned its own effective date. Consequently, Florida Cities argue that the primary objective should be to give interested parties fair opportunity to make their case for why and how the within-the-path scheduling methodology affects rate design on FGT's system, and to hold the implementation of the within-the path protocol in abeyance until that process is completed.

25. The Commission denies Florida Cities' request for clarification, and alternatively, their request for rehearing. In the October 26 Order, while rejecting multiple requests for rehearing on this issue, we discussed why it was necessary to implement the within-the-path methodology for secondary point allocation purposes.¹⁶ That discussion will not be repeated here. However, we did emphasize that notwithstanding the parties' agreement on a pro rata allocation methodology in a settlement, we were not compelled to allow the continuation of an allocation method with such a significant adverse impact on competition.

26. In order to strike a balance between the need to implement the within-the-path allocation methodology and the parties' settlement, we delayed the implementation of the within-the-path until October 1, 2003, the date by which FGT was to file a new general Section 4 rate case. We directed FGT to file revised tariff sheets reflecting a within-the-path priority methodology by October 1, 2003. We permitted this relatively short delay in the implementation of the within-the-path scheduling priority in order to give FGT an opportunity to propose under NGA Section 4 whatever rate design it regarded as appropriate in light of our holdings concerning the within-the-path scheduling priority, as well as our holdings concerning outside-the-path segmentation. FGT has proposed to continue its existing rate design, as an appropriate rate design even in light of our holdings in the Order No. 637 proceeding. As a result, the only way that FGT's rate design can be changed is through action pursuant to NGA Section 5. As the Cities

¹⁶ 102 FERC at 61,637-39.

recognize, any such change would be more time consuming to implement than a change proposed by FGT under Section 4. Moreover, whether such a change would be approved is less certain, since a change proposed by FGT could be accepted based solely on a finding that FGT's proposal is just and reasonable, while Section 5 action also requires a finding that FGT's existing rates are unjust and unreasonable.

27. In these circumstances, we are unwilling to further delay implementation of tariff changes that we have held are necessary to foster increased competition, pending the possibility of rate changes that may or may not take place. We note that under FGT's existing rate design, the Cities have the right to use secondary points throughout the market area, albeit with a lower priority downstream of their primary delivery points than other firm shippers whose primary delivery points are further downstream. Under the rate design changes sought by the Cities, they would have no secondary point rights in any newly created downstream rate zones. Thus, while the existing rate design may result in higher rates for them than under the revised rate design they seek, it carries with it correspondingly increased capacity rights. Also, in Order Nos. 637-A and B, the Commission recognized that on a pipeline with large rate zones, an upstream shipper would receive less valuable rights under the within-the-path allocation than a downstream shipper, despite paying the same rate. However, the Commission found that, as a practical matter, the shipper with the downstream primary point could preempt the upstream shipper in any event. The Commission therefore found that use of the within-the-path priority better promotes efficient allocation of capacity and improves competition as compared to the pro rata allocation method currently in use on FGT.¹⁷ For this reason, in Order No. 637-B, the Commission indicated that it would not generically delay implementation of within-the-path scheduling priority until after it has conducted an examination of pipeline rate structures. Similarly, we do not believe that it is necessary in the instant case to delay implementation of the within-the-path scheduling priority until the conclusion of the rate case on Docket No. RP04-12-000.¹⁸ Accordingly, as discussed below, we will accept FGT's revised tariff sheets implementing segmentation and the within-the-path scheduling priority to be effective March 1, 2004.

¹⁷ Order No. 637-A at 31,597-8.

¹⁸ 92 FERC ¶ 61,062 at 61170, (2000).

II. FGT's Filing to Comply with the February 26 Order

28. The February 26 Order rejected FGT's proposed tariff language limiting segmentation to points within a shipper's contract path. The order required FGT to file revised tariff sheets in this proceeding which allowed shippers, subject to available capacity, to segment within or outside their contractual paths.

29. In addition, the February 26 Order rejected FGT's tariff proposal to implement a pro rata method for allocating mainline capacity to secondary points, requiring FGT to file revised tariff sheets in this proceeding which implement a within-the-path priority method for allocating such capacity. The order directed that FGT's implementation of a within-the-path allocation methodology was to take effect in conjunction with the general Section 4 rate case that FGT was required to file by October 1, 2004.

30. When FGT filed its now pending general rate case in Docket No. RP04-12-000, it included pro forma tariff language (Sheet Nos. 119, 120A and 175) which satisfactorily addresses the Commission's policies on segmentation and capacity allocation, as described in the February 26 Order. However, to be consistent with the February 26 Order, the Commission, in its October 31 Order on FGT's rate filing, re-docketed Sheet Nos. 119, 120A and 175 as part of this proceeding under Docket No. RP00-387-004. The Commission therefore directs FGT to comply with the February 26 Order by filing actual tariff sheets in this proceeding corresponding to Pro Forma Sheet Nos. 119, 120A and 175, to be effective March 1, 2004.

31. In Docket No. RP04-12-000, FGT's pro forma tariff proposals on segmentation and capacity allocation were addressed by several of the protestors in that proceeding,¹⁹ who raised essentially the same concerns about the relationship of those proposals to FGT's rate case as have been raised in this proceeding. The merits of these concerns have been addressed in the February 26 Order, and are also addressed in the portion of this order dealing with requests for rehearing. Our concern in Docket No. RP00-387-004 is only whether or not FGT's pro forma tariff sheets comply with the directives of the February 26 Order regarding these issues. We find that the pro forma tariff language dealing with those issues is consistent with the February 26 Order, however FGT must still file corresponding actual tariff sheets to comply with the order. Therefore, the protests in Docket No. RP04-12-000 are denied, in part, only insofar as they address outside-the-path segmentation, and within-the-path capacity allocation.

¹⁹ Florida Cities, Florida Municipal Natural Gas Association, Florida Power & Light Company, and Florida Power Corporation

Docket Nos. RP00-387-003 and 004

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The Commission orders:

(A) The respective requests for rehearing and/or clarification are denied as discussed above.

(B) FGT is directed to file actual tariff sheets corresponding to Pro Forma Tariff Sheet Nos. 119, 120A, and 175, to be effective within thirty days of the issuance of this order, consistent with the discussion above.

(C) The protests filed in Docket No. RP04-12-000 are denied in part, only insofar as they address outside-the-path segmentation, and within-the-path capacity allocation in Docket No. RP00-387-004, as discussed above.

By the Commission. Commissioner Kelly not participating.

(S E A L)

Linda Mitry,
Acting Secretary.