

107 FERC ¶ 61,174
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

In the Matter of Amendments to
Blanket Sales Certificates

Docket No. RM03-10-001

ORDER DENYING REHEARING OF
BLANKET SALES CERTIFICATES ORDER

(Issued May 19, 2004)

1. On November 17, 2003, the Commission issued a final rule amending blanket certificates for unbundled gas sales services held by interstate natural gas pipelines and blanket marketing certificates held by persons making sales for resale of gas at negotiated rates in interstate commerce. This rule requires that pipelines and all sellers for resale adhere to a code of conduct with respect to gas sales.¹ As discussed below, this order denies the requests for rehearing and provides several clarifications of the Commission's November 17, 2003 Order.

I. Background

2. In Order No. 644, the Commission explained that the purpose of the code of conduct conditions is to ensure the integrity of the gas sales market remaining within the Commission's jurisdiction, and to continue the Commission's effort to restore confidence in the nation's energy markets. Contemporaneously with Order No. 644, the Commission also issued a rule to require wholesale sellers of electricity at market-based rates to adhere to certain behavioral rules when making wholesale sales of electricity.²

¹ Amendments to Blanket Sales Certificates, Order No. 644, 105 FERC ¶ 61,217 (2003); 68 Fed. Reg. 66,323 (Nov. 26, 2003); 18 CFR §§ 284.288 and 284.403 (2003) (Order No. 644).

² Investigations of Terms and Conditions of Public Utility Market-Based Rate Authorizations, 105 FERC ¶ 61,218 (2003).

3. Based on the comments received from market participants and further consideration of the issues presented, Order No. 644 modified the provisions of the code of conduct originally proposed in the Notice of Proposed Rulemaking issued on June 26, 2003.³

4. Under the codes of conduct, a pipeline providing unbundled natural gas sales service under section 284.284, or any person making natural gas sales for resale in interstate commerce pursuant to section 284.402, is prohibited from engaging in actions that are without a legitimate business purpose and that are intended to or foreseeably could manipulate market rules, prices, or conditions.⁴ Wash trades and collusion with others are included in this prohibition.

5. Sections 284.288 and 284.403 also contain various reporting obligations. To the extent that a pipeline providing service under section 284.284, or any person making natural gas sales for resale in interstate commerce pursuant to section 284.402, engages in the reporting of transactions to publishers of gas price indices, the pipeline or blanket marketing certificate holder shall provide complete and accurate information to any such publisher. Further, such entities must retain for three years all relevant data and information upon which they billed the prices they charged for natural gas they sold pursuant to their market based sales certificate or the prices they reported for use in price indices. Moreover, such entities that engage in reporting must do so consistent with the Policy Statement on Natural Gas and Electric Price Indices, 104 FERC ¶ 61,121 (2003) (Policy Statement), which provides, *inter alia*, that a data provider should only report each bilateral, arm's-length transaction between non-affiliated companies.

6. Order No. 644 provides that a person filing a complaint alleging a violation of these rules must do so no later than 90 days after the end of the calendar quarter in which the alleged violation occurred. However, Order No. 644 provides that if a person could not have known of the alleged violation, the 90-day time limit will run from the discovery of the alleged violation. In a similar vein, the Commission must act within 90 days from the date it is informed of an alleged violation of these regulations or knew of the potentially manipulative nature of the act. If the Commission does not act within this time period, the seller will not be exposed to potential liability regarding the subject action. A violation of these rules may result in disgorgement of unjust profits, suspension or revocation of a pipeline's blanket certificate or other appropriate non-monetary remedies.

³ Amendments to Blanket Sales Certificates, 103 FERC ¶ 61,350 (2003) (NOPR).

⁴ See 18 C.F.R. §§ 284.288 and 284.403.

7. In formulating these code of conduct regulations, the Commission sought to strike a balance among a number of competing interests. For example, while customers must be given an effective remedy in the event anticompetitive behavior or other market abuses occur, sellers must be provided sufficient notice of the rules of the road. In order to ensure that the marketplace will be competitive and well-functioning, we must provide rules prohibiting all market abuses, even those whose precise form and nature are unknown to the Commission at this time. Therefore, in promulgating these rules, the Commission has carefully balanced and accounted for the competing interests, and has ensured that all market abuses are prohibited and that sellers have sufficient notice of the prohibited conduct.

8. Eleven commenters sought rehearing or clarification of Order No. 644.⁵ The issues raised by these commenters include issues relating to: the application of the code of conduct to jurisdictional sellers; the limited jurisdiction of blanket certificates; the general language prohibiting manipulation, as well as the prohibitions of wash trades and collusion; the reporting to index gas publishers; the three-year data and information retention requirement; and finally, remedies. These issues are discussed below.

II. Comments

A. The Commission's Burden of Proof to Institute a Generic Rulemaking

9. Cinergy argues that the Commission has failed to meet its burden of proof under section 5 of the Natural Gas Act (NGA) to justify the imposition of new conditions in existing blanket sales certificates, on a generic basis. Cinergy argues that the Commission failed to show that blanket certificates, as a class, are no longer just and reasonable and that sellers have both market power and the ability to influence market prices, terms and conditions, and that the Commission has failed to prove that requiring the refund condition in blanket certificates is just and reasonable with respect to every natural gas market, every product, and every seller in the country. In particular, Cinergy

⁵ American Gas Association (AGA); Avista Corporation d/b/a Avista Utilities and Avista Energy Inc. (collectively, Avista); BP America Production Company and BP Energy Company (collectively, BP); Cinergy Marketing & Trading, L.P. (Cinergy); Duke Energy Corporation (Duke); Merrill Lynch Capital Services, Inc. and Morgan Stanley Capital Group Inc. (Merrill Lynch and Morgan Stanley); National Association of State Utility Consumer Advocates (NASUCA); Nicor Gas; Sempra Energy; Shell Offshore Inc. (Shell Offshore); and Western Gas Resources, Inc. (Western).

argues that the Commission's reliance in Order No. 644 upon the Final Report on Price Manipulation in Western Markets is not reasoned decision-making since the Final Report was based, in part, on non-public information that was not shared with the industry.

10. In its final rule, the Commission recognized that in Order No. 636, it authorized pipelines to make unbundled sales at market-based rates because it concluded that, after unbundling, jurisdictional sellers of natural gas would not retain market power. In Order No. 636, the Commission also noted that Congress had found that a competitive market exists for gas at the wellhead and in the field and required that the Commission maintain and protect the competitive well-head market.⁶ The Commission determined to institute a light-handed regulation regime and rely upon market forces to constrain unbundled pipeline sales for resale gas prices within the Natural Gas Act's "just and reasonable" standard. In Order No. 547, the Commission issued blanket certificates to all persons that were not interstate pipelines authorizing them to make jurisdictional gas sales for resale at negotiated rates with pregranted abandonment authority. The Commission also determined that the competitive gas commodity market would lead all gas suppliers to charge rates that are sensitive to the gas sales market.

11. In this proceeding, the Commission determined that its light-handed regulation of the jurisdictional gas market had been successful and had resulted in substantial economic benefits including lower national energy costs to consumers of over \$600 billion as compared to the continuation of tight regulation.⁷ However, the Commission concluded that in light of its Staff's determination regarding the types of behavior that

⁶ In adopting the Wellhead Decontrol Act, Congress required the Commission to "retain and improve this competitive structure in order to maximize the benefits of decontrol." Order No. 636 at 30,392, citing, H.R. Rep. No. 101-29, at 6 (1989) (emphasis in original).

⁷ 103 FERC ¶ 61,350 (2003) at P10 (citing Center for the Advancement of Energy Markets, California Here We Come: The Lessons Learned from Natural Gas Deregulation by Dr. Rodney Lemon (August 2001)).

occurred in the Western markets during 2000 and 2001,⁸ and by the Commission's experience in other competitive markets, its responsibility to ensure the integrity of the jurisdictional gas sales market required it to revise its regulations to place additional conditions on its grant of market based sales certificates. The Commission determined that such conditions would allow the Commission to fulfill its obligation to appropriately monitor markets and to ensure that market based rates remain within the zone of reasonableness required by the NGA.

12. The anticompetitive and manipulative actions prohibited by these rules are antithetical to the original intent of the grant of blanket market-based sales authority which was intended to "foster a truly competitive market for natural gas sales for resale in interstate commerce, giving purchasers of natural gas access to multiple sources of natural gas and the opportunity to make gas purchasing decisions in accord with market conditions."⁹ Therefore, the original grant of certificate authority to make jurisdictional

⁸ Final Report on Price Manipulation in Western Markets: Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, Docket No. PA02-2-000 (March 2003) (Final Report). In its report Staff concluded that markets for natural gas and electricity in California are inextricably linked, and that dysfunctions in each fed off one another during the California energy crisis. Staff also found that spot gas prices during the period studied rose to extraordinary levels, facilitating the unprecedented price increase in the electricity market. The Staff also found that dysfunctions in the natural gas market appear to stem, at least in part, from efforts to manipulate price indices compiled by trade publications.

⁹ Order No. 547, FERC Stats & Regs., Reg. Preambles January 1991-June 1996 at 30,719. The Commission also stated that:

The goal of this rule--in conjunction with the regulations promulgated in Order Nos. 636 and 636-A--is to provide to all merchants of natural gas the "level playing field" that the Commission continually strives to promote. By issuing marketing certificates, this final rule will place gas merchants who are not interstate pipelines on an equal footing with interstate pipeline merchants who are afforded blanket sales certificates pursuant to Order No. 636. Further, and most importantly, the final rule will foster a truly competitive market for natural gas sales for resale in interstate commerce, giving purchasers of natural gas access to multiple sources of natural gas and the opportunity to make gas purchasing decisions in accord with market conditions. As we emphasized in Order No. 636-A, our "policy of relying, to the maximum extent possible, on competitive market forces to balance the supply and demand for natural gas at reasonable prices should be extended to all sales markets." Id.

sales of natural gas implicitly prohibited acts which would manipulate the competitive market for natural gas. In light of the market manipulations in the West in 2000-2001, which occurred despite the implicit prohibitions in gas certificate authorizations and electric energy market-based rate authorizations, the Commission found it necessary, in order to ensure the competitiveness of the market, to explicitly prohibit acts intended to manipulate the natural gas market in its final rule. The Commission implemented these regulations under its authority pursuant to sections 5, 7, and 16 of the NGA.¹⁰ Here, the Commission has determined that a market based authorization for jurisdictional sales service cannot be in the public convenience and necessity unless the conditions promulgated by the instant final rule to ensure a competitive and transparent market are met.

13. The Commission's action in conditioning its grant of certificate authority explicitly places jurisdictional sellers of gas on notice of the type of actions that are prohibited in an effort to maintain a competitive marketplace for natural gas.¹¹ Therefore, the Commission has further ensured that its original intent in fostering a truly competitive marketplace for natural gas will be met.

14. In the instant proceeding, the Commission finds that market based sales of natural gas cannot continue unless subject to the explicit code of conduct set forth in these rules. The rules ensure that the integrity of the competitive natural gas market will not be undermined by manipulative behaviors. The Commission has not found that any particular jurisdictional seller of gas has engaged in the prohibited practices, but rather, that the prohibited practices are unjust and unreasonable, and that their explicit

¹⁰ See also 18 CFR §284.5 (2003) which states that:

The Commission may prospectively, by rule or order, impose such further terms and conditions as it deems appropriate on transactions authorized by this part.

¹¹ For example, in addition to prohibiting jurisdictional sellers from engaging in actions that were without a legitimate business purpose that manipulate or foreseeably could manipulate market conditions, the Commission at section 284.288(A)(1) specifically prohibited "wash" trades which the Commission determined were by their very nature manipulative and devoid of any legitimate business purpose. This is consistent with Commission findings that such wash trades are contrary to the Commission's original intent in authorizing market-based sales. *Enron Power Marketing, Inc, et al.*, 106 FERC ¶ 61,024 (2004).

prohibition is necessary to ensure that market-based sales of gas will be adequately protected from manipulation and, therefore, will be just and reasonable. To this end, the Commission has amended its grant of blanket certificate authority for market based sales to prohibit the types of behaviors which are inconsistent with and cannot exist in a competitive marketplace.

B. Application of Code of Conduct to Jurisdictional Sellers of Natural Gas

15. Nicor Gas argues that the Commission erred in applying the requirements of Order No. 644 to a limited group of sellers, which, they say, places them at a competitive disadvantage. Specifically, Nicor Gas argues that to maintain “first sales” status under the Natural Gas Policy Act of 1978 (NGPA), some wholesalers of natural gas can be expected to be unwilling to engage in transactions with entities subject to these rules, in order to avoid being subject to Order No. 644. Cinergy argues that the code of conduct rules will cause undue discrimination between market participants operating in the Commission regulated and first sales market since the Commission has set up the instant rules which will institute separate standards and penalties for actions in the two markets.

16. The fact that the Commission does not have authority to regulate all sellers in the natural gas market cannot prevent the Commission from explicitly imposing code of conduct rules on all sellers within its jurisdiction which the Commission determined is necessary to prevent the manipulation of prices. Otherwise, the Commission would be prevented from meeting its Congressionally-mandated obligation to ensure a competitive marketplace for sales for resale of natural gas.¹²

17. While recognizing that the code of conduct regulations can be applied only to jurisdictional sellers, the Commission noted that the regulations are intended only to prevent jurisdictional sellers from undermining the competitiveness of the marketplace by engaging in abusive or manipulative acts. On balance, therefore, the Commission determined that the benefits of such rules outweighed any potential market disruptions or burdens on jurisdictional sellers potentially caused by those rules.

¹² AGA requests clarification that an entity not engaged in wholesale sales that otherwise could be, is not considered a “seller” or “holder of a blanket certificate” under these rules, and therefore is not subject to the obligations in section 284.403(b)-(c). The Commission repeats that these code of conduct rules under sections 284.288 and 284.403 apply only to actual jurisdictional sellers: a pipeline providing unbundled natural gas sales service under section 284.284, or any person making natural gas sales for resale in interstate commerce pursuant to section 284.402.

18. Requiring jurisdictional sellers of natural gas to refrain from abusive or manipulative acts will not place jurisdictional sellers of natural gas at any disadvantage in the marketplace other than the disadvantage of being prohibited from engaging in anticompetitive behavior. The competitiveness of a market place is enhanced by rules that require sellers to operate in an open and transparent manner. Accordingly, after a review of the instant requests, the Commission finds that its original determination that its statutory responsibility to ensure just and reasonable rates for the sales over which it has jurisdiction outweighs concerns that a portion of the market will not be subject to these regulations.

C. Jurisdiction Arguments

19. In its final rule, the Commission explained its jurisdiction concerning the resales of natural gas and stated that the Commission's NGA jurisdiction to regulate the prices charged by sellers of natural gas had been substantially narrowed by the NGPA and Congress' subsequent enactment of the Natural Gas Wellhead Decontrol Act of 1989. The Commission stated that as a result of these statutory provisions first sales of natural gas were deregulated. The Commission stated that:

Under the NGPA, first sales of natural gas are defined as any sale to an interstate or intrastate pipeline, LDC or retail customer, or any sale in the chain of transactions *prior* to a sale to an interstate or intrastate pipeline or LDC or retail customer. NGPA Section 2(21)(A) sets forth a general rule stating that all sales in the chain from the producer to the ultimate consumer are first sales until the gas is purchased by an interstate pipeline, intrastate pipeline, or LDC. Once such a sale is executed and the gas is in the possession of a pipeline, LDC, or retail customer, the chain is broken, and no subsequent sale, whether the sale is by the pipeline, or LDC, or by a subsequent purchaser of gas that has passed through the hands of a pipeline or LDC, can qualify under the general rule as a first sale on natural gas. In addition to the general rule, NGPA Section 2(21)(B) expressly excludes from first sale status any sale of natural gas by a pipeline, LDC, or their affiliates, except when the pipeline, LDC, or affiliate is selling its own production.¹³

* * *

¹³ Order No. 644 at P 14 (emphasis added).

The Commission retains jurisdiction of sales of domestic gas for resale by pipelines, local distribution companies and affiliated entities, if the seller does not produce the gas it sells.¹⁴

20. BP and Shell Offshore argue that the Commission's interpretation of "first sales" is more limited than the statutory language of the NGPA, section 2(21)(A), and judicial precedent. BP and Shell Offshore argue that to qualify for "first sales" status, the sale of attributable production should relate to the production of the seller or its affiliate.¹⁵ BP and Shell Offshore argue that the issue raised by the underlined language is whether the Commission intended that in order to qualify for "first sale" exemption the seller must be selling only its own production or whether a seller may also qualify if it purchases its own affiliate's production and resells it in its own name. BP and Shell Offshore argue that if the gas is produced by an interstate pipeline, intrastate pipeline, LDC or any affiliate of the interstate pipeline, intrastate pipeline, or LDC, then the sale of those volumes by any other affiliated entity qualifies as a nonjurisdictional first sale.

21. BP and Shell Offshore argue that the Commission should clarify that to qualify for first sale status, the sale of attributable production would relate to production of the seller or its affiliate. The language referred to by BP and Shell Offshore was an attempt by the Commission to encapsulate section 2(21)(B) of the NGPA. This section states:

Certain Sales not included – Clauses (i), (ii), (iii), or (iv) of subparagraph (A) [relating to the definition of a first sale of natural gas] shall not include the sale of any volume or natural gas by any interstate pipeline, intrastate pipeline, or local distribution company, or any affiliate thereof, unless such sale is attributable to volumes of natural gas produced by such interstate pipeline, intrastate pipeline, or local distribution company, or any affiliate thereof.

22. The Commission's intent in its final rule was to follow this statutory language, and therefore, the Commission will clarify that if the gas is produced by an interstate pipeline, intrastate pipeline, LDC, or any affiliate of an interstate pipeline, intrastate pipeline, or LDC, then the sale of those volumes by any other affiliated entity qualifies as a nonjurisdictional first sale of natural gas. This finding is consistent with the court's

¹⁴ Order No. 644 at P 21 (emphasis added).

¹⁵ See BP's Request for Rehearing at 4-7 (citing City of Farmington, New Mexico v. FERC, 820 F.2d 1308, 1315 (D.C. Cir. 1987)). See also Shell Offshore's Request for Clarification and/or Rehearing at 6.

finding in City of Farmington, New Mexico v. FERC, where the court held that, “More generally, a seller (whether an “interstate pipeline,” an “intrastate pipeline,” a “local distribution company,” or an “affiliate thereof”) is engaged in a “first sale” if it is selling gas produced *either* by the seller itself (“such” seller) *or* by its affiliate (“any affiliate thereof”).”¹⁶

23. Western argues that the Commission has attempted to extend its jurisdiction in contravention of the Natural Gas Policy Act of 1978 by narrowing the definition of “first sales.” Western argues that this attempt lacks statutory support and exceeds the Commission’s authority. Western argues that the Commission erred in asserting that once natural gas is purchased by an interstate pipeline, intrastate pipeline, or LDC, the chain of first sales is broken, and that no subsequent sale, whether the sale is by the pipeline, or LDC, or by a subsequent purchaser of gas that has passed through the hands of a pipeline or LDC can qualify as a first sale. Western argues that the Commission’s construction would make unaffiliated marketers of natural gas, who have no relationship to a pipeline or LDC, subject to blanket sales authority whenever the marketer bought back volumes of natural gas from a pipeline or LDC. Western argues that there is no statutory or policy reason for such a change.

24. The Commission’s explanation of its jurisdiction set forth in the final rule is predicated on the NGA, as limited by the definition of first sales set forth in the NGPA. Section 2(21) (A) of the NGPA defines a first sale of natural gas as:

General Rule.- The term “first sale” means any sale of any volume of natural gas- (i) to any interstate pipeline or intrastate pipeline; (ii) to any local distribution company; (iii) to any person for use by such person; (iv) which precedes any sale described in clauses (i),(ii), (iii); and (v) which precedes or follows any sale described in clauses (i), (ii), (iii), or (iv) and is defined by the Commission as a first sale in order to prevent circumvention of any maximum lawful price established under this Act.

25. In its final rule, the Commission determined that NGPA section 2(21)(A) sets forth a general rule stating that all sales in the chain from the producer to the ultimate consumer are first sales until the gas is purchased by an interstate pipeline, intrastate pipeline, or LDC. The Commission reasoned that once such a sale is executed and the gas is in the possession of a pipeline, LDC, or retail customer, the chain is broken, and no subsequent sale, whether the sale is by the pipeline, or LDC, or by a subsequent

¹⁶ City of Farmington, New Mexico v. FERC, 820 F.2d 1308, 1315 and n.4 (D.C. Cir. 1987) (emphasis in original).

purchaser of gas that has passed through the hands of a pipeline or LDC, can qualify under the general rule as a first sale on natural gas.

26. Western's argument, that the chain, once broken, can be re-established to allow subsequent sales to be considered as first sales is based upon the premise that Congress did not prohibit this re-establishment in crafting section 2(21)(A) of the NGPA, and that Congress was aware of the possibility of multiple sales of gas in that it provided for first sale treatment for any sale of gas "which precedes any sale" to any interstate pipeline or intrastate pipeline, LDC, or user of natural gas. Western argues that Congress did not further qualify this portion of its definition by adding "so long as the gas has not previously been sold to a pipeline or LDC" as it purportedly would have if it had intended to so qualify its definition of first sales.

27. The Commission does not agree with Western's interpretation of the definition of first sales. Western argues that the chain of first sales may be re-established after it has been broken by a sale to an (i) interstate pipeline or intrastate pipeline, (ii) LDC, or (iii) user of natural gas. This interpretation is contradicted by the plain language of the definition of "first sales," which states that to qualify as a first sale of natural gas the sale must precede any sale described in (i), (ii), or (iii). The sale made by the unaffiliated marketer in Western's argument, or for that matter any sale after the first sale chain has been broken, is a sale that cannot precede any sale described in clauses (i), (ii), or (iii) of the definition of first sales because a prior sale to one of those entities must have been made, and the chain of first sales, would, therefore, be broken.

28. This interpretation -- that the chain of first sales cannot be re-established once broken -- is buttressed by an examination of the practical effects of such action. The NGPA originally set ceiling prices for first sales of natural gas linked to various categories of natural gas for sales of such gas. Once the chain of first sales was broken, the gas sales became subject to the jurisdiction of the NGA. To argue, as Western does, that the chain of first sales could be reestablished would lead to impractical results. This is because the ceiling prices established by the NGPA for a first sale of natural gas would be re-imposed downstream after the gas had been sold pursuant to NGA jurisdiction. This may have the perverse effect of requiring a buyer to accept an NGPA ceiling price for its gas sale which is less than the price it paid for the gas under NGA. Moreover, a further indication that the Commission has reasonably interpreted the definition is shown by clause (v) of the definition,¹⁷ which explicitly provides an exception allowing the

¹⁷ Clause (v) of the definition of first sales allows the first sale chain to be re-established only for sales which precede or follow any sale described in clauses (i), (ii), (iii), or (iv) and is defined by the Commission as a first sale in order to prevent circumvention of any maximum lawful price established under this Act.

Commission to re-establish a first-sale chain, but only when the Commission determines that it should do so in order to prevent the circumvention of a maximum lawful price established by the NGPA. As the definition explicitly includes a provision allowing the reestablishment of the first sale chain in only one specific circumstance, the Commission reasonably interpreted the definition as not allowing the chain to be reestablished in other circumstances. Therefore, the Commission denies Western's request for rehearing on this issue.

29. Sempra Energy states that the Commission should clarify that the Code of conduct will not modify the Commission's interpretation and implementation of the Mobile-Sierra doctrine. United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956); FPC v. Sierra Pac. Power Co., 350 U.S. 348 (1956); Sempra Energy's Request for Rehearing and Clarification at 7-8 (citing Town of Norwood v. FERC, 587 F.2d 1306, 1303-1315 (D.C. Cir. 1978)). The Commission clarifies that the code of conduct rules were not intended to change its policies regarding the Mobile-Sierra doctrine. Further, these rules will not supersede or replace parties' rights under section 5 of the NGA to file a complaint contending that a contract should be revised by the Commission, pursuant to either the "just and reasonable" or "public interest" standards as required by the subject contract.

D. Code of Conduct

1. General Language Prohibiting Manipulation

30. Section 284.288(a) of the Commission's regulations provides that:

A pipeline that provides unbundled natural gas service under § 284.284 is prohibited from engaging in actions or transactions that are without a legitimate business purpose and that are intended to or foreseeably could manipulate market prices, market conditions, or market rules for natural gas.¹⁸

¹⁸ Section 284.403(a) of the Commission's regulation provides that:

Any person making natural gas sales for resale in interstate commerce pursuant to section 284.402 is prohibited from engaging in actions or transactions that are without a legitimate business purpose and are intended to or foreseeably could manipulate market prices, market conditions, or market rules for natural gas.

31. Avista argues that in order to afford regulated parties fair notice of conduct to be prohibited and to comply with the dictates of due process, as well as to facilitate the efficient operation of competitive wholesale natural gas markets, the Commission should modify the general prohibition on market manipulation to prohibit only clearly-defined acts of market manipulation.¹⁹

32. The American Gas Association (AGA) argues that the rule's anti-manipulation code requires further clarification to afford regulated companies sufficient notice of prohibited conduct. Specifically, AGA argues that the Commission should modify the anti-manipulation rule by: (1) clarifying the legitimate business purpose test so that it offers a "safe harbor" against sanctions for particular trading activities (e.g., maximizing operational flexibility, providing additional credit support, avoiding cash out or penalty exposure under a pipeline's tariff, and engaging in price arbitrage through the use of storage service); (2) deleting the foreseeability concept from the rule; (3) clarifying that it will apply a definition of manipulation in accord with judicial and regulatory precedent,²⁰ and (4) modifying the rule by deleting "market conditions" and "market rules" or at a minimum offering further clarification as to the intended meaning of these phrases. Similarly, Cinergy argues that it is not possible to determine how the term "without a legitimate business purpose" will be interpreted in the future.²¹ BP requests clarification that the Commission's intent with regard to determining if a business transaction has a "legitimate business purpose" is not to second guess the actions of parties freely entering into bilateral or speculative transactions.

¹⁹ See also Merrill Lynch and Morgan Stanley Request for Rehearing at 6, 23; Cinergy's Request for Rehearing at 4-8.

²⁰ Specifically, AGA argues that the Commission should explicitly recognize that manipulation has been defined as comprising the following elements: (1) the trader had the ability to influence market prices; (2) the trader specifically intended to do so; (3) an artificial price occurred; and (4) the trade caused the artificial price. See also Merrill Lynch and Morgan Stanley at 4-5, 11-12 (arguing for the deletion of the foreseeability component since it purportedly legitimizes the use of speculative information that played no role in