UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Petition for Rulemaking to Update	)	
Commission Regulations Regarding	)	Docket No. RM22-17-000
Allocation of Interstate Pipeline Capacity	)	

REPLY COMMENTS OF THE AMERICAN GAS ASSOCIATION, AMERICAN PUBLIC GAS ASSOCIATION, PROCESS GAS CONSUMERS GROUP, AND NATURAL GAS SUPPLY ASSOCIATION

The American Gas Association ("AGA"), American Public Gas Association ("APGA"), Process Gas Consumers Group ("PGC"), and Natural Gas Supply Association ("NGSA") (collectively, the "Petitioners") respectfully submit these reply comments (the "Reply Comments") pursuant to the Notice of Inquiry issued by the Federal Energy Regulatory Commission ("FERC" or "Commission") on March 21, 2024, in the above-captioned docket (the "NOI").[1]

I. BACKGROUND

On June 2, 2022, the Petitioners, pursuant to Rule 207(a)(4) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.207(a)(4), submitted a Petition for Rulemaking (the "Petition") respectfully requesting that the Commission conduct a rulemaking to adopt a rule to preclude natural gas pipelines from the practice of aggregating bids on non-contiguous segments of capacity in determining the highest-value bid for the purpose of allocating capacity ("junk and jewel"). On July 18, 2022, the following companies submitted comments in opposition to the Petition: ANR Pipeline Company ("ANR"); Northern Border Pipeline company ("Northern Border"); Kinder Morgan, Inc. ("Kinder Morgan"); Northern Natural Gas Company ("Northern"); Transcontinental Gas Pipeline Company, LLC ("Transco"); Interstate Natural Gas Association of America ("INGAA"). Also, on July 18, 2022, the following parties submitted comments in support of the Petition: BP Energy Company ("BP"), Interstate Power and Light ("IPL"), Utica, LLC, Chesapeake

[1] *Petition for Rulemaking to Update Commission Regulations Regarding Allocation of Interstate Pipeline Capacity*, 186 FERC ¶ 61,197 (March 21, 2024).

Energy Marketing, L.L.C. ("Chesapeake"), ConocoPhillips Company ("Conoco"), Continental Resources, Inc. ("CLR"), and XTO Energy Inc. (collectively, the "Intervenors").[2] On August 3, 2022, Sabine Pass Liquefaction, LLC filed comments in support of the Petition and a Motion to Intervene Out-of-Time. On September 6, 2022, the Petitioners submitted reply comments in response to the comments of the Pipelines in opposition to the Petition (the "Reply"). On August 21, 2023, the National Association of Regulatory Utility Commissioners submitted comments in support of the Petition.

On March 21, 2024, the Commission issued the NOI. On June 27, 2024, the Petitioners submitted a response to the NOI in support of a rule prohibiting junk and jewel (the "Petitioner Comments"). Additionally, on June 26, 2024, the Canadian Association of Petroleum Producers ("CAPP"), and on June 27, 2024, the following parties, each submitted responses to the NOI in support of a rule precluding junk and jewel: Basin Electric Power Cooperative ("Basin Electric"), BP, Ascent Resources – Utica, LLC ("Ascent"), Chesapeake, Conoco, CLR, and ExxonMobil Oil Corporation ("Exxon"),[3] the Electric Power Supply Association ("EPSA"), EQT Energy, LLC ("EQT"), and Xcel Energy Services Inc. ("XES"; together with CAPP, Basin Electric, Indicated Shippers, EPSA, EQT, and XES, the "Supporting Commenters"). Also on June 27, 2024, Kinder Morgan, Transco, Northern, INGAA, and TC Energy Corporation ("TC Energy"; together with Kinder Morgan, Transco, Northern, and INGAA, the "Pipelines") submitted responses to the NOI opposing a rule precluding junk and jewel. In response to the opposition comments, the Petitioners submit the following reply comments.

[2] Utica, LLC, Chesapeake, Conoco, CLR and XTO Energy Inc. filed jointly as "Indicated Shippers".

[3] BP, Ascent, Chesapeake, Conoco, CLR, and Exxon filed jointly as "Indicated Shippers".

II. REPLY COMMENTS

A. **The NOI is the appropriate forum for the Commission to revise its policy allowing the bundling of non-contiguous packages in open seasons in light of new factual information, provided in this docket, that demonstrates that the practice is unjust, unreasonable, and unduly discriminatory, which evidence was not available to the Commission when individual tariffs were adopted for future implementation.**

The Pipelines argue that the Commission has permitted junk and jewel for many years and consequently should not change its policy on this issue.[4] However, the Commission has a statutory obligation under the Natural Gas Act ("NGA") to prohibit unjust and unreasonable rates and unduly discriminatory practices.[5] When evidence demonstrates that an existing policy results in unjust and unreasonable rates or is unduly discriminatory, the Commission is obligated to change the policy regardless of how long it has been in place.[6] When the Commission first considered the issue of junk and jewel when adopting individual tariffs, it anticipated that the bundling of non-contiguous packages of capacity in open seasons would result in benefits to consumers.[7] Petitioners have demonstrated that, to the contrary, in actual practice, the policy of allowing pipelines to bundle these packages in open seasons is unjust, unreasonable, and unduly discriminatory. Therefore, Petitioners urge the Commission to revise its policies and prohibit this practice consistent with its duty under the NGA.

The Commission has the authority to change its policy and adopt new regulations on an industry-wide basis when it is provided evidence that industry-wide pipeline practices are resulting in unjust and unreasonable results, provided the Commission gives notice and opportunity to comment in the context of a rulemaking or Notice of Inquiry.[8] The Petitioners have shown in the

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[4] *See* June 27, 2024 Comments to Notice of Inquiry from the Interstate Natural Gas Association of America ("INGAA Comments") at 2-3, 16; June 27, 2024 Comments of Kinder Morgan, Inc. on Notice of Inquiry ("Kinder Morgan Comments") at 24.

[5] 15 U.S.C. § 717d.

[6] *Id*.

[7] *See N. Border Pipeline Co.*, 164 FERC ¶ 61,150, at P 27 (2018), citing *Texican N. La. Transport, LLC v. Southern Natural Gas Company*, 129 FERC ¶ 61,270, at P 69 (2009).

[8] *Transmission Planning & Cost Allocation*, 136 FERC ¶ 61,051, P 60 (2011) ("It is within our discretion to conclude that a generic rulemaking, not case-by-case adjudications, is the most efficient approach to take to resolve the industry wide problems facing us.").

Petitioner Comments that junk and jewel is an industry-wide discriminatory practice.[9] Additionally, the Commission has authority under the NGA to prevent the Pipelines from exercising market power as part of its anti-trust enforcement authority.[10] The Petitioners demonstrate in their filings that pipelines are exercising market power through this practice by effectively collecting above maximum rates for valuable ("jewel") capacity by tying it to low-value or worthless ("junk") capacity.

In their comments, INGAA self-servingly asserts that individual rate cases are a better forum than this proceeding to address the problems with junk and jewel. This argument assumes that junk and jewel is a mere rate issue for shippers. It is not – as multiple shippers have stated in this proceeding, junk and jewel is preventing certain shippers from acquiring capacity they need and is unduly discriminatory in this regard.[11] Moreover, it is unsurprising that rate cases are the Pipelines' preferred forum for addressing the problems with junk and jewel, given that, as explained in the affidavit of Elizabeth H. Crowe submitted with the Petitioner Comments, in rate case settlements, pipelines often have significant leverage over shippers. Pipelines usually obtain significantly higher rates in settlements than would result from litigation because of the costs of litigation and the time value of money. As a result, such litigation rarely ever occurs. The Commission's inability to order refunds under Section 5 to lower rates beyond the current refund

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[9] Petitioner Comments at 7.

[10] 15 U.S.C. §§ 717a, 717c-1.

[11] *See* June 27, 2024 Comments of Xcel Energy Services Inc. ("XES Comments") at 11 ("XES is not aware of any instances involving packaged junk and jewel capacity in which a shipper who bid only on a portion of a package of posted capacity (i.e., a jewel-capacity-only bid) was awarded that capacity in the auction."); June 27, 2024 Comments of EQT Energy, LLC in Commission Petition For Rulemaking To Update Commission Regulations Regarding Allocation Of Interstate Pipeline Capacity ("EQT Comments") at 7 ("EQT posits that only shippers capable of optimizing large portfolios through various hedges on their positions, without geographical constraints, and with a different risk profile from EQT or the Petitioners, can readily compete under these conditions."); Petitioner Comments at p. 21-22; Petitioner Comments, Testimony of Terry Lewandowski, Exhibit No. 0002 at 2. *See also* Petition, Affidavit of Michael J. Frey, Exhibit No. 0001 at para. 6-7; Testimony of Terry Lewandowski, Exhibit No. 0002 at 2, lines 4-24; Affidavit of Mollie Giem, Exhibit No. 0003 at pages 4-7; Prepared Direct Testimony of George E. Briden, Ph.D., Exhibit No. 0004 at 11-12. Intervenors' supporting comments provide several examples of instances where a shipper lost an auction because the relevant Pipeline was able to realize a higher NPV by tying the desired capacity to a less marketable segment. *See*, July 18, 2022 Comments of Interstate Power and Light Company in Support of Petition for Rulemaking ("IPL Supporting Comments") at 3-4; July 18, 2022, Comments of CLR in Support of Petition for Rulemaking ("CLR Supporting Comments") at 2-3; CLR Supporting Comments, Affidavit of Josh Baskett at 1-2, P 6-11; July 18, 2022 Comments of Sabine Liquefaction, LLC in Support of Petition for Rulemaking ("Sabine Supporting Comments") at 5-6; Sabine Supporting Comments Appendix A; July 18, 2022 Comments of BP in Support of Petition for Rulemaking ("BP Supporting Comments") at 3; July 18, 2022 Supporting Comments of Indicated Shippers ("Indicated Shippers Supporting Comments") at 4-5.

floor except on a prospective basis further exacerbates the imbalance. Pipelines have little incentive to negotiate lower rates when current rates should be reduced under Section 5 because it is in their best interests to draw out the process as long as possible to avoid reducing their rates. Additionally, in many instances, pipelines in NGA Section 5 cases can threaten to file an NGA Section 4 case in addition to the existing Section 5 case to avoid lowering their rates, as some pipelines have done in recent years.[12] As further demonstrated in Ms. Crowe's affidavit, the statutory limitation on refunds, in turn, increases pressure on customers to offer and accept rates much higher than those that would likely result from litigation, thus reducing or eliminating entirely any benefit the supplemental junk and jewel revenues might otherwise have provided to them in rate cases.[13] Furthermore, as Petitioners and other shippers have pointed out in this proceeding, the prevalence of junk and jewel in short-term capacity auctions allows pipelines to exclude revenue extracted from shippers through junk and jewel from their rate case base or test periods, thereby obviating the potential impact of junk and jewel on their rates.[14] Finally, as Ms. Crowe's affidavit points out, when pipelines have filed rate cases, they have indicated in the filings that they do not expect such short-term sales to continue and, consequently, they have not included revenues from such sales in calculating their rates.[15]

B. The evidence submitted by the Petitioners and others demonstrates that junk and jewel discriminates against captive customers and harms consumers who cannot bid on segments of capacity that have no value to them in order to obtain the valuable capacity that they need.

The NGA is modeled on the Interstate Commerce Act, which was enacted to prevent railroads from discriminating in favor of certain customers through kickbacks and other payments

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[12] *See, e.g.*, *Panhandle*, 181 FERC ¶ 61,211 (2022).

[13] Petitioner Comments, Affidavit of Elizabeth H. Crowe, Exhibit No. 0003 at 7. *See also* Petitioner Comments, Affidavit of Tina Smith, Exhibit No. 0001 at paras. 17-18.

[14] *See* Petitioner Comments at 11-12; XES Comments at 15-18; EQT Comments at 12; June 27, 2024 Comments of Basin Electric Power Cooperative ("Basin Electric Comments") at 4; June 27, 2024 Initial Comments on Notice of Inquiry of the Indicated Shippers ("Indicated Shippers Comments") at 12-13.

[15] Petitioner Comments, Affidavit of Elizabeth H. Crowe, Exhibit No. 0003 at P 8-9. *See also* June 27, 2024 Comments of Northern Natural Gas Company at 4 (stating that billing determinants only change for long-term (i.e., longer than one year) capacity awards) ("When non-contiguous segments of pipeline capacity are sold for *longer than one year*, the pipeline's shippers benefit from lower rates by the increased billing determinants on which to allocate the pipeline's annual cost of service.") (emphasis added).

in excess of the posted tariff rates.[16] The practice of allowing pipelines to bundle non-contiguous and unrelated capacity segments in order to effectively charge in excess of the tariff rate for services that they need violates the fundamental tenets of prohibition of unduly discriminatory practices. As Petitioners and other shippers representing all sectors of the natural gas value chain have shown in this proceeding, junk and jewel has discriminatory effects on actors across all sectors of the natural gas market, from producers to electric generators to industrial end-users.[17]

C. The evidence demonstrates that regulated pipelines are able to charge unjust and unreasonable rates because they can extract monopoly rents by effectively charging in excess of the cost-based rate for the valuable capacity.

As Petitioners amply demonstrated in the Petitioner Comments, pipelines are using junk and jewel to extract market-based rates from shippers without having made the requisite showing that they lack market power, in direct contravention of the Commission's policies and procedures for setting rates for regulated entities.[18] Kinder Morgan implicitly admits as much by its argument that "allow[ing] pipelines to value bids submitted for short-term capacity at their actual value, not subject to any maximum rate cap" would function as an effective substitute for junk and jewel.[19] Kinder Morgan also argues that "it is common for retailers to combine different products and services into a combined package that can be purchased in one transaction," acknowledging that "the business of selling consumer products is of course quite different from the business of selling regulated pipeline transportation capacity"[20] but tellingly declining to enunciate the relevant

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[16] *See Northwest Alaskan Pipeline Co.*, 11 FERC ¶ 61,088 at 19 (1980) ("The provision in the Natural Gas Act prohibiting rate discrimination is closely modeled on the Interstate Commerce Act, 49 U.S.C.A. § 10,741 (Supp. 1978). The purpose of the latter is ". . . to prevent favoritism by insuring equality of treatment on rates for substantially similar services . . ." The statutory bar also protects some consumers from being placed at a competitive disadvantage with respect to other consumers.") (citing *St. Michaels's Utilities Commission v. FPC.*, 377 F. 2d 912, 915 (1967); *Public Service Co. of Indiana v. FERC*, 575 F. 2d 204 (CA 7-1978)).

[17] *See* EQT Comments at 6-9; June 27, 2024 Comments of the Electric Power Supply Association ("EPSA Comments") at 4-6; Basin Electric Comments at 5; Petitioner Comments at 2-3, 21-22; Petitioner Comments, Testimony of Terry Lewandowski, Exhibit No. 0002 at 2.

[18] Petitioner Comments at 12-13. *See also* June 25, 2024 Initial Comments of the Canadian Association of Petroleum Producers ("CAPP Comments") at 8-11; XES Comments at 18-20; EPSA Comments at 5.

[19] Kinder Morgan Comments at 10.

[20] Kinder Morgan Comments at 5.

distinction between pipelines and sellers of consumer products: pipelines, unlike sellers of razorblades or printer ink, are natural monopolies that are subject to statutory price regulation by the Commission.

D. **The Pipelines' bare assertion that shippers benefit from junk and jewel or that the practice occurs infrequently is directly contradicted by the comments and affidavits submitted by numerous shippers showing that they are being harmed by this practice.**

The Pipelines contend that shippers, and not the Pipelines alone, benefit from junk and jewel.[21] Belying these assertions, in a rare show of consensus, a coalition of shippers from every segment of the natural gas and electric industries (including municipals, public gas, independent power producers, natural gas producers, and marketers, as well as industrials) have filed comments in this proceeding to challenge junk and jewel.[22] These shippers clearly do not share the Pipelines' view that they are somehow benefiting from the policy *status quo*. To the contrary, they have submitted evidence that junk and jewel harms them by depriving them of the opportunity to obtain capacity they need, failing to benefit them in terms of reduced rates, and subjecting them to discrimination. Not a single shipper has come forward at any stage of this proceeding to avow its enjoyment of the elusive benefits that the Pipelines claim junk and jewel confers on shippers or otherwise to express support for the Pipelines' arguments. Additionally, contrary to INGAA's oft-repeated claims that shippers benefit in rate cases, as noted above, Ms. Crowe's affidavit demonstrates that this claim is false. The Pipelines also assert that junk and jewel "occurs infrequently."[23] Purportedly in reliance on the informal surveys conducted by Commission staff in 2019 and 2023 and cited in the NOI, Pipelines argue that there is no "widespread adoption" of junk and jewel because only 8% of all short-term open seasons or auctions evaluated in the 2023

[21] *See* Kinder Morgan Comments at 17-20; INGAA Comments at 8-12; June 27, 2024 Motion For Leave To Intervene and Comments of TC Energy Corporation ("TC Energy Comments") at 9; June 27, 2024 Comments to Notice Of Inquiry of Transcontinental Gas Pipe Line Company, LLC ("Transco Comments") at 4; June 27, 2024 Comments of Northern Natural Gas Company ("Northern Comments") at 4-7.

[22] Petitioner Comments, Basin Electric Comments, CAPP Comments, EPSA Comments, EQT Comments, Indicated Shippers Comments, XES Comments.

[23] INGAA Comments at 8.

survey comprised two unrelated segments.[24] This argument ignores the Commission's clear statement in the NOI regarding the informal survey that "Staff could not determine whether any of these examples reflect the packaging of high-value capacity with low-value capacity criticized by the Petitioners because Staff did not analyze the market value of any paths."[25] Additionally, in the Petitioner Comments, the Petitioners cite no less than 59 instances of packaging of unrelated segments by the pipelines in 2023,[26] representing 69% of short-term open seasons or auctions, but note that the incidence of junk and jewel is likely even higher because "the publicly available information is insufficient to fully identify the frequency with which pipelines offer non-contiguous and/or operationally unrelated paths for aggregated bidding given how quickly postings are removed from pipelines' EBBs after the auctions conclude."[27] As shown in Appendix A to these Reply Comments, during the pendency of this NOI alone, the Petitioners have documented four instances of pipelines packaging unrelated segments, by four different pipelines.[28] These recent transactions have, in aggregate, yielded these pipelines over $5.5 million in excess revenue.[29] Most importantly, the Pipelines' suggestion that a discriminatory or anti-competitive practice should be condoned if it is not widespread is contrary to the Commission's mandate under the NGA to prohibit unjust and unreasonable rates and unduly discriminatory practices.

E. <u>The Pipelines' conclusory statement that shippers should not fulfill their needs using short-term capacity is also directly contradicted by comments from shippers.</u>

Kinder Morgan states that "[s]hort-term capacity that only comes about on an intermittent basis is not the type of steady capacity that should be relied upon to meet the continuous and long-term needs of captive customers. Long-term, firm service from pipelines is much better suited for

[24] *Id.* at 6.

[25] NOI at 7-8.

[26] Petitioner Comments at 6.

[27] *Id*. at 9.

[28] Appendix A

[29] *Id*.

serving the continuous supply needs of LDC, municipal gas system, and industrial customers."[30] This conclusory statement is directly contradicted by the statements of LDCs, municipal gas systems, and industrial customers represented by the Petitioners and others in this proceeding, attesting to the value of short-term capacity to them as part of an overall supply portfolio.[31] The Pipelines have neither the prerogative to dictate how shippers should operate their businesses nor the expertise to inform the Commission how those businesses are, or should be, operated. In addition, this argument is a mere distraction from the real issue in this proceeding. The term of these transactions is irrelevant – packaging operationally unrelated, non-contiguous capacity segments is fundamentally discriminatory and anticompetitive behavior that the Commission should prohibit regardless of the contract term in question. Moreover, it is illogical for the Pipelines to argue that shippers actually value "unwanted" short-term capacity, as discussed below, while simultaneously claiming that shippers should not rely on short-term capacity that they need because long-term contracts are "much better suited" for serving their supply needs.[32]

F. <u>The Pipelines' argument that there is a "grey" secondary market ignores the fact that the Commission's capacity release rules require transparency and prohibit tying of unrelated products in releasing capacity.</u>

Kinder Morgan asserts that "[w]hen shippers obtain only a small portion of pro-rated short-term capacity, those shippers desiring a larger portion of the capacity will understandably turn to the secondary market or the unregulated grey market where they can obtain the capacity they desire by paying above-max rates."[33] Kinder Morgan ignores the fact that the Commission's rules governing capacity releases require that all terms be posted and non-discriminatory and prohibit the tying of unrelated products.[34] Moreover, as Petitioners and other intervenors have shown in this proceeding, shippers are already effectively paying above-maximum rates to pipelines in the primary capacity

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[30] Kinder Morgan Comments at 21-22.

[31] *See* XES Comments at 20; Comments at 19-20; Comments, Affidavit of Tina Smith, Exhibit No. 0001 at paras. 6-9.

[32] Kinder Morgan Comments at 21-22.

[33] Kinder Morgan Comments at 8.

[34] *See* Order No. 636-A., 57 Fed. Reg. 36,128 (August 12, 1992) at 30, 559.

market due to junk and jewel, the difference being that the Commission has authorized market-based pricing for short-term capacity for sellers in the secondary market but explicitly declined to extend this authorization to pipelines due to their ability to exercise market power as monopolies.[35]

[35] *See Final Rule re. Promotion of a More Efficient Capacity Release Market, Order No*. 712, 123 FERC ¶ 61,286 (Jun. 19, 2008) ("Order No. 712") at 30, 82.

G. <u>The Pipelines' request for the Commission to remove the cap on short-term releases ignores the Commission's decision in Order 712 that a cap is needed for pipelines due to their ability to exercise market power that other shippers do not have.</u>

As noted above, Kinder Morgan argues that if the Commission prohibits junk and jewel, it should "adopt a policy change that would allow pipelines to value bids submitted for short-term capacity at their actual value, not subject to any maximum rate cap."[36] This argument ignores the fact that the Commission declined to remove price ceilings on short-term pipeline capacity in Order 712 because "[u]nlike releasing shippers, the pipeline holders of primary capacity have a greater ability to exercise market power by withholding capacity and not constructing facilities. Because pipelines are in the best position to expand their own systems, cost-of-service rate ceilings help to ensure that pipelines have appropriate incentives to construct new facilities when needed."[37] It is for precisely these same reasons that the Commission should prohibit pipelines from evading the rate ceiling on short-term capacity through junk and jewel.

H. <u>The Pipelines' claim that all customers will be harmed if this practice is eliminated because they will be subject to *pro rata* allocation of the valuable capacity fails to consider that pipelines will have incentive to build more capacity if the practice is prohibited in order for the pipeline to earn more revenue, so *pro rata* allocation of pipeline capacity may no longer be needed in the future.</u>

The Petitioners and other intervenors represent a diverse group of shippers and recognize that prohibiting junk and jewel will result in *pro rata* allocation of valuable capacity. The Petitioners have affirmed repeatedly, as have other shippers in this proceeding, that a *pro rata* allocation of valuable capacity is preferable to the harms caused by junk and jewel.[38] The Pipelines dispute shippers' assessments of their own best interests, arguing that proration would harm shippers more than junk and jewel.[39] As is the case with the question of whether shippers benefit from junk and jewel, the Pipelines are in no position to ordain what constitutes shippers' best

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[36] Kinder Morgan Comments at 10.

[37] Order No. 712 at 85.

[38] *See* Indicated Shippers Comments at 17-18; XES Comments at 5; Petitioner Comments at 18, 23; Petitioner Comments, Affidavit of Tina Smith, Exhibit No. 0001 at para. 16; Petitioner Comments, Testimony of Terry Lewandowski, Exhibit No. 0002 at 3; Petition at 19.

[39] *See* INGAA Comments at 2.

interests. Furthermore, the Pipelines' arguments ignore the fact that eliminating junk and jewel would restore pipelines' incentive to invest in capacity expansion, rather than incentivizing pipelines to avoid expansion in order to capture monopoly rents from captive customers as junk and jewel does.[40]

I. <u>The Pipelines' attempts to discredit the characterization of junk capacity and the fact that shippers are effectively required to bid on bundled capacity rest on misrepresentations of the Petitioners' arguments and faulty logic.</u>

The Pipelines argue that the capacity that the Petitioners and other shippers in this proceeding characterize as junk may be of some value to a particular shipper and proffer in support of this argument the fact that shippers have occasionally used or released capacity characterized as junk.[41] As the Petitioners clearly acknowledged in the Petitioner Comments, junk capacity is not exclusively characterized by a complete lack of value, but rather "is, in some cases, characterized by its *undesirability relative* to the more valuable capacity with which it is packaged."[42] The Pipelines also state that shippers are not required to bid on both segments of junk and jewel packages, citing the fact that shippers sometimes win bids for only one segment of bundled capacity.[43] Kinder Morgan also notes that "Commission policy does not allow forced tying of capacity."[44] The Petitioners are keenly aware that Commission policy prohibits tying of capacity. However, as demonstrated by the evidence provided in the Petition, the comments of Intervenors, the Reply, the Petitioner Comments, and the comments of Supporting Petitioners, junk and jewel *effectively* requires shippers to bid on junk capacity to have any reasonable prospect of winning jewel capacity, in violation of the very policy that Kinder Morgan cites.[45] The

[40] *See* CAPP Comments at 14-16; Indicated Shipper Comments at 2; XES Comments at 5, 23; EPSA Comments at 6; Comments at 13, 20; Petitioner Comments, Affidavit of Tina Smith, Exhibit No. 0001 at para. 14; Petitioner Comments, Testimony of Terry Lewandoski, Exhibit No. 0002 at 3.

[41] *See* Kinder Morgan Comments at 5-6; INGAA Comments at 10-11.

[42] Petitioner Comments at 13.

[43] *See* Kinder Morgan Comments at 6, 12-13; INGAA Comments at 5.

[44] Kinder Morgan Comments at 12, citing *Transwestern Pipeline Co.*, 92 FERC ¶ 61,035, at 61,080 (2000).

[45] Petitioner Comments at 2 ("[T]he updated evidence attached to these Comments shows that customers are *effectively* required to bid on unwanted capacity with little or no market value in order to obtain the segments of high-market-

Petitioners do not dispute that shippers sometimes win bids for a single segment of packaged capacity or sometimes use or release awarded junk capacity. Junk and jewel is not merely the packaging of two segments of capacity: it is the packaging of *non-contiguous* segments of capacity with large differences in value and often large differences in volumes and terms. The Pipelines offer no rebuttal to the substantial body of evidence presented by the Petitioners, the Intervenors, and the Supporting Petitioners in this proceeding showing that these packages are *effectively* unwinnable by shippers who do not bid on both segments, except in the narrow circumstance where the market value of the jewel capacity at that time is less than the maximum cost-based rate based on the spread.[46] The fact that shippers may attempt to mitigate the losses imposed on them by the effective tying of junk and jewel segments by releasing or partially utilizing a portion of the junk capacity does not justify the pipelines' circumvention of maximum lawful prices for the jewel capacity.

Furthermore, if it were true that the Petitioners are falsely labeling junk capacity as such, the Pipelines would have no cause to mount such a vigorous defense of their putative right to package it with other capacity: if two segments have high values, the market will so reflect regardless of whether or not they are packaged together. Stated differently: if the practice of packaging non-contiguous segments was not, as the Petitioners and other shippers allege, effectively altering the value of the individual segments, the Pipelines would be indifferent as to

value capacity on the pipeline or else lose access to the capacity needed to serve their loads and supply their plants"; "These customers, who have an operational need for a particular segment of capacity to serve local distribution company ("LDC") load, a power plant, or a manufacturing facility, must *effectively* compete on a market-based price to win the capacity they need") (emphasis added), *id.* at 22 ("While the practice of tying packages of capacity together in a single open season does maximize the revenues to the pipeline, it does not benefit the shipper who *effectively* had no real opportunity to acquire only the valuable capacity needed to serve its plant"), *id.* (emphasis added). *See also* CAPP Comments at 9.

[46] In the examples provided by the Petitioners in the Appendix to the Petitioners, Northern Border conducted twelve junk & jewel auctions in 2023. In eight of the non-winter, single-month auctions (*i.e.,* for March only, April only, May only, June only, July only, August only, September only, and October only capacity), the market spread for the jewel package did not exceed the maximum tariff rate, so bidders did not bid on, or entered miniscule bids on, the junk package. By contrast, the December only, January only, and February only capacity did garner bids on the junk packages because the market spread of the jewel packages exceeded the maximum tariff rate during these winter months. A similar result occurred in the 2024 data, where the March only and April only paired capacity auctions drew low or no bids on the junk packages because these "shoulder-month" jewel packages did not have a market value that exceeded the maximum tariff rate. Of note, Northern Border made ~$41 million in 2023 and ~ $30 million in 2024 on the winter season junk packages (November to March terms), when the market spread on the jewel capacity was at its highest and far exceeded the maximum tariff rate.

whether they are sold separately or as a package.[47] Awarding capacity based on separate bids for non-contiguous segments would not only achieve the Commission's objective of awarding capacity to the shipper valuing it most but would also support the Commission's objective in Order 636 of unbundling services so that market signals would be transparently evident to all parties and help stimulate a robust, competitive market that maximizes benefits for the natural gas consumers that the market is designed to serve.

III. DOCUMENTS SUBMITTED WITH THESE COMMENTS

As mentioned above, Petitioners have included the following supporting documents with these Reply Comments:

A. Appendix A: Recent Open Season and Capacity Auction Postings

[47] *See also* CAPP Comments at 8-9.

IV. CONCLUSION

For the reasons stated above, the Petitioners respectfully ask the Commission to prohibit the practice of allowing pipelines to package operationally unrelated, non-contiguous capacity segments and the allocation of packaged capacity based on aggregated bids.

Respectfully submitted,

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July 29, 2024

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused a copy of the foregoing document to be served upon each person designated on the Service List for this docket compiled by the Secretary in accordance with the Commission's Rules of Practice and Procedure.

Dated at New York, NY, this 29th day of July 2024.

/s/ Daniel P. Barron
Daniel P. Barron