

shippers.¹⁹ However, as the Commission stated in the NOPR, once such an allocation methodology is approved for each pipeline, the determination of reservation charges and credits and the potential liability for contract overruns should follow the allocation of capacity.

E. Provision of Contract Information on Releases

24. Standard 5.3.z1 (R02002) requires a releasing shipper recalling capacity to provide notice of recall to the pipeline and the first replacement shipper.²⁰ Dominion contends that for biddable transactions,²¹ the releasing shipper will not have the information necessary to notify the first replacement shipper, and requests that the pipeline provide such contact information on the pipeline's Internet Web site.

25. While the current standards require pipelines to post the winning bidder's name and company code when they post capacity awards (Standard 5.4.3), it does not require the posting of contact information. The Commission agrees that for biddable deals subject to recall, pipelines need to make available to the releasing shipper information sufficient to enable it to contact the replacement shipper in the event of a capacity recall.

F. Standards Relating to Penalties

26. In comments on the WGQ's October 1, 2002, report on partial day recalls, Process Gas Consumers Group claimed that two standards (not included in this proceeding) on which the WGQ was working involved the allocation of penalties between releasing and replacement shippers as a result of partial day recalls, and requested that the Commission find that all penalty standards are beyond the scope of the WGQ. In the NOPR, the Commission stated that it would not rule the development of penalty standards beyond the scope of the WGQ, although the Commission explained that it "is not asking the WGQ specifically to develop standards for penalties."²² The Commission stated that the development of standards related to

penalties can help reduce barriers to multi-pipeline shipments and improve the overall efficiency of the pipeline grid, and it encouraged the WGQ to examine seriously "any such proposals that hold out the prospect of improving the efficiency of the pipeline grid."²³

27. A number of comments contend that the WGQ should not standardize penalties. AGA, INGAA, Duke, and Dominion generally assert that penalties are rate matters that should not be standardized, and that penalties and terms relating to penalties may need to vary by pipeline to reflect differences between the pipeline's needs and markets. AGA, however, asserts that some standards relating to penalties are within the scope of the WGQ, such as standards governing the allocation of penalties between releasing and replacement shippers.

28. The Commission reiterates that it is not requesting the WGQ to consider or develop standards relating to penalties. But, the Commission also will not categorically determine that any proposal for a standard that relates to penalties is beyond the scope of the WGQ. In the first place, deciding whether a standard is beyond the WGQ's scope is a decision for the WGQ, not the Commission. As AGA notes, the WGQ is already considering standards that arguably relate to penalties, and the Commission sees no reason for it to interfere with the WGQ's determination of what proposals are within its scope. Moreover, the WGQ passed a series of standards that created a more uniform and systematic method for pipelines to receive reimbursement for fuel use,²⁴ even though such standards bear on the rates charged for fuel. The Commission finds no reason here to prohibit the WGQ from considering similar standards with respect to penalties that will create a more uniform and efficient system for assessing penalties.

G. Incorporation by Reference

29. Dominion takes issue with the Commission's incorporation by reference of the WGQ standards. Dominion asserts that the standards are not reasonably available as required by the **Federal Register**, because they are only available from NAESB after payment of significant fees. It further argues that neither the Commission nor the WGQ have clearly indicated where changes in standards have been made, so that the incorporation by reference does not make clear the conditions on which an entity will be bound. It requests (along with KeySpan) that the

Commission direct NAESB to refile Version 1.6, and any future filings, with a redline comparison showing all changes from previous standards.

30. As the Commission has pointed out on several occasions, incorporation by reference is the appropriate, and indeed the required, method for adopting copyrighted standards material.²⁵ The Freedom of Information Act, and implementing regulations, establish that the proper method of adopting copyright material is to incorporate such material by reference upon approval by the Director of the Federal Register.²⁶ In fact, § 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTT&AA) instructs federal agencies to use technical standards developed by voluntary consensus standards organizations, like the WGQ,²⁷ and such standards are to be incorporated by reference.²⁸ According to the Federal Register regulations, material is eligible for incorporation by reference if such material "is * * * standards, specifications, * * * substantially reduces the volume of material published in the **Federal Register**, * * * and is reasonably available to and usable by the class of persons affected by the publication."²⁹

31. The WGQ standards comply with these requirements: they are standards and specifications, their incorporation by reference is necessary since the standards cannot be reproduced and such incorporation would substantially limit the volume of material in the **Federal Register**, the standards are reasonably available from NAESB, and the standards can be readily used since the standard versions and all the standards are numbered. The Office of the **Federal Register** approved the

²⁵ Order No. 587-A, 61 FR 55208, 77 FERC ¶ 61,061, at 61,232 (1996); Order No. 587-K, 64 FR 17277, FERC Stats. & Regs. Regulations Preambles (July 1996–December 2000) ¶ 31,072, at 30,775 (1999).

²⁶ 5 U.S.C. 552(a)(1) (for the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the **Federal Register** when incorporated by reference therein with the approval of the Director of the Federal Register); 1 CFR 51.7(4). Indeed, the Commission could not reproduce the WGQ standards in violation of the NAESB copyright. See 28 U.S.C. 1498 (government not exempt from patent and copyright infringement).

²⁷ Pub. L. 104–113, § 12(d), 110 Stat. 775 (1996), 15 U.S.C. 272 note (1997).

²⁸ See Federal Participation in the Development and Use of Voluntary Standards, OMB Circular A–119, at 6 (a)(1) (Feb. 10, 1998), <http://www.whitehouse.gov/omb/circulars/a119/a119.html> ("Use" means incorporation of a standard in whole, in part, or by reference for procurement purposes, and the inclusion of a standard in whole, in part, or by reference in regulation(s)).

²⁹ 1 CFR 51.7 (a)(2)–(4).

¹⁹ Cf. Algonquin Gas Transmission Company, 100 FERC ¶ 61,274 (2002), *reh'g denied*, 102 FERC ¶ 61,149 (2003) (rejecting a proposal deviating from the standards when the proposal would have limited shippers' flexibility and was not necessary to protect the pipeline).

²⁰ The pipeline is also required to notify all replacement shippers affected by the recall one hour after the notification by the releasing shipper.

²¹ Dominion recognizes, in any pre-arranged capacity release transaction, the releasing shipper will know the replacement shippers and will be aware of the necessary contact information.

²² NOPR at P 13.

²³ NOPR at P 13.

²⁴ Standards 1.3.15–1.3.16 and 1.3.28–1.3.31.