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EDITION

THE AGA FERC MANUAL: A GUIDE FOR LOCAL DISTRIBUTION COMPANIES



PREPARED BY
DEWEY & LeBOEUF LLP FOR THE AMERICAN GAS ASSOCIATION

DEWEY & LeBOEUF



THE AMERICAN GAS ASSOCIATION FERC MANUAL: A GUIDE FOR LOCAL DISTRIBUTION COMPANIES—2012 EDITION

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INTRODUCTION TO THE 2012 EDITION

WHAT'S IN THE *FERC Manual, 2012 Edition*?

From the inception of the *FERC Manual*, the American Gas Association, the Sponsoring Members of the *FERC Manual*, and the Legal and Federal Energy Regulatory Commission (“FERC”) Regulatory Committees, anticipated that as FERC’s requirements and restrictions changed, some of the substance covered by each edition would need to be updated to keep it current. Their foresight continues to be borne out by experience.

The 2012 Edition of the *FERC Manual* retains the essential structure and content of the original edition, but has been updated to take into account developments in a variety of areas or in some instances expanded to include coverage of a subject that was not included in earlier editions. The new subjects encompass:

- FERC’s description of how it will treat contracts and settlements that embody *Mobile–Sierra* standards, when it will decline to apply *Mobile–Sierra* and the conditions under which FERC will apply heightened standards of review even if it concludes that in the strictest terms, *Mobile–Sierra* does not apply;
- The apparent gap between FERC’s policies regarding rate treatment of service interruptions and the actual operation of pipeline tariffs;
- FERC accounting and rate treatment of expenses and investments made in light of pipeline safety legislation, including the most recent enactment, the Pipeline Safety, Regulatory Certainty and Job Creation Act of 2011;
- The relationship between negotiated contract rights of first refusal and FERC’s policies regarding the treatment of non-conforming contract provisions;
- Limitations on pipeline market-based storage rates;
- FERC’s new regulations dealing with multiple affiliate bidding in pipeline open seasons for capacity;
- The consequences of the lack of contract privity between releasing shippers and replacement shippers and methods that can be used as palliatives for the problem;
- Waivers of Capacity Release Rules for restructuring transactions;
- The effect of the United States Court of Appeals for the Fifth Circuit’s *vacatur* of Order No. 720’s posting requirements and its potential for affecting Order No. 704 and FERC’s consideration of market manipulation rules;

- FERC decisions in litigated cases dealing with claims of market manipulation, including the application of those rules to individuals;
- Application of FERC's Revised Civil Penalty Guidelines, issued only shortly before the last edition of the *FERC Manual*; and
- A revised illustrative compliance plan reflecting the guidance provided by FERC's Revised Civil Penalty Guidelines.

As has been the practice with earlier editions of the *FERC Manual*, this edition includes updated and new hypotheticals and accompanying explanatory material.

The American Gas Association observed in comments filed at FERC,¹ that FERC has increased the regulation of intrastate and Hinshaw pipelines despite the fact that these entities generally lie outside of FERC's jurisdiction under the Natural Gas Act ("NGA") or operate under grants of authority that had been accompanied by the commitment that they would be exposed only to the most limited exercise of FERC jurisdiction.

FERC's Office of Enforcement's Division of Audits now routinely includes detailed questions about the nature, organization, and budget of compliance programs in audits, regardless of the subject of the audit. And while the Division of Audits frequently offers suggestions to audited companies about their compliance programs, it has not—so far—included compliance matters in any deficiency reports to FERC.

The continuing enlargement of FERC's role in their businesses requires that Local Distribution Companies ("LDCs") and other users of interstate natural gas pipeline services and facilities have at hand a readily usable and current source of information about FERC's rules, requirements, and restrictions.

The *FERC Manual, 2012 Edition* provides updated text, new sidebars, new charts and tables, and new hypotheticals about the foregoing developments. Its contents reflect suggestions from the *FERC Manual's* Sponsors, the American Gas Association Legal Committee, and the FERC Regulatory Committee for new subjects.

1. See AGA Comments, Docket No. RM11-1-000, Capacity Transfers on Intrastate Natural Gas Pipelines (Dec. 29, 2010).

INTRODUCTION

WHY THE *FERC MANUAL* IS NEEDED

The authority of FERC once was focused on reviews of pipeline tariffs to ensure they contained just and reasonable terms, conditions, and rates. That focus has changed substantially. Although FERC now routinely reviews rates, as well as select terms and conditions of a handful of pipelines and storage companies each year, FERC considers its primary goals to include developing rules that encourage fair and efficient competitive markets, preventing the accumulation and exercise of market power, and preventing market manipulation by providing oversight and enforcement.

FERC fostered the development of open natural gas markets for almost two decades, but the Energy Policy Act of 2005 (“EPAAct 2005”) marked the first time Congress created a statutory tool to protect the integrity of natural gas markets. EPAAct 2005 established:

- Statutory responsibility for ensuring against manipulation by any entity of the markets subject to NGA jurisdiction; and
- Substantial penalty authority for violations of a statute, rule, regulation, or order within the scope of NGA jurisdiction (in a nutshell, penalties of up to \$1 million per violation for each day the violation continued).

Users of pipeline services, in general, and LDCs in particular, have been the subject of a large number of FERC enforcement settlements since EPAAct 2005 was enacted. These settlements have focused on interstate transportation and sale of gas by LDCs, the relationship of an LDC with its affiliated interstate pipeline (e.g., standards of conduct rules), and LDCs as shippers on interstate pipelines (e.g., capacity release rules, including the use of asset management agreements and the Shipper Must Have Title requirement).

In light of the focus of FERC’s enforcement activities, the American Gas Association and its Legal Committee consider that the *AGA FERC Manual: A Guide for Local Distribution Companies* can serve a useful purpose for the American Gas Association’s members and other users of the *FERC Manual*. The American Gas Association, its Legal Committee and FERC Regulatory Committee hope that the *FERC Manual* will be one of the first places to turn for quick answers about FERC’s rules, more detailed explanations and guides to additional research.

A GUIDE TO THE *FERC MANUAL*

The *FERC Manual* is focused on FERC’s regulation of companies under the NGA and the Natural Gas Policy Act of 1978 as that regulation affects LDCs and other users of pipeline services. The *FERC Manual* is not intended to be a treatise on the subjects it covers and it is not legal advice. Rather, the *FERC Manual* is intended to