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DC Circuit Affirms FERC On Maintaining Price Caps On Gas Pipeline Capacity Sales

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The U.S. Court of Appeals for the D.C. Circuit has upheld FERC's decision to remove price ceilings on short term (one year or less) capacity releases by shippers on natural gas pipelines, while maintaining price ceilings on capacity sales by the pipelines themselves. The court's **decision**, issued on August 13 in *Interstate Natural Gas Assoc. of America v. FERC*, rejected arguments from an association of pipelines that FERC had impermissibly subjected pipelines and shippers to different regulatory standards in the same short-term capacity sales market. In its 2008 ***Order No. 712***, FERC permanently removed existing price ceilings on shipper releases of interstate pipeline capacity for one year or less. But FERC kept in place price ceilings on pipelines' comparably short-term sales of capacity, reasoning that unlike shippers releasing capacity, pipelines could exercise market power and might have an incentive to withhold construction of new transportation capacity if allowed to charge market-based rates for short-term sales. The Interstate Natural Gas Association of America (INGAA) appealed this decision to the D.C. Circuit, arguing that FERC could not permit shippers to release short-term capacity at market-based rates while refusing to allow pipelines to do so. Rejecting INGAA's contentions, the D.C. Circuit found that FERC reasonably addressed the difference between capacity releases and pipeline capacity sales. In particular, the court seized upon FERC's finding that, unlike shippers, pipelines retain the ability to exercise market power and to hold capacity off the market. Largely deferring to FERC's expertise and findings of fact on this issue, the court determined that it was reasonable and permissible to remove the rate cap on short term shipper releases while maintaining the rate cap on short term pipeline capacity sales. In coming to this conclusion, the D.C. Circuit echoed its findings in a 2002 case in which INGAA had challenged FERC's decision to remove price caps on short-term shipper releases and maintain the caps for pipeline capacity sales for a two-year trial period. After making that policy permanent in Order No. 712, FERC has now successfully overcome the same pipeline challenges that it faced when it embarked on that experiment nearly a decade ago.