DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 358

[Docket Number RM01–10–001; Order No. 2004–A]

Standards of Conduct for Transmission Providers

Issued April 16, 2004.

AGENCY: Federal Energy Regulatory Commission, DoE.

ACTION: Final rule; order on rehearing.

SUMMARY: The Federal Energy Regulatory Commission (Commission) generally reaffirms its determinations in Order No. 2004 and grants rehearing and clarifies certain provisions. Order No. 2004 requires all natural gas and public utility Transmission Providers to comply with Standards of Conduct that govern the relationship between the natural gas and public utility Transmission Providers and all of their Energy Affiliates.

In this order, the Commission addresses the requests for rehearing and/or clarification of Order No. 2004. The Commission grants rehearing, in part, denies rehearing, in part, and provides clarification of Order No. 2004. This order (1) clarifies the definition of Energy Affiliate; (2) further codifies the definition of ''Marketing Affiliate;'' (3) clarifies which Field and Maintenance employees a Transmission Provider may share with its Energy Affiliates; (4) clarifies that a Transmission Provider may share with its Energy Affiliates information necessary to maintain the operations of the transmission system; (5) codifies the exception that permits a Transmission Provider to share senior officers and directors with its Marketing and Energy Affiliates; (6) codifies the exception that permits a Transmission Provider to share the risk management function with its Marketing and Energy Affiliates; (7) codifies that a Transmission Provider may share information with certain employees it shares with its Marketing and Energy Affiliates; and (8) defers the implementation date to September 1, 2004.

DATES: *Effective Date:* Revisions in this order on rehearing will be effective June 1, 2004.

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Order on Rehearing and Clarification

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

1. On November 25, 2003, the Federal Energy Regulatory Commission issued a Final Rule adopting Standards of Conduct for Transmission Providers (Order No. 2004 or Final Rule)[1] which added Part 358 and revised Parts 37 and 161 of the Commission's regulations.[2] The Commission adopted Standards of Conduct that apply uniformly to interstate natural gas pipelines and public utilities (jointly referred to as Transmission Providers) that were subject to the former gas Standards of Conduct in Part 161 of the Commission's regulations or the former electric Standards of Conduct in Part 37 of the Commission's regulations.[3] Under Order No. 2004, the Standards of Conduct govern the relationships between Transmission Providers and all of their Marketing and Energy Affiliates. The Commission affirms here the legal and policy conclusions on which Order No. 2004 is based. The goal of the Standards of Conduct for Transmission Providers is to prevent undue discrimination. In this order, the Commission addresses the requests for rehearing and/or clarification of Order No. 2004. As discussed below, the Commission grants rehearing, in part, denies rehearing, in part, and provides clarification of Order No. 2004. This order (1) clarifies the definition of Energy Affiliate; (2) further codifies the definition of ''Marketing Affiliate;'' (3) clarifies which Field and Maintenance employees a Transmission Provider may share with its Energy Affiliates; (4) clarifies that a Transmission Provider may share with its Energy Affiliates information necessary to maintain the operations of the transmission system; (5) codifies the exception that permits a Transmission Provider to share senior officers and directors with its Marketing and Energy Affiliates; (6) codifies the exception that permits a Transmission Provider to share the risk management function with its Marketing and Energy Affiliates; (7) codifies that a Transmission Provider may share information with certain employees it shares with its Marketing and Energy Affiliates; and (8) defers the implementation date to September 1, 2004.

I. Background

2. Following issuance of Order No. 637,[4] the Commission hosted a public

[1] Standards of Conduct for Transmission Providers, 68 FR 69134 (Dec. 11, 2003), III FERC Stats. & Regs., ¶ 31,155 (Nov. 25, 2003).

[2] The Commission also made minor conforming changes in Parts 250 and 284.

[3] The gas standards of conduct were codified at Part 161 of the Commission's regulations, 18 CFR part 161 (2003), and the electric standards of conduct were codified at 18 CFR 37.4 (2003).

[4] Regulation of Short-Term Natural Gas Transportation Services, Order No. 637, Final Rule, 65 FR 10156 (Feb. 25, 2000), FERC Stats. & Regs., Regulations Preambles July 1996–December 2000

conference on March 15, 2001, to discuss how the changes in the natural gas market affect the way in which the Commission should regulate transactions between pipelines and their affiliates, capacity managers and agents. Industry representatives urged the Commission to: (1) Apply the standards of conduct to all affiliates; (2) prohibit affiliates from holding capacity on affiliated pipelines; (3) limit an affiliate's capacity market share; or (4) take no action vis-à-vis affiliate relationships. Several industry representatives expressed a fear of retaliation for filing a complaint or inadequate resources to pursue complaints that result only prospective remedies.[5] Commenters also expressed concern that regulated entities can transfer all the benefits of their regulated (monopolistic) status to their unregulated affiliates, which can then use these benefits to reap unregulated profits from the public.[6]

3. On September 27, 2001, the Commission issued a Notice of Proposed Rulemaking (NOPR) in this proceeding.[7] Following review of the comments, in April 2002, the Commission published an ''Analysis of the Major Issues Raised in the Comments'' (Major Issues Analysis). At the request of commenters, the Commission also hosted a full-day technical conference in May 2002 giving interested persons the opportunity to discuss issues raised in the NOPR and the Major Issues Analysis. Panelists, interested persons and Commission staff discussed a variety of issues including: the impact of requiring the independent functioning between Transmission Providers and their Energy Affiliates; whether there were other ways to prevent discriminatory behavior; information disclosure issues; and proposed revisions to regulatory text and the definition of Energy Affiliate. About 100 interested persons submitted additional comments and/or draft regulatory text. On November 25, 2003, the Commission issued Order No. 2004, which became effective on February 9, 2004. Sixty-eight requests for rehearing and clarification and comments have been filed.[8]

II. Need for the Rule

Final Rule

4. The Final Rule identified a number of changes in the energy, natural gas, power and transmission markets that supported the need for enhancing the Standards of Conduct, including, but not limited to, open-access transmission, unbundling, changing commodity markets, increased mergers, convergence of gas and electric industries, asset management, electronic commodity trading and an increase in power marketers or entities with market-based rate authority. The gas industry also experienced consolidations in every sector—pipelines, producers, marketers and local distribution companies (LDCs)/utilities.

5. The Commission noted that a Transmission Provider could transfer its market power to its affiliated businesses because the former standards of conduct did not cover all affiliate relationships. Non-marketing affiliates of Transmission Providers compete against non-affiliates for transmission services, in capacity release transactions, in commodity and futures markets, in power sales, and in siting new generation. In addition, in the natural gas industry, non-marketing affiliates of interstate natural gas pipelines, such as asset managers, control large amounts of capacity on their affiliated pipelines, yet they were not covered by the former standards of conduct because they do not actually hold pipeline capacity. Non-marketing affiliates can also abuse preferential access to information about the Transmission Provider either as shippers or traders in the transmission or commodity marketplace.

6. The Standards of Conduct under former parts 37 and 161 did not address the sharing of information by Transmission Providers with Energy Affiliates. The Final Rule found that the preferential sharing of information between Transmission Providers and Energy Affiliates undermines and frustrates the efforts of independent businesses to buy, sell, build, grow and provide competitive alternatives. The Commission was concerned, for example, that an interstate natural gas pipeline could inform its affiliated asset manager about a proposed pipeline expansion or upcoming curtailment before the Transmission Provider revealed that information to the asset manager's competition. The Commission stated that Transmission Providers' unduly preferential behavior towards their Energy Affiliates violates the statutory prohibitions against undue discrimination or preferences in the provision of interstate transmission services,[9] and adopted the regulations in Final Rule to prevent such violations.

7. Given the need to maintain the reliability of the electric transmission and natural gas pipeline systems throughout the United States, the Commission noted that the Final Rule does not obstruct the free flow of information from any affiliated or non-affiliated customer to the transmission system operator. The Final Rule did not limit the ability of transmission system operators or pipeline system operators to work together with each other and affiliated or non-affiliated customers to reserve and schedule transmission or pipeline capacity usage on a non-discriminatory basis, nor did it limit the ability of system operators to issue any and all service-related directives to any customer, as necessary. And, during system emergencies, the Final Rule relaxed limitations on the flow of transmission information from the Transmission Provider to its Marketing or Energy Affiliates to facilitate any necessary reliability-related communications.

8. Many petitioners support the Final Rule and state that it is necessary. For example, Dominion states that the new regulations appropriately addressed changes in the industry and appropriately balanced the potential misuse of a Transmission Provider's market power against losing efficiencies of integrated operations. NiSource called Order No. 2004 a ''substantial improvement'' over the NOPR. Similarly APGA, APPA, CAPP, IPAA, IOGA-WV, NASUCA, NGSA, PGC and Transmission Dependent Utilities Systems welcomed the Final Rule and urged the Commission to refrain from taking any action that would diminish this important initiative. They claim that their silence on rehearing reflects satisfaction with the direction of Order No. 2004. NASUCA states that the reason there have been very few

¶ 31,091 (Feb. 9, 2000), Order No. 637–A, *order on reh'g*, 65 FR 35705 (June 5, 2000), FERC Stats. & Regs., Regulations Preambles July 1996–December 2000 ¶ 31,099 (May 19, 2000).

[5] *See, e.g.*, January 5, 2001 comments of Dynegy, Inc. and National Association of State Utility Consumer Advocates in PL00–1–000.

[6] *See, e.g.*, January 5, 2001 comments of Dynegy, Inc. and Amoco Production Company and BP Energy in PL00–1–000.

[7] Standards of Conduct for Transmission Providers, 66 FR 50919 (Oct. 5, 2001), IV FERC Stats. & Regs. ¶ 32,555 (Sept. 27, 2001).

[8] Appendix A contains a list of each person that requested rehearing or clarification of Order No. 2004 or submitted additional comments regarding Order No. 2004. The abbreviations for the participants are identified in Appendix A.

[9] Sections 4 and 5 of the Natural Gas Act (NGA), 15 U.S.C. 717c and 717e (2000), state that no natural gas company shall make or grant an undue preference or advantage with respect to any transportation or sale of natural gas subject to the Commission's jurisdiction. Similarly, under sections 205 and 206 of the Federal Power Act (FPA), 16 U.S.C. 824d and 824e (2000), no public utility shall make or grant an undue preference with respect to any transmission or sale subject to the Commission's jurisdiction.

complaints about anti-competitive behavior favoring affiliates other than Marketing Affiliates is because such behavior would not have violated the former standards of conduct.

Requests for Rehearing and/or Clarification and Commission Conclusions

9. El Paso, INGAA, Questar and Williams argue on rehearing that the Final Rule is overbroad and unsupported by substantial evidence. INGAA also argues that the industry changes cited by the Commission have been pro-competitive and do not justify the rule. Further, INGAA claims that the new services described in the Final Rule, such as capacity release, e-commerce and asset management are not new phenomena.

10. The Commission finds that the Final Rule is needed. The FPA and NGA require the Commission to prevent unduly discriminatory transmission service. For the Commission to meet that goal, the Standards of Conduct must guide the relationships between Transmission Providers and their affiliates that would use transmission information to compete unfairly with non-affiliates. As the identity of affiliates that engage in such competition has changed over time, the Standards of Conduct have had to change as well. Thus, the former standards of conduct focused on preventing the Transmission Provider from giving its merchant affiliate undue preferences by restricting the behavior between the Transmission Provider and its marketing affiliate or wholesale merchant function or affiliated power marketer.[10] The 1988 natural gas Standards of Conduct in Order No. 497[11] reflected market changes in the natural gas industry during the last half of the 1980s, as the natural gas industry reacted to natural gas wellhead price decontrol, long-term contract reformation, and open-access transportation. The 1996 electric Standards of Conduct in Order No. 889[12] were a companion to Order No. 888, which required public utilities to offer open access transmission service.

11. For example, Transmission Providers have economic incentives to unduly prefer agents or asset managers. Specifically, the introduction of a natural gas futures market by NYMEX in 1990, and the evolution of the use of these financial markets to hedge has prompted customers to use agents or asset managers to manage price risk. This allows those affiliates to aggregate, manage and control significant volumes of interstate pipeline capacity.

12. In the past, agency arrangements have been abused. For example, when Transcontinental Gas Pipeline Company authorized Williams Energy Marketing and Trading (WEM&T), its marketing affiliate, to act as agent for its merchant functions sales, it also gave WEM&T access to its nonaffiliated customers' contract data, invoice data, and transportation data. That information was not made available to non-affiliated customers.[13] Agency agreements were also a factor in the violations where an affiliated power marketer was acting as agent for Cleco Power LLC (Cleco) and its affiliated electric wholesale generators (EWGs). Through the agency agreements, the affiliated power marketer performed for Cleco and its affiliated EWGs a variety of services, including: resource coordination, commodity trading, retail and wholesale marketing, monitoring energy management, transmission scheduling services, optimizing the use of transmission paths to decrease transmission needed from outside the control area and market test power. Because the agency agreements empowered the affiliated power marketer, it had superior access to customer and transmission information, and shared employees with the Transmission Provider.[14]

13. The guidance provided by the Final Rule will compel Transmission Providers to provide no more information to affiliated agents and asset managers than the Transmission Providers provide to non-affiliates. Such requirements need to be spelled out in the Standards of Conduct to give Transmission Providers a clear understanding of their obligations to provide non-discriminatory service, as required by the NGA and the FPA.

14. The Final Rule also properly takes into account the convergence of the gas and electric industries.[15] Over the past decade, newly constructed electric generation has chosen natural gas as the fuel of choice. Mergers of electric utilities with natural gas companies have created corporate families with business activities across both industries.[16] Transmission Providers have economic incentives to favor any affiliate that is involved in transmission on their systems, not only those that directly market natural gas or power. Indeed, in some regions, notably California and the Northeast, the interdependence of natural gas and wholesale electric markets has raised concerns about reliability and prices of converging supply and demand forces

[10] Many marketing affiliates were originally created to help interstate natural gas pipelines that had historically offered bundled sales and transportation services, move towards transportation-only services, and sell gas supply committed under long-term take-or-pay contracts.

[11] Order No. 497, 53 FR 22139 (June 14, 1988), FERC Stats. & Regs., Regulations Preambles 1986–1990 ¶ 30,820 (June 1, 1988); Order No. 497–A, order on *reh'g*, 54 FR 52781 (Dec. 22, 1989), FERC Stats. & Regs., Regulations Preambles 1986–1990 ¶ 30,868 (Dec. 15, 1989); Order No. 497–B, *order extending sunset date,* 55 FR 53291 (Dec. 28, 1990), FERC Stats. & Regs., Regulations Preambles 1986–1990 ¶ 30,908 (Dec. 13, 1990); Order No. 497–C, *order extending sunset date,* 57 FR 9 (Jan. 2, 1992), FERC Stats. & Regs., Regulations Preambles 1991–1996 ¶ 30,934 (Dec. 20, 1991), *reh'g denied,* 57 FR 5815 (Feb. 18, 1992), 58 FERC ¶ 61,139 (Feb. 10, 1992); *Tenneco Gas* v. *FERC* (affirmed in part and remanded in part), 969 F.2d 1187 (DC Cir. 1992); Order No. 497–D, *order on remand and extending sunset date,* 57 FR 58978 (Dec. 14, 1992), FERC Stats. & Regs., Regulations Preambles 1991–1996 ¶ 30,958 (Dec. 4, 1992); Order No. 497–E, *order on reh'g and extending sunset date,* 59 FR 243 (Jan. 4, 1994), FERC Stats. & Regs., Regulations Preambles 1991–1996 ¶ 30,987 (Dec. 23, 1993); Order No. 497–F, *order denying reh'g and granting clarification,* 59 FR 15336 (Apr. 1, 1994), 66 FERC ¶ 61,347 (Mar. 24, 1994); and Order No. 497–G, *order extending sunset date,* 59 FR 32884 (June 27, 1994), FERC Stats. & Regs., Regulations Preambles 1991–1996 ¶ 30,996 (June 17, 1994). *See also* Standards of Conduct and Reporting Requirements for Transportation and Affiliate Transactions, Order No. 566, 59 FR 32885 (June 27, 1994), FERC Stats. & Regs., Regulations Preambles 1991–1996 ¶ 30,997 (June 17, 1994); Order No. 566–A, *order on reh'g,* 59 FR 52896 (Oct. 20, 1994), 69 FERC ¶ 61,044 (Oct. 14, 1994); Order No. 566–B, *order on reh'g,* 59 FR 65707 (Dec. 21, 1994), 69 FERC ¶ 61,334 (Dec. 14, 1994); and Reporting Interstate Natural Gas Pipeline Marketing Affiliates on the Internet, Order No. 599, 63 FR 43075 (Aug. 12, 1998), FERC Stats. & Regs., Regulations Preambles 1996–2000 ¶ 31,064 (July 30, 1998).

[12] Open Access Same-Time Information System (Formerly Real-Time Information Network) and Standards of Conduct, 61 FR 21737 (May 10, 1996), FERC Stats. & Regs., Regulations Preambles 1991–1996 ¶ 31,035 (Apr. 24, 1996); Order No. 889–A, *order on reh'g,* 62 FR 12484 (Mar. 14, 1997), FERC Stats. & Regs., Regulations Preambles 1996–2000 ¶ 31,049 (Mar. 4, 1997); Order No. 889–B, reh'g denied, 62 FR 64715 (Dec. 9, 1997), FERC Stats. & Regs., Regulations Preambles 1996–2000 ¶ 31,253 (Nov. 25, 1997). *See also* Promoting Wholesale Competition Through Open Access Non-Discrimination Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 FR 21540 (May 10, 1996), FERC Stats. & Regs., Regulations Preambles 1991–1996 ¶ 31,036 (Apr. 24, 1996) at 31,692; *order on reh'g,* Order No. 888–A, 62 FR 12274 (Mar. 14, 1997), FERC Stats. & Regs., Regulations Preambles 1991–1996 ¶ 31,048 (Mar. 4, 1997); *order on reh'g,* Order No. 888–B, 81 FERC ¶ 61,248 (1997); order on reh'g, Order No. 888–C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom., Transmission Access Policy Study Group* v. *FERC, 225 F.3d 667* (D.C. Cir. 2000), *cert. granted,* 69 U.S.L.W. 3574 (Nos. 00–568 (in part) and 00–809), *cert. denied* (No. 00–800) (U.S. Feb. 26, 2001).

[13] Transcontinental Gas Pipe Line Corporation, *et al.,* 102 FERC ¶ 61,302 (2003).

[14] Cleco Corp., 104 FERC ¶ 61,125 (2003).

[15] Final Rule at P 8.

[16] For example, NiSource, Inc. merged with Columbia Energy Group, Dominion Resources, Inc. merged with Consolidated Natural Gas Company, Duke Energy merged with the Coastal Companies, and Enron Corporation merged with Portland General Electric.

in the two industries.[17] As a result, the Standards of Conduct properly apply to Energy Affiliates across industries. INGAA argues that there is no harm to the market from Transmission Providers' interaction with their Energy Affiliates, particularly with natural gas producers, gas processors, gatherers and intrastate pipelines. The Commission disagrees.

15. For example, under the Final Rule, producer affiliates are Energy Affiliates, which reflects their significant control over pipeline capacity. Historically, in the late 1980s, producers and producer affiliates held very little capacity on natural gas Transmission Providers. But, as the role of marketers in the industry has decreased, producers have increased significantly the amount of capacity they hold on interstate natural gas pipelines. In 1998, only three producers were among the top 20 marketers.[18] However, by the fourth quarter of 2003, 14 of the top 20 marketers were producers.[19] Of the 14 producer/marketers, nine of them are affiliated with natural gas Transmission Providers.

16. Contrary to INGAA's argument, the Commission need not wait until there have been many adjudicated cases of unduly discriminatory conduct between producers or asset managers, on the one hand, and their affiliated Transmission Providers on the other hand before the Commission can issue Standards of Conduct that prevent them from straying into violations. The economic incentives for Transmission Providers to favor their Energy Affiliates are real.

17. While the Commission's actions have encouraged competition, competition has not eliminated the economic incentives that encourage a Transmission Provider to give its affiliates unduly preferential treatment. Rather, the evolution of wholesale energy markets has created new commercial methods of doing business, and along with them, new opportunities for Transmission Provider affiliates to profit from unduly preferential information or transmission access. Given the increased competition, a Transmission Provider may have more incentive to give its affiliate preferential service or preferential access to information to benefit the corporate family. Moreover, those who operate the transmission infrastructure continue to face limited competition and in most parts of the country, continue to hold significant market power. Now the Commission is concerned that Transmission Providers may be giving Energy Affiliates other than Marketing Affiliates unduly preferential treatment.

18. Unduly preferential behavior can and does harm customers. Although harm to the market is difficult to quantify,[20] the Commission has been able to quantify harm resulting from unduly preferential treatment in some cases. For example, Idaho Power Company gave its marketing affiliate unduly preferential access to its transmission system by treating the marketing affiliate's transmission requests as if the service was needed for native load. This unduly preferential behavior in favor of Idaho Power Company's merchant affiliate harmed the retail customers of Idaho in the amount of $5.8 million.[21] In another example, the retail customers of Louisiana were harmed approximately $2.1 million when Cleco Power favored its affiliates.[22] The Commission is ensuring that Transmission Providers do not give their Energy Affiliates similar unduly preferential treatment.

19. INGAA and the New York State Department also argue that the Commission failed to adequately consider the costs of compliance and did not conduct an extensive cost-benefit analysis. Contrary to these assertions, the Commission did consider the costs of compliance, and revised some of the proposals originally included in the NOPR, in part, to appropriately balance the costs of complying with the Standards of Conduct. The Commission reduced the costs of compliance by permitting integrated activities wherever possible without compromising the goals of the Final Rule. For example, the Commission permitted Transmission Providers and their Marketing and Energy Affiliates to share field and maintenance employees and support employees with appropriate safeguards. The Commission also permitted Transmission Providers and their Marketing and Energy Affiliates to share computer systems, Energy Management System (EMS) and Supervisory Control and Data Acquisition (SCADA) as long as transmission and customer information itself is not shared.

20. The Commission has given interested persons the opportunity to identify their estimated costs to comply with the Standards of Conduct. Transmission Providers claimed that it would cost them between $75,000 to $300 million to comply with the Standards of Conduct as originally proposed in the NOPR.[23] The Commission also encouraged Transmission Providers to submit estimates of costs in the Notice soliciting comments after the May 21, 2002 Conference,[24] and the Final Rule encouraged Transmission Providers to include in their Informational Filings estimates of the costs associated with complying with the Final Rule. A review of comments and Informational Filings confirms that changes incorporated in the Final Rule have decreased the Transmission Providers' costs of complying with the Standards of Conduct.[25] For example, Cinergy, which originally anticipated annual costs of $36,000,000-$39,000,000,[26] now estimates its annual costs at approximately $225,000.[27] Similarly, Alliance, which originally anticipated one-time compliance costs of $20-$30

[17] *See e.g.,* ''New England Maintains Deliveries Despite Record Demand, Bitter Cold,'' Natural Gas Intelligence, January 19, 2004, p. 1.

[18] Inside F.E.R.C. Gas Market Report, June 25, 1999, p. 12.

[19] There are no Marketing Affiliates in the list of the top 20 marketers for the fourth quarter of 2003. Gas Daily, March 23, 2004, p. 6.

[20] For example, the Commission could not quantify the harm when the Public Service Company of New Mexico failed to comply with the independent functioning requirement of the standards of conduct; when Ameren Corporation's transmission employees engaged in non-public, off-OASIS communications with wholesale merchant function employees and other customers; or when PacifiCorp allowed its wholesale merchant function employees to participate in bi-weekly meetings with transmission employees regarding reliability. See April 25, 2000 Letter from John Delaware, Deputy Director and Chief Accountant, to Public Service Company of New Mexico in Docket No. FA99–9–000; September 27, 2002 Letter from John Delaware, Deputy Director and Chief Accountant to Ameren Corporation in Docket Nos. FA01–5–000, FA01–6–000 and FA01–7–000; See December 18, 2003 Letter from William Hederman, Director of the Office of Market Oversight and Investigations, to PacifiCorp in Docket No. PA04–5–000.

[21] Idaho Power Co., IDACORP Energy, L.P., and IDACORP, Inc., 103 FERC ¶ 61,182 (2003).

[22] Cleco Corp., 104 FERC ¶ 61,125 (2003).

[23] Major Issues Analysis at pp. 13–15 and Final Rule at P 114.

[24] April 25, 2002 Notice of Staff Conference in Docket No. RM01–10–000.

[25] Review of the Transmission Providers' Informational Filings in their respective ''TS'' dockets reveals the following estimated costs to comply with the Standards of Conduct: (a) 5 Transmission Providers stated that the costs would be ''minimal,'' but did not give dollar figures; (b) 27 Transmission Providers stated it would cost them less than $50,000; (c) 29 Transmission Providers stated it would cost them between $50,000–$100,000; (d) 69 Transmission Providers stated it would cost them between $100,000–$500,000; (e) 11 Transmission Providers stated it would cost them between $500,000–$1,000,000; and (f) 12 Transmission Providers stated it would cost them more than $1,000,000. These include Questar Pipeline, which alone claimed higher costs from the Final Rule than from the NOPR.

[26] June 2, 2002 Supplemental Comments of Cinergy Services, Inc. in Docket No. RM01–10–000.

[27] February 9, 2004 Informational Filing by Cinergy Services, Inc. in Docket No. TS04–43–000.

million,[28] now estimates its compliance cost at $250,000.[29] Finally, Kinder Morgan Pipelines, which originally anticipated an increase of $22,600,000 annually and $5.8 million in a one-time cost to comply,[30] now estimates that it will cost approximately $200,000 for all four Kinder Morgan Pipelines if their rehearing requests are granted and $400,000-$500,000 if their rehearing requests are denied.[31] As discussed in the NOPR, the Major Issues Analysis and the Final Rule, the Commission has considered the costs of compliance with the revised Standards of Conduct, and finds, on balance, that the costs are reasonable to achieve the Commission's goal of preventing unduly discriminatory behavior in a competitive market. Further, clarifications made in this order will further reduce some of the compliance costs.

21. INGAA also challenges the Commission's review and analysis of the Index of Customers data [32] listed in the Final Rule.[33] These data identify the amount of capacity affiliates held on their affiliated gas pipelines. INGAA argues that the Commission should have calculated the total amount of the capacity held by affiliates compared to the total amount of pipeline capacity on an aggregate basis, rather than calculating the percentage of capacity held by an affiliate on its affiliated Transmission Provider. INGAA also use a volume-weighted average, rather than a simple average.

22. Evaluating the amount of capacity held by an affiliate on its affiliated Transmission Provider is a more accurate indication of the natural gas Transmission Provider's incentives to give its affiliate an undue preference. In some instances, a volume-weighted average minimizes the apparent incentives of Transmission Providers to favor their Energy Affiliates.[34] And the impact of Energy Affiliates other than Marketing Affiliates is pronounced. Producers' roles have evolved and, now, Gas Daily reported that producers have solidified their hold on marketer rankings as traditional marketers have vanished.[35]

23. Consideration of INGAA's concerns caused the Commission to look closer at the shipper data from the October 2003 Index of Customers information. The Commission found that of 87 pipelines examined, 58 had contracts with their affiliates for firm transportation, firm storage or both types of services. Of the 18 pipelines with LDC affiliate contracts, the affiliated LDCs held about 46 percent of the contracted capacity on those 18 pipelines and 48 percent of the pipelines' contracted storage capacity.[36] On nine of these 18 pipelines, LDC affiliates held in excess of 50 percent of the contracted firm transmission capacity. Of the 16 natural gas pipelines affiliated with natural gas producers, producer affiliates held about 37 percent of the firm transportation capacity.[37] On six of these pipelines, producer affiliates held more than 60 percent of the firm transportation capacity. These data paint a very different picture than the aggregate, volume-weighted data produced by INGAA. The Commission's analysis more accurately reflects the relationship between an individual Transmission Provider and its Marketing or Energy Affiliates.

24. Moreover, the Index of Customer data does not always identify the level of an affiliate's involvement, either as an asset manager or agent or as a replacement shipper. For example, review of Texas Eastern Transmission Company's Capacity Release information from January 1, 2002 through July 31, 2003, shows that Duke Energy Trading Company, an affiliated marketer, released capacity to Energy Plus, another marketing affiliate, on 141 occasions and Energy Plus released capacity to Duke Energy Trading Company on 47 occasions, yet a comparable review of Texas Eastern's Index of Customers does not identify Energy Plus as an affiliate holding firm pipeline capacity.

25. BP argues that the Final Rule did not impose sufficient restrictions or prohibitions on Transmission Providers. Specifically, BP argues that the Commission should have adopted pipeline allocation procedures for affiliates holding capacity on affiliated gas pipeline Transmission Providers. The Commission denies rehearing. While the Commission considered additional measures, such as those recommended by BP, it decided not to adopt them on a generic basis. However, the Commission will consider additional remedies on a case-by-case basis if a Transmission Provider violates the Standards of Conduct.

III. Analysis of Requests for Rehearing and/or Clarification

26. The Commission has received many requests for rehearing or clarification with alternative requests for waiver, partial waiver or exemption with respect to individual Transmission Providers' specific circumstances. Many petitioners also filed requests for waiver, partial waiver or exemption in their individual ''TS'' filings on the same issues.[38] The Commission will address the individual requests for exemption, waiver or partial waiver in orders in the individual ''TS'' filings, and in this order will address the generic issues.

A. Applicability of the Standards of Conduct

Final Rule

27. Pursuant to §§ 358.1(a), (b) and (c), the Standards of Conduct apply to Transmission Providers, but not to Commission-approved Independent System Operators (ISOs) or Regional Transmission Organizations (RTOs). Section 358.1(c) also provides that a public utility transmission owner that participates in a Commission-approved

[28] June 14, 2002 Post-Technical Conference Comments of Alliance Pipeline L.P. in Docket No. RM01–10–000.

[29] February 9, 2004 Informational Filing of Alliance Pipeline L.P. in Docket No. TS04–84–000.

[30] June 28, 2002 Comments of Kinder Morgan, Inc. in Docket No. RM01–10–000.

[31] February 9, 2004 Informational Filing of Kinder Morgan Interstate Gas Transmission, L.L.C in Docket No. TS04–88–000.

[32] Although INGAA also urges the Commission to publish its analysis of the Index of Customers data, it was able to duplicate the Commission's calculations and make its own calculations and analysis from the publicly available information in the October 2003 Index of Customers. At INGAA's urging, the Commission is attaching its updated analysis to the Order on Rehearing.

[33] Final Rule at P 10 and 67.

[34] For example, under INGAA's analysis using a volume-weighted calculation, production affiliates held only 1.6 percent of the capacity on all 87 gas Transmission Providers. However, using a simple average calculation, 16 production affiliates held 37 percent of the capacity on their affiliate gas Transmission Providers with production affiliates.

[35] Gas Daily, ''Producers solidify hold on marketer rankings,'' March 23, 2004.

[36] Carnegie Interstate Pipeline Company, CenterPoint Energy Gas Transmission, Columbia Gas Transmission Corporation, Columbia Gulf Transmission Company, Dominion Transmission, Inc., Eastern Shore Natural Gas Company, Equitrans, L.P., Granite State Gas Transmission Inc., Guardian Pipeline L.L.C., Kinder Morgan Interstate Gas Transmission Company, Mississippi River Transmission Corp., National Fuel Gas Supply Corp., Paiute Pipeline Company, Panhandle Eastern Pipeline Company, Questar Pipeline Company, Vector Pipeline, L.P., Westgas Interstate Inc., and Williston Basin Interstate Pipeline.

[37] CenterPoint Energy Gas Transmission, Chandeleur Pipe Line Company, Columbia Gas Transmission Corporation, Dauphin Island Gathering Partners, Destin Pipeline Company, L.L.C., Equitrans L.P., Garden Banks Gas Pipeline, L.L.C., Maritimes & Northeast Pipeline L.L.C., Mississippi Canyon Gas Pipeline, L.L.C., National Fuel Gas Supply Corporation, Northwest Pipeline Corporation, Nautilus Pipeline Company, L.L.C., Sabine Pipe Line L.L.C., TransColorado Gas Transmission Company, Venice Gathering System, L.L.C., and Wyoming Interstate Company, Ltd.

[38] On January 16, 2004, the Commission issued a notice that it had created the docket prefix ''TS'' or Transmission Standards for all Informational Filings and requests for waiver or exemption under Order No. 2004.

RTO or ISO and does not operate or control its transmission facilities and has no access to transmission, customer or market information covered by § 358.5(b) may request an exemption from the Standards of Conduct.[39] The Final Rule also states that the Standards of Conduct also apply to non-public utility Transmission Providers[40] through the reciprocity provisions of Order No. 888.[41] Generation and transmission cooperatives (G&T) are not subject to the Standards of Conduct consistent with the policies established under Order No. 888.[42]

28. In the Final Rule, the Commission continues the exemptions and partial waivers of the Standards of Conduct for the entities that previously received exemptions or partial waivers under Order No. 889 or Order No. 497, and states that Transmission Providers may request waivers or exemptions from all or some of the requirements of Part 358 for good cause. *See* 18 CFR 358.1(d).

Requests for Rehearing and/or Clarification and Commission Conclusions

29. BP requests clarification that the Commission will grant exemptions only for good cause. The Commission grants the request for clarification. As discussed in the Final Rule, the Commission will review the merits of each exemption request to determine whether a Transmission Provider qualifies for a full or partial waiver of the Standards of Conduct. *See* Final Rule at P 27.

30. USG and B–R request rehearing of the Commission's decision not to categorically exempt small pipelines, for example, those less than 25 miles long, with limited operations that serve one or a few affiliated and/or non-affiliated customers. The Commission grants rehearing. The Commission will exempt small pipelines, based on the size of the company, the number of employees and level of interest in transportation on the pipeline, and where appropriate, whether the company has separated to the maximum extent practicable from its Marketing or Energy Affiliates. These are the criteria the Commission used in determining whether small pipelines qualified for partial exemptions from the requirements of Order No. 497.[43]

31. Applying these criteria to the circumstances on USG and B–R, the Commission finds that partial exemptions are appropriate. The information in B–R's request for exemption in Docket No. TS04–183–000 indicates that B–R is 17-mile pipeline, is managed by U.S. Gypsum (its affiliate) and does not have any employees, is a free-flow, delivery only pipeline that is not interconnected with any other pipeline. Similarly, the information in USG's request for exemption in Docket No. TS04–103–000 indicates that USG is a 13-mile pipeline, is also managed by U.S. Gypsum and does not have any employees, is a free-flow, delivery only pipeline that is not interconnected with any other pipeline. USG and B–R are exempt from the Independent Functioning requirements of § 358.4 and the information disclosure prohibitions in § 358.5(a) and (b). They are not exempt from the remainder of the Standards of Conduct.

32. WPSC and UPPC request clarification that Order No. 2004 does not prohibit a future request for an exemption from the Standards of Conduct. The Commission so clarifies. Order No. 2004 does not limit the time for filing requests for exemptions or waivers.

B. Definition of a Transmission Provider

Final Rule

33. Section 358.3(a) defines a Transmission Provider as: ''(1) Any public utility that owns, operates or controls facilities used for the transmission of electric energy in interstate commerce; or (2) Any interstate natural gas pipeline that transports gas for others pursuant to Subpart A of Part 157 or Subparts B or G of Part 284 of this chapter.''

34. The Final Rule codified two general principles concerning Transmission Providers' behavior. The first requires Transmission Providers' employees engaged in transmission system operations to function independently from the employees of the Transmission Providers' Marketing or Energy Affiliates. The second, in essence, the golden rule, is that a Transmission Provider must treat all transmission customers, affiliated and non-affiliated, on a non-discriminatory basis, and cannot operate its transmission system to benefit preferentially a Marketing or Energy Affiliate. *See* Final Rule at P 30.

Requests for Rehearing and/or Clarification and Commission Conclusions

35. NASUCA requests reconsideration of the Commission's decision not to classify Hinshaw[44] or intrastate pipelines as Transmission Providers under the Standards of Conduct. NASUCA argues that section 311 of the Natural Gas Policy Act of 1978 (NGPA)[45] authorizes the Commission to condition the certificates that authorize these pipelines to engage in transmission transactions. NASUCA claims that intrastate pipelines have the same incentives to transfer market power to their Energy Affiliates as do other Transmission Providers. NASUCA argues that requiring the independent functioning of employees would limit the opportunities for intrastate pipelines to give preferential treatment to marketing affiliates that compete with non-affiliated shippers on intrastate pipelines. NASUCA claims that discriminatory intrastate transactions have the potential to distort wholesale

[39] This approach, rather than a codified exemption, recognizes that:

If a Transmission Provider operates transmission facilities, regardless of whether it belongs to an RTO/ISO, it has the ability to provide an undue preference to an affiliate and has access to valuable transmission information. Unless the ISO or RTO has a control center and field employees dedicated to the operation and maintenance of all transmission facilities under its operation, a Transmission Provider may be responsible for the operation of the transmission assets (under the direction of the ISO or RTO) and, more importantly, have direct access to transmission information. Participation in an ISO or RTO does not necessarily prevent a Transmission Provider from sharing information with its affiliates preferentially or preferentially operating facilities for the benefit of its Energy Affiliates.

Final Rule at P 20. No petitioner sought rehearing on this point.

[40] *See* Final Rule at P 28.

[41] Promoting Wholesale Competition Through Open Access Non-Discrimination Transmission Service by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs., Regulations Preambles January 1991–June 1996 ¶ 31,036 (1996), *order on reh'g*, Order No. 888–A, FERC Stats. & Regs., Regulations Preambles July 1996–Dec. 2000 ¶ 31,048 (1997), *order on reh'g*, Order No. 888–B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888–C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Group, et al.* v. *FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York, et al.* v. *FERC*, 535 U.S. 1 (2002).

[42] Order No. 888–A, FERC Stats. & Regs., Regulations Preambles July 1996–December 2000 ¶ 31,048 at 30,366. In Order No. 888–A, the Commission clarified that if a distribution cooperative sought open access transmission service from a Transmission Provider, only the distribution cooperative (not its member distribution cooperatives) would be required to offer transmission service. The Commission excluded from the definition of affiliate distribution cooperative members of a generation and transmission cooperative.

[43] *See e.g.*, Ringwood Gathering Company, 55 FERC ¶ 61,300 (1991), Caprock Pipeline Company, *et al.*, 58 FERC ¶ 61,141 (1992).

[44] Hinshaw pipelines are exempt from Commission regulation under the NGA, but they may have limited jurisdiction certificates to provide interstate transportation services like an intrastate pipeline under the Natural Gas Policy Act of 1978. *See* Order No. 63, FERC Stats. & Regs., Regulations Preambles 1977–1981 ¶ 30,118 (1980).

[45] 15 U.S.C. 3371 (2000).

markets, and may fall between the cracks of Federal and State regulation.

36. The Commission denies rehearing requested by NASUCA and will not classify intrastate and Hinshaws pipelines as Transmission Providers under the Standards of Conduct. As will be discussed further below, Hinshaws are State-regulated entities and are also frequently local distribution companies (LDCs). Not including Hinshaws in the definition of Transmission Provider is consistent with our treatment of LDCs. Both are regulated by States, which have jurisdiction to prevent undue discrimination on such facilities. Similarly, intrastate pipelines are regulated by the States and States may require them to observe separation of functions and non-disclosure requirements with respect to intrastate transactions. As discussed further below, both intrastate and Hinshaw pipelines may be classified as Energy Affiliates if they engage in Energy Affiliate activities described in § 358.3(d), and Transmission Providers subject to the Commission's jurisdiction must observe the separation of functions and disclosure requirements of the Standards of Conduct with respect to them. Consequently, no compelling purpose will be served by defining Hinshaws and intrastate pipelines as Transmission Providers.

37. WPSC and UPPC request clarification that ownership of a financial interest in transmission facilities, by an entity that does not directly own, operate or control transmission facilities does not make the entity a Transmission Provider.[46] The Commission clarifies that an entity that owns a financial interest in transmission facilities, but does not otherwise own, operate or control transmission facilities, is not a Transmission Provider, as defined. Although, owning a financial interest or controlling 10 percent or more of the voting interest[47] would make WPSC and UPPC an Affiliate of the Transmission Provider.

38. Encana argues on rehearing that Transmission Providers with no market power should be exempt from the requirements of Order No. 2004, particularly independent storage providers that are not interconnected with the facilities of affiliated pipelines. Encana argues that such storage providers cannot exercise market power, having: No market power (as found by Commission order); no exclusive franchise area; no captive ratepayers; no cost-of service; no guaranteed rate of return; no ability to cross-subsidize at-risk business with ratepayer contributions; and no affiliation with any Transmission Provider to which it interconnects.

39. The Commission grants Encana's request to generically exempt from the definition of Transmission Provider natural gas storage providers authorized to charge market-based rates that are not interconnected with the jurisdictional facilities of any affiliated interstate natural gas pipeline, have no exclusive franchise area, no captive ratepayers and no market power. Such storage providers will be treated as Energy Affiliates if they are affiliated with any Transmission Providers.

40. NW Natural and Kelso Beaver request rehearing of the definition of Transmission Provider to the extent that it covers non-open access natural gas pipelines that transport gas for others solely under subpart A of part 157 of the Commission's regulations. These entities were not previously subject to the former standards of conduct, and petitioners argue that the original notice did not propose to expand the Standards of Conduct to cover entities that had not previously been subject to the rule. They also argue that the majority of pipelines certificated under part 157 are small and serve one or few customers.[48]

41. The Commission denies rehearing. Contrary to petitioners' assertion, the regulatory text in the NOPR gave notice that the Commission proposed that the Standards of Conduct would govern the behavior of natural gas pipelines providing transmission service under part 157 of the Commission's regulations.[49] Such pipelines may seek an exemption or waiver on a case-by-case basis.

C. Definition of an Energy Affiliate

Final Rule

42. The Final Rule defined Energy Affiliate in § 358.3(d) as an affiliate that:

(1) Engages in or is involved in transmission transactions in U.S. energy or transmission markets; or

(2) Manages or controls transmission capacity of a Transmission Provider in U.S. energy or transmission markets; or

(3) Buys, sells, trades or administers natural gas or electric energy in U.S. energy or transmission markets; or

(4) Engages in financial transactions relating to the sale or transmission of natural gas or electric energy in U.S. energy or transmission markets.

(5) An energy affiliate does not include:

(i) A foreign affiliate that does not participate in U.S. energy markets;

(ii) An affiliated Transmission Provider; or

(iii) A holding, parent or service company that does not engage in energy or natural gas commodity markets or is not involved in transmission transactions in U.S. energy markets; or

(iv) An affiliate that purchases natural gas or energy solely for its own consumption and does not use an affiliated Transmission Provider for transmission of natural gas or energy; or

(v) A state-regulated local distribution company that does not make any off-system sales.

i. Defining the Phrase ''Engages in or Is Involved in Transmission Transactions''

Requests for Rehearing and/or Clarification and Commission Conclusions

43. INGAA, Cinergy, Dominion and Entergy urge the Commission to provide additional clarification on the meaning of § 358.3(d)(1) because the Commission did not define the meaning of the terms ''engages in'' or ''is involved in.'' INGAA argues that those phrases do not sufficiently describe the activities that would make an Affiliate an Energy Affiliate.

44. The Commission grants petitioners' clarification request. The term ''engages in'' transmission transactions means the Affiliate holds (or is requesting) transmission capacity on a Transmission Provider as a shipper or customer or buys or sells transmission capacity in the secondary capacity market. When the Commission uses the phrase ''involved in'' it means acting as agent, asset manager, broker or in some fashion managing, controlling or aggregating capacity on behalf of transmission customers or shippers. Other transmission-related interactions between a Transmission Provider and its interconnected Affiliate, such as confirming nominations and schedules with upstream producers and gathering facilities, exchanging operational data

[46] Based on the pleading, it appears that WPSC and UPPC own financial interests in ATCLLC, a Transmission Provider, which is a transmission-owning member of Midwestern Independent System Operator (MISO), but they do not directly own any transmission facilities. WPSC's and UPPC's request to withdraw their previous standards of conduct under Order No. 889 is pending before the Commission in Docket No. TS04–130–000, and will be addressed in a separate order on the merits of the request.

[47] Control is defined at 18 CFR 358.3(c) and Affiliate is defined at 18 CFR 358.3(b).

[48] NW Natural and Kelso Beaver also filed a joint request for exemption in Docket No. TS04–2–000, which the Commission will address by separate order.

[49] FERC Stats. & Regs., Proposed Regulations 1999–2003 at 34,093.

relating to interconnection points, and communications relating to maintenance of interconnected facilities are not included in the definition of the terms ''engaged in'' or ''involved in.'' This clarification has the practical effect of addressing many of the concerns raised by interconnected gatherers, processors or intrastate pipelines. The majority of gatherers, processors and intrastate pipelines do not participate in the activities described in § 358.3(d) and, thus, they will no longer be treated as Energy Affiliates. As discussed further below, this clarification will reduce the number of gatherers, processors, intrastate pipelines and Hinshaw pipelines that are Energy Affiliates under the rule.

ii. LDCs as Energy Affiliates

Requests for Rehearing and/or Clarification and Commission Conclusions

45. INGAA argues that the expanded definition of Energy Affiliate in Order No. 2004 applies to entities that are not subject to the Commission's jurisdiction. Similarly, New York State Department argues that the imposition of Standards of Conduct on LDCs' employees not engaged in sales for resale is an unlawful exercise of jurisdiction, contrary to section 1(c) of the NGA and section 201 of the FPA. New York State Department reads the Final Rule as subjecting the entire retail distribution unit to Federal regulation if the electric distribution unit sells excess energy through the New York Independent System Operator (NYISO).

46. The Commission disagrees with INGAA's and New York State Department's assertions that the Commission is attempting to exercise jurisdiction over non-jurisdictional activities. The Standards of Conduct are imposed only on Transmission Providers, not Marketing or Energy Affiliates. The Commission has very clear statutory mandates to ensure that interstate commerce in natural gas and electricity takes place at rates and terms and conditions of service that are just and reasonable and not unduly discriminatory or preferential.[50]

47. The Standards of Conduct apply to a Transmission Provider's relationship with an affiliated LDC (gas and/or electric) that makes off-system sales. In response to the New York State Department, the Commission finds that if a retail sales function also engages in off-system sales of excess electric power in the wholesale market, the Transmission Provider must observe the Standards of Conduct vis-à-vis the retail sales function.[51] However, that retail sales function itself does not become subject to Federal jurisdiction. Further, the Commission sees no conflict between the Standards of Conduct and New York's State-imposed standards of conduct which govern the behavior of New York's LDCs. In our view, these Standards of Conduct will complement each other rather than conflict.

48. This rule does not regulate—directly or indirectly—the provision of rates, terms and conditions of service for local distribution, production, gathering, processing or intrastate transmission. The Standards of Conduct provide rules that help define activities that would be unduly discriminatory or preferential in a Transmission Provider's conduct towards affiliates that are also involved in interstate natural gas and wholesale electricity markets. Preventing such violations is at the heart of the Commission's statutory mandate, and the Commission has not exceeded this mandate in limiting Transmission Providers' interactions with other Energy Affiliates.

a. Regulatory Text of the LDC Exemption

49. The preamble discussion in the Final Rule, which exempts from the definition of Energy Affiliate State-regulated LDCs that solely engage in retail service and make no off-system sales (Final Rule at P 44) does not exactly track the regulatory text in § 358.3(d)(5)(v), which exempts from the definition of Energy Affiliate State-regulated LDCs that do not engage in off-system sales. CenterPoint notes this inconsistency and argues that LDCs should be allowed to participate in wholesale energy market activities other than off-system sales, such as asset management.[52]

50. For example, under CenterPoint's proposal, a State-regulated affiliated LDC that does not engage in off-system sales, but manages or controls transmission capacity of another, buys, sells, trades, or administers natural gas or electric energy, or engages in financial transactions relating to the sale or transmission of natural gas or electricity would be exempt from the definition of Energy Affiliate.

51. The Commission will not extend the LDC exemption to include an LDC that engages in Energy Affiliate activities that are not directly related to its State-regulated retail sales functions. Such Energy Affiliate activities include, acting as a merchant, agent, or asset-manager for others. Moreover the Commission will amend the regulation at § 358.3(d)(5)(v) to clarify that a State-regulated LDC is exempt from the definition of Energy Affiliate if it provides solely retail service and engages in no off-system or other Energy Affiliate activities. This is consistent with the discussion in the preamble of the Final Rule at P 44. The new regulatory text will exempt: ''A State-regulated local distribution company that acquires interstate transmission capacity to purchase and resell gas only for on-system customers, and otherwise does not engage in the activities described in §§ 358.3(d)(1), (2), (3) or (4) * * *.''

b. Retention of the LDC Exemption

52. IOGA–WV argues that the Commission erred in exempting any LDCs from the definition of Energy Affiliate. IOGA–WV argues that in Appalachia, integrated natural gas companies utilize their affiliated LDCs to share information and dominate the interstate natural gas market. IOGA–WV argues that LDCs can easily avoid the constraints of the Final Rule, without making off-system sales. IOGA–WV argues that LDCs can create marketing affiliates which make off-system sales while allowing their parent LDCs to continue to qualify for the exemption in the definition of Energy Affiliate, and thereby circumvent the Standards of Conduct. IOGA–WV argues that § 358.3(d)(5)(v) should be amended to eliminate this loophole.

53. The Commission denies rehearing on this issue. The Commission does not find that this is a realistic concern. And, any sales from the LDC to its marketing affiliate would be off-system sales and void the LDC's exemption from the Standards of Conduct.

Any marketing affiliate of the LDC would also be the affiliated Transmission Provider's Marketing or Energy Affiliate. In either case, an exemption from the definition of Energy Affiliate would not apply.

c. Scope of the LDC Exemption

54. Questar supports the exemption granted to State-regulated LDCs provided they do not make off-system sales.

55. On the other hand, AGA, Dominion, INGAA, National Fuel-Distribution, National Fuel-Supply, New York State Department, NICOR, NiSource, NW Natural and Kelso

[50] *See* section 4 of the NGA and section 205 of the FPA.

[51] A Transmission Provider that is a member of the NYISO, relinquishes control over its operations to the NYISO and does not have access to transmission or customer information may request an exemption from the Standards of Conduct.

[52] See February 9, 2004 Informational Filing of CenterPoint Energy Gas Transmission Company in Docket No. TS04–2–000.

Beaver, ONEOK, PA–OCA, PS&EG, and Xcel argue that the Commission erred in exempting from the definition of Energy Affiliate only LDCs that make no off-system sales. They argue that to the extent LDCs make off-system sales on non-affiliated Transmission Providers, there is no threat of affiliate abuse. AGA and PA–OCA argue that prohibiting LDCs from making off-system sales will increase costs to the LDCs' retail customers or impose additional compliance costs on LDCs. AGA also argues that ''this formulation of the exemption is contrary to the way in which the Commission applied the exemption for local distribution companies in Order No. 497.'' (footnote omitted.) AGA also cites to *National Fuel Gas Supply Corp.*, 64 FERC ¶ 61,192 at 62,582 (1993), where under the previous rules, the Commission did not treat National Fuel-Distribution (an affiliated LDC) as a marketing affiliate to the extent its off-system sales were not transported by its affiliated pipeline, National Fuel-Supply. AGA argues that LDCs, faced with State-mandated obligations to serve, must stand ready to meet peak load requirements. Off-peak, AGA argues, LDCs need the flexibility to make off-system sales (and capacity releases) to minimize their costs.

56. Dominion argues that ''it is difficult to envision a material advantage that a pipeline could provide its affiliated LDC with respect to off-system sales that do not involve that pipeline.'' [53] Dominion adds that if a pipeline were to find a way to afford an affiliate an advantage on another pipeline, ''its action would likely violate the Commission's open access regulations, the antitrust laws, or other laws and regulations.''

57. National Fuel-Distribution argues that restricting an LDC's firm participation in off-system sales would reduce market efficiencies, increase the cost of gas to the LDC's customers, and reduce price transparency. National Fuel-Distribution states that 99 percent of its off-system sales are conducted in the daily gas market and argues that the probability of its affiliated pipeline, National Fuel-Supply, having any information that could affect the market, if divulged, is remote. In addition, National Fuel-Distribution claims the affiliated LDC will gain no advantage over a non-affiliated LDC with affiliated pipeline information.

58. NW Natural and Kelso Beaver argue that it is arbitrary and capricious to subject it to compliance with the Standards of Conduct if it chooses to make off-system sales, while non-affiliated LDCs face no such burden.

59. The Commission denies rehearing requested by those who seek to expand the LDC exception to include those LDCs that make off-system sales which are not transported on an affiliated Transmission Provider. The Commission does not agree that in these circumstances there can be no harm.

60. Under the expansion of the LDC exemption sought by petitioners, Transmission Providers would be free to share transmission-related and customers' market information with their affiliated LDCs. In most states, large natural gas customers often take advantage of retail transportation programs by purchasing natural gas from competing wholesale suppliers; the local LDC also competes for these markets. Any LDC making off-system wholesale sales has a powerful incentive to maximize its revenues in those sales regardless of whether the sales take place on its affiliated Transmission Provider's system or off-system.[54] An LDC which makes off-system sales would be in a position to benefit from preferential information as would any other marketer.

61. The Commission recognizes that an LDC serving only its on-system customers must comply with pipeline balancing requirements and may be required to buy or sell de minimus quantities of natural gas in the wholesale commodity market, purchase short-term park and loan and storage services, buy or sell imbalances in the pipeline's cash out mechanism, or take other steps to meet pipeline tariff balancing tolerances on a daily or monthly basis. LDCs with limited participation in wholesale markets to satisfy these needs will continue to be exempt from the definition of Energy Affiliate as long as they are not participating in the other activities described in § 358.3(d).

62. The Commission also notes that the level of LDCs' off-system sales varies significantly. For example, National Fuel-Distribution, the affiliated LDC of National Gas-Supply, makes off-system sales of approximately $63,000,000.[55]

63. In some circumstances transmission activities on the affiliated Transmission Provider will have a large and direct impact on the prices of natural gas and wholesale electricity on points upstream or downstream of the affiliated Transmission Provider's system.[56] For example, an operational flow order (OFO) on one of the three large interstate natural gas pipelines serving New York City-area markets or on one of the regional storage fields could have a direct and significant effect on the price of gas in that market. In today's spot markets, advance information of an OFO would allow an LDC to use that knowledge to position itself at the expense of other market participants.

64. It would be difficult for an LDC whose shared employees operated both the Transmission Provider and LDC systems not to have advance notice of a Transmission Provider's OFO. An affiliated LDC would have a head start in responding to an OFO, and would have a first shot at the spot market to sell off stranded supply or purchase needed make-up supply. Any advantage afforded by transmission information not available to non-affiliates would come at the expense of other wholesale market competitors. When the LDC does not make off-system sales, this degree of vertical integration does not harm wholesale markets or non-affiliated competitors.

65. Contrary to National Fuel-Distribution's argument, early knowledge of events or circumstances on an affiliated pipeline system has value. As noted by National Fuel-

[53] Dominion at p. 12.

[54] To the extent an LDC can reduce its costs of purchasing natural gas through off-system sales, this may reduce cost to retail ratepayers—a laudable goal—to the extent those cost savings are passed through the retail rates. However, some states permit the revenues from off-system sales to be shared with stockholders. Under these circumstances, the benefits of off-system sales to retail ratepayers claimed by petitioners is overstated because these benefits are shared with the LDC's stockholders.

[55] National Fuel Gas Company, 2002 Annual Report and Form 10–K.

[56] Energy Information Administration, ''Northeast Pipeline Restrictions Ease Following Weather Reprieve,'' Natural Gas Weekly Update (January 22, 2004). (''Operational Flow Orders (OFOs), which can vary significantly in severity, were issued by a variety of pipelines last week during the record cold snap in the Northeast. When these restrictions are in place, customers without firm contracted capacity on the pipeline generally are interrupted and cannot access Gulf supplies because transportation through the pipeline grid is not available. Thus, prices in the Northeast and Gulf region become disconnected as customers in the Northeast without firm contracted capacity seek incremental supplies only in local market areas. The result last week was that prices at some Northeast trading locations spiked to $45 per MMBtu or more for gas deliveries the following day.'') *See also* Energy NewsData, Western Price Survey, ''Spring Housekeeping Stymies Some Shipping'' (April 12, 2002). (''Gas prices were skewed by a host of maintenance on pipelines and storage facilities coming out of the Rocky Mountains. Aside from some maintenance on El Paso's San Juan lateral the temporary closure of the big Clay Basin storage facility in northeast Utah meant that shippers without firm capacity on West-bound pipelines had no place to put their supplies. The San Juan Basin index price plummeted to $0.99/MMBtu Tuesday and pipelines were ordering their customers to follow their reservations or face penalties.'')

Distribution, daily trading occurs over a compressed time period. Other market participants have little time to obtain rapidly breaking news that can affect spot prices. Yet the affiliated LDC, were it not considered an Energy Affiliate, would have the ability to get the relevant news first, and act on it before other market participants had access to the information. Contrary to National Fuel-Distribution's assertion, this would be an unduly preferential advantage.

66. As to NW Natural's and Kelso Beaver's assertions that they are placed at a competitive disadvantage relative to non-affiliated LDCs making off-system sales, the Commission disagrees. The Standards of Conduct do not put affiliated LDCs at a disadvantage with respect to non-affiliated LDCs. Rather, affiliates and non-affiliates are on an equal footing because all market participants will have the same access to transmission information and transmission services. Non-affiliated market participants do not have access to the Transmission Providers' transmission or customer information. The petitioners have not provided any explanation why an affiliated LDC that is participating in the wholesale sales market or is providing asset management services for a customer is entitled to unduly preferential access to the Transmission Providers' transmission or customer information.

67. The Commission wishes to make clear that it is not the purpose or the effect of this Final Rule to prohibit LDCs from making off-system sales. Rather, if an LDC chooses to make off-system sales, its affiliated Transmission Provider must comply with the Standards of Conduct vis-à-vis its affiliated LDC as an Energy Affiliate. The Transmission Provider's compliance with the Standards of Conduct places all wholesale market participants, affiliated and non-affiliated, on an equal footing.

d. Treatment of LDC Divisions

68. AGA requests clarification whether the LDC division of an electric Transmission Provider would be considered an Energy Affiliate because the division does not meet the definition of ''Affiliate'' in § 358.3(b). The Commission clarifies that an LDC division of an electric Transmission Provider shall be considered the functional equivalent of an Energy Affiliate if it engages in the activities described in §§ 358.3(d)(1), (2), (3) or (4), and codifies this at § 353.3(d)(5). Although the division is not technically an ''affiliate,'' it is functionally equivalent to an affiliate. This is consistent with § 284.286, where the Commission treats a pipeline's sales operating unit as if it were a marketing affiliate for purposes of the Standards of Conduct.

69. PSEG makes a similar request for rehearing arguing that the Hinshaw pipeline division of an electric Transmission Provider is not an ''Affiliate'' and thus the relationship between an electric Transmission Provider and its Hinshaw pipeline division [57] should not be governed by the Standards of Conduct. PSEG claims that the Commission should not be concerned about the relationship between an electric Transmission Provider and its Hinshaw pipeline division because there is no potential for abuse. Further, PSEG argues that it would be unduly burdensome citing its joint operations between its wires and pipes divisions in storm restoration efforts, customer operations/call centers and applicance service operations.

70. The Commission denies PSEG's request to categorically exclude an electric Transmission Provider's Hinshaw gas pipeline division from the definition of Energy Affiliate. There are instances in which the Commission is concerned about the relationship between the electric Transmission Providers and gas divisions. For example, to the extent a combined electric/gas utility's Hinshaw pipeline affiliate provided transportation services delivering natural gas to third-party independent generators which compete in the same wholesale markets for electricity, either directly, or indirectly, through the release of interstate transmission capacity on an upstream pipeline, the events of its day-to-day operation,[58] would have an impact on the competitors and markets for wholesale electricity in that region. The Hinshaw pipeline also collects information about the natural gas scheduled to flow to the competing generators, and to the natural gas-fired generation operated and self-scheduled by the combination utility's electric Transmission Provider. Knowledge of sudden changes in the availability of natural gas transmission capacity could be of competitive value to the electric Transmission Provider (in the wholesale real-time markets), the Hinshaw pipeline (the NYMEX futures exchange and spot markets), and to each of its Energy Affiliates (in all three areas) if it could be acquired shortly before such knowledge became publicly available. However, in the example of shared services that PSEG raises, employees who provide storm restoration efforts, staff customer operations/retail call centers and appliance service operations would be the types of support or field and maintenance employees that could be shared under § 358.4(a)(4).

71. The Commission will revise the definition of Affiliate at § 358.3(b) to incorporate this clarification as follows: ''[a]n Affiliate includes a division that operates as a functional unit.''

e. Applicability of the Standards of Conduct to Special Purpose Certificated Interstate Service

72. National Fuel-Distribution raises the issue of its status as a holder of limited-jurisdictional certificates authorizing interstate exchanges and NGA section 7(f) authorizations. Specifically, National Fuel-Distribution also raises the issue of whether its status under its special purpose interstate exchange certificate or NGA section 7(f) service area determinations subject it to being considered as either a Transmission Provider or an Energy Affiliate. National Fuel-Distribution asks the Commission to clarify that this is not the case. The Commission clarifies that National Fuel-Distribution's special purpose interstate exchange certificate and NGA section 7(f) service area determinations do not make it either a Transmission Provider or an Energy Affiliate.

iii. Producers, Gatherers, and Processors

Final Rule

73. In the Final Rule, the Commission defines Energy Affiliate to include any affiliate of a Transmission Provider that conducts any of the following activities in U.S. energy markets: Engages in or is involved in transmission transactions; manages or controls transmission capacity; buys, sells, trades, or administers natural gas or electric energy; or engages in financial transactions relating to the sale or transmission of natural gas or electric energy (collectively Energy Affiliate activities).[59] Producers, gatherers and processors that perform such activities are Energy Affiliates as defined in the Final Rule.

[57] PSEG claims that its Hinshaw pipeline division possesses a limited-jurisdiction certificate from the Commission under Order No. 63.

[58] These events might include capacity constraints caused by competing demands, scheduled maintenance, unscheduled equipment breakdowns, and unexpected significant fluctuations in demand or supply.

[59] These are the characteristics of an Energy Affiliate, as defined in 18 CFR 358.3(d).

Requests for Rehearing and/or Clarification and Commission Conclusions Gatherers and Processors

74. Petitioners [60] assert that gatherers and processors performing their traditional functions do not hold transmission capacity on affiliated pipelines and, similar to the LDCs, should not be considered Energy Affiliates. Several petitioners argue that it is inconsistent for the Commission to treat gatherers and processors differently than LDCs. Questar argues that gatherers and processors should not be defined as Energy Affiliates if they do not sell natural gas for resale, buy natural gas only for consumption of their own processing operational needs and do not ship natural gas on their affiliated interstate pipelines.

75. Shell Transmission and others argue that elimination of the prior exception from the Standards of Conduct issued under Order No. 497 for producers, gatherers, and processors will lead to significant duplication of costs for multiple offshore pipeline and gathering lines that are currently operated from one common operations center with consolidated staff (*e.g.*, contract administrators, engineers, gas control operators).

76. INGAA, CenterPoint, Dominion, Duke Energy and El Paso argue that it is important to allow affiliated pipelines, gatherers, producers, and processors to share information during planning and financing of new infrastructure to ensure that needed supplies are brought efficiently and promptly to market, especially during periods of tight supply. Duke, Shell Transmission and Shell Offshore argue that separation of gathering functions from transmission functions, and the associated restrictions on communications, will impede pipeline operations. A number of small independent producers request that the Commission allow gatherers to buy the gas that the independent producers sell without converting the gatherers into Energy Affiliates.[61]

77. The Commission clarifies that gatherers and processors that are not involved in or engage in transmission transactions; do not manage or control transmission capacity; do not buy, sell, trade or administer natural gas or electric energy; and do not engage in financial transactions relating to the sale or transmission or natural gas or electric energy are not Energy Affiliates. If a gatherer or processor merely provides a gathering or processing service and only purchases natural gas to supply operational needs (such as compression fuel), and does not engage in any of the other activities described above, it is not an Energy Affiliate. In these roles, gatherers and processors provide services to wholesale market participants but do not compete with them. When their operations are limited to this service-provider role, they are not defined as Energy Affiliates and do not become subject to the separation of functions requirement and information disclosure prohibitions of the Standards of Conduct. However, gatherers or processors that buy gas for resale or hold or manage transmission capacity are Energy Affiliates as defined in § 358.3(d)(3).

78. Further, the Final Rule neither prohibits nor hinders the kinds of cooperation and communications Shell Transmission notes among its producing and gathering affiliates, such as producer personnel at platforms routinely performing field maintenance and operation activities, such as launching pigs on behalf of gathering affiliates or sharing operational status information. Many of the petitioners' concerns regarding defining producers, gatherers and processors as Energy Affiliates focus on the sharing of field and maintenance personnel and the sharing of operational information. As discussed in more detail below, the Commission is providing additional clarifications that address the petitioners' concerns regarding the sharing of information and field and maintenance employees between a Transmission Provider and its Marketing or Energy Affiliates.[62]

79. The Commission will not, however, grant a blanket exemption from the Standards of Conduct for gatherers or processors.

80. Specifically, CenterPoint argues that:

Although a trading or financial affiliate might benefit from preferential access to information about the interstate pipeline's operations (by trading in natural gas or a related financial instrument whose value may be affected by a constraint on the pipeline), a similar benefit is unlikely to be conferred on a traditional gatherer.[63]

The Commission agrees with CenterPoint in both aspects of its argument: Trading and financial affiliates might benefit from preferential access to information about an interstate pipeline's operations; and a gatherer that does not conduct Energy Affiliate activities is unlikely to benefit from such information in the wholesale energy marketplace.

81. Accordingly, the Commission will continue to include producers, gatherers and processors in the definition of Energy Affiliate to the extent they engage in Energy Affiliate activities. A gatherer or processor is in a position to profit from preferential information if it engages in Energy Affiliate activities. Under the Commission's regulations, a gatherer or processor is not limited to selling at the terminus of its own physical facilities. Similarly, any entity, including a gatherer or processor, may also buy and sell energy futures traded on the NYMEX. Allowing preferential access to information about transmission capacity or third party customers would confer an undue competitive advantage on such an entity. A gatherer or processor which also participates in Energy Affiliate activities is indistinguishable from any other Energy Affiliate in this regard.

82. Furthermore, preferential access to market information gives Transmission Provider affiliates fuller, more complete, and more timely information about market conditions, potentially contestable markets and the prices other market participants will be willing to accept.[64] The Commission finds that such preferential access to information is contrary to the Commission's statutory mandate to prevent undue discrimination or preferences.

[60] CenterPoint, El Paso, Questar, Shell Transmission, Williston Basin and Williams.

[61] Letters were addressed to Chairman Pat Wood from Mr. Bruce Morain, INOK Investments, L.L.C. (dated February 18, 2004); Mr. Jerry G. Kerr, Plymouth Resources, Inc. (dated February 24, 2004); Mr. Web Carr, C and E Operators, Inc. (dated February 27, 2004); Mr. Carlos Barton ''Scooter'' Griffin, Jr.—President, GeoVest Incorporated (February 20, 2004), Mr. Robert T. Wilson, AGS Oil and Gas Ventures, Inc. (dated February 12, 2004); and C & L Oil and Gas Corp (dated March 9, 2004). Each of these letters has been placed in the public record in Docket No. RM01–10–000.

[62] See also the discussions of the Sharing of Field and Maintenance Personnel, and Critical Operating Information Exceptions, below.

[63] CenterPoint at pp. 8–9.

[64] In addition, this information will be available to the Transmission Provider affiliates at little or no cost. Transmission Providers acquire market-relevant information in the normal course of operating transmission facilities, with the expenses of this information collection generally recovered through their regulated cost-based rates. In contrast, independent wholesale market participants incur significant costs to gather market intelligence of inferior scope and completeness. Absent Commission-mandated disclosure of transmission information, much of this market information will not be available to independent wholesale market participants at any price. And under the Commission's requirements, sensitive information is often protected from disclosure, or subject to delays in disclosure to protect shippers from competitive harm. For independent wholesale market participants, the market is opaque, blurry and constantly changing, but for affiliates allowed to share employees or information with a Transmission Provider, the market will be transparent and relatively clear.

83. The Commission's ruling here does not prohibit gatherers or processors from buying or selling natural gas. The Standards of Conduct do not prohibit those activities. Rather, a Transmission Provider must observe the Standards of Conduct vis-à-vis gatherers and processors that choose to participate in wholesale commodity markets or engage in Energy Affiliate activities to ensure that the Transmission Provider treats its affiliated entities the same way it treats non-affiliated entities.

Producers

84. The Commission denies rehearing to the extent petitioners argue that producers should be exempt from definition as Energy Affiliates. Natural gas producers affiliated with Transmission Providers are Energy Affiliates as defined in § 358.3(d). Producers are perhaps the largest marketers of natural gas.[65] First sales of natural gas are fully deregulated.[66] In addition, like any other willing entity in the natural gas industry, producers are authorized to make sales for resale.[67] These sales take place at points throughout the interstate natural gas delivery network, not just at the point of production in the producing fields. Affiliated producers, because they have the same opportunities to exploit Transmission Provider information for undue advantage, are Energy Affiliates under the Final Rule.

85. Contrary to the concerns of petitioners, defining producers as Energy Affiliates will not subject them to inappropriate public release of competitively-sensitive information under the Standards of Conduct. An affiliated producer seeking information about the potential expansion of infrastructure necessary to secure connections to new production is afforded the same confidential treatment as any other shipper seeking new service under the transaction-specific protections of the Final Rule.[68] To the extent an affiliated producer is neither a potential shipper nor supporting the request of a potential shipper, its access to information on capacity or the availability of service to transport new supplies will be appropriately limited to the same information available to any other party.

86. Open access interstate natural gas pipelines are required to post on their Internet websites timely and accurate information about available capacity and services.[69] Those who believe that posted information does not meet the requirements of the Commission's regulations requiring disclosure of available capacity[70] may contact the Commission's Enforcement Hotline or file a formal complaint. The Commission does not believe that the equitable treatment afforded transmission information will hinder the development of new infrastructure.[71]

87. Dominion requests the Commission to exclude from the definition of an Energy Affiliate a producer that sells its own production to another affiliated company. The Commission denies Dominion's request. Dominion has not provided any justification why a Transmission Provider should be allowed to share employees and transportation or customer information with its affiliated producer. Specifically, the Commission is concerned that a Transmission Provider's non-affiliated customers could be harmed if a Transmission Provider could freely share customer information with affiliated producers. Nor has Dominion explained why the producer's sale to an affiliate eliminates the Commission's concerns about affiliate abuse.

iv. Intrastate and Hinshaw Pipelines

The Final Rule

88. Intrastate and Hinshaw pipelines are included in the definition of Energy Affiliate to the extent that they engage in or are involved in transmission transactions in U.S. energy markets or participate in the other activities described in § 358.3(d). Allowing such intrastate pipeline or Hinshaw pipeline to have preferential access to a transmission system or information would be inconsistent with the prohibitions against undue preferences or discrimination in section 4 of the NGA in the provision of interstate transportation service.

Requests for Rehearing and/or Clarification and Commission Conclusions

89. Several petitioners[72] request clarification that LDCs which are also Hinshaw pipelines will nonetheless continue to qualify for the LDC exemption from Energy Affiliate status. They argue that Hinshaws are State-regulated and nearly always are LDCs. Empire argues that a Hinshaw pipeline, by definition, must be regulated by a State to qualify for the Hinshaw exemption.

90. Saltville and SCG argue that there is no difference between a Hinshaw pipeline and an LDC in terms of their relationship with jurisdictional pipelines, and therefore there is no basis for this asymmetrical regulation. Questar argues that Hinshaw pipelines which are also State-regulated LDCs should not be counted as Energy Affiliates under the Standards of Conduct. To do so, Questar argues, would destroy vertical integration efficiencies, increase costs,[73] reduce service reliability, reduce firm transportation capacity by 105,000 Dth per day, or more, and reduce the service flexibility available to all shippers.

91. Kinder Morgan Pipelines argue that even Hinshaw pipelines which are not LDCs should be exempt because they are State regulated and analogous to affiliated Transmission Providers, which are not defined as Energy Affiliates.

92. Kinder Morgan Pipelines argue that intrastate pipelines, including Hinshaw pipelines, which provide State-regulated intrastate transportation, bundled commodity sales, and interstate transportation pursuant to section 311 of the NGPA, but do not make any off-system sales should be excluded from the definition of Energy Affiliate.[74] The Texas Pipeline Association, an association of nineteen intrastate natural gas pipelines operating in Texas, and Williams also object to categorizing intrastate pipelines and Hinshaw pipelines as Energy Affiliates.

93. The Commission agrees generally with the requests that an LDC's status as

[65] Gas Daily, ''Producers solidify hold on marketer rankings,'' March 23, 2004, p. 1 and p. 12. *See also,* Gas Daily, ''Midtier players dominate Q3 marketer rankings,'' December 9, 2003. (Producers BP, Shell and ConocoPhillips were ranked first, third and fourth, representing nearly 40 percent of the total reported volumes used in the rankings of 22 marketers. Thirteen of the top 22 marketers listed were producers.)

[66] Natural Gas Wellhead Decontrol Act of 1989, Pub L. 101–60, 103 Stat. 157 (1989).

[67] 18 CFR 284.402 (2003).

[68] *See* 18 CFR 358.5(b)(5) (''A Transmission Provider is not required to contemporaneously disclose to all transmission customers or potential transmission customers information covered by § 358.5(b)(1) if it relates solely to a Marketing or Energy Affiliate's specific request for transmission service.'')

[69] *See* 18 CFR 284.13 (2003).

[70] *Id.*

[71] To the extent posted information is not sufficient for producers' needs, this concern is appropriately addressed to the Transmission Providers, affiliated and otherwise, who may wish to consider the needs of their customers and other industry stakeholders for timely and adequate information about available capacity and system capabilities on their Internet website postings.

[72] *See, e.g.,* AGA, Dominion, Duke Energy, Empire, INGAA, Kinder Morgan Pipelines, National Fuel-Distribution, National Fuel-Supply, NICOR, Questar, Southwest Gas, and Xcel.

[73] Questar argues that full separation of functions would require the construction of new pipeline facilities costing $44 million, which would increase Questar's annual cost-of-service by $14.4 million.

[74] Kinder Morgan Pipelines also filed a request for exemption in Docket No. TS04–249–000, which the Commission will consider by separate order.

a Hinshaw pipeline does not invalidate its treatment as an LDC under the Standards of Conduct. Hinshaw pipelines are typically LDCs, regulated by State commissions, and primarily focused on providing retail service within their States. To the extent Hinshaw pipelines are state-regulated LDCs, make no off-system sales and do not engage in any of the activities described in § 358.3(d), they are not Energy Affiliates. However, as is the case for LDCs, Hinshaw pipelines which make off-system sales or participate in Energy Affiliate activities will continue to be defined as Energy Affiliates.

94. The Commission clarifies that intrastate pipelines that do not engage in Energy Affiliate activities described in § 358.3(d) are not defined as Energy Affiliates. To the extent that an intrastate pipeline makes sales or hold interstate transmission capacity or engages in Energy Affiliate activities, they are Energy Affiliates.

v. Affiliated and Foreign Transmission Providers

Final Rule

95. Section 358.3(d)(5)(ii) excludes affiliated Transmission Providers from the definition of Energy Affiliate because they are already subject to the requirements of the Standards of Conduct. Section 358.3(d)(5)(i) excludes foreign affiliates that do not participate in U.S. energy markets. In the Final Rule, the Commission also stated that affiliated gas pipeline Transmission Providers that cross the United States international border will not be treated as Energy Affiliates as long as neither the Transmission Provider nor the affiliated international pipeline shares employees or information with its Marketing or Energy Affiliate.[75] However, this was not codified in the regulatory text for § 358.3(d)(5)(i).

Requests for Rehearing and/or Clarification and Commission Conclusion

96. INGAA requests clarification because foreign affiliated Transmission Providers do not fit within the definition of a ''Transmission Provider,'' which transmits energy or gas in U.S. interstate commerce under parts 157 or 284 of the Commission's regulations. *See* 18 CFR 358.3(a). INGAA and Enbridge also argue that the Commission cannot regulate the behavior of foreign affiliated pipelines.

97. The Commission is granting rehearing and revising the regulatory text to better reflect our intent that foreign affiliates that engage in transmission activities that cross the U.S. international border, which activities are regulated by the state, province or national regulatory board of the foreign country in which the facilities are located, will not be treated as Energy Affiliates. Nonetheless, a Transmission Provider cannot use a foreign affiliate as a conduit to circumvent the independent functioning requirement or information sharing prohibitions of the Standards of Conduct. Contrary to petitioners' assertions, the Commission is not regulating the behavior of a foreign corporation, but merely regulating the behavior of the jurisdictional Transmission Provider. The Commission does not prohibit Canadian pipelines from sharing Canadian transmission information or employees with its Canadian Affiliates. However, a Transmission Provider may not share information and employees with its Canadian-affiliated Transmission Provider if it is a conduit for sharing information with an Energy Affiliate doing business in the U.S. commodity or transmission markets. A Canadian Energy Affiliate that does business in the U.S. commodity and transmission markets should not be afforded undue preferences or services.

vi. Holding or Parent Companies

Final Rule

98. Section 358.3(d)(5)(iii) excludes from the definition of Energy Affiliate, a holding, parent or service company that does not engage in energy or natural gas commodity markets or is not involved in transmission transactions in U.S. energy markets.[76]

Requests for Rehearing and/or Clarification and Commission Conclusion

99. NiSource, Dominion, EEI, INGAA and AGA request clarification that a parent or holding company does not become an Energy Affiliate of a Transmission Provider by acting as a guarantor on a contract or approving financial expenditures for the subsidiary Transmission Provider. EEI states that if such parent or holding companies providing financial security are deemed to be Energy Affiliates, few entities will qualify for the exemption. The petitioners argue that the parent/holding company is not engaged in a financial transaction and thus should not become an Energy Affiliate. Similarly, National Fuel-Distribution and Duke Energy request clarification that the performance of corporate functions by a parent or holding company will not make the parent or holding company an Energy Affiliate. On the other hand, NASUCA argues that service companies that engage in financial transactions should be included in the definition of Energy Affiliate.

100. One of the roles of a parent or holding company is to act as guarantor or provide financial security for its subsidiaries. Generally, when a parent or holding company acts as guarantor for a Transmission Provider or its Marketing or Energy Affiliate, the parent or holding company is not engaging in any transmission transactions or in energy or natural gas commodity markets. Thus, the Commission clarifies that it is permissible for a parent or holding company to act as guarantor or to provide financial security for its subsidiaries without becoming an Energy Affiliate. A parent or holding company may also approve the financial expenditures for its affiliated Transmission Provider. But, as discussed later, when a parent or holding company engages in financial transactions that are the functional equivalent of physical transactions in the commodity market, it acts as an Energy Affiliate under the Standards of Conduct.

101. Duke Energy, INGAA and Kinder Morgan Pipelines request rehearing of the Commission's decision to exclude only parent or holding companies that are not involved in energy or natural gas markets or transmission transactions. They argue that a parent or holding company should not be considered an Energy Affiliate if it is involved in energy or transmission transactions. The Commission rejects this request for a categorical exemption because parent or holding companies could then be used to circumvent the Standards of Conduct. However, on a case-by-case basis, the Commission will consider specific requests.

Requests for Clarification Regarding Parent Companies

102. CenterPoint requests clarification that certain divisions of a parent company could be Energy Affiliates while the remainder of the parent company would not be considered an Energy Affiliate. The Commission cannot answer this question generically. The Commission will review this issue on a case-by-case basis after evaluating

[75] Final Rule at P 60.

[76] Generally, a holding company is registered with the Securities and Exchange Commission under the Public Utility Holding Company Act of 1935. A parent company or corporation is a company or corporation with multiple subsidiaries and/or controls other companies. A service company is usually a subsidiary of a holding or parent company/corporation that generally provides shared services to the parent or holding company's subsidiaries and/or affiliates and/or serves as a mechanism to employ all corporate employees.

the individual structure of the Transmission Provider and its parent company.

103. Duke Energy requests that the Commission clarify how it will treat a parent company that is also a Transmission Provider. At Duke Energy, the electric utility Transmission Provider, which engages in retail and wholesale sales, is a division of the parent company, which is also the parent company for several natural gas Transmission Providers. Because the parent company is also the electric public utility that engages in wholesale sales of power, Duke Energy is concerned that its parent company does not qualify for the parent company exemption. Duke Energy proposes that the Commission treat its parent company as an affiliated Transmission Provider. Under this scenario, Duke Energy pipeline subsidiaries will be permitted to provide non-public information to Duke Energy management for corporate governance purposes; but Duke Energy will be prohibited from sharing such information with the sales or marketing unit of Duke Energy or of any other Energy Affiliate. Duke Energy argues that this is also consistent with the codification at § 358.4(a)(5) that allows a Transmission Provider to share senior officers and directors with their Marketing and Energy Affiliates.

104. Duke Energy's proposal is an acceptable means to comply with the Standards of Conduct. As a parent company/Transmission Provider, Duke Energy is subject to the independent functioning requirements and information sharing prohibitions of the Standards of Conduct. It is already required to put in place mechanisms to ensure that the unit/division that engages in wholesale sales of power functions independently and does not have access to transmission or customer information.

105. Kinder Morgan Pipelines also ask for clarification that its parent company, which has LDC assets, qualifies for the parent company exemption. The fact that the LDC is a parent company is no reason to exempt it from its status as an Energy Affiliate. Unlike the situation at Duke Energy, where the parent company/Transmission Provider is responsible for implementing all of the Standards of Conduct, Kinder Morgan Pipelines on the other hand are seeking an exemption from the Standards of Conduct. As an LDC making off-system sales, it falls squarely within the definition of Energy Affiliate. Therefore, the Commission denies Kinder Morgan Pipelines' request. However, the Commission will consider individual requests if the parent company/LDC can demonstrate an acceptable level of independent functioning for the LDC division and ensure that there are adequate safeguards to restrict the sharing of transmission and customer information.

106. Finally, Enbridge urges the Commission to clarify that a foreign parent company can use the parent company exemption if it otherwise qualifies. The Commission so clarifies.

vii. Service Companies

Final Rule

107. The Final Rule excludes from the definition of Energy Affiliate service companies that do not engage in energy or natural gas commodity markets or are not involved in transmission transactions in U.S. energy markets. *See* 18 CFR 358.3(d)(5)(iii). The Final Rule also states that if a Transmission Provider utilizes a service corporation or other subsidiary as the mechanism for employment, all the employees assigned, dedicated or working on behalf of a particular entity, such as a Transmission Provider or Energy Affiliate, are subject to the Standards of Conduct requirements as if they were directly employed by the Transmission Provider or Energy Affiliate.[77]

Requests for Rehearing and/or Clarification and Commission Conclusions

108. SCG requests that the Standards of Conduct not apply to service company employees. In addition, Dominion requests clarification that only service company employees who devote all or nearly all of their time to a Transmission Provider or Energy Affiliate will be subject to the Standards of Conduct.

109. NASUCA, on the other hand, wants clarification that all employees of the Transmission Provider, Marketing or Energy Affiliate will be covered by the definition of Energy Affiliate. NASUCA also argues that service (or parent or holding) companies that engage in financial transactions relating to the sale or transmission of natural gas or electric energy should not be exempt from the definition of Energy Affiliate. NASUCA expresses concern that financial transactions that are the functional equivalent of physical transactions are not subject to the Standards of Conduct and could enable transmission or customer information about counterparties to a transaction to be passed among Energy Affiliates.

110. The Commission rejects SCG's rehearing request. Service company employees are properly subject to the Standards of Conduct if they are working on behalf of the Transmission Provider or Energy Affiliates. Otherwise, such service companies would become mechanisms by which to circumvent the Standards of Conduct. Employees working on behalf of a Transmission Provider or its Marketing or Energy Affiliates are subject to the Standards of Conduct as if those individuals were directly employed by the respective companies. If service company employees only provide support services, they can be shared. But, if they have any energy-affiliated or transmission-related functions, they cannot be shared.

111. With respect to NASUCA's concerns, service (or parent/holding) companies may engage in certain types of financial activities that include capital funding, creditworthiness and risk management type activities, as discussed herein. However, when a service company (or parent/holding company) engages in financial transactions that may be functionally equivalent to physical transactions in the commodity and transmission markets, it will be treated as an Energy Affiliate. For example, the purchase or sale of financial transmission rights in an RTO or trading in NYMEX natural gas or electric futures will give a service company a stake in wholesale energy markets because they are engaging in wholesale commodity activities. Whenever the service company has such a stake, it will be treated as an Energy Affiliate under the Standards of Conduct.

112. Cinergy, Enbridge, Entergy, NiSource, Southern and Xcel raise a concern that when employees of a service company are assigned to an Energy Affiliate, the service company could be deemed to be ''involved'' or ''engaged'' in transmission transactions on behalf of an affiliate. Xcel claims that service companies regularly employ transmission and marketing employees, but segregate employees to comply with the Standards of Conduct, which is consistent with the preamble language of the Final Rule at Paragraph 57, but not the service company exemption included in the regulatory text at § 358.3(d)(5)(iii). Cinergy requests clarification that only those service company employees who are assigned, dedicated or working on behalf of the Transmission Provider or Energy Affiliate, and not the entire service company will be subject to the Standards of Conduct.

113. EEI requests clarification on the functions that can be shared in a service company. Similarly, Enbridge, INGAA,

[77] Final Rule at P 57.

NICOR, NiSource and Southern request clarification that service companies, such as those with operating control centers that conduct operations on behalf of Transmission Providers or which have a substantial number of employees assigned to perform Energy Affiliate functions, are not themselves Energy Affiliates.

114. The Commission clarifies that a service company will not become an Energy Affiliate merely by providing Transmission or Marketing or Energy Affiliate employees. However, the service company must segregate those employees if they are assigned to those functions. Service companies use an assortment of mechanisms to assign employees to their affiliates, such as work orders, loans, and agency agreements. While the service company does not necessarily become an Energy Affiliate, the Transmission Provider is ultimately responsible to ensure that all employees assigned or dedicated to it observe the independent functioning and information sharing prohibitions of the Standards of Conduct.

115. EEI requests clarification that, when a service company acts as agent for a Transmission Provider, it is not involved in energy markets or transmission transactions. In several investigations of entities that violated the former standards of conduct, the Commission discovered that agency agreements resulted in improper sharing of information or abusing native load preferences.[78] Agency agreements can also be used to aggregate control over transmission capacity. Therefore, the Commission clarifies that a service company may act as agent for its affiliated Transmission Provider, Marketing or Energy Affiliate without becoming an Energy Affiliate so long as the service company is involved in only non-energy related activities, *e.g.*, acting as an agent to lease office space or to obtain cleaning service. However, if the service company/agent is involved in energy-related activities, it is an Energy Affiliate.

viii. Affiliates Buying Power for Themselves

Final Rule

116. Section 358.3(d)(5)(iv) excludes from the definition of Energy Affiliate, ''an affiliate that purchases natural gas or energy solely for its own consumption and does not use an affiliated Transmission Provider for transmission of that natural gas or energy.''

Requests for Rehearing and/or Clarification and Commission Conclusions

117. EEI argues that an affiliate should not be prohibited from using its affiliated Transmission Provider if it is buying power or gas for its own consumption. EEI argues that the term ''using'' is unclear and should be revised to reflect the Commission's concern with the affiliate ''arranging'' transmission on the affiliated Transmission Provider.

118. The Commission clarifies that the affiliate may use an affiliated Transmission Provider to buy power or gas for its own consumption. However, to ensure that the Transmission Provider does not provide undue preferences to an affiliate, the Transmission Provider must treat the affiliate as an Energy Affiliate unless the gas or power is for its own consumption. Therefore, an electric generator that is using electric energy or natural gas transported on the affiliated Transmission Provider for the subsequent generation of electricity will not be exempt from the definition of Energy Affiliate.

D. Definition of Marketing, Sales or Brokering

Final Rule

119. Section 358.3(e) defines marketing, sales or brokering as ''a sale for resale of natural gas or electric energy in interstate commerce.'' A sales and marketing employee or unit includes: (1) An interstate natural gas pipeline's sales operating unit, to the extent provided in § 284.286 of this chapter,[79] and (2) a public utility Transmission Provider's energy sales unit, unless such unit engages solely in bundled retail sales.[80] *See* 18 CFR §§ 358.3(e)(1) and (2).

120. The Final Rule retains the exemption of Order No. 889, which permits sharing between the bundled retail sales function and the public utility Transmission Provider's interstate transmission function. However, the Final Rule emphasizes, that the Standards of Conduct will apply to merchant employees who are engaged in sales or purchase of power that will be resold at retail pursuant to state retail access programs.[81] In the Final Rule, the Commission also emphasizes that if a retail sales function employee engages in any wholesale sales, such as selling excess generation to a non-retail customer, the retail function will be treated as a wholesale merchant function.[82] It is not appropriate for an entity that participates in the wholesale market to obtain an undue preference when competing with non-affiliates for transmission capacity. When a wholesale merchant function does take advantage of its affiliate status, customers, competitors and the market are harmed. Therefore, as stated in the Final Rule, if a retail sales unit engages in any wholesale sales, the separation of functions requirement will apply.[83]

i. Treatment of Retail Sales Employees

Requests for Rehearing and/or Clarification and Commission Conclusions

121. Calpine and TAPS request rehearing of the Commission's decision to retain the exemption of Order Nos. 888 and 889. Calpine claims that the Commission failed to carry out its statutory duties under section 205 of the FPA by allowing the Transmission Provider to use the same employees for its interstate transmission business and bundled retail business. Similarly, TAPS argues that the Commission identified discrimination and failed to remedy it. TAPS argues that the Commission has the jurisdiction to eliminate the loophole and should do so.

122. Calpine also urges the Commission to limit retail sales function employees from getting any undue preferences when they go into the wholesale market to buy power to

[78] *See* Transcontinental Gas Pipe Line Corp., 102 FERC ¶ 61,302 (2003) (*Transco*); Idaho Power Corp., 103 FERC ¶ 61,182 (2003) (*Idaho Power*); and Cleco Corp., 104 FERC ¶ 61,125 (2003) (*Cleco*).

[79] Section 284.286 of the Commission's regulations currently requires an interstate natural gas pipeline to separate its interstate transmission function from its unbundled sales service, essentially treating the pipeline's sales business as the equivalent of an affiliated marketing company. *See* 18 CFR 284.286 (2003).

[80] The term bundled retail sales employees means those employees of the public utility Transmission Provider or its affiliates who market or sell the bundled electric energy product (including generation, transmission, and distribution) delivered to the transmission provider's firm and non-firm retail customers.

[81] In Order No. 888–A, ''if unbundled retail transmission in interstate commerce occurs voluntarily by a public utility or as a result of a state retail access program, the Commission has exclusive jurisdiction over the rates, terms and conditions of such transmission.'' FERC Stats. & Regs., Regulation Preambles January 1991–June 1996 ¶ 31,036 at 31,781. *See also*, American Electric Power Service Corporation, 81 FERC ¶ 61,332 (1997), *order on reh'g*, 82 FERC ¶ 61,131 (1998), order on reh'g, 82 FERC ¶ 31,357 (1998). *See also, New York et al.* v. *FERC et al.*, 535 U.S. 1 (2002).

[82] *See* Final Rule at P 78–79.

[83] The Commission wants to prevent an employee that is shared between the bundled retail sales function and the wholesale merchant function from taking advantage of the preferences afforded retail service or utilizing information that may be shared with the retail function but not the wholesale function.

satisfy native load. Calpine claims that when retail sales function employees buy power to serve native load, they have an incentive to favor their own generation or to grant a preference to affiliated wholesale suppliers over competitive suppliers.

123. The Commission rejects petitioners' request for rehearing. An electric public utility Transmission Provider engaging in bundled retail sales is providing a service that is somewhat similar to the service provided by an LDC when it makes on-system sales. Where an electric public utility Transmission Provider's wholesale merchant function solely engages in bundled retail sales, the Transmission Provider is not required to treat its merchant function as a Marketing Affiliate. Similarly, if a natural gas Transmission Provider's affiliated LDC solely makes on-system sales, the Transmission Provider is not required to treat the LDC as an Energy Affiliate. As stated in the Final Rule, a public utility Transmission Provider is permitted to use the same employees for its interstate transmission business and its bundled retail sales business.[84] However, when the merchant function of an electric public utility Transmission Provider participates in the wholesale market, the Transmission Provider must treat the merchant function as a Marketing Affiliate.

ii. Treatment of Electricity Provider of Last Resort Service (POLR)

Requests for Clarification and Commission Conclusion

124. Cinergy seeks clarification that a Transmission Provider serving as the Provider of Last Resort (POLR) in a State that has adopted a retail choice program is permitted to continue to serve retail customers as it had prior to the introduction of competitive retail electric service. Essentially, Cinergy wants POLR employees to fall outside the definition of marketing or sales unit personnel under Order No. 2004 because, in Cinergy's view, POLR service is essentially the same as the bundled retail sales service for which Order No. 2004 provides an exemption.[85]

125. Cinergy claims that CG&E, its affiliate located in Ohio, provides unbundled electric transmission service with the prices of electric generation supply, transmission and distribution separately stated and regulated pursuant to Ohio's electric retail competition program. Cinergy suggests that, other than the Ohio requirement to allow retail customers to purchase electric generation from an alternative supplier, CG&E's POLR service is a ''package'' of electric generation, transmission and distribution service virtually identical to the bundled retail service offered by another Cinergy affiliate, PSI, in Indiana, which has not adopted a retail choice program.

126. Cinergy contends further that CG&E's Account Representatives, who support Cinergy's retail customers, are subject to the independent functioning requirement of the Standards of Conduct because they provide services related to POLR generation, regulated distribution and transmission services. Cinergy also states that in Ohio, the competitive retail electric affiliates must be separate from the Transmission Function and Ohio has promulgated a code of conduct to prevent competitive advantages to affiliates.[86] Cinergy claims that CG&E's POLR employees do not reserve or schedule transmission service; these functions are handled by Cinergy's marketing unit, which observes the Standards of Conduct.

127. The Commission is not prepared to adopt Cinergy's proposed rule change and amendment to the definition of ''marketing, sales or brokering'' to accord POLR service the same treatment, on a generic basis, as the Commission has accorded bundled retail sales. Since the details surrounding CG&E's POLR service or the POLR services of other Transmission Providers are not available, the Commission will not modify the definition of ''marketing, sales or brokering'' to allow automatic exemptions in all cases. Nonetheless, the Commission does not rule out the possibility that a particular POLR service deserves treatment equivalent to that accorded bundled retail sales treatment.

Accordingly, the Commission will entertain case-by-case requests for exemption of a POLR service based on the relevant facts and circumstances.

E. Definition of a Transmission Function Employee

Final Rule

128. Section 358.3(j) defines the term ''Transmission Function Employee'' as an employee, contractor, consultant or agent of a Transmission Provider who conducts transmission system operations or reliability functions, including, but not limited to, those who are engaged in day-to-day duties and responsibilities for planning, directing, organizing or carrying out transmission-related operations.

Requests for Rehearing and/or Clarification and Commission Conclusions

129. INGAA and Dominion request clarification on whether the Commission intended that the term ''operating employee'' (at P 112) of the Final Rule have the same meaning as by the term ''Transmission Function Employee.'' Similarly, INGAA is also concerned that Paragraph 120 of Final Rule states that a Transmission Function Employee is ''participating in directing, organizing or executing transmission system or reliability functions of a Transmission Provider,'' but that phrase is not identical to the language contained in the definition of Transmission Function Employee in § 358.3(j). LG&E/KU urge the Commission to replace the phrase ''including day-to-day duties and activities * * *'' in the definition of Transmission Function Employee with ''defined as the * * *'' LG&E states that by using the phrase ''including day-to-day'' there is still some doubt as to whether certain employees, specifically officers and directors, would be considered Transmission Function Employees because the term ''including'' implies that this is not an exhaustive list of the types of activities that could be considered transmission functions.

130. Order No. 2004 replaced the term ''operating employee,'' which was originally defined in Order Nos. 497–E and 497–F, with the term ''Transmission Function Employee.'' The term ''operating employee'' and ''Transmission Function Employee'' are not identical. In Order No. 497–E, the Commission defined ''operating employee'' as ''an individual who has day-to-day duties and responsibilities for planning, directing, organizing, or carrying out gas-related operations, including gas transportation, gas sales or gas marketing activities.''[87] ''Operating employee'' was used in discussions for both a Transmission Provider as well as its Marketing Affiliate, hence the references to gas sales or gas marketing activities. Whereas the term ''Transmission Function Employee'' is defined as ''an employee, contractor, consultant or agent of a Transmission Provider who conducts transmission

[84] Final Rule at P 78.

[85] Section 358.3(e)(2) states ''sales and marketing employee or unit includes * * * [a] public utility Transmission Provider's energy sales unit, unless such unit engages solely in bundled retail sales.''

[86] *See* Cinergy at p. 9, referencing Ohio Rev. Code Ann. section 4928.17 (Anderson 2003) and Ohio Admin Code section 5901; 1–20–16.

[87] Order No. 497–E, FERC Stats. & Regs., Regulations Preambles January 1991–June 1996 ¶ 30,987 at 30,996.

system operations or reliability functions, including, but not limited to, those who are engaged in day-to-day duties and responsibilities for planning, directing organizing or carrying out transmission-related operations.'' *See* 18 CFR 358.3(j). Consequently, the term ''operating employee'' also covered employees engaged in gas sales or marketing functions whereas the term Transmission Function employees does not.

131. With respect to LG&E/KU's specific question, the discussion at Paragraph 120 of the Final Rule was intended to provide additional guidance on the definition of the term Transmission Function Employee, which uses the phrase ''including, but not limited to.'' There is no real distinction between the preamble discussion and the regulatory text because the regulatory text did not attempt to capture every activity of a Transmission Function Employee. As the Commission stated in the preamble of the Final Rule, and in a series of cases interpreting the term ''operating employee,'' this definition includes, but is not limited to, employees engaged in ''day-to-day'' activities. There may be ''Transmission Function Employees'' who do not engage in ''day-to-day'' activities, but are performing, on less frequent, but equally as significant basis, transmission functions, such as organizing expansion of capacity or deciding on whether to construct an interconnection. In the past, the Commission looked at the actual duties and responsibilities of the individuals. For example, when considering the responsibilities of a particular officer, the Commission evaluated whether he participated in directing, organizing or executing transmission or wholesale merchant functions, including whether he had direct access to transmission or reliability information on the EMS or other databases and whether he approved contracts or transactions.[88]

F. Definition of Marketing Affiliate

132. Several petitioners, including Dominion, state on rehearing that the Commission did not define the term ''Marketing Affiliate,'' although it is used in the Final Rule and in the regulatory text. Dominion urges the Commission to adopt a formal definition of the term Marketing Affiliate to promote understanding.

133. The Final Rule defines marketing at 18 CFR 358.3(e) and affiliate at 18 CFR 358.3(b). However, since the Commission uses the term Marketing Affiliate throughout the Final Rule and regulatory text, the Commission is adopting Dominion's request and will codify a definition of Marketing Affiliate at § 358.3(k): ''Marketing Affiliate means an Affiliate as that term is defined in § 358.3(b) or a unit that engages in marketing, sales or brokering activities as that term is defined in § 358.3(e).''

G. Independent Functioning

134. One of the most significant elements of the Standards of Conduct is the requirement that the Transmission Provider function independent of its Marketing and Energy Affiliates. The independent functioning of the Transmission Provider limits its ability to give its Marketing and Energy Affiliates unduly preferential service or access to information. However, the Commission also recognizes that a Transmission Provider and its Marketing and Energy Affiliate should be permitted to share employees to conduct corporate governance functions, to take advantage of the efficiencies of corporate integration and to respond to emergency circumstances. As a result, the Commission has permitted the sharing of officers and directors, support service employees, and field and maintenance employees between a Transmission Provider and its Marketing/Energy Affiliates in most circumstances. Although the Commission has permitted sharing for the categories of employees noted above, the Commission will evaluate in compliance audits and investigations, employees' actual functions and duties to determine whether the Transmission Provider is appropriately applying this exemption.

i. Sharing of Senior Officers and Directors

Final Rule

135. In the Final Rule, the Commission stated that it would allow senior officers and directors who do not engage in transmission functions, or have day-to-day duties and responsibilities for planning, directing, organizing or carrying out transmission-related operations to maintain such positions with the Transmission Provider and its Marketing or Energy Affiliates. The Commission, however, cautioned that shared executives may not serve as conduits for sharing transmission, customer or market information with a Marketing or Energy Affiliate.

Requests for Rehearing and/or Clarification and Commission Conclusions

136. On rehearing, AGA, Cinergy, Dominion, Duke Energy, EEI, Entergy, INGAA, NICOR, NiSource and Shell Offshore request that the Commission codify the exemption for senior officers and directors in the regulatory text. The Commission agrees with this request and will codify the exception at § 358.4(a)(5) as follows: Transmission Providers are permitted to share with their Marketing and Energy Affiliates senior officers and directors who are not ''Transmission Function Employees'' as that term is defined in § 358.3(j).

137. LG&E/KU argue that the codification for the senior officers and directors exemption should be broader in scope. They argue that certain executives may have dual supervisory responsibility for the company's transmission and merchant functions with a fiduciary obligation to manage both functions.

138. The Commission denies LG&E/KU's request. An executive who has day-to-day transmission-related responsibilities should not have a role in Marketing or Energy Affiliates. The Final Rule has taken into account the fiduciary obligation of high-level officers and directors (who may be shared) by adopting the more flexible ''no conduit'' rule regarding the sharing of information rather than the more stringent ''automatic imputation'' rule. *See* Discussion in Final Rule at P 144–150. This enables the limited number of shared officers and directors to oversee all functions of the company without violating the Standards of Conduct. If LG&E/KU or any Transmission Provider has a specific concern about the roles of its executive employees, the Transmission Provider can seek clarification from the Commission as to whether sharing is permitted under this Final Rule.

139. Duke Energy also requests that when the Commission codify the officers and directors section, it also clarify that the information sharing prohibitions do not limit officers' and directors' ability obtain information necessary to engage in corporate governance functions. The Commission also incorporates regulatory text in § 358.4(a)(5) to better reflect that the Commission does not intend to restrict corporate governance functions as follows: ''A Transmission Provider may share transmission information covered by §§ 358.5(a) and (b) with its senior officers and directors provided that they do not (1) participate in directing, organizing or executing transmission

[88] *See* Ameren Services Company, 87 FERC ¶ 61,145 at 61,600 (1999).

system operations or marketing functions; or (2) act as a conduit to share such information with a Marketing or Energy Affiliate.

140. Williams filed a motion for clarification that incorporates a proposal to revise the Final Rule to create a two-tier exemption for senior officers and directors to facilitate corporate governance functions. Under Williams' proposal, the ''Group A'' category would include directors of the parent company, the Chief Executive Officer (CEO), the Chief Finance Officer (CFO) and the General Counsel, who would have unfettered access to information to discharge their corporate governance duties. Williams proposes that these individuals never be considered Transmission Function employees even if they occasionally engage in some Transmission Functions, such as approving a significant transaction for a particular business unit. Williams proposes that ''Group B'' would include a small group of senior officers who are involved in the day-to-day operations of their respective business units, including Gas Pipelines (transmission), Midstream, Exploration and Production and Power. Williams argues that the Group A officers need input and advice from the Group B officers and should jointly constitute an ''Executive Officer Team.'' Williams proposes seven ''protections'' for the Group B officers that it argues are consistent with the Commission's goals of Order No. 2004. Allegheny, Cinergy, Duquesne, KCPL and PGE filed motions in support of Williams' request. However, INGAA and El Paso urged the Commission to avoid imposing Williams' suggested approach on a generic basis to other companies. INGAA and El Paso caution the Commission not to assume that the approach proposed by Williams is appropriate or workable for all companies. Similarly, EEI similarly states while that the Williams approach may address corporate governance concerns at Williams, the Commission should not assume that the Williams' approach is appropriate for all companies.

141. The Commission denies Williams' proposal for revision. As discussed in the Final Rule, the Commission has already taken into account the need for the CEO and CFO to comply with the certification requirements of section 302 and section 906 of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley Act) by adopting the no-conduit rule. The Commission clarifies that in most circumstances, the ''Group A'' executives Williams identifies would not be Transmission Function Employees, as that term is defined. The CEO, CFO or General Counsel of a company would not become a ''Transmission Function Employee'' by approving major capital expenditures for the company. The Commission will not approve the creation of an ''Executive Officer Team'' that includes ''Transmission Function Employees'' and employees of a Marketing or Energy Affiliate that do not qualify for shared treatment. The goals of Order No. 2004 cannot be achieved if Group B employees who are involved in the day-to-day operations of the Marketing or Energy Affiliates had access to the Transmission Providers' transmission and customer information.

ii. Sharing of Field and Maintenance Personnel

Final Rule

142. Section 358.4(a)(4) codifies the Commission's historical policy of allowing Transmission Providers to share field and maintenance personnel with their Marketing and Energy Affiliates.

Requests for Rehearing and Clarification and Commission Conclusions

143. INGAA, Dominion, NiSource and Shell Gas seek clarification that a ''field supervisor'' who has the ability to restrict or shut down the operation of a particular section of a pipeline will not be treated as an operating employee, despite the language of Order No. 497–F.[89] INGAA claims that virtually any field employee may restrict or shut down the operation of a particular stretch of pipeline in a particular set of circumstances, and that this function alone should not render those field personnel ''Transmission Function Employees.'' In lieu of controlling the flow on the pipeline, INGAA and Dominion urge the Commission to adopt a definition that would be limited to those supervisory employees who may plan to shut down a pipeline in advance or may choose to shut down based on economic factors.

144. In addition, Dominion urges the Commission to clarify that the exception for field and maintenance employees also applies to technicians, mechanics and their immediate supervisors who are responsible for electric transmission activities.

145. The Commission clarifies that shared field personnel may include field supervisors who do not take part in advance planning for facility shut downs or are involved in shutting down facilities based on economic reasons.

146. The Commission also clarifies that the field and maintenance employees exception also applies to technicians, mechanics and their immediate supervisors who are responsible for electric transmission activities.

iii. Risk Management Employees

Final Rule

147. The Final Rule prohibits the sharing of risk management employees who are operating employees of either the Transmission Providers or their Marketing or Energy Affiliates.[90] The Final Rule also prohibits risk management employees from being a conduit for improperly sharing information because they are in a position to use transmission, customer and market information to give Marketing and Energy Affiliates undue advantages.

Requests for Rehearing and/or Clarification and Commission Conclusions

148. SCG and its affiliate SCE&G request rehearing of the prohibition against sharing risk management employees who are also operating employees of the Transmission Provider or Marketing or Energy Affiliate.

149. Cinergy, NiSource, Dominion, Duke Energy, EEI and Entergy request that the Commission codify that risk management employees can be shared so long as they are not operating employees of the Transmission Provider or Marketing or Energy Affiliate.

150. Dominion, INGAA and NiSource urge the Commission to clarify that the types of risk management functions described in the Final Rule do not constitute transmission functions.[91] INGAA also urges that risk management employees should be permitted to make general appraisals of creditworthiness of particular counterparties (governed by business standards and not tariffs) and set appropriate exposure limits to which corporations are willing to be exposed. Similarly, Dominion argues that managing corporate-wide risk and investment, approving expansions and establishing spending limits should not

[89] In Order No 497–F, the Commission stated, ''to the extent that supervisory field personnel have the ability to control a pipeline's gas operations, they would be considered operating employees.'' Order No. 497–F, 66 FERC ¶ 61,347 at 62,167.

[90] Final Rule at P 112.

[91] In the Final Rule, the Commission identified various examples of risk management functions, including: (1) Managing corporate-wide business risk exposure of the corporation and/or its affiliates; (2) business risk exposure for third parties; (3) managing overall corporate investment for the entire corporation; (4) assessing credit risk for counter-parties; (5) approving expansion projects; and (6) establishing spending, trading and capital authorities for each business unit. Final Rule at P 109.

be considered risk management functions. Dominion and INGAA also urge the Commission to permit the management of corporate exposure including financial transactions for the sole purpose of hedging risks.

151. The Commission rejects the rehearing requests of SCG and SCE&G. Risk management employees will have access to valuable transmission, customer and market information that can be used to the detriment of third parties.

152. As per the request of several petitioners, the Commission will codify the exception that permits Transmission Providers to share risk management employees with their Marketing and Energy Affiliates at § 358.4(a)(6).

153. With respect to the petitioners' requests to identify certain risk management activities that can be shared between a Transmission Provider and its Marketing and Energy Affiliates, the Commission finds that it is permissible for the risk management function to: (1) Manage corporate-wide business risk exposure of the corporation and/or its affiliates; (2) evaluate business risk exposure for third parties on an aggregate basis; (3) manage overall corporate investment for the entire corporation; (4) approve expansion projects; and (5) establish spending, trading and capital authorities for each business unit. However, the risk management function is not permitted to assess creditworthiness of a particular customer under a pipeline's tariff. This is consistent with the Commission's previously articulated policy, in which the Commission held that the ''act of deciding whether a potential shipper can become an actual shipper by satisfying the creditworthiness requirements under [a pipeline's] tariff is a transportation function.'' [92]

154. While risk management function employees are permitted to engage in the types of activities identified in the preceding paragraphs, the employee must pay particular attention to communications with Marketing and Energy Affiliates. Certainly, transmission and customer information are not a part of setting corporate-wide limits or managing corporate investment. A risk management function employee cannot share transmission or customer information obtained from the Transmission Provider with its Marketing or Energy Affiliates. For example, the risk management function employee can communicate to the Marketing or Energy Affiliate that Company X has reached or exceeded its corporate-wide credit limit or its credit rating has been downgraded by non-affiliated financial rating entities, but the risk management function employee is prohibited from telling the Marketing or Energy Affiliate that Company X has reached or exceeded its corporate-wide credit limit because it had not paid its transmission fees. The distinction is subtle, but important. The Commission will not permit the risk management function employee to be used as a vehicle to share information with the Marketing or Energy Affiliates that the Transmission Provider is prohibited from sharing under § 358.5(a).

iv. Lawyers as Transmission Function Employees

Final Rule

155. The Final Rule does not prohibit a Transmission Provider from sharing support employees with its Marketing and Energy Affiliates. But, if employees, such as lawyers, are engaging in transmission functions, they are not ''support'' staff; rather, they are Transmission Function Employees who are subject to the Standards of Conduct. The Commission will not permit a Transmission Provider to label individuals or categories of employees as ''support'' to circumvent the independent functioning requirement.

Requests for Rehearing and/or Clarification and Commission Response

156. Dominion, INGAA, Entergy and SCE&G requested clarification on when lawyers become Transmission Function Employees. Entergy argues that when lawyers provide legal or regulatory advice or set policy they should not become Transmission Function Employees. Dominion urges the Commission to clarify that lawyers can be considered shared support employees, and only if they engage in transmission functions would they be considered Transmission Function Employees and could not be shared.

157. The Commission clarifies that if lawyers participate in transmission policy decisions on behalf of a Transmission Provider, the Commission considers that activity as a Transmission Function and the lawyer is a Transmission Function Employee. For example, a lawyer who participates in a decision on whether the Transmission Provider should seek a contract with a customer is acting as a Transmission Function Employee. If, however, the lawyer is asked to implement the Transmission Provider's business decision and negotiate a contract with that customer, the lawyer would not be a Transmission Function Employee.

H. Identification of Affiliates on Internet

i. Posting Organizational Charts.

Final Rule

158. Section 358.4(b) requires all Transmission Providers to post information, including organizational charts and job descriptions, with respect to Marketing and Energy Affiliates on their OASIS or Internet websites.

159. Specifically, § 358.4(b)(3) requires Transmission Providers to post organizational charts and job descriptions on their respective Internet websites or OASIS. The Transmission Provider is also required to update the organizational charts and job descriptions within seven business days of a change. In addition, where a Transmission Provider shares clerical, field or maintenance employees with its Marketing or Energy Affiliates, the Transmission Provider must clearly identify the business units for the shared employees and provide a description of the shared services functions or responsibilities; but it is not required to provide names or job descriptions for the clerical or field or maintenance employees. *See* 18 CFR 358.4(b)(3)(ii).

Requests for Rehearing and/or Clarification and Commission Conclusions

160. Shell Gas requests that the Commission reconsider the website postings and argues that the complexity of organizational charts for affiliates is an unjustified burden.

161. On the other hand, Calpine urges the Commission to require Transmission Providers to post full identification of all affiliates with a statement of each affiliate's activities and a designation of which affiliates are considered by the Transmission Provider to be Marketing Affiliate or providing wholesale merchant functions. Calpine further urges the Commission to require the Transmission Provider to post, for each affiliate it claims to be exempt from the definition of Energy Affiliate, a full and complete explanation for the basis of the determination.

162. Duke Energy requests that the Commission clarify that the requirement to post Transmission Provider job titles applies only to employees involved in transmission or wholesale sales functions and their managers. Dominion notes that the Final Rule contemplated (at P 125) a Transmission Provider posting organizational charts and job descriptions for business units that are shared between a Transmission Provider

[92] *See* Vector Pipeline, L.P., 97 FERC ¶ 61,085 (2001).

and its affiliated Marketing or Energy Affiliates and urges the Commission to codify this requirement.

163. The purpose of posting organizational charts and job descriptions is to provide a mechanism for the Commission and market participants to determine whether the Transmission Provider is functioning independently of its Marketing and Energy Affiliates. This transparency is an integral component of the independent functioning requirement. Hence, the requirement to post an organizational chart that identifies the parent corporation with the relative position in the corporate structure of the Transmission Provider, Marketing and Energy Affiliates. *See* 18 CFR 358.4(b)(3)(i). When posting the business unit for the Transmission Provider as required by § 358.4(b)(3)(ii), it must identify whether any of those business units are shared with the Marketing or Energy Affiliates. If a corporation uses a service company as the employment mechanism for the Transmission Provider and its Marketing or Energy Affiliates, the organizational charts should clearly specify those circumstances. Similarly, if a corporation uses both functional and structural organizational charts for its management, the organizational charts must accurately reflect its operations. Support units that are shared between a Transmission Provider and its Marketing or Energy Affiliates must be clearly identified.

164. Several petitioners, including EEI, argue that the Commission should eliminate the requirement of § 358.4(b)(3)(ii) to post employees that are shared between the Transmission Provider and Energy or Marketing Affiliates since Transmission Providers are not permitted to share employees. The Commission rejects petitioners' request. There may be circumstances where a Transmission Provider will be permitted to share employees with its Marketing or Energy Affiliates, such as when officers and directors are shared or when a Transmission Provider obtains a partial waiver. Therefore, the Commission will retain the requirement to post shared employees.

165. In addition, the organizational charts should accurately reflect when Transmission Providers use service company employees to staff the Transmission Provider or its Marketing or Energy Affiliates. The organizational charts should be well organized and self-explanatory and company specific acronyms should be explained in a legend. In several recent investigations, the Commission found that organizational charts and job descriptions were incomplete, inaccurate or difficult to understand, and in some instances, did not include all the required job titles, names of managers and job descriptions.[93]

166. EEI also urges the Commission to reconsider the time when information should be posted and recommends that the Commission require the information to be updated within 14 days, rather than the seven days in the Final Rule. The Commission already considered EEI's request in the comments to the NOPR. Originally, the Commission proposed that the OASIS and Internet websites be updated within three days. However, upon consideration of the petitioners' requests for additional time to update the information, the Commission balanced the need for transparency and updated information with the Transmission Providers' ability to actually update the information and determined that updating the information within seven days was the appropriate balance.

167. Southwest Gas also requests clarification whether the posting requirements apply to a Transmission Provider that has no Marketing or Energy Affiliate. The Commission clarifies that the Transmission Provider should still post the information (as well as develop procedures and designate a Chief Compliance Officer).

ii. Posting of Merger Information

Final Rule

168. Section 358.4(b) requires the Transmission Provider to post the name(s) and address(es) of potential merger partner(s) and Energy Affiliates on the OASIS or Internet website. This is consistent with the Commission's current policy, which treats potential merger partners as affiliates.[94]

Requests for Clarification and Commission Conclusion

169. Several petitioners query whether it is acceptable to put a link to potential merger partners' websites in lieu of posting all the required information on its own website. The Commission finds that it is acceptable, so long as the link sends the user directly to the appropriate location and is kept up to date.

170. Dominion also requests clarification regarding the timing of the posting of merger information because the regulatory text at § 358.4(b)(3)(iv) requires the posting within seven days of when the merger is announced, but the preamble discussion stated that the merger information should be posted within seven days after a potential merger is announced. *See* Final Rule at P 127. The Commission clarifies that the information should be posted within seven days of when a potential merger is announced and will revise the regulatory text to reflect the discussion in the preamble of the Final Rule and herein.

iii. Transfer of Employees

Final Rule

171. Section 358.4(c) requires a Transmission Provider to post notices of employee transfers on the OASIS or Internet website.

Requests for Rehearing and/or Clarification and Commission Conclusions

172. Dominion requests clarification on whether the Transmission Provider is also required to post the transfers between the Marketing and Energy Affiliates. Dominion argues that the regulatory text at § 358.4(c) does not accurately reflect the discussion in the Final Rule at P 128.

173. The Commission so clarifies. The Final Rule is intended to capture the transfers between a Transmission Provider on the one hand and its Marketing or Energy Affiliates on the other. The first line of regulatory text at § 358.4(c) is, therefore, revised, as follows: ''Employees of the Transmission Provider, Marketing or Energy Affiliates are not precluded from transferring among such functions as long as such transfer is not used as a means to circumvent the Standards of Conduct. Notices of any employee transfers between the Transmission Provider, on the one hand, and the Marketing or Energy Affiliates, on the other, must be posted on the OASIS or Internet website, as applicable.'' [95]

iv. Posting Standards of Conduct Procedures

Final Rule

174. Section 358.4(e) requires Transmission Providers to post written procedures implementing the Standards of Conduct on their OASIS or Internet websites in lieu of filing them with the Commission.

[93] See *Transco supra* note 86. *See also* National Fuel Gas Supply Corporation, 103 FERC ¶ 61,192 (2003).

[94] Revised Filing Requirements Under Part 33 of the Commission's Regulations, Order No. 642, 65 FR 70983 (Nov. 28, 2000), FERC Stats. & Regs., Regulations Preambles 1996–2000 ¶ 31,111 at 31,887 (Nov. 15, 2000), *reh'g denied*, Order No. 642–A, 94 FERC ¶ 61,289 (2001).

[95] The remainder of the regulatory text at 18 CFR 358.4(c) remains the same.

Requests for Rehearing and/or Clarification and Commission Conclusions

175. Shell Offshore and Xcel request rehearing and would require Transmission Providers to submit their compliance procedures to the Commission for review and approval. Petitioners argue that there is no assurance that the Transmission Providers' Standards of Conduct procedures will conform to the Commission's intent in Order No. 2004. They ask that the Commission provide a formal review procedure under which the Commission will review and approve each Transmission Provider's compliance procedures. Shell Offshore claims that, over the years, the Commission often required several ''rounds'' of compliance filings before it approved a Transmission Provider's Standards of Conduct procedures.

176. The Commission denies rehearing. Previously, the Commission gave little generic guidance on acceptable implementation of the Standards of Conduct. In the Final Rule, the Commission identified the types of information that should be included in the compliance procedures,[96] and we provide more guidance herein.[97]

177. Moreover, posting the written procedures on the OASIS or Internet website gives users immediate access to the information and does not create additional administrative burdens for the Commission. Commission staff will be monitoring Standards of Conduct compliance closely. Although some petitioners expressed concern that the Hotline may not provide consistent advice or adequate mechanisms to respond to inquiries regarding the Standards of Conduct, the Commission finds that the Hotline is experienced in providing advice on and interpreting the Standards of Conduct.

178. NiSource requests clarification on where an electric utility Transmission Provider that no longer has an OASIS, presumably because it participates in an RTO or ISO with an OASIS, should post the required information. The Commission clarifies that the Transmission Provider should make arrangements, as is the current practice for some, to have the OASIS provider, *e.g.*, the RTO or ISO, include a link to the Transmission Provider's information. The link should be directly to the information postings, so the user does not have to search the website for the relevant information.

v. Training

Final Rule

179. At the request of petitioners, the Final Rule included a provision, at § 358.4(e)(5), that formalizes the requirement to train employees in the Standards of Conduct as follows: ''Transmission Providers shall require all their employees to attend training and sign an affidavit certifying that they have been trained regarding the Standards of Conduct requirements.''

Requests for Rehearing and/or Clarification and Commission Conclusions

180. Petitioners that request rehearing and clarification focus on two issues with regard to training: (1) Who should be trained; and (2) what types of training and certification are acceptable. INGAA and Alliance argue that a Transmission Provider should not be required to distribute the Standards of Conduct to the employees of its Marketing and Energy Affiliates because the Transmission Provider may not know the names of all those employees.

181. Some petitioners, including Alliance, BP, Cinergy, Dominion, Duke Energy, EEI, Entergy and INGAA, argue that training all employees would include employees who have no involvement in energy, gas, power or transmission functions and/or do not have access to information related to those functions. The Commission clarifies that it is the Transmission Provider's responsibility to ensure that all Transmission Provider employees and Marketing and Energy Affiliate employees with access to information about transmission, energy, power or marketing receive a copy of the Standards of Conduct and training.

182. EEI notes that the regulatory text requires training of all employees while the preamble identified several categories of employees who should be trained, such as shared support employees and risk management employees. EEI urges that training cover: (1) Transmission Function employees (and not all employees of the Transmission Provider); (2) Marketing Affiliate Employees; (3) shared support employees; (4) risk management employees who support the Marketing and Energy Affiliates; and (5) shared management employees. EEI also claims that some union contracts contain provisions restricting the ability to require the signing of affidavits by union employees. Also, according to EEI, for some workers, training does not seem appropriate, *e.g.*, cafeteria, building maintenance and field workers.

183. One of the goals of training of a broad group of employees is to ensure that employees with access to information about transmission, energy, power, gas or marketing functions understand the restrictions on sharing information and the prohibition on acting as a conduit for sharing information. For those employees without access to information about transmission, energy, or natural gas functions, however, training will not be required.

184. The purpose of distributing the Standards of Conduct and training is to ensure that employees are knowledgeable about their obligations under the Standards of Conduct. The Transmission Provider may implement this requirement by ensuring that the Marketing and Energy Affiliates distribute the Standards of Conduct to their employees, either in paper copy or electronically. As suggested by INGAA, this can be accomplished by sending a copy of the written procedures to the person designated to receive service at each of the Marketing and Energy Affiliates. The Chief Compliance Officer will be responsible for following up with the Marketing and Energy Affiliates to ensure that the Standards of Conduct were actually distributed to the appropriate employees.

185. Computer-based or electronic training is an acceptable method of training, as is a computer-generated certificate of training, in lieu of an affidavit from the employee certifying she or he has been trained.[98] The Chief Compliance Officer will be responsible

[96] Final Rule at P 36.

[97] A Transmission Provider is required to prepare written procedures explaining how it will comply with each of the Standards of Conduct and distribute the procedures to its employees. At a minimum, the Standards of Conduct procedures should: (1) Identify and explain the measures the Transmission Provider uses to keep secure transmission information and confidential customer information, such as locked file rooms, card-key access to control center and/or password restricted databases (more extensive information should be included where the Transmission Provider also shares facilities, including computer facilities, with its Marketing or Energy Affiliates); (2) identify the Chief Compliance Officer, describe his or her general duties and functions, and provide contact information; (3) identify any categories of employees shared between the Transmission Provider and its Marketing or Energy Affiliates (it is not necessary to identify the names of the shared support employees); (4) identify procedures that will be used to make sure that the names and addresses of its Marketing and Energy Affiliates, organizational charts and job descriptions, merger, transfer, tariff waiver and discount information are kept up-to-date on the OASIS or Internet website, and are archived consistent with the requirements of Parts 37 and 284 of the Commission's regulations; and (5) identify procedures to ensure that information, including documents and communications, are retained to demonstrate that the Transmission Provider is in compliance with the Standards of Conduct.

[98] With some computer-based training programs, a certificate of completion is generated when the student completes the entire training program.

for ensuring that employees participate in the Standards of Conduct training.

vi. Chief Compliance Officer

Final Rule

186. Section 358.4(e)(6) requires Transmission Providers to designate Chief Compliance Officers who will be responsible for Standards of Conduct compliance.

Requests for Clarification and Commission Conclusions

187. Entergy expresses concern that a Chief Compliance Officer, who may be a lawyer, does not become a Transmission Function Employee because she or he is involved in directing policy. Rather, Entergy urges that the Chief Compliance Officer be bound by the no-conduit rule for information she or he has access to. A Chief Compliance Officer does not become a Transmission Function Employee when she or he is involved in organizing a Transmission Provider's policies and procedures to comply with the Standards of Conduct. She or he will have access to transmission and customer information and is prohibited from being a conduit for sharing this information with the Marketing or Energy Affiliates.

188. NiSource requests clarification that one Chief Compliance Officer may be appointed for several affiliated Transmission Providers within the same corporate family. The Commission so clarifies. Several affiliated Transmission Providers within the same corporate family may designate the same Chief Compliance Officer who will be responsible for Standards of Conduct compliance activities.

I. Information Access and Disclosure Prohibitions

189. Section 358.5(a) requires Transmission Providers to ensure that employees of their Marketing and Energy Affiliates have access only to that information that is made available to the Transmission Providers' other transmission customers (*i.e.*, information posted on an OASIS or Internet website, concerning transmission capability, price, curtailments, storage, ancillary services, balancing, maintenance activity, capacity expansion plans or similar information).

190. The Final Rule also prohibits a Transmission Provider from disclosing to the employee of the Transmission Provider's Marketing or Energy Affiliates any information concerning the transmission system of the Transmission Provider or the transmission system of another Transmission Provider.[99] The Final Rule also prohibits the Transmission Provider from sharing any information acquired from non-affiliated transmission customers or potential non-affiliated transmission customers or developed in the course of responding to requests for transmission or ancillary services on the OASIS or Internet website with employees of its Marketing of Energy Affiliates except to the limited extent information is required to be posted on the OASIS or Internet website in response to a request for transmission service or ancillary service.[100]

191. The Commission established the following specific exemptions from the information disclosure prohibitions that permit a Transmission Provider to communicate with its Marketing or Energy Affiliate: (1) Information relating to specific transactions (transaction specific exemption); [101] (2) crucial operating information (crucial operating information exemption); [102] (3) information regarding a customer with that customer's voluntary consent (voluntary consent exemption); [103] and (4) certain limited generation information necessary to perform generation dispatch (generation dispatch exemption).[104]

Requests for Rehearing and/or Clarification and Commission Conclusions

192. Duke Energy argues the Commission to clarify that the Standards of Conduct do not interfere with the ability of co-owners of jointly-venture gas pipeline Transmission Providers to communicate with each other regarding the operations of the jointly owned pipeline.[105] Duke Energy explains that a bar on communication of transmission information could prevent a pipeline operator from sharing information with the Transmission Provider's management committee. Duke Energy argues that if the Final Rule prohibits such communications, then business partners will not be able to manage their investments, thus inhibiting additional corporate infrastructure development.

193. The Commission denies Duke Energy's request for rehearing. Duke Energy seems to be concerned that the rule prohibits pipeline-to-pipeline information that is necessary for operations. That is not the case. Transmission Providers may share information with affiliated Transmission providers (an affiliated Transmission Provider is not considered an Energy Affiliate) and may share crucial operating information consistent with § 358.3(b)(8)).

i. No Conduit Rule

Final Rule

194. Section 358.5(b)(7) provides that neither a Transmission Provider nor an employee of a Transmission Provider is permitted to use anyone as a conduit for sharing information covered by the prohibitions of § 358.5(b)(1) and (2) with a Marketing or Energy Affiliate. The Final Rule also states that the Commission would adopt the ''No-Conduit Rule'' vis-à-vis shared employees.[106]

Requests for Rehearing and/or Clarification and Commission Conclusions

195. Petitioners, including EEI, Entergy, Cinergy and Duke Energy, argue that, although the discussion in the Final Rule purportedly adopts the ''no conduit'' rule, the regulatory text for § 358.5(b)(7) operates like an ''automatic imputation'' rule because it does not expressly permit the disclosure of information to permissibly shared employees, such as shared officers and directors. *See* Final Rule at P 145–150.

196. According to petitioners, the no-conduit rule has two purposes: (1) To prohibit the Transmission Provider from using anyone as a conduit to share transmission or customer information with a Marketing or Energy Affiliate; and (2) to allow certain information to be shared with shared, non-operating employees, such as officers and directors, as long as those employees are not a conduit for sharing transmission or customer information with a Marketing or Energy Affiliate.

197. The Commission grants petitioners' request. Sections 358.5(b)(1) and (2) expressly prohibit a Transmission Provider from sharing certain information with its Marketing or Energy Affiliates. Notwithstanding the prohibitions of §§ 358.5(b)(1) and (2), the Commission intends to allow a Transmission Provider to share such information with employees that may be

[99] 18 CFR 358.5(b)(1).

[100] 18 CFR 358.5(b)(2).

[101] 18 CFR 358.5(b)(5).

[102] 18 CFR 358.5(b)(8).

[103] 18 CFR 358.5(b)(4).

[104] 18 CFR 358.5(b)(6).

[105] Duke Energy explains that many joint-venture pipelines are operated by a management committee that makes operating decisions for the pipeline.

[106] *See* Final Rule at P 145–150. Under a ''no-conduit rule,'' an employee that may be shared by a Transmission Provider and its Marketing or Energy Affiliate could receive transmission or customer information as long as the shared employee did not act as a conduit for sharing the information with the Marketing or Energy Affiliate.

shared so that they can engage in certain functions, *e.g.*, corporate governance, risk management or certain ''support-type'' services. Accordingly, the Commission is adopting additional regulatory text to reflect its intent to adopt the no-conduit rule in § 358.5(b)(7), as follows: ''A Transmission Provider may share information covered by §§ 358.5(b)(1) and (2) with employees permitted to be shared under §§ 358.4(a)(4), (5) and (6) provided that such employees do not act as a conduit to share such information with any Marketing or Energy Affiliates.''

ii. Crucial Operating Information Exemption

Final Rule

198. In the Final Rule, § 358.5(b)(8) permits a Transmission Provider to share crucial operating information with its Energy Affiliates to maintain the reliability of the transmission system.

Requests for Rehearing and/or Clarification and Commission Conclusions

199. Many petitioners, including Shell Gas, Duke Energy, NiSource, INGAA, and El Paso, challenge the Commission's decision to limit shared information to crucial operating information and argue that such a limitation may jeopardize a Transmission Provider's ability to operate safely by limiting the Transmission Providers' ability to communicate with interconnected facility operators. They argue that Transmission Providers should be allowed to share crucial operating information during circumstances other than those needed to maintain the reliability of the transmission system for a variety of reasons, including to confirm nominations. NiSource encourages the Commission to revise the regulatory text to include information transmitted between interconnected parties, whether affiliated or not, as needed to maintain normal operating conditions, to ensure system integrity or to ensure safe and reliable operations.

200. New York State Department seeks clarification that the general prohibition of § 358.4(a)(1) which provides that, except in emergency circumstances affecting system reliability, the Transmission Function Employees of the Transmission Provider must function independently of the Transmission Provider's Marketing or Energy Affiliates' employees, and is not intended to limit the specific exemption for sharing ''crucial operating information'' with an Energy Affiliate to maintain the reliability of the transmission system on a daily basis as provided in § 358.5(b)(8).

201. NiSource and Xcel request the Commission to clarify the types of operating information that may be shared or, in the alternative, require Transmission Providers to specify or list the operational information they intend to share in their respective Standards of Conduct. El Paso suggests that such a list include operational information regarding future expansions and how and when capacity will be available in the future. According to petitioners, the failure to require such a listing will create uncertainty as to what information will, or will not, be shared. INGAA and El Paso claim that companies need to be able to communicate with affiliates about future expansions and how and when capacity could be made available in the future, and to have a free exchange of operating information between a pipeline and its upstream affiliates.

202. NiSource and Shell Offshore challenge the Commission's suggestion that entities consult the Hotline as a source for guidance on a permissible communications. They argue that the Hotline may get inundated with calls and may give inconsistent advice. They question what a Transmission Provider should do if it does not agree with the Hotline's advice.

203. It appears that several petitioners have interpreted the phrase ''crucial operating information to maintain the reliability of the transmission system'' to mean information only needed during emergency circumstances to maintain system reliability. That was not the Commission's intent in the Final Rule. ''Crucial'' operating information is that information necessary to operate and maintain the transmission system on a day-to-day basis; it does not include transmission or marketing information that would give a Transmission Provider's Marketing or Energy Affiliate undue preference over a Transmission Provider's nonaffiliated customers in the energy marketplace. In using the term ''crucial operating information,'' the Commission intended that Transmission Providers would be permitted to share day-to-day operational-type information with interconnected Energy Affiliates necessary to maintain the pipelines' operations; such information includes confirmations, nominations and schedules with upstream producers and gathering facilities, operational data relating to interconnection points, and communications relating to maintenance of interconnected facilities. The Commission expects that these types of communications will take place between the operators of the pipeline or gas control facilities. Those operators are prohibited from being a conduit for sharing transmission or customer information with other employees of the Marketing or Energy Affiliates. To better reflect the Commission's intent, the Commission is revising the regulatory text at § 358.5(b)(8) as follows: ''A Transmission Provider is permitted to share information necessary to maintain the operations of the transmission system with its Energy Affiliates.''

204. The Commission declines to develop a list of the types of operating information that would be deemed ''crucial'' operating information. Such a list, whether created by the Commission, or created and posted by the Transmission Provider, likely would not identify all types of crucial operating information.

205. The Commission rejects petitioners' challenge to the Enforcement Hotline's ability to handle questions about crucial operating information. A Transmission Provider that does not agree with advice offered by the Enforcement Hotline is free to file a request for declaratory order or a complaint with the Commission.

206. Finally, Entergy argues that the Final Rule fails to codify a specific exemption to allow sharing of certain information required to comply with requirements imposed on operators of nuclear generating facilities by the Nuclear Regulatory Commission. The Commission declines to revise the regulatory text of § 358.5(b)(6) as requested by Entergy. The Commission stated in the Final Rule that a Transmission Provider will be permitted to share information required by other regulatory agencies such as NRC with its Energy Affiliate.[107] This type of information is covered by the crucial operating information exemption in § 358.5(b)(8), and further codification is not necessary.

iii. Transaction Specific Exemption

Final Rule

207. In the Final Rule, the Commission retained the ''transaction specific exemption'' by codifying it in § 358.5(b)(5). Under the exemption, Transmission Providers do not have to contemporaneously disclose information covered by § 358.5(b)(1) if it relates solely to a Marketing or Energy Affiliate's specific request for transmission service.

[107] Final Rule at P 155.

Requests for Rehearing and/or Clarification and Commission Conclusions

208. INGAA, National Fuel-Supply and Shell Offshore each request that the Commission clarify whether the transaction specific exemption covers requests by the Marketing or Energy Affiliate for the expansion or extension of the Transmission Provider's existing system, interconnection requests or discussions about building new infrastructure. Shell Offshore states that it is concerned about its ability to discuss available capacity or new capacity solutions for transportation of gas from reserves that have yet to be discovered or developed. Shell Offshore is concerned that such general discussions with a Marketing or Energy Affiliate would have to be disclosed because they do not fit within the scope of the transaction specific exemption. Similarly, National Fuel-Supply is concerned that not all requests seeking the establishment of an interconnection and the construction of related facilities are associated with a specific request for transportation service.

209. The Commission addressed a similar concern about the transaction specific exemption in its recent Order on Rehearing of Order No. 2003, the Standardization of Generator Interconnection Agreements and Procedures.[108] In that proceeding, the Commission addressed a request for clarification as to whether a Transmission Provider would violate the Standards of Conduct if it shared technical information regarding its transmission system with an interconnection customer that is an affiliate. The Commission noted that the definition of ''Transmission Service'' under § 358.3(f) includes interconnection service. Final Rule at P 105.

210. The Commission is balancing its concerns that a Transmission Provider will abuse its relationship with a Marketing or Energy Affiliate by providing it unduly preferential access to information about potential expansion plans or new production areas against the need to facilitate infrastructure development by allowing the Transmission Provider to coordinate construction and planning with an interconnecting gatherer, pipeline or producer. Therefore, the Commission clarifies that ''Transmission'' also includes an interconnection to facilitate gas transportation service. Thus, discussions between a natural gas Transmission Provider and an Energy Affiliate to provide an interconnection or expansion for the Energy Affiliate would be covered by the transaction specific exception. Interconnecting entities may discuss, the location, practicality and cost of potential interconnections with an affiliated Transmission Provider. The purpose of this is to encourage the Transmission Provider and an interconnecting Energy Affiliate to work together to develop additional infrastructure and facilitate development of production.

211. However, consistent with the requirements of Order No. 2003–A, the Commission will require the following additional safeguards to ensure that the Transmission Provider does not give its Energy Affiliate an undue preference. Specifically, when a Transmission Provider and an Energy Affiliate participate in scoping meetings or discussions about capacity expansion or new development, the Transmission Provider must: (1) Post an advance notice to the public on its OASIS or Internet website of its intent to conduct a meeting with its Energy Affiliate; (2) transcribe the meeting in its entirety; and (3) retain the transcript of the scoping meeting for three years and make it available to the Commission upon request.

212. Of course, Transmission Providers must provide interconnection and expansion service in a non-discriminatory fashion to similarly situated non-affiliated requestors. Moreover, a Transmission Provider cannot provide advance information to a Marketing or Energy Affiliate regarding a general expansion project because that would not be transaction-specific and such information would give the Marketing or Energy Affiliate an undue competitive advantage.

213. National Fuel-Supply also requests the Commission to ''cure the ambiguity in the regulatory text'' that limits the exemption to a Marketing or Energy Affiliate's specific ''request'' for transmission service in § 358.5(b)(5). National Fuel-Supply states that, in a narrow sense, a ''request'' for transmission is satisfied when a pipeline and a shipper enter into a transportation agreement. National Fuel-Supply suggests that the Commission revise the regulatory text to include an agreement resulting from a specific request. The Commission denies National Fuel-Supply's request to revise the regulatory text, but clarifies that by using the term ''relate'' in the phrase ''if it relates solely to a Marketing or Energy Affiliate's specific request for transmission service,'' the Commission intended to include the corresponding transportation service agreements that result from a ''request.''

iv. Voluntary Consent Exemption

Final Rule

214. Section 358.5(b)(4) provides that a non-affiliated transmission customer may voluntarily consent, in writing, to allow a Transmission Provider to share that customer's information with a Marketing or Energy Affiliate.

Requests for Rehearing and/or Clarification and Commission Conclusions

215. BP argues that the Commission should eliminate the ''voluntary consent'' exemption because, in the natural gas area, there is no business reason why a customer would allow the Transmission Provider to share that customer's information with a Transmission Provider's Marketing or Energy Affiliate. According to BP, Transmission Providers could coerce the customer to consent; therefore, such consent is not truly voluntary. BP proposes that the Commission require Transmission Providers to post any voluntary consent on their OASIS or Internet websites along with a statement that no tying arrangement was required and that no preferences, either operational or rate-related, were granted for the voluntary consent.

216. The Commission denies BP's request to eliminate the voluntary consent exemption. As discussed in the Final Rule, the Commission has permitted customers, in writing, to allow a Transmission Provider to share the non-affiliate's information with a Marketing Affiliate.[109] There are circumstances where a customer authorizes the Marketing Affiliate to act as its agent or asset manager regarding transmission transactions on the affiliated Transmission Provider. For example, a municipality may authorize a Marketing Affiliate to perform its scheduling or nominations on the Transmission Provider. The Commission does not intend to discourage these types of services. Customers may use an affiliate to provide it these services. The customer must provide the Transmission Provider, in writing, permission for that entity to act on its behalf and/or authorize the Transmission Provider to share the customer's information with that entity.

217. However, the Commission will adopt BP's second proposal. If a transmission customer voluntarily

[108] Standardization of Generator Interconnection Agreements and Procedures, Order No. 2003, 68 FR 49845 (Aug. 19, 2003), III FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g*, 106 FERC ¶ 61,220 (2004).

[109] Final Rule at P 156.

authorizes the Transmission Provider to share the customer's information with a Marketing or Energy Affiliate, the Transmission Provider is required to post notice on the OASIS or Internet website of that consent along with a statement that it did not provide any preferences, either operational or rate-related, in exchange for that voluntary consent.

218. Finally, customers who feel ''coerced'' can file a complaint with the Commission or seek informal resolution through the Enforcement Hotline.

v. Posting of Shared Information Requirement

Final Rule

219. Section 358.5(b)(3) provides that, if a Transmission Provider's employee discloses information in a manner contrary to the Standards of Conduct requirements of §§ 358.5(b)(1) and (2) (the information sharing and disclosing prohibitions), the Transmission Provider must immediately post this information on its OASIS or Internet website.

Requests for Rehearing and/or Clarification and Commission Conclusions

220. El Paso, INGAA and Shell Gas argue that it will be impractical for pipelines to post contemporaneously the numerous intra-day communications and information shared and disclosed between a pipeline and its Marketing or Energy Affiliates. El Paso argues that operational information by necessity must be communicated in real-time and continuously between operators of interconnected natural gas systems. They argue further that it is inefficient for the Transmission Provider to post and report each time its gas control personnel communicates with gatherers. They also argue that this posting requirement will harm Energy Affiliates by disclosing sensitive information that might reveal the marketing strategies of the Energy Affiliate. NiSource requests that the Commission clarify that any public utility that no longer maintains an OASIS must post the shared information on its website.

221. The petitioners' arguments assume that the crucial operating exemption does not allow them to share various day-to-day communications with interconnecting affiliates, and, thus, they are required to post information relating to those communications on the OASIS or Internet website under § 358.5(b)(3).

222. As discussed above, the Transmission Provider may share certain information with its Energy Affiliates covered under § 358.5(b)(8) without triggering the posting requirements under § 358.5(b)(3). The clarification above addresses the petitioners' concerns about voluminous intra-day communications.

223. The Commission emphasizes that if a Transmission Provider does disclose information contrary to the Standards of Conduct, it must immediately post that information on the OASIS or Internet website. Contemporaneous posting and transparency are one of the most effective deterrents to favoritism, undue discrimination and anti-competitive conduct.

224. Finally, we clarify that, in the event a Transmission Provider does not maintain an OASIS, it must post the shared information on an Internet website.

J. Discounts

Final Rule

225. Section 358.5(d) requires a Transmission Provider to post on its OASIS or Internet website, any offer of a discount at the conclusion of negotiations, ''contemporaneous with the time that the offer is contractually binding.'' In the Final Rule, the Commission stated that this result balances the importance of equal and timely access to discount information with clarity. The Commission noted that the former requirement to post gas discounts within 24 hours of gas flow[110] was too late to afford a non-affiliated competitor the opportunity to negotiate a comparable deal in today's fast-paced markets.

Requests for Rehearing and/or Clarification and Commission Conclusions

226. INGAA, NiSource and National Fuel-Supply separately request the Commission to clarify that in the context of a precedent agreement, the requirement to post discounts should not occur until the conditions in the precedent agreement are satisfied. They argue that to hold otherwise would place a chilling effect on contract negotiations and note that a precedent agreement is not binding until all of the conditions are met.

227. The Commission denies the proposal to delay the posting requirement for discounts of precedent agreement until all of the terms and conditions are met. This would be an exemption that would swallow the rule because the purpose of the timing of the posting requirement is that it provides time for a non-affiliated competitor to negotiate a comparable discount. The Commission clarifies that a Transmission Provider must comply with the discount posting requirement at the time a precedent agreement containing the discount has been reached.

228. Shell Offshore requests that the Commission clarify whether ''contractually binding'' means legally executed, asserting that the ''conclusion of negotiations'' is not a defined term or term of art. NiSource requests that the Commission clarify that the posting of discounts is not required until both parties are bound to the contract. NiSource argues that the posting should not be made at the time of the offer and that under contract law it could be argued that that a Transmission Provider could be bound when it extends the discount offer.

229. The Commission clarifies that the time the offer is contractually binding means the time that both parties are bound.

230. NiSource also asks the Commission to clarify that the posting requirements in Order No. 637 remain applicable to discounts given to non-affiliated customers. Under Order No. 637, discounts must be posted prior to the first nomination on a new or amended contract. The Commission clarifies that the Final Rule does not affect the posting requirements for non-affiliate discounts under Order No. 637.

K. Accounting Treatment for Compliance Costs

231. The Final Rule was silent on the accounting treatment to be used for compliance costs.

232. Xcel requests that the Commission allow Transmission Providers to record their compliance costs as regulatory assets in Account No. 182.3, Other Regulatory Assets, with amortization of the compliance costs over a period of years in future FERC jurisdictional rates. Xcel argues that anticipated compliance costs will be substantial and are not reflected in its currently effective transmission rates. Allowing such accounting treatment under the Uniform System of Accounts, Xcel argues, will promote compliance by providing jurisdictional entities a means to recover the initial and ongoing compliance costs over time. Xcel notes as support for its position that the Commission allowed regulatory asset treatment for market start-up costs incurred by the Midwest Independent System Operator (MISO).

233. The Commission denies rehearing. The Commission will not make a generic determination that

[110] Former 18 CFR 161.3(h)(2) of the Commission's regulations.

regulatory asset accounting treatment is appropriate for the costs incurred to implement the Standards of Conduct, nor agree to allow the amortization of those costs over a period of years in a Transmission Provider's future FERC jurisdictional rates. The Commission's determination in *MISO* does not support Xcel's position. In *MISO*, the Commission responded to concerns about the ability of member public utilities to recover costs billed by MISO but incurred by the public utilities. Here the issue is costs directly incurred by a Transmission Provider to operate and administer its transmission system. The costs at issue here are like the costs of implementing business practice standards, which are not treated as regulatory assets.

L. Request for Extension of Time

234. On March 22, 2004, EEI submitted a motion for an extension of time for compliance with Order No. 2004. EEI argues that the Commission should defer the deadline for compliance with Order No. 2004 until September 1, 2004. Alternatively, EEI urges the Commission to consider extending the time for training of employees under § 358.4(e)(5) and the posting requirements under § 358.4(b) until September 1, 2004. EEI argues that if a rehearing order changes the rules after training has occurred, Transmission Providers would have to revise their training programs or modules. The Commission grants EEI's request to extend the deadline for compliance with Order No. 2004. *See* 18 CFR 358.4(e)(2).

M. Typographical Corrections

235. The Commission is also making some corrections to the regulatory text to reflect the term ''Marketing Affiliate,'' and to correct typographical errors.

N. Applicability of the Standards of Conduct to Newly Formed Transmission Providers

236. The Commission will also address the issue of when a newly created Transmission Provider becomes subject to part 358 Standards of Conduct. The Commission clarifies that the Standards of Conduct apply to any Transmission Provider, including those which have not yet begun operations. The statutory requirement that Transmission Providers act in a manner that is not unduly discriminatory or preferential applies before the Transmission Provider begins to provide transmission services. For example, it has become a common practice for project sponsors of new interstate natural gas pipeline projects to hold open seasons to reach the largest economically feasible market for their enterprises, and to avoid creating perceptions of undue discrimination during project development. As a general principle, the Commission believes that new Transmission Providers should take the appropriate steps to comply with the Standards of Conduct as soon as practicable.

237. A newly-formed company will, of course, take the requirements of Part 358 into account when establishing its initial corporate organization. However, the Commission recognizes that some aspects of the Standards of Conduct may have no meaningful applicability until the company has been staffed and begins to perform transmission functions, such as soliciting business, or negotiating contracts. To the extent a prospective Transmission Provider is unsure of the adequacy of its compliance with the Standards of Conduct, it may seek specific guidance from the Commission.

IV. Document Availability

238. In addition to publishing the full text of this document in the **Federal Register**, the Commission also provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's home page *http://www.ferc.gov* and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5 p.m. Eastern time) at 888 First Street, NE., Room 2A, Washington, DC 20426.

239. From the Commission's home page on the Internet, this information is available in the eLibrary. The full text of this document is available on eLibrary in PDF and Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

240. User assistance is available for eLibrary and the Commission's Web site during normal business hours from FERC Online Support (by phone at (866) 208–3676 (toll free) or for TTY, contact (202) 502–8659, or by e-mail at *FERCOnlineSupport@ferc.gov*.

V. Effective Date

241. The revisions in this order on rehearing will be effective June 1, 2004.

List of Subjects in 18 CFR Part 358

Electric power plants, Electric utilities, Natural gas, Reporting and recordkeeping requirements.

By the Commission. Commissioners Brownell and Kelliher dissenting in part with separate statements attached.

Magalie R. Salas,

Secretary.

■ In consideration of the foregoing, the Commission amends Part 358, Chapter I, Title 18 of the Code of Federal Regulations, as follows:

PART 358—STANDARDS OF CONDUCT

■ 1. The authority citation for Part 358 continues to read as follows:

Authority: 15 U.S.C. 717–717w, 3301–3432; 16 U.S.C. 791–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

■ 2. In § 358.1, paragraph (c), the word ''§ 385.5(b)'' is removed and the word ''§ 358.5(b)'' is inserted in its place.

■ 3. Section 358.2 is revised as follows:

§ 358.2 General principles.

(a) A Transmission Provider's employees engaged in transmission system operations must function independent from the employees of its Marketing and Energy Affiliates.

(b) A Transmission Provider must treat all transmission customers, affiliated and non-affiliated, on a non-discriminatory basis, and must not operate its transmission system to preferentially benefit its Marketing or Energy Affiliates.

4. In § 358.3, paragraph (a)(3) is added, paragraph (b)(1) is revised, paragraph (d)(5) is redesignated as (d)(6), a new paragraph (d)(5) is added, redesignated paragraphs (d)(6)(ii) and (d)(6)(v) are revised and a new paragraph (k) is added to read as follows:

§ 358.3 Definitions.

(a) * * *

(3) A Transmission Provider does not include a natural gas storage provider authorized to charge market-based rates that is not interconnected with the jurisdictional facilities of any affiliated interstate natural gas pipeline, has no exclusive franchise area, no captive rate payers and no market power.

(b) * * *

(1) Another person which controls, is controlled by or is under common control with, such person. An Affiliate includes a division that operates as a functional unit, and

* * * * *

(d) * * *

(5) An LDC division of an electric public utility Transmission Provider shall be considered the functional equivalent of an Energy Affiliate.

(6) * * *

(ii) An affiliated Transmission Provider or an interconnected foreign affiliated natural gas pipeline that is engaged in natural gas transmission activities which are regulated by the state, provincial or national regulatory boards of the foreign country in which such facilities are located.

* * * * *

(v) A State-regulated local distribution company that acquires interstate transmission capacity to purchase and resell gas only for on-system customers, and otherwise does not engage in the activities described in §§ 358.3(d)(1), (2), (3) or (4), except to the limited extent necessary to support on-system customer sales and to engage in de minimus sales necessary to remaining in balance under applicable pipeline tariff requirements.

* * * * *

(k) *Marketing Affiliate* means an Affiliate as that term is defined in § 358.3(b) or a unit that engages in marketing, sales or brokering activities as those terms are defined at § 358.3(e).

5. In § 358.4, paragraphs (a)(5) and (a)(6) are added and paragraphs (b)(1), (b)(2), (b)(3)(i), (b)(3)(iii), (b)(3)(iv), (b)(3)(v), (c), (e)(3) and (e)(5) are revised to read as follows:

§ 358.4 Independent functioning.

(a) *Separation of functions.*

* * * * *

(5) Transmission Providers are permitted to share with their Marketing or Energy Affiliates senior officers and directors who are not ''Transmission Function Employees'' as that term is defined in § 358.3(j). A Transmission Provider may share transmission information covered by § 358.5(a) and (b) with its senior officers and directors provided that they do not participate in directing, organizing or executing transmission system operations or marketing functions; or act as a conduit to share such information with a Marketing or Energy Affiliate.

(6) Transmission Providers are permitted to share risk management employees that are not engaged in Transmission Functions or sales or commodity Functions with their Marketing and Energy Affiliates.

(b) * * *

(1) A Transmission Provider must post the names and addresses of Marketing and Energy Affiliates on its OASIS or Internet website.

(2) A Transmission Provider must post on its OASIS or Internet website, as applicable, a complete list of the facilities shared by the Transmission Provider and its Marketing and Energy Affiliates, including the types of facilities shared and their addresses.

(3) * * *

(i) The organizational structure of the parent corporation with the relative position in the corporate structure of the Transmission Provider, Marketing and Energy Affiliates;

* * * * *

(iii) For all employees who are engaged in transmission functions for the Transmission Provider and marketing or sales functions or who are engaged in transmission functions for the Transmission Provider and are employed by any of the Energy Affiliates, the Transmission Provider must post the name of the business unit within the marketing or sales unit or the Energy Affiliate, the organizational structure in which the employee is located, the employee's name, job title and job description in the marketing or sales unit or Energy Affiliate, and the employee's position within the chain of command of the Marketing or Energy Affiliate.

(iv) The Transmission Provider must update the information on its OASIS or Internet website, as applicable, required by §§ 358.4(b)(1), (2) and (3) within seven business days of any change, and post the date on which the information was updated.

(v) The Transmission Provider must post information concerning potential merger partners as affiliates within seven days after the potential merger is announced.

* * * * *

(c) *Transfers.* Employees of the Transmission Provider, Marketing or Energy Affiliates are not precluded from transferring among such functions as long as such transfer is not used as a means to circumvent the Standards of Conduct. Notices of any employee transfers between the Transmission Provider, on the one hand, and the Marketing or Energy Affiliates, on the other, must be posted on the OASIS or Internet website, as applicable. The information to be posted must include: the name of the transferring employee, the respective titles held while performing each function (*i.e.*, on behalf of the Transmission Provider, Marketing or Energy Affiliate), and the effective date of the transfer. The information posted under this section must remain on the OASIS or Internet website, as applicable, for 90 days.

* * * * *

(e) * * *

(2) Each Transmission Provider must be in full compliance with the Standards of Conduct by September 1, 2004.

(3) The Transmission Provider must post on the OASIS or Internet web site, current written procedures implementing the standards of conduct in such detail as will enable customers and the Commission to determine that the Transmission Provider is in compliance with the requirements of this section by September 1, 2004 or within 30 days of becoming subject to the requirements of part 358.

* * * * *

(5) Transmission Providers shall require all of their employees to attend training and sign an affidavit certifying that they have been trained regarding the standards of conduct requirements. Electronic certification is an acceptable substitute for an affidavit.

* * * * *

6. In § 358.5, paragraphs (a)(1), (a)(2), (b)(1), (b)(2), (b)(4), (b)(7), (b)(8), (c)(5) and (d) are revised to read as follows:

§ 358.5 Non-discrimination requirements.

(a) * * *

(1) The Transmission Provider must ensure that any employee of its Marketing or Energy Affiliate may only have access to that information available to the Transmission Provider's transmission customers (*i.e.*, the information posted on the OASIS or Internet website, as applicable), and must not have access to any information about the Transmission Provider's transmission system that is not available to all users of an OASIS or Internet website, as applicable.

(2) The Transmission Provider must ensure that any employee of its Marketing or Energy Affiliate is prohibited from obtaining information about the Transmission Provider's transmission system (including, but not limited to, information about available transmission capability, price, curtailments, storage, ancillary services, balancing, maintenance activity, capacity expansion plans or similar information) through access to information not posted on the OASIS or Internet website or that is not otherwise also available to the general public without restriction.

(b) * * *

(1) An employee of the Transmission Provider may not disclose to its Marketing or Energy Affiliates any information concerning the transmission system of the Transmission Provider or the transmission system of another (including, but not limited to, information received from non-affiliates or information about available transmission capability, price, curtailments, storage, ancillary services, balancing, maintenance activity, capacity expansion plans, or similar

information) through non-public communications conducted off the OASIS or Internet website, through access to information not posted on the OASIS or Internet website that is not contemporaneously available to the public, or through information on the OASIS or Internet website that is not at the same time publicly available.

(2) A Transmission Provider may not share any information, acquired from non-affiliated transmission customers or potential non-affiliated transmission customers, or developed in the course of responding to requests for transmission or ancillary service on the OASIS or Internet website, with employees of its Marketing or Energy Affiliates, except to the limited extent information is required to be posted on the OASIS or Internet website in response to a request for transmission service or ancillary services.

* * * * *

(4) A non-affiliated transmission customer may voluntarily consent, in writing, to allow the Transmission Provider to share the non-affiliated customer's information with a Marketing or Energy Affiliate. If a non-affiliated customer authorizes the Transmission Provider to share its information with a Marketing or Energy Affiliate, the Transmission Provider must post notice on the OASIS or Internet website of that consent along with a statement that it did not provide any preferences, either operational or rate-related, in exchange for that voluntary consent.

* * * * *

(7) Neither a Transmission Provider nor an employee of a Transmission Provider is permitted to use anyone as a conduit for sharing information covered by the prohibitions of §§ 358.5(b)(1) and (2) with a marketing or Energy Affiliate. A Transmission Provider may share information covered by §§ 358.5(b)(1) and (2) with employees permitted to be shared under §§ 358.4(a)(4), (5) and (6) provided that such employees do not act as a conduit to share such information with any Marketing or Energy Affiliates.

(8) A Transmission Provider is permitted to share information necessary to maintain the operations of the transmission system with its Energy Affiliates.

(c) * * *

(5) The Transmission Provider may not, through its tariffs or otherwise, give preference to its Marketing or Energy Affiliate, over any other wholesale customer in matters relating to the sale or purchase of transmission service (including, but not limited to, issues of price, curtailments, scheduling, priority, ancillary services, or balancing).

(d) *Discounts.*

Any offer of a discount for any transmission service made by the Transmission Provider must be posted on the OASIS or Internet website contemporaneous with the time that the offer is contractually binding. The posting must include: the name of the customer involved in the discount and whether it is an affiliate or whether an affiliate is involved in the transaction, the rate offered; the maximum rate; the time period for which the discount would apply; the quantity of power or gas scheduled to be moved; the delivery points under the transaction; and any conditions or requirements applicable to the discount. The posting must remain on the OASIS or Internet website for 60 days from the date of posting.

Note: The following Attachments will not be published in the *Code of Federal Regulations*.

Attachment A—List of Petitioners Requesting Rehearing or Clarification or Submitting Comments

AGS Oil and Gas Ventures, Inc. (AGS)
Allegheny Energy, Inc. (Allegheny)
Alliance Pipeline, LP (Alliance)
American Gas Association (AGA)
American Public Gas Association (APGA)
American Public Power Association (APPA)
BP America Production and BP Energy Company (BP)
Canadian Association of Petroleum Producers (CAPP)
C and E Operators, Inc. (C&E)
C and L Oil and Gas Corp (C&L)
Calpine Corporation (Calpine)
CenterPoint Energy Gas Transmission Company (CenterPoint)
Cinergy Services, Inc. (Cinergy)
Dominion Resources, Inc. (Dominion)
Duquesne Light Company (Duquesne)
Duke Energy Corporation (Duke Energy)
Edison Electric Institute (EEI)
El Paso Corporation (El Paso)
Empire District Electric Co. (Empire)
Enbridge, Inc. (Enbridge)
Encana Gas Storage Inc. (Encana)
Entergy Services, Inc. (Entergy)
Fairview Production Co.
Florida Power and Light (FPL)
GeoVest Incorporated (GeoVest)
Independent Oil & Gas Association of West Virginia (IOGA-WV)
Independent Petroleum Association of America (IPAA)
Independent Producers Association (IPA)
INOK Investments (INOK)
Interstate Natural Gas Association of America (INGAA)
Jack Forrester
Kansas City Power and Light (KCPL)
Kinder Morgan Interstate Pipelines (Kinder Morgan Pipelines)
LG&E Energy Corporation and Kentucky Utilities Company (LG&E/KU)
National Association of State Utility Consumer Advocates (NASUCA)
National Fuel Gas Distribution Corporation (National Fuel—Distribution)
National Fuel Gas Supply Corporation (National Fuel—Supply)
National Grid USA (National Grid)
National Rural Electric Cooperative Association (NRECA)
Natural Gas Supply Association (NGSA)
New York State Public Service Commission (New York State Department)
NICOR Gas (NICOR)
NiSource, Inc. (NiSource)
Northwest Natural Gas Company and Kelso Beaver Pipeline Company (NW Natural and Kelso Beaver)
ONEOK
Pennsylvania Office of Consumer Advocate (PA-OCA)
Plymouth Resources, Inc. (Plymouth)
Portland General Electric (PGE)
Process Gas Consumers (PGC)
PSEG Companies (PSEG)
Questar Pipeline Co., Questar Gas Co., Questar Regulated Services Co. (Questar)
Saltville Gas Storage Co., LLC (Saltville)
SCG Pipeline Inc. (SCG)
Shell Gas Transmission, LLC (Shell Transmission)
Shell Offshore, Inc. (Shell Offshore)
South Carolina Electric & Gas Co. (SCE&G)
Southern Company Services, Inc. (Southern)
Southwest Gas Corporation (Southwest Gas)
Texas Pipeline Association (Texas Pipeline Association)
Transmission Access Policy Study Group (TAPS)
Transmission Dependent Utilities Systems Transmission Group
USG Pipeline Company, B–R Pipeline and U.S. Gypsum Company (USG and B–R)
Utah Associated Municipal Power Systems (Utah Munis)
Williams Companies (Williams)
Williston Basin Interstate Pipeline Company (Williston Basin)
Wisconsin Public Service Corp. and Upper Peninsula Power Co. (WPSC and UPPC)
XCEL Energy Services, Inc. (Xcel)

Attachment B—Staff Analysis of Interstate Natural Gas Pipeline Index of Customers Data

Staff compiled index of customers data from all 87 pipelines for which it was available for the October 1, 2003 filing.

Staff identified 63 pipelines which had reported affiliated transactions. Staff noted that 5 of these pipelines had contracts only with Transmission Provider affiliates and removed these from the study as a special category. The remaining 58 pipelines were then examined in more detail.

Staff then identified the type of affiliation, *e.g.*, marketer, LDC, producer, for each customer from publicly available information.

The table ''Summary of Natural Gas Pipeline Affiliate Information'' shows summary affiliate information by pipeline and type of affiliation. Totals are shown also for all 58 pipelines examined. The information was derived from the detailed affiliated customer data as follows:

—Table rows labeled ''Affil Vols (MMBtu)'' are simply total volumes by affiliation type for individual pipelines or the group of 58

pipelines aggregated from the data for individual affiliated customers.

—Table rows for each pipeline labeled ''Pct of P/L Total Vols'' are the affiliate volumes shown divided by the total contracted volumes for the pipeline.

—The table row labeled ''Pct of Relevant PL Tot Vols (WA)'' for the group of 58 pipelines are the affiliate volumes shown divided by the total contracted volumes only for those pipelines that have affiliated customers of the type shown in that column of the table. This is a weighted average.

—The Table row labeled ''Pct of Relevant PL Tot Vols (SA) is the simple average of the ''% of P/L Total Vols'' figures for each pipeline with data in that column.

Some pipelines have more than one type of affiliate, and would be included in the summary information compiled under each affiliate type.

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Summary of Natural Gas Pipeline Affiliate Information
Source: Oct 2003 Index of Customers

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Pipeline	Item	Transportation Affiliate	Storage Affiliate	Transpo Marketing Affiliate	Storage Marketing Affiliate	Transpo Producer Affiliate	Storage Producer Affiliate	Transpo LDC Affiliate	Storage LDC Affiliate
All Pipelines (58 PLs)	Affil Vols (MMBtu)	21,842,719	345,328,545	6,737,835	102,025,929	2,695,111	7,436,818	13,246,318	252,288,681
	% of Relevant PL Tot Vols (SA)	38	57	19	44	37	11	46	48
	% of Relevant PL Tot Vols (WA)	17	34	6	15	9	8	35	32
ALLIANCE PIPELINE L.P.	Affil Vols (MMBtu)	188,559	.	188,559	.	.	.	.	.
	% of P/L Total Vols	13	.	13	.	.	.	.	.
ANR PIPELINE COMPANY	Affil Vols (MMBtu)	78,000	.	21,000	.	.	.	.	.
	% of P/L Total Vols	1	.	0	.	.	.	.	.
CARNEGIE INTERSTATE PIPELINE CO.	Affil Vols (MMBtu)	13,000	.	.	.	.	.	13,000	.
	% of P/L Total Vols	57	.	.	.	.	.	57	.
CENTERPOINT ENERGY GAS TRANSMISSI	Affil Vols (MMBtu)	1,249,309	17,543,333	32,929	.	20,000	.	1,196,380	17,543,333
	% of P/L Total Vols	39	100	1	.	1	.	37	100
CENTRAL NEW YORK OIL AND GAS COMP	Affil Vols (MMBtu)	.	11,900,000	.	11,900,000	.	.	.	.
	% of P/L Total Vols	.	100	.	100	.	.	.	.
CHANDELEUR PIPE LINE COMPANY	Affil Vols (MMBtu)	210,000	.	.	.	210,000	.	.	.
	% of P/L Total Vols	77	.	.	.	77	.	.	.
CLEAR CREEK STORAGE COMPANY L.L.	Affil Vols (MMBtu)	.	8,000,000	.	8,000,000	.	.	.	.
	% of P/L Total Vols	.	100	.	100	.	.	.	.
COLORADO INTERSTATE GAS COMPANY	Affil Vols (MMBtu)	100,000	.	100,000	.	.	.	.	.
	% of P/L Total Vols	3	.	3	.	.	.	.	.
COLUMBIA GAS TRANSMISSION CORPORA	Affil Vols (MMBtu)	5,411,834	126,689,688	3,338	.	567	.	5,395,929	126,689,688
	% of P/L Total Vols	42	51	0	.	0	.	42	51
COLUMBIA GULF TRANSMISSION COMPAN	Affil Vols (MMBtu)	587,039	.	10,000	.	.	.	577,039	.
	% of P/L Total Vols	18	.	0	.	.	.	17	.
CROSSROADS PIPELINE COMPANY	Affil Vols (MMBtu)	8,700	.	8,700	.	.	.	.	.
	% of P/L Total Vols	9	.	9	.	.	.	.	.
DAUPHIN ISLAND GATHERING PARTNERS	Affil Vols (MMBtu)	28,440	.	28,440	.	28,440	.	.	.
	% of P/L Total Vols	14	.	14	.	14	.	.	.
DESTIN PIPELINE COMPANY L.L.C.	Affil Vols (MMBtu)	301,800	.	.	.	301,800	.	.	.
	% of P/L Total Vols	63	.	.	.	63	.	.	.
DOMINION COVE POINT LNG LP	Affil Vols (MMBtu)	95,000	.	95,000	.	.	.	.	.
	% of P/L Total Vols	7	.	7	.	.	.	.	.

Summary of Natural Gas Pipeline Affiliate Information
Source: Oct 2003 Index of Customers

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Pipeline	Item	Transportation Affiliate	Storage Affiliate	Transpo Marketing Affiliate	Storage Marketing Affiliate	Transpo Producer Affiliate	Storage Producer Affiliate	Transpo LDC Affiliate	Storage LDC Affiliate
DOMINION TRANSMISSION INC.	Affil Vols (MMBtu)	1,515,633	44,749,533	211,630	5,970,000	.	.	1,368,503	38,779,533
	% of P/L Total Vols	28	16	4	2	.	.	25	14
EASTERN SHORE NATURAL GAS COMPANY	Affil Vols (MMBtu)	45,465	255,803	.	.	.	.	45,465	255,803
	% of P/L Total Vols	41	74	.	.	.	.	41	74
EGAN HUB PARTNERS L.P.	Affil Vols (MMBtu)	.	3,000,000	.	3,000,000	.	.	.	.
	% of P/L Total Vols	.	18	.	18	.	.	.	.
EL PASO NATURAL GAS COMPANY	Affil Vols (MMBtu)	132,112	.	132,112	.	.	.	.	.
	% of P/L Total Vols	2	.	2	.	.	.	.	.
ENBRIDGE PIPELINES (ALATENN) L.L.	Affil Vols (MMBtu)	700	.	700	.	.	.	.	.
	% of P/L Total Vols	1	.	1	.	.	.	.	.
EQUITRANS L.P.	Affil Vols (MMBtu)	579,920	15,006,619	34,985	3,859,049	206,000	4,181,818	338,935	6,965,752
	% of P/L Total Vols	89	63	5	16	31	18	52	29
FLORIDA GAS TRANSMISSION	Affil Vols (MMBtu)	21,000	.	21,000	.	.	.	.	.
	% of P/L Total Vols	1	.	1	.	.	.	.	.
GARDEN BANKS GAS PIPELINE LLC	Affil Vols (MMBtu)	209,102	.	.	.	209,102	.	.	.
	% of P/L Total Vols	76	.	.	.	76	.	.	.
GRANITE STATE GAS TRANSMISSION I	Affil Vols (MMBtu)	105,400	.	.	.	.	.	105,400	.
	% of P/L Total Vols	92	.	.	.	.	.	92	.
GREAT LAKES GAS TRANSMISSION LIMI	Affil Vols (MMBtu)	93,540	.	93,540	.	.	.	.	.
	% of P/L Total Vols	2	.	2	.	.	.	.	.
GUARDIAN PIPELINE L.L.C.	Affil Vols (MMBtu)	1,302,500	.	2,500	.	.	.	1,300,000	.
	% of P/L Total Vols	99	.	0	.	.	.	99	.
GULF SOUTH PIPELINE COMPANY LP	Affil Vols (MMBtu)	340,000	26,865,998	340,000	26,865,998	.	.	.	.
	% of P/L Total Vols	14	90	14	90	.	.	.	.
KINDER MORGAN INTERSTATE GAS TRAN	Affil Vols (MMBtu)	171,470	2,179,485	.	.	.	.	5,086	.
	% of P/L Total Vols	21	54	.	.	.	.	1	.
KO TRANSMISSION COMPANY	Affil Vols (MMBtu)	218,000	.	218,000	.	.	.	.	.
	% of P/L Total Vols	80	.	80	.	.	.	.	.
MARITIMES & NORTHEAST PIPELINE L	Affil Vols (MMBtu)	199,335	.	199,335	.	185,335	.	.	.
	% of P/L Total Vols	30	.	30	.	28	.	.	.

Summary of Natural Gas Pipeline Affiliate Information
Source: Oct 2003 Index of Customers

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Pipeline	Item	Transportation Affiliate	Storage Affiliate	Transpo Marketing Affiliate	Storage Marketing Affiliate	Transpo Producer Affiliate	Storage Producer Affiliate	Transpo LDC Affiliate	Storage LDC Affiliate
MIDWESTERN GAS TRANSMISSION	Affil Vols (MMBtu)	1,600	.	1,600	.	.	.	.	.
	% of P/L Total Vols	0	.	0	.	.	.	.	.
MIGC INC.	Affil Vols (MMBtu)	90,000	.	90,000	.	.	.	.	.
	% of P/L Total Vols	69	.	69	.	.	.	.	.
MISSISSIPPI CANYON GAS PIPELINE	Affil Vols (MMBtu)	558,518	.	.	.	558,518	.	.	.
	% of P/L Total Vols	85	.	.	.	85	.	.	.
MISSISSIPPI RIVER TRANSMISSION CO	Affil Vols (MMBtu)	53,710	1,725,989	12,887	650,444	.	.	40,823	1,075,545
	% of P/L Total Vols	3	5	1	2	.	.	2	3
MOJAVE PIPELINE COMPANY	Affil Vols (MMBtu)	24,000	.	24,000	.	.	.	.	.
	% of P/L Total Vols	6	.	6	.	.	.	.	.
NATIONAL FUEL GAS SUPPLY CORPORAT	Affil Vols (MMBtu)	1,252,530	34,650,281	73,882	3,255,000	73,882	3,255,000	1,178,648	31,395,281
	% of P/L Total Vols	57	51	3	5	3	5	53	46
NAUTILUS PIPELINE COMPANY LLC	Affil Vols (MMBtu)	277,648	.	.	.	277,648	.	.	.
	% of P/L Total Vols	74	.	.	.	74	.	.	.
NORTHERN NATURAL GAS COMPANY	Affil Vols (MMBtu)	1,660,004	11,314,460	1,660,004	11,314,460	.	.	.	.
	% of P/L Total Vols	10	17	10	17	.	.	.	.
NORTHWEST PIPELINE CORPORATION	Affil Vols (MMBtu)	15,635	.	15,635	.	15,635	.	.	.
	% of P/L Total Vols	0	.	0	.	0	.	.	.
OZARK GAS TRANSMISSION L.L.C.	Affil Vols (MMBtu)	197,380	.	197,380	.	.	.	.	.
	% of P/L Total Vols	85	.	85	.	.	.	.	.
PAIUTE PIPELINE COMPANY	Affil Vols (MMBtu)	81,100	400,571	.	.	.	.	81,100	400,571
	% of P/L Total Vols	51	82	.	.	.	.	51	82
PANHANDLE EASTERN PIPE LINE COMPA	Affil Vols (MMBtu)	27,880	1,471,800	.	.	.	.	27,880	1,471,800
	% of P/L Total Vols	1	2	.	.	.	.	1	2
PG&E GAS TRANSMISSON NORTHWEST CO	Affil Vols (MMBtu)	654,668	.	609,968	.	.	.	.	.
	% of P/L Total Vols	21	.	20	.	.	.	.	.
PINE NEEDLE LNG COMPANY LLC	Affil Vols (MMBtu)	.	3,255,000	.	3,255,000	.	.	.	.
	% of P/L Total Vols	.	79	.	79	.	.	.	.
PORTLAND NATURAL GAS TRANSMISSION	Affil Vols (MMBtu)	60,000	.	15,000	.	.	.	.	.
	% of P/L Total Vols	28	.	7	.	.	.	.	.

Summary of Natural Gas Pipeline Affiliate Information
Source: Oct 2003 Index of Customers

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Pipeline	Item	Transportation Affiliate	Storage Affiliate	Transpo Marketing Affiliate	Storage Marketing Affiliate	Transpo Producer Affiliate	Storage Producer Affiliate	Transpo LDC Affiliate	Storage LDC Affiliate
QUESTAR PIPELINE COMPANY	Affil Vols (MMBtu)	929,080	16,412,368	929,080	16,412,368	.	.	898,902	15,347,368
	% of P/L Total Vols	61	31	61	31	.	.	59	29
SABINE PIPE LINE LLC	Affil Vols (MMBtu)	64,000	.	64,000	.	60,000	.	.	.
	% of P/L Total Vols	72	.	72	.	67	.	.	.
TENNESSEE GAS PIPELINE COMPANY	Affil Vols (MMBtu)	213,565	6,403,610	161,500	6,403,610	.	.	.	.
	% of P/L Total Vols	3	8	2	8	.	.	.	.
TEXAS EASTERN TRANSMISSION LP	Affil Vols (MMBtu)	40,400	.	35,400	.	.	.	.	.
	% of P/L Total Vols	1	.	1	.	.	.	.	.
TOTAL PEAKING SERVICES LLC	Affil Vols (MMBtu)	72,000	1,140,000	72,000	1,140,000	.	.	.	.
	% of P/L Total Vols	100	100	100	100	.	.	.	.
TRANSCOLORADO GAS TRANSMISSION CO	Affil Vols (MMBtu)	125,000	.	.	.	125,000	.	.	.
	% of P/L Total Vols	18	.	.	.	18	.	.	.
TRANSCONTINENTAL GAS PIPELINE COR	Affil Vols (MMBtu)	457,630	.	457,630	.	.	.	.	.
	% of P/L Total Vols	7	.	7	.	.	.	.	.
TRANSWESTERN PIPELINE COMPANY	Affil Vols (MMBtu)	25,000	.	25,000	.	.	.	.	.
	% of P/L Total Vols	0	.	0	.	.	.	.	.
TUSCARORA GAS TRANSMISSION COMPAN	Affil Vols (MMBtu)	127,101	.	127,101	.	.	.	.	.
	% of P/L Total Vols	77	.	77	.	.	.	.	.
VECTOR PIPELINE L.P.	Affil Vols (MMBtu)	768,000	.	405,000	.	.	.	255,000	.
	% of P/L Total Vols	64	.	34	.	.	.	21	.
VENICE GATHERING SYSTEM L.L.C.	Affil Vols (MMBtu)	297,010	.	.	.	297,010	.	.	.
	% of P/L Total Vols	40	.	.	.	40	.	.	.
WESTGAS INTERSTATE INC.	Affil Vols (MMBtu)	11,372	.	.	.	.	.	11,372	.
	% of P/L Total Vols	85	.	.	.	.	.	85	.
WILLISTON BASIN INTERSTATE PIPELI	Affil Vols (MMBtu)	425,856	12,364,007	19,000	.	.	.	406,856	12,364,007
	% of P/L Total Vols	92	100	4	.	.	.	87	100
WYOMING INTERSTATE COMPANY LTD.	Affil Vols (MMBtu)	126,174	.	.	.	126,174	.	.	.
	% of P/L Total Vols	7	.	.	.	7	.	.	.

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Brownell, Commissioner, dissenting in part.

1. For the reasons set forth in my dissent in part to Order No. 2004, Standards of Conduct for Transmission Providers, 68 FR 69134 (Dec 11, 2003), III FERC Stats. & Regs. ¶31,155 (Nov. 25, 2003), I would have retained the existing exemptions under Order No. 497 for affiliated producers, gatherers, processors, intrastate pipelines, and Hinshaw pipelines.

2. For these reasons, I respectfully dissent in part.

Nora Mead Brownell,
Commissioner.

Kelliher, Commissioner, dissenting in part:

I am writing separately to explain my reasoning with respect to the Standards of Conduct Final Rule. I support the Rehearing Order, but do so with some discomfort, because I believe the rehearing order improves what is a flawed Final Rule.

In my view, the flaw in the Standards of Conduct Final Rule is the lack of record evidence to support expanding the scope beyond Marketing Affiliates. The basis for the rule is the observation that ''significant changes have occurred [in the electricity and gas industries] since the standards of conduct were first adopted,'' [1] that there has been a proliferation of energy affiliates,[2] and a suspicion that affiliate abuse is occurring in the dealings between Transmission Providers and Energy Affiliates.

I agree significant changes have occurred in the electricity and gas industries, and pipelines and utilities do have a wider array of energy affiliates than previously. However, suspicion is not a sufficient basis for expanding the scope of Standards of Conduct beyond Marketing Affiliates.

The Final Rule and the Rehearing Order cite a number of instances where affiliate abuse has occurred. The cases cited by the orders all relate to preference in dealings between a Transmission Provider and a Marketing Affiliate, not other Energy Affiliates. I do not see how a record of affiliate abuse limited to Marketing Affiliates argues in favor of expanding the scope of the rule beyond Marketing Affiliates. To my mind, it argues in favor of keeping the scope of the rule where it was. Indeed, there appears to be no factual basis to support expanding the scope beyond Marketing Affiliates.

With respect to the discrete policy calls made in the rehearing order, I largely agree with them. I would have gone further in some areas in limiting application of the Standards of Conduct. In particular, I would have expanded the scope of the local distribution company exemption to include local distribution companies that make no off-system sales on affiliated pipelines. The prospect of affiliate abuse involving off-system sales on nonaffiliated pipelines appears remote. Of course, there is no record of affiliate abuse involving such sales.

Commission policy has promoted off-system sales in order to encourage greater efficiency and enable local distribution companies to lower their costs. In my view, expanding the local distribution company exemption would have been consistent with this policy direction. The Rehearing Order notes that National Fuel-Distribution made $63 million in off-system sales. It is worth observing that all of those sales were made on nonaffiliated pipelines.

In addition, I would have granted an exemption to Part 157 pipelines. These pipelines serve one or few customers, and the prospect of affiliate abuse appears remote. There certainly is no record of affiliate abuse to merit applying the Standards of Conduct to Part 157 pipelines.

Finally, I also would have granted the rehearing request by The Williams Companies to clarify the role of senior officers and directors in managing their companies in a manner consistent with their fiduciary duties and principles of sound corporate governance. Under the Final Rule, senior officers and directors may be shared between a transmission business unit and the marketing unit or energy affiliate only if they ''do not engage in transmission functions.''[3] Commission case law suggests that a senior officer or director who approves even a limited number of transactions or investments would become an ''operating'' employee of a Transmission Provider, and could not qualify as a shared employee. Currently, decisions on large transactions and investments are often reserved to senior corporate officers and directors. The Final Rule forces these corporate officers to make a Hobson's choice: either they continue to make these decisions, and thereby become construed as operating employees of a Transmission Provider, and are thereby disqualified to serve as a shared employee, with all the resultant limitations on information sharing, or they divest themselves of responsibility to make these decisions. I believe the Final Rule may impede the ability of corporate management to engage in informed decisionmaking, and runs counter to principles of sound corporate governance.

Two years ago, the U.S. Court of Appeals for the District of Columbia Circuit overturned a Commission order extending application of Standards of Conduct beyond the marketing affiliates of Dominion Resources. In part, the Court was concerned that doing so would ''destroy[] * * * [corporate] efficiencies'' without justification.[4] I have some of the same concerns about the Final Rule.

To be clear, I support the goal of the Standard of Conduct Final Rule, namely the prevention of unduly discriminatory behavior. However, for the reasons stated above, I do not believe the Final Rule advances this goal.

Joseph Kelliher.

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[1] Standards of Conduct for Transmission Providers, 68 FR 69,134 (December 11, 2003), III FERC Stats. & Regs., ¶ 31,155 at ¶ 6 (Nov. 25, 2003).

[2] *Id.*

[3] *Id.* at ¶ 104.

[4] *Dominion Resources, Inc.* v. *FERC,* 286 F.3d 586, 593 (DC Cir. 2002).