

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 37, 161, 250, 284 and 358

[Docket No. RM01-10-000; Order No. 2004]

Standards of Conduct for Transmission Providers

November 25, 2003.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule.

SUMMARY: The Federal Energy Regulatory Commission is adopting standards of conduct that apply uniformly to interstate natural gas pipelines and public utilities (jointly referred to as Transmission Providers). The standards of conduct will govern the relationships between regulated Transmission Providers and all of their Energy Affiliates. The new standards of conduct will eliminate the loophole in the current regulations that do not cover a Transmission Provider's relationship with Energy Affiliates that are not marketers or merchant affiliates. The

Final Rule will ensure that Transmission Providers cannot extend their market power over transmission to wholesale energy markets by giving their Energy Affiliates unduly preferential treatment.

EFFECTIVE DATE: The rule will become effective February 9, 2004.

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SUPPLEMENTARY INFORMATION:

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Before Commissioners: Pat Wood, III, Chairman; William L. Massey, and Nora Mead Brownell.

1. The Federal Energy Regulatory Commission is adding Part 358 to its regulations and revising Parts 37 and 161 of its regulations in response to the changing structure of the energy industry.¹ In this rule, the Commission adopts standards of conduct that apply uniformly to interstate natural gas pipelines and public utilities (jointly referred to as Transmission Providers) that are currently subject to the gas standards of conduct in Part 161 of the Commission's regulations and the electric standards of conduct in Part 37 of the Commission's regulations.² In light of the changing structure of the energy industry, the standards of conduct will govern the relationships between regulated Transmission Providers and all of their Energy Affiliates. The new standards of conduct will eliminate the loophole in the current regulations that do not cover a Transmission Provider's relationship with Energy Affiliates that are not marketers or merchant affiliates. The Final Rule will ensure that Transmission Providers cannot extend their market power over transmission to wholesale energy markets by giving their Energy Affiliates unduly preferential treatment.

I. Background

2. On September 27, 2001, the Commission issued a Notice of Proposed Rulemaking (NOPR) in this proceeding.³ One hundred and fifty-five interested persons submitted comments.⁴ Several commenters requested an opportunity for an oral presentation on the matters raised in the NOPR. On April 25, 2002, the Commission published an "Analysis of

the Major Issues Raised in the Comments" (Major Issues Analysis), suggesting some possible changes to the proposals in the NOPR. The Major Issues Analysis proposed changes in the definition of an Energy Affiliate, among other things, and provided draft regulatory text.

3. The Major Issues Analysis also gave notice that the Commission would host a full-day technical conference giving interested persons the opportunity to discuss issues raised in the NOPR and the Major Issues Analysis. Approximately 200 participants attended the conference on May 21, 2002. During and following the conference, participants were encouraged to submit drafting options for regulatory text. The Commission then posted all of the proposals on its Internet Website. Since the conference, the Commission has received more than 100 additional comments, many from interested persons who previously submitted comments.

4. This Final Rule is being issued after a review of all the comments filed in this proceeding and will become effective on February 9, 2004. By February 9, 2004, each Transmission Provider is required to file with the Commission and post on the OASIS or its Internet website a plan and schedule for implementing the standards of conduct. By June 1, 2004, all Transmission Providers must comply with the standards of conduct and post procedures on the Internet that will enable customers and the Commission to determine whether Transmission Providers are in compliance with the standards of conduct requirements contained herein.

II. Current Regulations

5. The current standards of conduct restrict the ability of interstate natural gas pipelines and public utilities (Transmission Providers) to give their marketing affiliates or wholesale merchant functions undue preferences over non-affiliated customers. The Commission's goal—to prevent unduly discriminatory behavior—reflects FERC's statutory responsibilities under

the NGA and FPA.⁵ Both gas⁶ and electric⁷ standards of conduct rely on

⁵ 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.

⁶ 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 (D.C. 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).

⁷ Open Access Same-Time Information System (Formerly Real-Time Information Network) and Standards of Conduct, Order No. 889, 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

¹ The Commission is also making minor conforming changes in Parts 250 and 284.
² The gas standards of conduct are codified at part 161 of the Commission's regulations, 18 CFR part 161 (2003), and the electric standards of conduct are codified at 18 CFR 37.4 (2003).
³ Standards of Conduct for Transmission Providers, 66 FR 50919 (Oct. 5, 2001), IV FERC Stats. & Regs. Regulation Preambles ¶ 32,555 (Sept. 27, 2001).
⁴ *See* Appendix A for a list of commenters.

similar mechanisms to prevent transmission from being used in an undue preferential or discriminatory manner by: (1) Separating employees⁸ engaged in transmission services from those engaged in commodity marketing services, *i.e.*, marketing or sales for resale of natural gas or electric energy; and (2) ensuring that all transmission customers, affiliated and non-affiliated, are treated on a non-discriminatory basis. The Commission's goals have not changed. This rule is designed to prevent Transmission Providers from giving undue preferences to any of their Energy Affiliates to ensure that transmission is provided on a non-discriminatory basis.

III. Need for the Rule

6. As discussed in the NOPR, significant changes have occurred since the standards of conduct were first adopted. In Order No. 636, the Commission required all interstate natural gas pipelines to provide open-access transportation service and to unbundle their gas sales from transportation.⁹ Since then, the market has expanded to include both physical and financial transactions by marketing and non-marketing gas pipeline affiliates.¹⁰ In the gas industry, these changes include unbundling, capacity release, and e-commerce. Today, as a result of growth and consolidations, many interstate natural gas pipeline companies also have a much wider array of affiliates in all sectors of the energy business. The gas industry has

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).

⁸ Each reference to employees includes contractors, consultants and agents.

⁹ Order No. 636, Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations, and Regulation of Natural Gas Pipelines After Partial Wellhead Decoupling, FERC Stats. & Regs. ¶ 30,939 (1992), *order on reh'g*, Order No. 636-A, FERC Stats. & Regs. ¶ 30,950 (1992), *order on reh'g*, Order No. 636-B, 61 FERC ¶ 61,272 (1992), *aff'd in part, rev'd in part*, *United Distribution Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996), *cert denied*, 137 L. Ed 2d 845, 117 S. Ct. 1723 (1997), *on remand*, Order No. 636-C, 78 FERC ¶ 61,186 (1997), *order on reh'g*, Order No. 636-D, 83 FERC ¶ 61,210 (1998).

¹⁰ We also have seen the entry of many financial institutions into the trading arena, *e.g.*, Morgan Stanley Capital Group, Inc., Bank of America, N.A., and UBS AG.

experienced consolidations in every sector—pipelines, producers, marketers, LDC/utilities and industrials. Examples include the mergers of El Paso Energy Corporation, Sonat Inc. and the Coastal Corporation, and Columbia Energy Group and NiSource Inc. Marketing affiliates and non-marketing affiliates today offer a variety of new services, such as bundled sales, asset management, price hedging, risk management, and electronic commodity trading. Recently, some pipelines have reduced or eliminated some of these services, while others continue to have active merchant, management and trading functions.

7. Similarly, now that public utility Transmission Providers have been providing open-access service under Order No. 888 for several years, there has been a large increase in the number of power marketers with market-based rates,¹¹ an increased market for available transmission capacity, and an increased number of power transactions. Electric power is evolving into a more liquid, transparent commodity.

8. Not only are the affiliated entities changing in size and scope, so are the Transmission Providers. As a result of an increase in merger activities there has been a convergence of the gas and electric industries.¹² These industry changes mean that interstate natural gas pipelines and their affiliates not only deal in gas, but also in power, much of which is generated using natural gas. In one of its recent regulatory reviews, the Federal Trade Commission (FTC) found that the proposed acquisition of Panhandle and Trunkline by CMS was likely to adversely affect industrial plants in the CMS local natural gas franchise areas that rely on natural gas as a fuel to generate electric power onsite.¹³

9. The Commission is concerned that a Transmission Provider's market power could be transferred to its affiliated businesses because the existing rules do not cover all affiliate relationships. For

¹¹ As of October 1, 2003, the Commission has granted approximately 1300 market-based rate authorizations; nearly 880 of these were approved within the last five years. Of the authorizations granted within the last five years, about 500 were granted to investor-owned utilities and their affiliates.

¹² Since 1995, the Commission has received 66 public utility merger applications, 60 of which have been approved, one has been set for hearing and five have been withdrawn or terminated. Several mergers joined gas and electric companies, such as NiSource Inc. with Columbia Energy Group and Dominion Resources, Inc. with Consolidated Natural Gas Company.

¹³ In the matter of CMS Energy Company and Panhandle Eastern Pipeline Co. *et al.*, FTC File 991-0046, Analysis of Proposed Consent Order to Aid Public Comment.

example, an integrated entity could exercise market power in delivered natural gas service to raise costs of rival generators or inhibit entry of new generators into wholesale power markets.

10. Although the current standards of conduct limit Transmission Providers' ability to make or grant undue preferences to their wholesale merchant functions or to their marketing affiliates, they do not cover the transmission providers' other non-marketing affiliates, even though the NGA and FPA prohibit a natural gas pipeline company and a public utility from giving any entity an undue preference. Non-marketing affiliates of Transmission Providers compete against non-affiliates for transmission services, in capacity release transactions, in power sales, and in siting new generation. For example, in the gas industry, non-marketing affiliates of interstate natural gas pipelines control large amounts of capacity on their affiliated pipelines, yet they are not covered by the current standards of conduct because they do not actually hold pipeline capacity (functioning instead as asset managers) or they fit within one of the existing exceptions, *e.g.*, producers, gatherers and local distribution companies.¹⁴ See 18 CFR 161.2 (2003). A comparison of the October 2003 Index of Customers data to the January 2001 Index of Customers data reveals that the amount of firm capacity held by marketing affiliates has decreased during that period, while the amount of firm capacity held by other affiliates has increased during that period.¹⁵

¹⁴ A review of data from the 85 interstate natural gas pipelines and certificated storage companies that submitted an Index of Customers for October 2003, shows that 63 of them transport or store gas for their affiliates. Thirty-six pipelines transport gas for their marketing affiliates, which hold an average of 16 percent of the affiliated pipelines' capacity. Similarly, 13 pipelines with storage services "transport" gas for their marketing affiliates, which hold an average of 43 percent of the affiliates storage companies' capacity.

In addition, 33 pipelines transport gas for other (non-marketing) affiliates that hold an average of 42 percent of the affiliated pipelines' capacity, and 16 storage companies "transport" gas for their other affiliates, which hold an average of 46 percent of the affiliated storage companies' capacity.

Staff's review, which looked at all interstate natural gas pipelines that filed Index of Customers is more complete than an INGAA-sponsored study of select pipelines that showed, during 2000, that marketing and non-marketing affiliates of natural gas pipelines contracted for 14.4 percent of the capacity on their affiliated pipeline.

¹⁵ The January 2001 Index of Customers data shows that marketing affiliates held about 18 percent of affiliated interstate natural gas pipelines' firm capacity and non-marketing affiliates held an additional 19 percent of the affiliated pipelines' firm capacity. The October 2003 Index of Customers

11. The current standards of conduct do not address the sharing of confidential shipper information and transportation information with all Energy Affiliates. For example, if an interstate natural gas pipeline informs its affiliated asset manager about a proposed pipeline expansion or upcoming curtailment, the current standards of conduct do not require it to make that information available to non-affiliates, unless the asset manager is a Marketing Affiliate. Nor do the current standards address whether an electric Transmission Provider can share with its generator affiliates information about generation projects planned by competitors. 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 in markets where there are concerns about market power. Although Transmission Providers' unduly preferential behavior towards their Energy Affiliates may not violate the current standards of conduct, we believe it violates the general statutory prohibitions against undue discrimination and undue preferences in the provision of interstate transmission services.

12. Many commenters argue generally that the rule is unnecessary. They maintain that there have been relatively few cases of anti-competitive behavior. Some commenters urged the Commission to maintain the status quo. Many public utility Transmission Providers and interstate natural gas pipeline Transmission Providers argue that there is no need for a general rule, and individual instances of abuse can be considered and resolved by the Commission in case-by-case investigations or in individual Commission proceedings.

13. Some commenters supported the Commission's proposal to develop uniform standards of conduct. For example, the American Antitrust Institute said that Transmission Providers have the ability and incentive to adversely affect electricity or gas prices by frustrating or precluding a rival's access to electric transmission or gas transportation. In addition, those companies involved in the converging energy industry support the Commission's initiative because they currently operate under both the electric and gas standards of conduct. Some commenters urge the Commission to

adopt stricter prohibitions, such as structural remedies or capacity limits. NASUCA says that the lack of complaints is a "Catch-22." NASUCA states that the reason there have been very few complaints regarding other affiliates is that anti-competitive transactions involving these transactions do not violate the current standards of conduct.

14. Having carefully considered all the comments, the Commission is convinced of the need for a general rule to establish standards of conduct governing relationships between Transmission Providers and their Energy Affiliates. With the creation of the Office of Market Oversight and Investigations (OMOI), the Commission is seeing the results of a more active enforcement program investigating unduly discriminatory practices. Recently, the Enforcement Division of OMOI has uncovered affiliate abuse activity that reveals that some Transmission Providers are giving their affiliates undue preferences and violating the standards of conduct.¹⁶ In addition, several audits of public utilities, conducted by the Division of Regulatory Audits, Office of the Executive Director, revealed violations of the standards of conduct. Specifically, Public Service Company of New Mexico (PNM) failed to comply with the independent functioning requirement.¹⁷ In addition, wholesale merchant function employees had access to computer terminals that allowed them to access transmission system information on the EMS (Energy Management System). More recently, an audit of Ameren Corporation revealed, among other things, that Ameren's transmission employees had engaged in non-public, off-OASIS communications with wholesale merchant function employees and other customers.¹⁸

15. Transmission Providers continue to have economic incentives to show undue preferences toward their Energy Affiliates. The Commission is adopting new rules to close loopholes in existing

rules and to give Transmission Providers specific guidance on how to eliminate undue discrimination and undue preferences in the provision of interstate transmission services, consistent with the directions of the NGA and FPA. The Commission believes that the revised standards of conduct will ensure that Transmission Providers function independently of all their Energy Affiliates. Such separation is vital if the Commission is to ensure that Transmission Providers do not use their access to information about transmission to unfairly benefit their own or their affiliates' sales to the detriment of competitive markets.

IV. Section-by-Section Analysis of Final Rule

A. Applicability—§ 358.1

16. The NOPR proposed that the standards of conduct would apply to all Transmission Providers, as discussed in the section below. The NOPR also stated that the standards of conduct would not apply to Commission-approved Regional Transmission Organizations (RTOs) that comply with the requirements of Order No. 2000.¹⁹ However, RTOs would be subject to the posting requirements in §§ 37.5 and 37.6 of the Commission's regulations, 18 CFR 37.5 and 37.6 (2003). Finally, the NOPR provided that a public utility transmission owner that participates in a Commission-approved RTO and does not operate or control its transmission facilities may request an exemption from the standards of conduct. Following a review of the comments, and as discussed in more detail below, the Commission is adopting this section with modifications, as follows:

§ 358.1 Applicability.

(a) This part applies to 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.

(b) This part applies to any public utility that owns, operates, or controls transmission facilities used for the transmission of electric energy in interstate commerce.

(c) This part does not apply to a Transmission Provider that is a Commission-approved Regional Transmission Organization (RTO) or Independent System Operator (ISO). If a public utility transmission owner participates in a Commission-approved RTO or ISO and does

data shows that marketing affiliates hold about 16 percent of the affiliated pipelines' firm capacity and non-marketing affiliates hold an additional 42 percent of the affiliated pipelines' firm capacity.

¹⁶ See e.g., Transcontinental Gas Pipe Line Corp., 102 FERC ¶ 61,302 (2003) (*Transco*); National Fuel Gas Supply Corp., 103 FERC ¶ 61,192 (2003); Idaho Power Corp., 103 FERC ¶ 61,182 (2003) (*Idaho Power*); and Cleco Corp., 104 FERC ¶ 61,125 (2003) (*Cleco*).

¹⁷ 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.

¹⁸ For example, merchant function employees called transmission function employees to request the most up-to-date, non-firm ATC information to save time in submitting requests for transmission service via OASIS. See September 27, 2002 Letter from John Delaware, Deputy Executive Director and Chief Accountant to Ameren Corporation in Docket Nos. FA01-5-000, FA01-6-000 and FA01-7-000.

¹⁹ Regional Transmission Organizations, Order No. 2000, 65 FR 809 (Jan. 6, 2000), FERC Stats. & Regs., Regulation Preambles July 1999-December 2000 ¶ 31,089 (Dec. 20, 1999), *order on reh'g*, Order No. 2000-A, 65 FR 12088 (Mar. 8, 2000), FERC Stats. & Regs., Regulation Preambles 1996-2000 ¶ 31,092 (Feb. 25, 2000), *petitions for review pending sub nom.*, Public Utility District No. 1 of Snohomish County, *Washington v. FERC* (D.C. Cir., Apr. 24, 2000 (Nos. 00-1174, et al.)).

not operate or control its transmission facilities and has no access to transmission or market information covered by § 385.5(b), it may request an exemption from this part.

(d) A Transmission Provider may file a request for an exemption from all or some of the requirements of this part for good cause.

i. Regional Transmission Organizations/Independent System Operators

17. The NOPR proposed to exempt Commission-approved RTOs from the standards of conduct, while Transmission Providers that are members of RTOs would not automatically be exempt from them. The NOPR stated that depending on how an RTO is structured, there may be a continuing need to apply the standards of conduct to public utility Transmission Providers that are members of RTOs. While an RTO may administer or manage the transmission facilities, there are instances in which a transmission owner continues to physically control or operate the transmission facilities or control centers.²⁰

18. EEI urged the Commission to be flexible to accommodate the varying operational arrangements that may be worked out between RTOs or ISOs and participating utilities. EEI, the Kentucky Commission, LG&E and KU urged the Commission to permit utilities that have joined an RTO, but still “technically” operate transmission facilities, to be eligible for exemptions from the rule. They argued that because the RTO “administratively” controls the transmission facilities, concerns about improper transfer and use of transmission information are alleviated.

19. BPA stated that it is unclear whether a Transmission Provider would be eligible for an exemption if, despite turning over operation and control, the Transmission Provider retains preferential access to unposted transmission information and requested that the Commission exempt a Transmission Provider even if it possesses minimal transmission information.

20. BPA has highlighted one of the main concerns of the standards of conduct—information access. 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.

²⁰ See PJM Interconnection, L.L.C. and Allegheny Power, 96 FERC ¶ 61,060 (2001), where the Commission permitted PJM-West’s transmission assets to be operated through PJM’s central control center, while the physical control of these transmission assets remained with the transmission owners.

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.²¹ 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.

21. NYISO requested clarification that it would not be subject to the rule. The Commission clarifies that NYISO would not be subject to the rule.

22. LILCO urged the Commission to require RTOs to be subject to the requirement to implement tariffs in a non-discriminatory fashion under § 385.5(c) of the Commission’s regulations. Similarly, MID and the Illinois Commission requested that the Commission require RTOs and comparable entities (ISOs) to comply with the standards of conduct. MID claimed that RTOs and ISOs often procure Ancillary Services and Energy to meet their customers’ needs and such purchases can have a significant effect on the market.

23. The Commission will not require ISOs or RTOs to be subject to the requirements of the standards of conduct as these transmission organizations have been designed and approved by the Commission to eliminate unduly preferential practices. Indeed, one of the many reasons for their creation was to provide a remedy to undue discrimination rather than relying on the standards of conduct. If transmission customers observe that an ISO or RTO is not complying with its Commission-approved tariff or behaving in an unduly discriminatory fashion, it may file a complaint with the Commission, or contact the Commission’s Enforcement Hotline or the ISO’s or RTO’s market monitoring unit (MMU).

ii. Non-Public Utilities

24. The Kentucky Commission, LPPC, Nebraska Public Power District and SMUD urged the Commission to clarify that the standards of conduct will apply

²¹ RTOs and ISOs centrally monitor the transmission system, approve transmission service requests through OASIS, and direct member Transmission Providers in the operation of the transmission assets. RTOs, ISOs and member Transmission Providers share transmission information to facilitate safe and reliable operation of the transmission system.

to non-public utilities, by virtue of the reciprocity provisions of Order No. 888, in the same manner as the current standards of conduct apply to non-public utilities. Sempra urged the Commission to clarify that public power agencies or non-jurisdictional Transmission Providers that get access to the jurisdictional grid through reciprocity tariffs under Order No. 888 should be required to comply with the standards of conduct to eliminate the preferences they provide to their own merchant operations. The Commission agrees and is amending the proposed regulation to make it clearer which entities are subject to the requirements of the standards of conduct. If a non-public utility voluntarily files a reciprocity open access tariff under Order No. 888, it shall comply with the Final Rule.

iii. Cooperatives and Small Pipelines and Utilities

25. Several commenters, including Alabama Electric Coop., Arkansas Electric Coop., Connexus, Seminole Electric Coop., Old Dominion, Midwest Energy, National Rural Electric Coop. Assoc., Southwest Transmission Coop., East Texas Electric Coop., Wolverine Power Supply Coop., Energy East Companies, Empire Electric District, Wells Rural Electric Coop. and Rural Utilities Service of the Department of Agriculture, asked the Commission to clarify that small utilities or cooperatives (coops) that obtained waivers of the standards of conduct under Order No. 889 would automatically be exempt from the provisions of the Final Rule.²² Along the same lines, B-R Pipeline, Distrigas of Massachusetts, Hampshire Storage, NiSource, SCG, USG, and U.S. Gypsum and Washington Gas Light urged the Commission to categorically exempt small pipelines or those that were built to serve one or several customers. NRECA requested that the Commission incorporate waiver provisions in the standards of conduct and continue the effectiveness of previously issued waivers.

26. The Industrials recommended that the regulatory text contain a specific exemption provision. Dynegy, on the other hand, urges the Commission not to create broad categorical exemptions from the rule but, rather, to evaluate specific claims of hardship on a case-by-case basis.

27. The Commission will continue the exemptions and partial waivers for the entities that have previously received

²² Black Creek Hydro, Inc. 77 FERC ¶ 61,232 (1996).

exemptions and partial waivers under Order No. 889 or Order No. 497. However, an exemption may be revoked if, after an investigation or audit, the Commission determines that the entity no longer qualifies for the exemption or the entity has abused the exemption.

28. In addition, Transmission Providers that did not previously obtain an exemption may request an exemption from all or some of the requirements of Part 358. RUS and NRECA requested clarification that generation and transmission cooperatives and their distribution cooperatives will not be subject to the Final Rule. The Commission clarifies that it will treat generation and transmission cooperatives consistent with the policies established under Order No. 888.²³

iv. Delay of Applicability

29. Alliance urges the Commission to allow Transmission Providers to delay implementing the Final Rule while the Commission reviews a Transmission Provider's request for an exemption or waiver from the standards of conduct. This is inconsistent with Commission policy to implement rules after reasonable notice; however, apart from the information filing required in § 358.5(e)(1), the Commission is giving Transmission Providers until June 1, 2004 to implement the requirements of the Final Rule. This implementation date should afford Transmission Providers time to fashion requests for waivers or exemptions.

B. General Principles—§ 358.2

30. The NOPR proposed the following general principles for the standards of conduct: (1) A Transmission Providers' employees engaged in transmission system operations must function independently from the Transmission Providers' sales or marketing employees and from any employees of their Energy Affiliates,²⁴ and (2) 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 an Energy Affiliate or Marketing Affiliate.

31. No comments were received on this section. Therefore, the Commission is adopting these principles as proposed in the NOPR. These principles are based on Section 4 of the NGA and Section 205 of the FPA, which prohibit a natural gas company or a public utility,

respectively, from making or granting an undue preference with respect to transportation/transmission or sale subject to the Commission's jurisdiction.

C. Definitions—§ 358.3

32. As proposed in the NOPR, § 358.3 combines and revises the definitions that were previously contained in §§ 37.3 and 161.2 of the Commission's regulations, and adds, as appropriate, definitions for new terms. The Commission is modifying and adopting the definitions proposed in the NOPR, as discussed below.

i. Definition of a Transmission Provider

33. The NOPR defined a Transmission Provider as:

(1) any public utility that owns, operates or controls facilities used for transmission of electric energy in interstate commerce; or (2) any interstate natural gas pipeline that transports gas for others pursuant to subpart A or Part 157 or subparts B or G of Part 284.

34. The Major Issues Analysis did not address the definition of Transmission Provider. The Commission has reviewed the commenters' recommendations, but, as discussed in more detail below, is adopting the definition of Transmission Provider as proposed.

35. The American Forest and Paper Association (AFPA) urged the Commission to clarify that the definition of a Transmission Provider only includes "any public utility that owns, operates or controls transmission facilities used for the transmission of electric energy in interstate commerce and is subject to the open access requirements of Order No. 888." It requested the Commission to clarify that Transmission Providers do not include industrials that own some discrete transmission facilities used solely for the purpose of interconnecting with the electrical grid. Along the same lines, the Industrials requested clarification that the definition of Transmission Provider will not apply to industrials with self-generation. The Industrials were concerned that the definition would include wholesale sellers such as power marketers and merchant generators with market-based-rate authority and qualifying facilities (QF) because these entities self provide ancillary services or that selling ancillary services would be considered providing "transmission service." Industrials claimed that any generator directly interconnected with an investor-owned transmission system would be deemed a Transmission Provider under the proposed definition. Finally, the Industrials were concerned that owning an interconnect could be interpreted as ownership of a

transmission facility. Similarly, Calpine argued that independent generators connected to jurisdictional transmission facilities that do not own transmission facilities, must be excluded from the definition of Transmission Provider.

36. The revision proposed by AFPA is unnecessary. Consistent with our implementation of Order No 888, Industrials that merely interconnect with the interstate transmission grid and sell power would not be a Transmission Provider as used in the Final Rule. Nor is self-generation considered transmission in interstate commerce.

ii. Definition of an Energy Affiliate

37. The NOPR's proposed definition of Energy Affiliate yielded the greatest volume of comments. The NOPR defined the term Energy Affiliate broadly, as:

an affiliate of a Transmission Provider that (1) engages in or is involved in transmission transactions; or (2) manages or controls transmission capacity of a Transmission Provider; or (3) buys, sells, trades or administers natural gas or electric energy; or (4) engages in financial transactions relating to the sale or transmission of natural gas or electric energy.

38. Since the Standards of Conduct seek to prohibit undue preferences and thereby the transfer of market power from the Transmission Provider to its affiliates, the term Energy Affiliate must cover more than the marketers and merchants covered by the existing rules. A narrow definition of Energy Affiliates will not specifically prohibit the transmission function from sharing employees and information with some of its Energy Affiliates who could then receive an unfair advantage in the competitive marketplace. On the other hand, too broad a definition of Energy Affiliate will limit some of the efficiencies gained from certain corporate structures. This language is also intended to cover affiliates that are indirectly involved in transportation, such as asset managers or agents.

39. The definition in the NOPR proposed to govern the relationship between the Transmission Provider, and, among others, affiliated producers, gatherers, local distribution companies (LDCs) and processors. Virtually all of the industry groups argued that the definition of Energy Affiliates is overly broad, and suggested that some narrowing of the definition would be appropriate.

40. In response to numerous comments, the Major Issues Analysis recommended various changes to the definition of Energy Affiliate and provided draft regulatory text. Follow-up comments recommended further

²³ Order No. 888-A at 30,666.

²⁴ As noted earlier, when the Commission references employees, it includes contractors, consultants or agents.

changes, which are grouped into several categories. As discussed below, the Commission is revising the definition of Energy Affiliate as follows:

- (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 transactions 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.

1. LDCs

41. As proposed by the NOPR, Transmission Providers would be required to apply the standards of conduct to their relationships with their affiliated LDCs by eliminating the exemption of Order No. 497, which permitted natural gas pipelines to share employees and information between their transmission businesses and their affiliated LDCs that do not make off-system sales.²⁵

42. Fourteen entities, including producers and unaffiliated gas marketers, NASUCA, AIA, the Industrials and the FTC supported the proposed definition of energy affiliate, focusing on LDCs. They asserted that: (1) Conditions have changed since Order No. 497 was promulgated, and LDCs compete more vigorously for access to transmission service; (2) the current exemption is a loophole that permits LDCs to get preferential access to information, which harms competition; and (3) the LDC exemption permits pipelines to circumvent the standards of conduct by using the LDC as a conduit for sharing information. The Connecticut Commission argued that giving LDCs an unfair competitive advantage can only hurt the long-term competitiveness of the market.

43. However, thirty-four commenters, primarily interstate natural gas

pipelines and affiliated marketers, INGAA and AGA opposed applying the standards of conduct to a Transmission Provider's relationship with its affiliated LDCs. These commenters recommended that the Commission retain the current exception in Order No. 497 for LDCs that do not engage in off-system sales. They argued that: (1) Section 1 of the NGA makes distribution subject to regulation by the states and not FERC; (2) there is no evidence or market analysis to support eliminating the exemption granted under Order No. 497; (3) to require such separation would cause unnecessary duplication of employees and gas control facilities, resulting in additional costs to customers;²⁶ and (4) limits on communications with LDCs would impair reliability, and the "emergency" exception in the proposed rule is insufficient.

44. The Commission has decided to retain the existing exemption for LDCs that do not make off-system sales. Specifically, the definition of Energy Affiliates will exclude those LDCs that are regulated by the state, provide solely retail service and engage in no off-system sales. However, the Commission notes that an affiliated LDC that engages in any off-system sale is an Energy Affiliate, and subject to the standards of conduct. An off-system sale would include a situation in which the affiliated LDC had contractually committed for more gas than it needed to serve its on-system customers and sold that gas off its system, *e.g.*, at a hub or on the spot market. Moreover, affiliated LDCs are prohibited from being conduits for improperly sharing information covered by the Final Rule. We also remind Transmission Providers that they are required to comply with the undue discrimination and undue preferences provisions of the NGA vis-à-vis their behavior with their affiliated LDCs and will be subject to greater scrutiny prospectively.

2. Affiliates Not Engaged or Involved in Transmission Transactions, *e.g.*, Trading and Financial Affiliates

45. Thirteen entities, including Ad Hoc Marketers, INGAA and interstate natural gas pipelines, opposed the proposed definition of Energy Affiliates because it does not require the Energy Affiliate to be engaged or involved in transmission transactions on the Transmission Provider's system. These commenters urged the Commission to narrow the definition of Energy

Affiliates to apply only to affiliates that are involved in transportation on affiliated Transmission Providers' systems. Similarly, several commenters, including Ad Hoc Marketers, INGAA, Gulf South, and four public utility Transmission Providers requested that the Commission exclude from the definition of Energy Affiliates entities that trade power or are engaged in financial transactions. Gulf South argued that gas futures contracts are traded only for delivery in the future and are unrelated to the current spot market price of gas.

46. The Commission disagrees with the commenters. Although an affiliate may not be directly involved in transmission transactions, the transmission markets and energy-related financial markets are so interconnected that a Transmission Provider does have the ability to operate its transmission system in a manner that gives a trading affiliate an undue preference or provides the trading affiliate with unduly preferential information. For example, a transmission constraint directly impacts the value of the commodity being transported. Preferential access to information about such a constraint could provide a significant benefit to an affiliate engaged in speculative trading of the commodity and cause the price of the commodity to rise to the detriment of the market, even if the trader is not using the affiliated Transmission Provider.

47. Entities involved in the trading of power or gas or in financial transactions related to the sale, purchase or transmission of power or gas are an integral part of the financial and transmission markets. The monthly volume of futures contracts on the NYMEX has grown from approximately 170,000 per month in January 1982 to 7,000,000 per month in January 2000.²⁷ As seen in the chart below, the financial natural gas (futures) markets and the physical (or spot) markets are closely linked. For example, NYMEX futures prices strongly correlate with transactions to buy and sell natural gas at Henry Hub, the physical delivery point specified in the NYMEX futures contracts.²⁸

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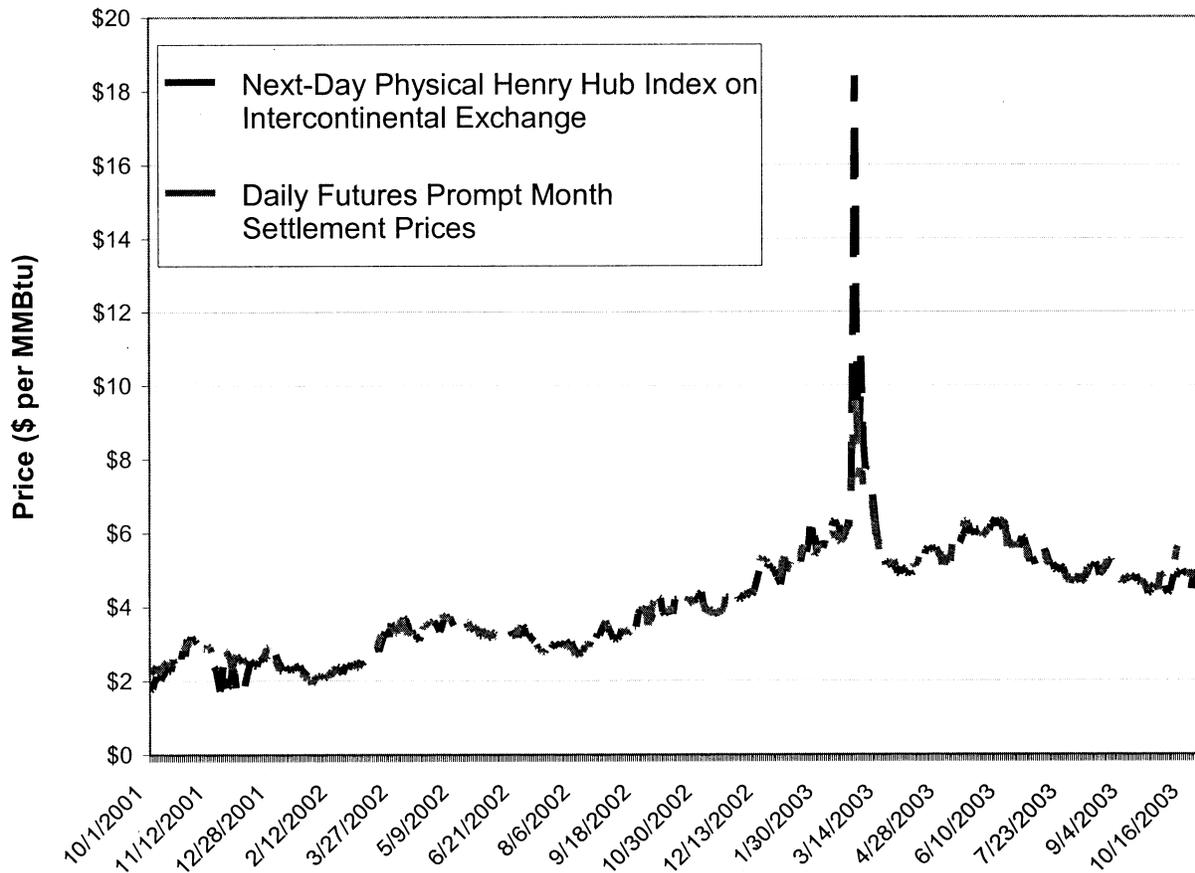
²⁷ "Derivatives and Risk Management in the Petroleum, Natural Gas and Electricity Industries," www.eia.doe.gov/oiaf/seservice/rpt/derivative/index (Oct. 24, 2003).

²⁸ See, *e.g.*, Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices, Docket No. PA02-2-000, Final Report on Price Manipulation in Western Market, March 2003 (Chapter IX at pp. IX-2 to IX-9).

²⁶ A discussion of the commenters' concerns regarding additional costs is included in the Independent Functioning discussion, below.

²⁵ 18 CFR 161.2(c) (2003).

Next-Day Physical Henry Hub Indices and NYMEX Prompt Month Futures Settlement Prices October 1, 2001 through October 31, 2003



Sources: www.theice.com, Bloomberg, L.P.

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48. The financial natural gas markets are so interconnected with the natural gas physical markets and the transmission market, that a Transmission Provider has the ability to operate its transmission system in a manner so as to give a trading affiliate an undue preference or to provide the trading affiliate with unduly preferential information. Therefore, the definition of Energy Affiliates in the Final Rule incorporates trading and financial affiliates to the extent they are engaged in transactions in the U.S. energy or gas commodity or transmission markets.

3. Affiliated Transmission Providers

49. Twenty-seven entities, the majority of which are in the interstate natural gas pipeline industry, pointed out that the definition of Energy Affiliate would appear to require Transmission Providers to treat affiliated Transmission Providers as Energy Affiliates. Many argued that such a broad definition of Energy

Affiliate would restrict the joint operations of jurisdictional transmission facilities and would mandate unnecessary duplication of jointly operated facilities. INGAA and others pointed out that putting limitations on the relationship between affiliated Transmission Providers would be inconsistent with recent Commission policy. They cited the Commission's orders that required Dominion Transmission, Inc. to apply the gas standards of conduct to its Energy Affiliates as a merger condition.²⁹ There, the Commission specifically excluded affiliated Transmission Providers from the definition of Energy Affiliates because they are already

²⁹ Dominion Resources, Inc. and Consolidated Natural Gas Co., 89 FERC ¶ 61,162 (1999), *order on compliance filing*, 91 FERC ¶ 61,140 (2000), *order denying reh'g*, 93 FERC ¶ 61,214 (2000), *vacated and remanded*, (D.C. Cir. No. 01-1169 Slip. Op. issued on April 19, 2002), *order on remand pending*.

subject to the non-discrimination provisions of the standards of conduct.

50. The Major Issues Analysis proposed an exemption that would exclude FERC-jurisdictional Transmission Providers from the definition of Energy Affiliate and provided draft regulatory text for comment. Numerous follow-up comments supported this proposed revision, including those filed Cinergy, Entergy, First Energy, NiSource, INGAA, and KM Interstate.

51. The Commission agrees; FERC-jurisdictional interstate natural gas pipelines coordinating transactions with affiliated FERC-jurisdictional interstate natural gas pipelines should be permitted to share transmission function employees and information, since both are bound by the standards of conduct requirements and are prohibited from sharing transmission, customer or market information with their Energy Affiliates. Similarly, a public utility Transmission Provider

may share transmission function employees and information with other public utility Transmission Providers. Nor does it appear that communications between FERC-regulated gas Transmission Providers and FERC-regulated public utility Transmission Providers is a problem for the same reason. Moreover, the focus of the standards of conduct is to prevent transmission market power from extending to other products or services, so Transmission Provider to Transmission Provider communications should not violate the purpose of the rule. The definition of energy affiliates, therefore, is clarified to exclude affiliated Transmission Providers. Many commenters expressed support for the language proposed in the Major Issues Analysis, and we will adopt it.

4. Holding or Service Companies

52. Several commenters, including INGAA, Dominion, EEI, NiSource, and Williams, argued that the definition of Energy Affiliates could be construed to include service or holding companies because the definition includes affiliates that engage in financial transactions related to the transmission of natural gas or electricity. The commenters argued that this could limit the ability of senior officers and directors of the holding or service companies to exercise their fiduciary duties for their subsidiaries.

53. As discussed in the Major Issues Analysis, holding and service companies typically do not participate in the energy or transmission markets, and if they do not participate in those markets, they would not be considered Energy Affiliates. As discussed above, affiliates engaged in financial transactions that concern energy or natural gas commodity or transmission markets will be considered Energy Affiliates. Therefore, the Major Issues Analysis recommended that the Commission adopt a definition of Energy Affiliate that excludes holding or service companies that do not engage in and are not involved in energy or natural gas commodity or transmission transactions. The Major Issues Analysis also recommended that the Commission prohibit any affiliate, including holding companies or others exempt from the standards of conduct, from acting as a conduit for improperly sharing information.

54. Supplemental comments in response to the language proposed by the Major Issues Analysis were generally supportive of the holding company exception, including those filed by DTE, Gulf South, National Grid, and PacifiCorp and PSE&G. However, several commenters expressed concern

that the revision recommended in the Major Issues Analysis was insufficient. They claimed that, even with the narrowing proposed in the Major Issues Analysis, they could not comply with the standards of conduct and the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley Act), which requires senior corporate executives to be fully informed about the financial conditions of their corporations and their subsidiaries.³⁰ As noted by various commenters, including EEI and Duke, a parent company with an electric utility or gas distribution system as an operating division would not qualify for the exception proposed by the Major Issues Analysis. They claimed that separating the management or forming a holding company would require corporate reorganization, could be costly, and might trigger the restrictive requirements of the Public Utility Holding Company Act (PUHCA).³¹

55. For example, Duke argued that complying with the Final Rule and the Sarbanes-Oxley Act would be difficult because the Duke Power Division of Duke Energy, which engages in transmission and wholesale and bundled electric sales, would be considered an Energy Affiliate of its interstate natural gas pipeline subsidiaries, and the pipeline subsidiaries would be prohibited from sharing information with the senior management of its Energy Affiliate/parent company, Duke Energy.

56. The Major Issues Analysis specifically excluded holding and service companies, but did not mention "parent companies." Duke encouraged the Commission to extend the holding company exemption to apply to parent companies that may not fall within the legal definition of "holding company," as set forth by PUHCA. NGS, APGA and IPAA all support Duke's proposal to the extent that the parent companies are not involved in energy transactions. The Commission is adopting this recommendation and will include "parent" companies that are not involved in energy or transmission transactions in the "holding company" exception from the definition of Energy Affiliate.

57. Several commenters were also concerned about Transmission Providers with service corporation subsidiaries that employ virtually all corporate employees, including those who do work for Transmission Providers and Energy Affiliates. The

Commission clarifies 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, e.g., 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.

58. In addition, in follow-up comments, National Grid encouraged the Commission to clarify that the holding company exclusion extends to companies engaged or involved in markets not related to energy, power or transmission. The Commission so clarifies.

5. Foreign Affiliates

59. Thirteen commenters, including INGAA, six interstate natural gas pipelines, EEI, five public utility Transmission Providers and Shell objected to the proposed definition of Energy Affiliates to the extent that it included foreign affiliates. They are concerned that Transmission Providers will be required to treat affiliates in Europe, South America and the Caribbean as Energy Affiliates. The Major Issues Analysis urged the Commission to exclude foreign affiliates and revised the draft regulatory text accordingly. Virtually all follow-up comments supported the staff's proposal.

60. The Commission sees no reason to be concerned about the possibility that a Transmission Provider will extend its market power by giving foreign affiliates undue preferences where the foreign affiliates do not participate in energy markets in the United States. The Final Rule clarifies that the definition of Energy Affiliates excludes foreign affiliates that do not participate in the United States (U.S.) energy or transmission markets.

61. In addition, where a foreign affiliate has an ownership interest in a jurisdictional Transmission Provider, that affiliate is, by virtue of its ownership interest, participating in the U.S. energy or transmission markets. For example, a joint venture U.S.-Canadian pipeline would have to treat as Energy Affiliates its Canadian affiliates that buy, sell or trade natural gas or electric energy or engage in or are involved in transmission transactions in U.S. energy markets.

62. On a slightly different note, several pipelines including Alliance, Maritimes and Northeast Pipeline, as well as Duke Energy, Canadian Association of Petroleum Producers and the Alberta Department of Energy,

³⁰ See Section 302 of the Sarbanes-Oxley Act, Pub. L. 107-204, Sec. 9, 116 Stat. 745, 777 (2002).

³¹ Public Utility Holding Company Act of 1935, 15 U.S.C. 79a *et seq.* (2000).

expressed concern about affiliated pipelines that cross the U.S. and Canadian borders. These companies argued that under the exception proposed by the Major Issues Analysis, affiliated pipelines that cross or interconnect at the U.S. and Canadian borders would fall within the definition of Energy Affiliate. The commenters argued that they should be treated as affiliated pipelines because their operations are closely coordinated and transmission services are shared even though they cross the international border. The Commission agrees and will permit these companies to share their transmission function activities and coordinate along both sides of the border as long as neither of the Transmission Providers shares employees or information with any of its Marketing or Energy Affiliates.

6. Affiliates Buying Power for Themselves

63. Several commenters, including Dominion, Calpine and KM, argued that the Commission needs to clarify the definition of Energy Affiliates because including the terms “buy,” “sell,” or “administer” could be construed to include an affiliated entity that is purchasing power for its own consumption, such as a communications affiliate that is purchasing power to heat its office building. They argued that under the NOPR, if an affiliate is simply “buying” power for its own energy consumption and not using the affiliated Transmission Provider for transmission, the Transmission Provider would be required to post the organizational charts and job descriptions for the Energy Affiliates, which the commenters argue would be burdensome.

64. In response to these comments, the Major Issues Analysis recommended that the Commission exclude an affiliate of a Transmission Provider that is purchasing electricity or natural gas for its own consumption and is not using an affiliated Transmission Provider for transmission.

65. Although these purchases can have an impact on the energy markets, nonetheless, there is little potential for competitive harm if the definition of Energy Affiliates is clarified to exclude any affiliate of the Transmission Provider that is solely purchasing power or natural gas for its own consumption and is not using an affiliated Transmission Provider for transmission. Therefore, the Commission will adopt this recommendation in the Final Rule. However, this exception is not intended to create a loophole that circumvents

the intent of rule, and does not apply to Energy Affiliates that use natural gas or power to produce another source of energy, e.g., generation affiliates.

7. Producers, Gatherers, and Processors

66. The NOPR defined Energy Affiliate to include producers, gatherers and processors. The NOPR states that whether a producer or gatherer is making an on-system sale or an off-system sale, it is still competing for access to the interstate transmission system. NGA stated that upstream services and transportation services are frequently offered as a single package by pipelines or their affiliates, which allows a pipeline to leverage its market power in the transportation market to gain an advantage in the upstream market. The comments regarding affiliated producers, gatherers, and processors were mostly included in the comments about affiliated LDCs. Commenters, including El Paso Energy Partners, Shell Offshore and Shell Gas, argued that: (1) The Commission does not have jurisdiction over producers, gatherers or intrastate pipelines; (2) there is no evidence to support eliminating the exemption granted under Order No. 497; (3) to require separation would cause unnecessary duplication of employees and gas control facilities, resulting in additional costs to customers;³² and (4) restrictions on communication would impair reliability.

67. The Commission is adopting the proposed regulation. The Commission is not asserting jurisdiction over the producers, gatherers or processors. The Commission has ample authority to ensure that the interstate pipeline treats all customers, affiliated and unaffiliated, on a non-discriminatory basis by regulating the behavior of the Transmission Provider. Staff's review of the October 2003 Index of Customers indicates that 14 interstate natural gas pipelines transport gas for their production and gathering affiliates, which hold an average of 46% of the affiliated pipelines' capacity. But, unlike LDCs, producers, gatherers and processors are not generally subject to state regulation.

68. Several commenters argue that Section 1 of the NGA makes production and gathering subject to regulation by the states and not the Commission. The Commission is not asserting jurisdiction over producers, gatherers or processors. The Commission has ample authority to ensure that the Transmission Provider

treats all customers, affiliated and non-affiliated, on a non-discriminatory basis by regulating the conduct of the transmission provider's interactions with affiliated producers, gatherers or processors.

69. The commenters voiced practical concerns about how the proposed standards of conduct would impact communications between a Transmission Provider and affiliated producers, gatherers, and processors. During the May 21 Conference there was much discussion about the possibility that expanding the standards of conduct would harm deepwater operations and future off-shore development efforts. Several participants stated that competing producers had worked cooperatively on affiliated pipelines to develop deepwater gas reserves. On the other hand, BP argued that Transmission Providers should not be permitted to share any information regarding a shipper's use of the pipeline or information regarding the operations or customers of non-affiliated gatherers that compete with the affiliate. BP argued that the definition of Energy Affiliate should not include affiliate gas processing plants. However, as discussed in more detail below, the Commission is permitting transmission providers to share crucial operational information with certain of its Energy Affiliates.

70. Commenters also argued that there was no evidence that pipelines had unduly favored their producers, gatherers or processing affiliates. However, in a recent example, Transcontinental Gas Pipe Line Corporation and its gathering affiliate, Williams Field Services Company, acted as one entity for purposes of gathering and transporting natural gas in interstate commerce in a monopolistic fashion and abused their market power.³³

71. The Commission's focus is to ensure comparability of service. To retain a loophole that permits the transmission provider to share employees or give its affiliated producers, gatherers or processors preferential information is inconsistent with the Commission's goal of non-discriminatory interstate transmission service. Producers that are selling energy are competing with other non-affiliated shippers for access to the pipelines' transmission systems. Whether a producer is selling gas from its own production or from the production of another, it is competing

³² A discussion of the commenters' concerns regarding additional costs is included in the Independent Functioning discussion, below.

³³ *Shell Offshore Inc. v. Transcontinental Gas Pipe Line Corp., et al.*, 100 FERC ¶ 61,254 (2002), order on reh'g, 103 FERC ¶ 61,177 (2003), appeal filed June 27, 2003 (D.C. Cir. No. 03-1179).

with non-affiliates for access to the pipeline's transportation system. We conclude that providing a producer, gatherer or processor with preferential access to the pipeline's transmission system or information concerning the pipeline's system is inconsistent with NGA Section 4's prohibition against undue preferences or discrimination in the provision of interstate transportation services; accordingly, this Final Rule will prevent such conduct.

8. Intrastate and Hinshaw Pipelines

72. Although the NOPR did not specifically address intrastate or Hinshaw pipelines,³⁴ the definition of Energy Affiliate proposed in the NOPR would include intrastate and Hinshaw pipelines. Several commenters, including the Association of Texas Intrastate Natural Gas Pipelines, SCE&G and CMS, opposed including intrastate and Hinshaw pipelines in the definition of Energy Affiliate and urged the Commission to retain the current exemption at § 161.2(c)(3) of the Commission's regulations, 18 CFR 161.2(c)(3) (2003), that permits intrastate pipelines to make on-system sales without triggering the standards of conduct. The arguments raised mirror those raised with respect to producers, gatherers or processors, which currently enjoy the same exemption. The Commission's definition of Energy Affiliate in the Final Rule will include intrastate and Hinshaw pipelines. Providing an intrastate pipeline or Hinshaw pipeline preferential access to a transmission system or information concerning a transmission system would be inconsistent with NGA Section 4's prohibitions against undue preferences or discrimination in the provision of interstate transportation service.

iii. Definition of Marketing, Sales or Brokering

73. The NOPR proposed to define marketing, sales or brokering as:

A sale for resale of natural gas or electric energy in interstate commerce. Sales and marketing employee or unit includes: (1) Any pipeline's sales operating unit, to the extent provided in § 284.286 of this chapter, and (2) an electric transmission provider's sales unit, including those employees that engage in wholesale merchant sales or bundled retail sales.³⁵

³⁴ 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.

³⁵ 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

74. The NOPR proposed that "marketing" would include a public utility Transmission Provider's sales unit, including all employees that engage in wholesale merchant sales or bundled retail sales functions.³⁶ This would eliminate the exemption of Order No. 889, which permitted a public utility Transmission Provider to use the same employees for its interstate transmission business and its bundled retail sales business.

75. Fourteen commenters, including the FTC, Cooperatives, Calpine, ELCON, EPSA, NEMA, Transmission Access Policy Group, Transmission Group, several state commissions, and AAI supported the NOPR's proposal to treat retail function employees as marketing affiliate employees. They argued that the Commission can assert jurisdiction over the organizational structure of the jurisdictional public utility and the dissemination of information acquired through the operation of jurisdictional assets. In addition, they argued that: (1) The Commission must ensure that transmission service is not unduly discriminatory; (2) the bundled retail sales represent a large percentage of utilities' sales, and the utilities have little incentive to promote comparability, to improve OASIS or to provide equal quality service; and (3) the distinction between wholesale and retail is artificial and the conditions in the retail market impact the wholesale market.

76. However, thirty-six commenters, including EEI, NASUCA, NARUC, many public utility Transmission Providers, several cooperatives and ten state commissions, opposed treating retail function employees as Marketing Affiliate employees. Many commenters questioned the need to change the standards of conduct for public utility Transmission Providers when the current rules appear to be adequate.³⁷ For the most part, they contend that: (1) The Commission is exceeding its statutory authority under Section 201 of the FPA, which gives states regulatory authority over facilities used in local distribution, intrastate commerce or retail consumption; (2) there are no competitive concerns because retail

(including generation, transmission, and distribution) delivered to the transmission provider's firm and non-firm retail customers.

³⁶ 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).

³⁷ The Commission does not have detailed data on the amount of transmission used for retail electric service.

service is state regulated; (3) the Transmission Provider may not be able to maintain reliability and would have difficulty in coordinating generation dispatch; (4) some Transmission Providers could not fulfill their state-mandated obligations to be providers of last resort; (5) the Transmission Provider would not be able to engage in integrated resource planning; and (6) separating employees engaged in the bundled sales function for retail load from interstate transmission employees would cause expensive duplication of staff and facilities, without any countervailing competitive benefit.³⁸

77. The Major Issues Analysis recommended retaining the proposal in the NOPR. Many commenters submitted follow-up comments opposing the Staff's recommendation. In contrast with some commenters' statements, there have been several recent examples of affiliate abuse in the electric industry. In 2002, Idaho Power favored its wholesale merchant function and marketing affiliate by accepting their representations that certain non-firm transmission requests were necessary to serve native load, when in fact they were not.³⁹ More recently, the Commission approved a settlement with Cleco Corp. for its 1999–2002 violations of the standards of conduct, including, among other things, sharing of a trading floor by employees engaged in wholesale merchant functions and in retail sales functions.⁴⁰

78. The Commission has ample authority to regulate the behavior of the public utility that owns, operates or controls transmission in interstate commerce and its relationship with any Energy Affiliates. Nevertheless, the Final Rule will retain the exemption of Order No. 889, which permits a public utility Transmission Provider to use the same employees for its interstate transmission business and its bundled retail sales business. However, as stated 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.⁴¹ 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 wheeling

³⁸ A discussion of the commenters' concerns regarding additional costs is included in the Independent Functioning discussion, below.

³⁹ 103 FERC ¶ 61,182 (2003).

⁴⁰ 104 FERC ¶ 61,125 (2003).

⁴¹ FERC Stats. & Regs., Regulation Preambles January 1991–June 1996 ¶ 31,036 at 51,781.

programs.⁴² The Commission is also clarifying, however, 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. 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.

79. Under the Final Rule, the definition of Marketing, Sales and Brokering includes: A sale for resale of natural gas or electric energy in interstate commerce. Sales and marketing employee or unit includes: (1) any interstate natural gas pipeline's sales operating unit, to the extent provided in § 284.286 of this chapter, and (2) a public utility Transmission Provider's energy sales unit, unless such unit engages solely in bundled retail sales. If a retail sales unit engages in any wholesale sales, the separation of functions requirement will apply.

iv. Definition of a Transmission Function Employee

80. Although the NOPR did not provide a definition for the term "Transmission Function employee," many commenters, including Duke, urged the Commission to adopt a definition to provide additional clarity to the regulations. Following the May 21 Conference, several commenters provided draft regulatory text. In response to the comments, the Commission will add a definition for the term "Transmission Function" to the Final Rule, as follows:

Transmission Function employee means 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.

v. Definition of a Reseller

81. The NOPR defined a "reseller" as any transmission customer who offers to sell transmission capacity it has purchased. As noted by Duke, Carolina Power and Light, FPA and several other commenters, the definition of "reseller" was used in the NOPR, but was not used in the rest of the regulatory text. They request that the term be deleted. The Commission agrees and is deleting the term from the Final Rule.

⁴² American Electric Power Service Corporation, 81 FERC ¶ 61,332 (1997).

D. Independent Functioning—§ 358.4

82. The NOPR proposed § 358.4, as follows:

(a) Separation of functions.

(1) 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 sales employees and its energy affiliates' employees.

(2) Notwithstanding any other provisions in this section, in emergency circumstances affecting system reliability, Transmission Providers may take whatever steps are necessary to keep the system in operation. Transmission Providers must report to the Commission and post on the OASIS or Internet website, as applicable, each emergency that resulted in any deviation from the standards of conduct, within 24 hours of such deviation.

(3) The Transmission Provider is prohibited from permitting its sales and marketing employees or employees of its energy affiliates from: (i) conducting transmission system operations or reliability functions; and (ii) having access to the system control center or similar facilities used for transmission operations or reliability functions that differs in any way from the access available to other transmission customers.

83. Several commenters proposed an alternative "functional approach," while others focused on implementation of the proposed independent functioning requirement, including: (1) Sharing of senior management between Transmission Providers and their Marketing and Energy Affiliates (corporate governance); (2) sharing of non-transmission support employees between Transmission Providers and Marketing and Energy Affiliates; (3) sharing of field and maintenance employees between Transmission Providers and Marketing and Energy Affiliates; (4) allowing Transmission Provider employees to engage in operational or cash-out sales.

84. In response to the NOPR, commenters focused on whether certain types of non-transmission function employees could be shared between Transmission Providers and their Energy and Marketing Affiliates. The Major Issues Analysis recommended that the Commission adopt the language proposed in the NOPR, with some clarifications to permit the sharing of "support-type" employees. During the May 21 Conference and in follow-up comments, several entities made recommendations regarding an alternative approach.

85. As discussed in more detail below, the Commission is adopting the independent functioning requirement with the modifications discussed below.

The independent functioning requirement in the Final Rule is as follows:

(a) Separation of functions.

(1) 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.

(2) Notwithstanding any other provisions in this section, in emergency circumstances affecting system reliability, a Transmission Provider may take whatever steps are necessary to keep the system in operation. Transmission Providers must report to the Commission and post on the OASIS or Internet website, as applicable, each emergency that resulted in any deviation from the standards of conduct, within 24 hours of such deviation.

(3) The Transmission Provider is prohibited from permitting Marketing or Energy Affiliates' employees from: (i) conducting transmission system operations or reliability functions; and (ii) having access to the system control center or similar facilities used for transmission operations or reliability functions that differs in any way from the access available to other transmission customers.

(4) Transmission Providers are permitted to share support employees and field and maintenance employees with their Marketing and Energy Affiliates.

i. Background and History of Independent Functioning Requirement

86. The principle underlying proposed § 358.4 is that when employees engaged in transmission services function independently, there are significantly fewer opportunities to give unduly preferential treatment to affiliates engaged or involved in commodity transactions or other business activities that compete with non-affiliated customers of the Transmission Providers. Section 358.4(a) combines the separation of functions requirements of current §§ 161.3(g)⁴³ and 37.4(a)(1) and (2), ensures that the transmission function employees of the Transmission Provider function independently of the Transmission Provider's sales and marketing employees and employees of the Energy Affiliates. Like the separation of functions requirement in current § 37.4(a)(1) and (2), employees engaged in transmission functions would be required to function

⁴³ Under Standard G, 18 CFR 161.3(g) (2003), to the maximum extent practicable, a pipeline's operating employees and the operating employees of its marketing affiliate must function independently of each other. In Order No. 497-E, the Commission defined operating employees as, in part, those who are engaged in 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. Order No. 497-E at 30,996.

independently; but, in the event of emergencies affecting system reliability, may take whatever steps are necessary to keep the transmission systems in operation, including, if needed, using affiliates' employees.

87. Currently, under § 37.4(a)(2), if the transmission function of a public utility Transmission Provider utilizes the services of a wholesale merchant function employee during an emergency circumstance affecting system reliability, the public utility Transmission Provider posts each such event on its OASIS and reports it to the Commission in an "EY" docket within 24 hours of a deviation. The Final Rule holds interstate natural gas pipeline Transmission Providers to the same requirement under proposed § 358.4(a). Since 1998, the Commission has received as few as eight and as many as 18 reports of emergency circumstances necessitating deviations from the separation of functions requirement per year.

ii. Energy Affiliate Function or Commercial Function

88. The NOPR proposed to govern the relationship between the Transmission Provider and all of its Energy Affiliates. This approach recognizes that the Commission has jurisdiction over the Transmission Provider and is exercising that jurisdiction by governing the behavior of the Transmission Provider to ensure that it does not provide any Energy Affiliate with any undue preferences. Thus, this approach, which focuses on the corporate entities (*e.g.*, the Transmission Provider) and its employees, restricts the behavior and communications between the regulated Transmission Provider and its Energy Affiliates (Energy Affiliate Approach). The Commission uses this approach in the existing standards of conduct, *i.e.*, the standards of conduct govern the relationship between the interstate natural gas pipeline and its Marketing Affiliates and the public utility Transmission Provider and its wholesale merchant function and affiliated power marketer(s).

89. The majority of commenters supported the Energy Affiliate approach.⁴⁴ The Energy Affiliate approach recognizes some of the efficiencies of vertical integration by permitting sharing of certain "support" type functions and service.

90. As an alternative, several commenters proposed the "functional approach." Under a functional

approach, the standards of conduct would govern the relationship between the "transmission functions" of a Transmission Provider and its Energy Affiliates and the "commercial functions"⁴⁵ or the "energy functions"⁴⁶ of the Transmission Provider and its Energy Affiliates (Commercial Function Approach). In a Commercial Function approach, the transmission function of a pipeline and the transmission function(s) of its affiliated LDCs, affiliated intrastate pipelines and other affiliates with transmission services would be able to share employees and communications with each other, and the sales function of a pipeline and the sales functions of any of its affiliates would be able to share employees and communications with each other. But the sales and transmission functions would be prohibited from sharing employees and information with each other. The functional approach prohibits the Transmission Provider's "transmission function" from sharing employees or information with the "commercial" or "energy" function of the energy affiliates, but permits the sharing of employees and information with other "non-commercial" functions of the Energy Affiliates.

91. The functional approach was the subject of much discussion at the May 21 Conference, and 13 commenters supported the functional approach in their supplemental comments.⁴⁷ NASUCA opposed the commercial function approach. Many of the trade associations that submitted comments on specific aspects of the NOPR were silent on the type of approach that should be used. Some of the proponents of the functional approach, including Portland, argue that the Commission's approach in the NOPR represents a departure from the requirements of Order No. 889.

92. The Commission has carefully considered the comments and alternative proposals for structuring the Final Rule and is adopting the Energy Affiliate approach. With respect to the Energy Affiliate approach, the regulated Transmission Provider is responsible for

ensuring separation of functions and compliance with information disclosure prohibitions between itself and its Energy Affiliates. Under the Commercial Function approach, the responsibility for ensuring compliance would be shared by the transmission function of the Transmission Provider and the non-jurisdictional transmission functions of the unregulated Energy Affiliates. The Commission does not believe that such shared responsibility is workable. The Commission is concerned that it would not be able to enforce compliance with the standards of conduct based on a commercial function approach.

93. The advocates of the Commercial Function approach argued that Transmission Providers would be permitted to share more "support-type" employees than they would under the Energy Affiliate approach. While it may be less costly for some companies to implement the Commercial Function approach, particularly for those companies that are already structured on a functional basis, such as Dominion and Cinergy, the Commission is concerned that it does not have the jurisdiction to direct unregulated Energy Affiliates on how to structure their functions, operations and communications.

94. The Energy Affiliate approach has worked successfully in the past and avoids concerns whether FERC has jurisdiction to direct an unregulated Energy Affiliate on how to structure its functions, operations and communications.

iii. Sharing of Non-Transmission Functions

95. Forty-six commenters, including interstate natural gas pipelines, public utility Transmission Providers, AGA, Cleco Power, EEI, First Energy, INGAA, NGS and Industrials, were very concerned because the NOPR was silent on whether the Commission would implement the independent functioning requirement consistent with the case law that has developed under the current standards of conduct. Several commenters, including INGAA, asked that the Commission specify which "support employees" and "field personnel" can be shared between the Transmission Provider and its Energy Affiliates. Several commenters, including Cinergy and LG&E, requested that the Commission codify the proposed exception that allows the sharing of field and maintenance employees or identify the types of employees who would qualify as non-operating, *e.g.*, legal, accounting, human resources, and information technology.

⁴⁴ However, not all commenters supported the breadth of the definition of Energy Affiliates, *i.e.*, expanding it beyond marketing affiliates.

⁴⁵ Dominion proposed defining commercial function employees as those who engage in certain day-to-day activities such as transmission transactions, buy, sell or trade gas or energy or manage or control transmission capacity.

⁴⁶ Entergy proposed defining energy function employees as those who engage in purchases for resale, sale, or trade of natural gas or electric energy, but does not capture those that "control" capacity, but do not "hold" it (asset managers).

⁴⁷ AEP, Cinergy, Duke (partially), Dominion, Entergy, EEI (partially), FPL, Keyspan, National Grid, PG&E, Portland General Electric, Ohio Commission and Xcel.

96. Historically, the Commission has recognized that different Transmission Providers are faced with different practical circumstances in reviewing the appropriate degree of separation between the Transmission Provider's transmission function and the marketing affiliate or wholesale merchant function. Under the current standards of conduct, the Commission has permitted the transmission function to share with its marketing affiliate or wholesale merchant function non-operating officers or directors and personnel performing various non-operating functions such as legal, accounting, human resources, travel and information technology.⁴⁸

97. By permitting such sharing of non-operating employees, the Commission has allowed the Transmission Provider to realize the benefits of cost savings through integration where the shared employees do not have duties or responsibilities relating to transmission, and generally, would not be in a position to give a marketing affiliate undue preferences. In these circumstances, the sharing of transmission business employees with marketing affiliate employees was not considered to be likely to be harmful to shippers, consumers or competition. The Commission has also recognized that under normal circumstances, highly placed employees, such as officers or directors, are not involved in day-to-day duties and responsibilities and can be shared between a Transmission Provider and its marketing affiliate so long as these individuals comply with the information disclosure prohibitions.⁴⁹

98. When the Commission reviewed public utilities standards of conduct filings, it used a similar approach. The Commission stated that Transmission Providers may allow senior managers, officers or directors to have ultimate responsibility for both transmission system operations and wholesale merchant functions, as long as the persons with shared responsibilities do not participate in directing, organizing or executing transmission system operations or reliability functions or wholesale merchant functions. Further,

⁴⁸ Under Standard G, a pipeline's operating employees and the operating employees of its marketing affiliate must function independently of each other to the maximum extent practicable. See 18 CFR 161.3(g) (2003). In Order No. 497-E, the Commission defined operating employees as, in part, those that are engaged in the day-to-day duties and responsibility for planning, directing, organizing or carrying out gas-related operations, including gas transportation, gas sales or gas marketing activities. See Order No. 497-E, FERC Stats. & Regs., Regulations Preambles 1991-1996, at 30,996.

⁴⁹ *Id.* at 30,996.

the Commission stated that Transmission Providers may share "support" staff, such as legal counsel, accounting services and data processing who do not participate in operating activities.⁵⁰

99. The Commission has previously allowed the sharing of billing, accounting and legal employees. The rationale was that accountants and lawyers were obliged by professional responsibility to maintain the confidentiality of transmission or customer information. For those employees involved in "billing," the rationale was that the employees produced the bills after the transmission took place, and those involved in billing would have little opportunity to give marketing affiliates undue preferences. However, the recent investigations indicate that staff has been improper conduits of transmission information.

100. With respect to accountants, at most Transmission Providers, there are accountants who are responsible for day-to-day accounting functions, which may include billing, gas accounting and invoicing. There are also accountants or a "finance department" responsible for pulling together information for the corporation as a whole. The level of sharing of the accounting employees varies among Transmission Providers. In the *Transco* investigation, the Commission learned that marketing affiliate employees involved in billing and accounting had access to significant amounts of transmission information and confidential shipper information through shared databases and provided non-affiliate customer information to marketing affiliate employees.⁵¹ In an investigation of *Cleco*, the Commission learned that accounting and billing employees improperly re-designated certain power sales transactions between the utility's the wholesale merchant function and its affiliated power marketer.⁵²

101. Accountants and personnel involved in billing have the ability to provide preferential information, or, as in the case of *Cleco*, alter the books after transactions, to benefit an affiliate. While the Commission recognizes the efficiencies in allowing Transmission Providers to share accountants and employees involved in billing with their Energy Affiliates, we are concerned about their behavior and ability to provide preferential treatment. Therefore, the Commission will require that Transmission Providers train all shared support employees regarding the

⁵⁰ *AEP*, 81 FERC at 62,515.

⁵¹ *Transco*, 102 FERC ¶ 61,302 (2003).

⁵² *Cleco*, 104 FERC ¶ 61,125 (2003).

standards of conduct and that shared employees sign affidavits that they will not be a conduit for sharing transmission, market or customer information with a Marketing or Energy Affiliate.

iv. Sharing of Senior Officers and Directors

102. Many commenters urge the Commission to permit Transmission Providers to share senior officers and directors with their Marketing and Energy Affiliates consistent with current Commission practices.⁵³

103. The Major Issues Analysis recommended that the Commission retain this exception. In follow-up comments, this proposal received support from virtually all the commenters. This exception, which impacts the ability of the senior officers and directors to engage in corporate governance functions is important and merits retention. Therefore, the Commission will codify this exception in the regulatory text.

104. In the Final Rule, the Commission will continue to allow senior officers and directors who do not engage in transmission functions, including day-to-day duties and responsibilities for planning, directing, organizing or carrying out transmission-related operations to share such positions with the Transmission Provider and its Marketing or Energy affiliates. These shared executives may not serve as a conduit for sharing transmission, customer or market information with a Marketing or Energy Affiliate.

v. Sharing of Field and Maintenance Personnel

105. Numerous commenters urged the Commission to permit Transmission Providers to share field and maintenance personnel with their Marketing and Energy Affiliates, consistent with the Commission's current practices. In Order No. 497-F and in reviewing Tennessee's standards of conduct, the Commission found that "field employees," such as those who perform manual work (dig trenches) or purely technical duties (operate and

⁵³ On several occasions, the Commission has specifically addressed the sharing of employees. For example, in reviewing ANR Pipeline Company's standards of conduct, the Commission stated that the potential for abuse when there are shared officers or directors is minimized because the shared officers or directors normally should not receive confidential information from nonaffiliated shippers or potential nonaffiliated shippers nor would they be likely to receive transportation information.

maintain the pipeline's equipment),⁵⁴ are supportive in nature and would not have direct operational responsibilities. Similarly, field technicians or mechanics and their immediate supervisors would not be considered operating employees. The Commission added, however, that if supervisory field personnel can control a gas pipeline's operations, they are operating employees. The Commission also stated that if a supervisor has the ability to restrict or shut down the operation of a particular section of the pipeline, that supervisor is considered an operating employee.⁵⁵

106. The Major Issues Analysis recommended that the Commission retain this exception. In follow-up comments, this proposal received support from all the commenters. This exception merits retention. Therefore, the Final Rule will codify this exception in the regulatory text. In the Final Rule, the Commission will continue to allow the sharing of field and maintenance personnel.

vi. Transmission Employees That Engage in Operational Purchases

107. Several interstate natural gas pipelines, as well as INGAA, noted that the NOPR does not appear to retain the historical exclusion that permits transportation function employees to buy and sell gas for operational reasons, including to balance fuel usage, for storage operations, to effectuate cashouts and deplete or replenish line pack.⁵⁶

108. The Major Issues Analysis recommended that the Commission retain this exception. In follow-up comments, this proposal received support from many commenters, including AdHoc Marketers. This exception, which impacts practical operations of the transmission system is important and merits retention. Therefore, the Commission will codify this exception in the regulatory text.

vii. Risk Management Employees

109. Many commenters, including Ad Hoc Marketers, Basin Electric Coop, Florida Power Corp., Gulf South, Carolina Power & Light, Cinergy, PGE, EEI, INGAA, NEMA, NiSource, Pinnacle West, BPA, Atlantic City and Delmarva, urged the Commission to permit the

sharing of risk-management employees or functions. Discussions during the May 21 Conference revealed that there are many different definitions, uses and applications of the term risk management and credit management. For example, risk management functions can include: (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. EEI claims that corporate-wide risk management employees must understand the exposure of the entire corporation, including the Transmission Provider, the wholesale merchant function and Energy Affiliates, so that the corporation may fulfill its fiduciary duties to shareholders and corporate lending covenants. NiSource claims that risk management mitigates the corporation's overall risk and does not profit from transmission or energy commodity markets.

110. There are two issues that relate to risk management: (1) Whether it may be a shared function; and (2) if so, how to handle the transmission, customer and market information received by the risk management employees. According to Carolina Power & Light, Florida Power Corp. and EEI, risk information from business units filters up to senior management or a risk management committee, but then the risk management function does not provide any operational unit with information derived from any other business units and will not be a conduit for sharing information.

111. Several commenters, including FirstEnergy, state that risk management has become a core concern of the ratings organizations and urge the Commission to permit shared risk management. Portland General Electric states that risk management employees cannot use their access to transmission information to the detriment of third parties.

112. Risk management employees are in a position to use transmission, customer and market information to give Energy Affiliates an undue advantage where the members of the risk management committee are made up of employees from the transmission function and the Energy Affiliates. Therefore, any shared risk management employees may not be operating employees of either the Transmission Providers or the Marketing or Energy Affiliates nor can they be a conduit for improperly sharing information.

viii. Costs of Compliance

113. In determining the extent of independent functioning between the Transmission Providers and Energy Affiliates, the Commission has to balance the associated costs of separating shared functions against the benefit to competition and the elimination of discriminatory behavior.

114. As noted by many of the commenters, there will be costs, and for some transmission companies that have fully integrated production, gathering, generation, transmission and distribution functions, those costs could be considerable. In their comments, gas Transmission Providers provided one-time cost estimates to function independently of their affiliated LDCs that ranged from \$8,000,000 (Pauite) to \$210,000,000 (Questar),⁵⁷ while annual cost estimates ranged from \$5,000,000 (Pauite) to \$16,000,000 (National Fuel). Similarly, public utility Transmission Providers provided one-time cost estimates to function independently of their retail function that ranged from \$750,000 (Colorado Springs) to \$1,000,000 (DTE), while annual cost estimates ranged from \$1,500,000 (Conectiv) to \$95,000,000 (Cinergy).⁵⁸

115. Commenters provided estimates of costs in varying levels of detail, but the majority of the commenters' projected costs the independent functioning requirement reflect the "worst-case" scenario, that assumed the Commission would require a complete separation of affiliated Transmission Providers, holding companies and other Energy Affiliates as well as prohibit the sharing of support services and field personnel.⁵⁹ As Duke recognized, however, the magnitude of these increased costs depends on whether an LDC or load serving entity is defined as an Energy Affiliate, how the separation is implemented and whether specific functions, like administrative or support functions, and certain information, like specific transaction or reliability information, can be shared between the

⁵⁷ Questar's estimate includes capital investments, transmission investments, investment in additional systems, legal fees, design engineers, state regulatory efforts, duplicate SCADA and duplicate field operations.

⁵⁸ Few public utility transmission providers provided one-time cost estimates; several, like Cinergy and Southern provided estimates over a multi-year basis, \$180,000,000 over two years and \$350,000,000 over five years, respectively.

⁵⁹ Generally, the projected costs included: duplication of system control or control center facilities; duplication of field, maintenance, human resources, information technology, travel and other support-type personnel, duplication of customer service, load forecasting and scheduling employees, duplication of office facilities, computers, software, SCADA, as well as administrative and leasing costs.

⁵⁴ Additional examples of field or maintenance employees include: those who read meters, locate lines, do snow removal and maintain the roadways.

⁵⁵ Order No. 497-F, 66 FERC ¶ 61,347 at 62,165; Tennessee Gas Pipeline Company, 55 FERC ¶ 61,285 (1990).

⁵⁶ See, e.g., East Tennessee Natural Gas Co., 63 FERC ¶ 61,578, order on reh'g, 64 FERC ¶ 61,159 (1993).

transmission function and the retail sales function.

116. The Final Rule will not be as costly as anticipated by the commenters because the Final Rule excludes certain categories of affiliates, such as LDCs making only on-system sales, from the definition of Energy Affiliate, does not include solely bundled retail sales employees in the definition of Marketing Affiliate, allows the sharing of certain support and field personnel, and adopts the no-conduit rule as well as other exceptions to the informational disclosure prohibitions. The level of separation of functions required by the Final Rule is needed to ensure that Transmission Providers do not use their access to information about transmission to the detriment of customers or competitors. EPSC states that the long-term benefits could amount to several billion dollars.

117. The Commission disagrees with commenters' arguments that there is no harm to the market under the current level of sharing between Transmission Providers and their Energy Affiliates. There is harm to the market. For example, unduly preferential behavior in favor of a marketing affiliate harmed the retail customers of Idaho in the amount of \$5.8 million until the Commission required a refund as a condition of a settlement.⁶⁰ Similarly, the retail customers of Louisiana were harmed approximately \$2.1 million until the Commission required a refund as a condition of settlement.⁶¹ Although there was no specific quantification of harm caused by the unduly preferential behavior described in the *Transco* settlement, it was of sufficient magnitude that the Commission required the marketing affiliate to exit the market, and Transco paid a record civil penalty of \$20 million.

ix. Conclusion

118. The independent functioning requirement is a central component of the standards of conduct which limits the ability of the Transmission Provider to use its market power to preferentially benefit an Energy Affiliate. Nonetheless, it is necessary to recognize the practicalities of operating a transmission system, and, therefore, the Commission will continue to permit the sharing of certain non-transmission function employees between the Transmission Provider and its Marketing and Energy Affiliates in the Final Rule.

119. However, in an investigation of Transco, the Commission learned that

there are instances in which a shared information technology function provided a marketing affiliate an undue preference.⁶² Specifically, a shared IT employee designed a software program for the marketing affiliate that gave the marketing affiliate access to the pipeline's mainframe databases and used the pipeline's modeling information to optimize the marketing affiliate's nominations on the pipeline's transmission system. In these circumstances, the IT employees were no longer "support" employees, and gave the marketing affiliate unduly preferential access to valuable transmission information.

120. Similarly, if lawyers are participating in directing, organizing or executing transmission system operations or reliability functions or direct the policy of the Transmission Provider, they are not "support staff," rather they are transmission function operating employees who are subject to the standards of conduct. The exemption of "support employees" is not a mechanism to circumvent the prohibition on providing a Marketing or Energy Affiliate an undue preference relating to transmission or preferential access to transmission information.

121. Although the majority of "support employees" are genuinely performing supporting functions, some have or receive access to transmission or customer information. Therefore, the Final Rule will require Transmission Providers to train all of the "support" employees in the standards of conduct and prohibit them from acting as conduits for sharing information with marketing or Energy Affiliates. In addition, Transmission Providers with shared support employees will be subject to greater audit scrutiny.

E. Identification of Affiliates on Internet

122. Section 358.4(b) requires all Transmission Providers to post information with respect to their marketing and sales employees and energy affiliates on their OASIS or Internet Web sites, as applicable. Gas pipelines already post this information with respect to their marketing affiliates under § 161.3(l). Although the current regulations do not require public utility Transmission Providers to post the names and addresses of their marketing affiliates on the OASIS, the Commission did require the posting of organizational charts and job descriptions when it reviewed the electric Transmission Providers' implementation of the

standards of conduct.⁶³ The Major Issues Analysis recommended that the Commission revise some of the posting requirements consistent with some of the commenters' suggestions. Commenters have submitted follow-up comments, which make additional arguments and suggestions. The Final rule requires:

(1) A Transmission Provider must post the names and addresses of its sales and marketing units and Energy Affiliates on its OASIS or Internet Web site.

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

(3) A Transmission Provider must post comprehensive organizational charts showing:

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

(ii) For the Transmission Provider, the business units, job titles and descriptions, and chain of command for all positions, including officers and directors, with the exception of clerical, maintenance, and field positions. The job titles and descriptions must include the employee's title, the employee's duties, whether the employee is involved in transmission or sales, and the name of the supervisory employees who manage non-clerical employees involved in transmission or sales.

(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 sales unit or energy affiliate.

(iv) The Transmission Provider must update the information on its OASIS or Internet website, as applicable, required by §§ 358.4(1), (2) and (3) within seven business days of any change, posting 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 merger is announced.

(vi) All OASIS or Internet website postings required by Part 358 must comply, as applicable, with the requirements of § 37.3 or §§ 284.12(a) and (c)(3)(v) of this chapter.

⁶⁰ Idaho Power Co., IDACORP Energy, L.P., and IDACORP, Inc., 103 FERC ¶ 61,182 (2003).

⁶¹ *Cleco*, 104 FERC ¶ 61,125 (2003).

⁶² *Transco*, 102 FERC ¶ 61,302 (2003).

⁶³ American Electric Power Service Corporation, 81 FERC ¶ 61,332 (1997), *order on reh'g*, 82 FERC ¶ 61,131 (1998); *order on reh'g*, 83 FERC ¶ 61,357 (1998).

i. Posting Organizational Charts

123. The NOPR proposed that organizational charts and job descriptions be updated within three days of a change. Under the current gas standards of conduct, interstate natural gas pipelines are required to make changes to the postings within three days of a change. The Commission has never addressed the frequency of changes to be madder under the electric standards of conduct. Commenters asked the Commission to reconsider this proposal. They argued that there would be significantly more information to post if the Commission adopts a broad definition of the term Energy Affiliate. Williston Basin, Sempra and others urged that the organizational charts be updated every seven days. EEI, AEP, Basin Electric, Carolina Power & Light, Florida Power Corp. and PacifiCorp, urged that organizational charts be updated on a quarterly basis. Several commenters, including Carolina Power & Light and Florida Power Corp., argued that the posting of organizational charts is too broad and burdensome and others argued that it may be difficult to post all changes within three days given the complexity of some mergers or buy-outs. While some companies link their employee or human resource databases to the posted organizational charts and job descriptions, so that automatic downloads or updates take place each day, not all Transmission Providers have that capability. In balancing the burden associated with updating information with the efforts that would be needed to post organizational charts, the Commission has decided it would be reasonable to require the information to be posted within seven business days of a change.

124. Currently, the gas standards of conduct and the posting requirements at § 284.12, required gas Transmission Providers to retain information concerning organizational charts and job descriptions for three years. While § 37.6 of the Commission's regulations, 18 CFR 37.6 (2003), requires public utility Transmission Providers to retain OASIS postings for three years, this section did not specifically refer to the posting of organizational chart and job descriptions. Basin Electric recommended that all Transmission Providers be required to retain, for three years, all posted organizational charts and job descriptions to facilitate the Commission's monitoring and enforcement efforts. To avoid any confusion, the Commission will adopt this suggestion in the Final Rule.

125. Several commenters also argued that Transmission Providers that share

support employees that are of no interest to the Commission, such as legal, accounting, human resources, information technology, and customer service should not be required to post detailed information and job descriptions for each of these employees. With respect to posting organizational information where a Transmission Provider shares support, 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 is not required to provide names or job descriptions for the support or field or maintenance employees.

ii. Posting of Merger Information

126. The Commission's current policy with respect to announced mergers is to treat the potential merger partners as affiliates.⁶⁴ The NOPR solicited comments on whether the Standards of Conduct should require the posting of the potential merger partners on the OASIS or Internet Website. In response to the NOPR, several commenters, including APGA, Michigan Commission, New Power, Oklahoma Commission, Ohio Commission, Reliant and the CPUC, supported this proposal as being consistent with the Commission's current policy. Pan Canadian Energy urged that the Commission adopt the same posting requirements as the SEC. In contrast, Niagara Mohawk, Williston Basin, Calpine, Carolina Power and Light, Florida Power Corp., National Grid and Questar opposed posting merger information. EEI urged the posting of mergers after they are announced.

127. Following a review of the comments, the Commission will require the posting of merger information within seven days after a potential merger is announced as it is consistent with the Commission's policy on potential merger partners. The Transmission Provider shall post the name(s) and address(es) of potential merger partner(s) and Energy Affiliates on the OASIS or Internet website with the information in § 358.4(b), which requires a Transmission Provider to post the names and addresses of its sales and marketing units and Energy Affiliates on the OASIS or Internet website.

⁶⁴ 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 (Mar. 15, 2001).

iii. Transfer of Employees

128. Proposed § 358.4(c) parallels the current requirements of § 37.4(b)(2) of the electric standards of conduct, which permits Transmission Provider employees, marketing and sales employees and Energy Affiliate employees to transfer between such functions, as long as such transfers are not used as a means to circumvent the standards of conduct. Notices of employee transfers would be posted on the OASIS or Internet website. Several commenters sought clarification that the Commission did not intend to capture the transfer of all employees between the Energy and Marketing Affiliates. The Commission is granting the clarification. The Commission did not intend to require the posting of employees that transfer between the Energy and Marketing Affiliates.

129. Some commenters, such as Avista and PSE&G opposed the requirement to post the transfers between a Transmission Provider and its Energy Affiliates. While the Industrials urged the Commission to enhance and enforce posting requirements regarding employee transfers, Exelon, National Grid, and AEP asked for clarification that the posting of employees is for those employees that transfer between the Transmission Provider and the Marketing or Energy Affiliate, and not the transfer of employees among all the Marketing and Energy Affiliates.

130. The Commission is adopting § 358.4(c) as proposed. The transfer of employees between transmission and marketing or sales functions or between a Transmission Provider and its Energy Affiliates presents opportunities for the inappropriate sharing of information in circumvention of the standards of conduct. While a one-time transfer of an employee from the Transmission Provider to the marketing or sales function or energy affiliate (or vice versa) may not be a problem, transferring an employee multiple times (*i.e.*, cycling) is inconsistent with the independent functioning requirement. In *KN Interstate Gas Transmission Company (KN)*, the Commission prohibited the cycling of employees and held that transferred employees may not use, in their new jobs, transportation information that is not publicly available.⁶⁵

⁶⁵ 80 FERC ¶ 61,212 (1997). For example, in *KN*, the Commission suggested that a transferred employee could be restricted to assignments or responsibilities that would not use information obtained from non-affiliated or potential non-affiliated shippers or by showing that the transportation information has lost its commercial

131. The cycling of employees between the Transmission Provider, the Marketing or Energy Affiliates facilitates the sharing of preferential information between these functions. The posting of transfer information provides a technique to detect possible improper cycling of employees.⁶⁶ This enables the Commission and the public to monitor all transfers and to ensure that employees are not cycling between functions.

F. Books and Records

132. Proposed § 358.4(d) parallels current §§ 161.3(j) and 37.4(b)(6). Under this requirement, Transmission Providers must keep separate books and records from those of their Energy Affiliates. This ensures that the companies operate independently. It also helps to ensure that the regulated companies are not used to subsidize or support the unregulated companies. There were no comments regarding proposed § 358.4(d), and the Commission adopts it as proposed in the NOPR.

G. Written Procedures

133. The NOPR proposed that § 358.4(e) would replace the requirements of §§ 161.3(i) and 37.4(c), by requiring Transmission Providers to file with the Commission written procedures implementing the standards of conduct as follows:

The Transmission Provider must file with the Commission and post on the OASIS or Internet website, current written procedures implementing the standards of conduct as will enable customers and the Commission to determine that the Transmission Provider is in compliance with the requirements of this section.

134. The NOPR solicited comments on whether it is sufficient to file this information with the Commission or whether it should also be posted on the OASIS and Internet websites. As discussed in more detail below, several commenters suggested that it would be sufficient to post the procedures, rather than file them with the Commission, and made several other recommendations that the Commission is adopting in the Final Rule, as follows:

(e) Written procedures.

(1) By February 9, 2004, each Transmission Provider is required to file with the Commission and post on the OASIS or Internet website a plan and schedule for implementing the standards of conduct.

value, *i.e.*, a “cooling off” period before or after the transfer.

⁶⁶ See *e.g.*, Kinder Morgan Interstate Gas Transmission, L.L.C., *et al.*, 90 FERC ¶ 61,310 (2000).

(2) Each Transmission Provider must be in full compliance with the standards of conduct by June 1, 2004.

(3) Each Transmission Provider must post on the OASIS or Internet website, 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 June 1, 2004 or within 30 days of becoming subject to the requirements of this part.

(4) Transmission Providers will distribute the written procedures to all Transmission Provider employees and employees of the Marketing and Energy Affiliates.

(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.

(6) Transmission Providers are required to designate a Chief Compliance Officer who will be responsible for standards of conduct compliance.

i. Posting Standards of Conduct Procedures.

135. Several commenters recommended that the Commission require the posting of the Transmission Provider's written procedures implementing the Standards of Conduct on the OASIS or Internet website in lieu of filing them with the Commission. The Commission is adopting this suggestion and will modify § 358.4(e) to include a posting requirement instead of a filing requirement. 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. Filing the written procedures is not required because the Commission has sufficient mechanisms to address problems through the Enforcement Hotline and complaints under the FPA or the NGA. Moreover, Commission staff will aggressively monitor standards of conduct compliance. Each Transmission Provider is required to post on its OASIS or Internet website written procedures implementing the Standards of Conduct no later than June 1, 2004 or within 30 days of becoming subject to the requirements of Part 358.

136. With respect to the standards of conduct procedures that Transmission Providers will post on their OASIS or Internet Website merely restating the regulations or incorporating them by reference will not show acceptable compliance. The Transmission Providers must explain the measures they use to implement the standards of conduct, *e.g.*, how transmission information and confidential customer information is kept secure, whether the

standards of conduct have been distributed to employees, whether employees have been offered training on the standards of conduct, and whether employees are required to read and sign acknowledgment forms.

137. In addition, within 60 days of publication of the Final Rule in the **Federal Register**, each Transmission Provider is required to file with the Commission and post on the OASIS or Internet website an informational filing that includes a plan and schedule for implementing the standards of conduct by June 1, 2004, and the Transmission Provider's projected costs of complying with the standards of conduct.

ii. Training

138. Standards of Conduct training for employees was not discussed in the NOPR, although it is one of the factors the Commission historically looks at when determining if a Transmission Provider has complied with the standards of Conduct. In response to the NOPR, Cinergy, Ohio Commission, PGE and other commenters urged the Commission to require training and evaluation or to formalize the training requirement.

139. The Commission likes this suggestion, and will revise § 358.4(e) to adopt it.

iii. Chief Compliance Officer

140. The Ohio Commission recommended that the Commission should require the creation of a corporate ethics officer for each Transmission Provider, who would investigate and certify, on a periodic basis, whether the Transmission Provider is complying with the standards of conduct requirements. In several recent settlements, the Commission has required the hiring or designation of a Chief Compliance Officer. These individuals have a working knowledge of the company, its structure and operations and have been invaluable in post-settlement compliance activities.

141. It is appropriate to designate an individual to be responsible for standards of conduct compliance. Therefore, in the Final Rule, the Commission is requiring that each Transmission Provider hire or designate a Chief Compliance Officer. This individual will be responsible for employee training, answering employee questions and coordinating audits and investigations with Commission Staff, as well as duties to ensure that the Transmission Provider complies with the standards of conduct.

H. Non-Discrimination Requirements—§ 358.5

142. The principle underlying these requirements is that the Transmission Provider is prohibited from giving the employees of its Marketing or Energy Affiliates any undue preferential treatment. The proposed standards specify the ways in which a Transmission Provider must ensure equal treatment and equal access to information.

i. Information Access and Disclosure Prohibitions

143. The NOPR proposed information access and disclosure prohibitions that tracked the requirements of §§ 161.3(e) and (f) and 37.4(b)(3) and (4) from the gas and electric standards of conduct. The proposed prohibitions prevent a Transmission Provider from giving its Marketing or Energy Affiliates undue preferences over their unaffiliated customers through the exchange of “insider” information. The existing gas and electric standards of conduct concerning the permissible flow of information between affiliates are not consistent with each other, so as a result, the positions of the commenters varied. As discussed below, proposed § 358.5(a) and (b) generated a large volume of comments. Few commenters identified substantive concerns with the specific language of the proposed regulations; rather, they focused on what was not discussed in the NOPR, implementation of the information disclosure prohibitions. The Major Issues Analysis made a variety of recommendations and provided draft regulatory text. Virtually all of the follow-up comments addressed the information requirements. As discussed in more detail below, the Commission is revising the information requirements and, as recommended by commenters, codifying several exceptions. The Final Rule requires:

(a) Information access.

(1) The Transmission Provider must ensure that any employee of the Transmission Provider engaged in marketing or sales or any employee of any 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 the Transmission Provider engaged in marketing or sales or any employee of any 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) Prohibited disclosure.

(1) An employee of the Transmission Provider may not disclose to its marketing or sales employees, or to employees of the Transmission Provider’s 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 nonaffiliated transmission customers or potential nonaffiliated 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.

(3) If an employee of the Transmission Provider discloses information in a manner contrary to the requirements § 358.5(b)(1) and (2), the Transmission Provider must immediately post such information on the OASIS or Internet website.

(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.

(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.

(6) A Transmission Provider may share generation information necessary to perform generation dispatch with its Marketing and Energy Affiliate that does not include specific information about individual third party transmission transactions or potential transmission arrangements.

(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.

(8) A Transmission Provider is permitted to share crucial operating information with its

Energy Affiliates to maintain the reliability of the transmission system.

A. “No Conduit” or “Automatic Imputation”

144. *Current Policies:* Under the current gas standards of conduct, when an interstate natural gas pipeline company shares transportation information with its marketing affiliate, the pipeline must contemporaneously share that information with non-affiliates.⁶⁷ This requirement is designed to prevent a Transmission Provider from giving its marketing affiliate undue preferences over its unaffiliated customers through the exchange of transmission information. In addition, the current gas standards of conduct prohibit a pipeline from sharing with its marketing affiliate any information the pipeline receives from a nonaffiliated shipper or potential nonaffiliated shipper (this is considered confidential customer information).⁶⁸ The gas industry commonly refers to this as the “automatic imputation rule” because the Commission’s policy is that when an employee who performs functions for the pipeline and its marketing affiliate receives confidential shipper information, the information is automatically divulged or imputed to the marketing affiliate. In *Tenneco*, the Court of Appeals endorsed this approach when it found that the relevant question is not whether a shared employee who receives critical information will disclose it to the affiliate, but whether that shared employee will in fact receive such information in the first place, or alternatively, how the pipeline intends to keep information supplied by nonaffiliated shippers from reaching a shared employee.⁶⁹

145. Over the past 15 years, several interstate natural gas pipelines have urged the Commission to adopt different approaches; (1) apply the “automatic imputation rule” only to shared operating employees; and (2) adopt a “no-conduit rule.”⁷⁰ Up until now,

⁶⁷ Standard F states that to the extent a pipeline provides to a marketing affiliate information related to transportation of natural gas, it must provide that information contemporaneously to all potential shippers, affiliated and non-affiliated on its system. See 18 CFR 161.3(f) (2003).

⁶⁸ Standard E states that a pipeline may not disclose to its marketing affiliate any information the pipeline receives from a nonaffiliated shipper or potential nonaffiliated shipper. See 18 CFR 161.3(e) (2003).

⁶⁹ *Tenneco Gas v. FERC*, 969 F.2d 1187 (D.C. Cir. 1992) (*affirmed in part and remanded in part*).

⁷⁰ Under a “no-conduit rule,” a shared non-operating employee could receive confidential information as long as the shared employee did not act as a conduit for actively sharing the information

Commission has rejected the “no-conduit rule” for the gas industry.⁷¹

146. In contrast, under the current electric standards of conduct, which contain broader information disclosure prohibitions, the Commission has permitted shared non-operating employees to receive confidential shipper information as long as the shared employee did not act as a conduit for sharing the information with wholesale merchant function employees.⁷² In implementing Order No. 889, the Commission justified the different rule because the electric standards of conduct provide a stricter separation of functions requirement than the pipeline standards.⁷³ When the Commission reviewed the standards of conduct for public utility Transmission Providers, the Commission adopted the “no-conduit” rule, rather than applying the “automatic imputation rule.”⁷⁴

147. The NOPR was silent on how the information prohibitions would be applied to shared employees, that is, whether the Commission would adopt the “automatic imputation rule” from the gas standards of conduct or the “no-conduit rule” from the electric standards of conduct. In their Initial Comments, many commenters from both the gas and electric industries, requested, without much explanation, that the Commission codify the “no-conduit rule” and apply to it all Transmission Providers. The Major Issues Analysis proposed to apply the automatic imputation rule. After much discussion at the May 21st Conference, the Commission received more than 100 supplemental comments on this issue.

with the marketing affiliate or wholesale merchant function.

⁷¹ See Order Nos. 497-E and F; *Amoco Production Co. and Amoco Energy Trading Co. v. Natural Gas Pipeline Company of America*, 83 FERC ¶ 61,197 at 61,849 (1998).

⁷² Under the gas standards of conduct, the contemporaneous disclosure requirement only applies to transportation information, while under the electric standards of conduct, the contemporaneous disclosure requirement applies to transmission and market information and prohibits off-OASIS communications. See 18 CFR 37.4(4) and 161.3(f) (2003).

⁷³ Under the gas standards of conduct, to the maximum extent practicable, a pipeline’s operating employees and the operating employees must function independent of each other. See 18 CFR 161.3(g) (2003). In contrast, the employees of the electric Transmission Provider engaged in transmission system operations must function independently of the employees engaged in wholesale merchant functions, except for emergency circumstances affecting system reliability. See 18 CFR 37.4(a)(1) (2003). The key difference is the flexibility under the term “maximum extent practicable,” which permits, in certain situations, the sharing of operating employees.

⁷⁴ *Allegheny Power Service Corp., et al.*, 84 FERC ¶ 61,316 at 62,425 (1998).

Almost every segment of the industry and all major industry trade associations that opposed the automatic imputation rule argued that it could force the break-up of service companies and that the limitations on the sharing of information would restrict a director, officer or senior manager’s ability to engage in corporate governance functions. Of the states that commented, Connecticut favored the automatic imputation rule, while Alabama, Indiana, Nebraska, and Ohio favored the no-conduit rule.

148. A few commenters supported the “automatic-imputation” proposal. NASUCA stated that the no-conduit rule fails to recognize the reality that a person who gains access to important information is likely to act upon that information. Rather than advocate a particular position with respect to these options, the Industrials merely stated that officers and directors should be allowed to discharge their duties. Sempra raised a valid point—the potential for harm is great when the Commission permits the sharing of operating employees, but the danger is low when the shared employees are engaged in “support-type” services, while the potential for cost savings by permitting the sharing of “support-type” services is significant.

149. One significant event that occurred after the NOPR was the passage of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley Act), which requires corporate officers to engage in informed oversight and requires CEOs to personally vouch for the veracity, timeliness and fairness of their companies’ public disclosures.⁷⁵ In addition, there is significant industry-wide concern that the automatic imputation rule would limit the information a director, officer or senior manager could receive, effectively restricting his or her ability to engage in the corporate governance function under the Sarbanes-Oxley Act.⁷⁶

150. After carefully considering the comments, the Final Rule will adopt the “no-conduit rule.” As a result, interstate natural gas Transmission Providers,

⁷⁵ Effective August 29, 2002, the Securities and Exchange Commission adopted a Final Rule that requires the principal executive and financial officers each to certify the financial and other information submitted in quarterly and annual reports to the SEC. See Ownership Reports and Trading by Officers, Directors and Principal Security Holders, Final Rule and Request for Comments, 67 FR 56461 (Sept. 3, 2002).

⁷⁶ In July 2003, Commission staff met with representatives of the Securities and Exchange Commission (SEC) to get a better understanding how the SEC implements the Sarbanes-Oxley Act, and how the Commission’s proposed information disclosure prohibitions would affect compliance with the Sarbanes-Oxley Act.

which have been operating under the stricter “automatic imputation rule” since 1987, will now be covered by the more flexible “no conduit rule.” This rule will prohibit employees of a Transmission Provider from using any affiliate or employee of an affiliate as a conduit for sharing information that is prohibited by § 358.5(b)(1) and (2).

B. Sharing of Operational Information

151. Many commenters from virtually all segments of the gas industry argued that the separation of functions and the information disclosure prohibitions required by the NOPR will prohibit a Transmission Provider from communicating crucial operational information with its affiliated producers, gatherers or LDCs. They argued that prohibiting certain of these communications will endanger the reliability of the gas transmission systems. NGSAs proposed that employees who are responsible solely for the physical operations of their structure (infrastructure operators) be permitted to share operational information because those infrastructure operators are not involved in other functions. Several commenters argued that the Commission should adopt the approach taken when implementing Order No. 889, where the Commission permitted Transmission Providers to share certain types of operational information with its generation function and wholesale merchant function. The Major Issues Analysis recommended that Transmission Providers and their Energy Affiliates be permitted to share crucial operational information necessary to maintain the reliability of the transmission system.

152. In supplemental comments, many commenters, including Alliance, BP America, EEI, Duke, First Energy, INGAA, National Grid, and Williston Basin supported the Staff’s proposal. NiSource expressed concern that the exception may be too narrow because certain day-to-day information is needed on both sides of the meter to ensure that a gas pipeline meets its service obligations, regardless of whether the interconnected party is an affiliate. Several commenters encouraged the Commission to create a list of permissible communications. However, the AdHoc Marketers, Cinergy and Shell Offshore discouraged the Commission from creating a “laundry list” of permissible communications because it would be inadequate and incomplete and create regulatory uncertainty.

153. The Commission is declining to create a list of permissible communications. However,

Transmission Providers are encouraged to contact the Hotline for guidance regarding permissible communications. Although the Commission will permit Transmission Providers and their Energy Affiliates to share crucial operational information necessary to maintain the reliability of the transmission system, we caution that this is not to be a mechanism to circumvent the rules.

C. Generation Dispatch

154. Many commenters argued that the separation of functions and the information disclosure prohibitions suggested by the NOPR would prohibit a Transmission Provider from communicating crucial operational information with its affiliated retail sales function. They argue that prohibiting certain of these communications will endanger the reliability of the electric transmission systems. Several commenters argue that the Commission should adopt the approach taken when implementing Order No. 889, where the Commission permitted Transmission Providers to share certain types of operational information with its generation function and wholesale merchant function.⁷⁷ Cinergy and PGE urge the Commission to codify the case-specific exemption that permits Transmission Providers to share with generation dispatch employees information necessary to perform such dispatch, provided that such information does not include specific information about individual third-party transmission arrangements.⁷⁸ Although the Commission is not providing a list of types of communications, we will codify the exception that permits the sharing of generation-related information. For example, the Marketing and Energy Affiliates may have access to information such as area control error, regulation rates, but not the specific load of third party transmission customers. Likewise, wholesale merchant function employees or employees of the Energy Affiliates may not have access to information that would enable them to determine, directly or indirectly, the interchange schedules of third party customers, consistent with Commission precedent.⁷⁹

⁷⁷ See, e.g., American Electric Power Service Corp., *et al.*, 81 FERC ¶ 61,332 (1997); Allegheny Power Service Corporation, *et al.*, 81 FERC ¶ 61,339 (1997); Allegheny Power Service Corporation, *et al.*, 84 FERC ¶ 61,131 (1998).

⁷⁸ See, e.g., Indianapolis Power and Light Co., 90 FERC ¶ 61,174 (2000).

⁷⁹ APS, 84 FERC ¶ 61,131 (1998).

155. Exelon notes that nuclear plant operators belonging to an Energy Affiliate of a Transmission Provider would be prohibited from receiving information they need to satisfy certain requirements of the Nuclear Regulatory Commission's regulations. For example, station blackout rules require that nuclear stations have real-time information on grid disturbances and the duration of power unavailability under 10 CFR 50.63 (2003). The Transmission Provider would be permitted to share this type of information with its Energy Affiliate under this exception.

D. Voluntary Consent

156. Although the NOPR did not discuss whether a non-affiliate could voluntarily consent, in writing, to allow a Transmission Provider to share the non-affiliate's information with the marketing affiliate, numerous commenters suggested that the Commission codify this exception.⁸⁰ The Major Issues Analysis concurred with the commenters' suggestions and provided draft regulatory text to codify this policy. Carolina Power & Light, Duke Energy, EEI and Florida Power Corp., among others, supported the Staff's recommendation. However, in follow-up comments, several commenters, including Indicated Shippers, BP America, BP Energy, Exxon-Mobil, and Occidental Energy Marketing urged the Commission not to adopt the voluntary consent provision. They argue that it is anti-competitive because even if a shipper agreed to disclose the information, the consent may not truly be voluntary because the Transmission Provider could be exercising market power.

157. The Commission is adopting this voluntary consent exception, which impacts practical operations of the transmission system, and is incorporated into the regulatory text of the Final Rule. Any shipper may file a formal complaint or approach the Enforcement Hotline on a confidential basis if a Transmission Provider is abusing this exception. Transmission Providers are required to preserve all written consents, and any amendments, transfers or withdrawals of them.

E. Transaction Specific Exemption

158. Under current policy regarding the gas standards of conduct, an interstate natural gas pipeline is not required to contemporaneously disclose to all shippers information relating to a

⁸⁰ See, e.g., Southern Natural Gas Company, 70 FERC ¶ 61,348 (1995).

marketing affiliate's specific request for transportation service.

159. In contrast, current § 37.4(b)(3) and (4) of the Commission's regulations, 18 CFR 37.4(b)(3) and (4) (2003), prohibit the disclosure of any transmission information to wholesale merchant employees by off-OASIS communications. Order No. 889 did clarify that this does not foreclose customers, including wholesale merchant employees, from obtaining information about the status of particular transactions.⁸¹ However, the Transmission Provider must provide the same types of information with the same level of detail to all customers presenting similar requests.

160. The NOPR did not specifically address this issue.

161. Virtually every segment of the gas industry requested clarification whether the Commission would continue the "specific-transaction exception." The Major Issues Analysis recommended that the Commission codify this policy and provided draft regulatory text for comment. All the follow-up comments from the gas industry, as well as Cinergy, EEI and Exelon supported the Major Issues Analysis and draft regulatory text. This exception, which impacts practical operations of the transmission system merits retention, and the regulatory text has been revised accordingly.

ii. Implementing Tariffs

162. Proposed § 358.5(c) combines §§ 161.3(a), (b), (c), (d) and (k) and § 37.4(b)(5), under which Transmission Providers are required to treat all customers in a fair and impartial manner. For example, Transmission Providers must apply tariff provisions in a manner that treats all transmission customers in a non-discriminatory manner. Transmission Providers would be prohibited from giving their marketing and sales employees and Energy Affiliates' employees preferential treatment, such as more flexible service. There were no comments on this proposed section in response to the NOPR, and the Final Rule adopts the language as originally proposed.

I. Discounts

163. The NOPR proposed that § 358.5(d) would combine the requirements of §§ 161.3(h) and 37.6(c)(3). The NOPR stated that proposed § 358.5(d) is consistent with the way electric Transmission Providers currently treat discounts—any offer of a

⁸¹ FERC Stats. & Regs., Regulation Preambles 1991–1996 ¶ 31,035 at 31,597.

discount for any transmission service made by the Transmission Provider must be announced to all potential customers solely by posting on the OASIS. The NOPR did not propose to change the OASIS requirements currently codified at § 37.6(c)(3).

164. Proposed § 358.5(d) would change current discounting requirements for natural gas pipelines, however. Currently, § 161.3(h)(1), states that if a pipeline offers a discount to its marketing affiliate, the pipeline must make a comparable discount contemporaneously available to all similarly situated non-affiliated shippers. However, under current § 161.3(h)(2), the pipeline is required to post relevant information (name of affiliate, maximum rate, discounted rate, delivery points, quantity of gas and conditions) on its Internet website within 24 hours of the time at which gas first flows under a discounted transaction. The NOPR also solicited comments on whether it would be necessary to continue posting discount information for gas transactions under proposed § 358.5(d) when rate information is required to be posted under §§ 284.13(b)(1) and (2) of the Commission's regulations.⁸²

165. Commenters from the electric industry were largely silent on this issue.

166. A few commenters, APGA, Amoco/BP, CPUC and Reliant, offered unqualified support for the requirement to offer all discounts by posting on OASIS or Internet websites. In addition, the Ohio Commission, Michigan Commission, and Oklahoma Commission stated that advance knowledge of discounts enables affiliates to profit from "insider trading." Twenty-six commenters, primarily from the natural gas industry, INGAA, Ad Hoc Marketers, NGSAA, EPSSA, and Industrials, strongly opposed posting discounts at the time of the offer. The commenters point out that discounting is fundamentally different between the gas and electric industries. In the gas industry, pipelines face pipeline-to-pipeline competition and competition from alternative fuel sources. They argue that the posting requirement is inconsistent with selective discounting for the gas industry and that this proposal would discourage discounting. Many expressed

concern about the vagueness of the word "offer" and offered various definitions or proposals for when the information should be posted. Several commenters, AGA, Dominion, Industrials and NiSource, recommended that discounts be posted after they are executed.

167. The Major Issues Analysis recommended that the Final Rule require the transmission provider to post a discount at the conclusion of negotiations, "when the discount offer is contractually binding." The majority of follow-up comments supported the Major Issues Analysis recommendation. However, the Transmission Group is concerned that the discount posting requirements will discourage shippers from making early commitments to pipeline projects, *e.g.*, precedent agreements.

168. The Final Rule adopts Commission staff's recommendation. This result balances the importance of equal and timely access to discount information with clarity. The term "offer" could have been interpreted in a variety of ways and the text proposed by staff provided additional clarification on the timing of the posting. However, the current requirement, under § 161.3(h)(2), to post information within 24 hours of gas flow is too late to afford an unaffiliated competitor the opportunity to negotiate a comparable deal in today's fast-paced markets.

169. The Transmission Group has not provided any reason for claiming that the posting of a discount "when the discount offer is contractually binding" would discourage a potential shipper from entering into a precedent agreement. The Commission disagrees with the Transmission Group's suggestion that the posting of discounts will discourage precedent agreements.

V. Conforming Changes

170. The Commission proposes to make conforming changes to the regulations to delete references to Parts 37 and 161, as necessary, and add references to Part 358.

VI. Additional Policy Changes Not Adopted

171. The NOPR also solicited comments on specific additional policy suggestions, such as structural remedies, capacity limits, revising capacity allocation methods, disgorgement of opportunity costs and prohibiting profit sharing mechanisms. For the most part, the commenters, which were predominantly from the gas industry on these policy suggestions, argued that there was no evidence that justified the need for implementing, on a generic

basis, the additional policy suggestions discussed in the NOPR. Very few commenters supported any of the measures. At this time, the Commission is not adopting any of these additional measures. However, we note that these are the some of the types of remedies that may be imposed if a Transmission Provider violates the standards of conduct.

172. The NOPR also solicited comments on whether the Commission should, in this proceeding or in a separate proceeding, codify the electric market-based rate power sales codes of conduct to govern the relationship between public utilities and their power marketing affiliates. The Commission has decided not to codify the codes of conduct at this time, but may do so in a separate proceeding.

VII. Regulatory Flexibility Act Certification

173. The Regulatory Flexibility Act⁸³ requires rulemakings to contain either a description and analysis of the effect that a rule will have on small entities or to certify that the rule will not have a significant economic effect on a substantial number of small entities. Because most Transmission Providers do not fall within the definition of "small entity,"⁸⁴ the Commission certifies that this rule will not have a significant economic impact on a substantial number of small entities.

VIII. Information Collection Statement

174. The Office of Management and Budget's (OMB) regulations require approval of certain information collection requirements imposed by agency rules.⁸⁵ Upon approval of a collection of information, OMB will assign an OMB control number and an expiration date. Respondents subject to the filing requirements of this rule will not be penalized for failing to respond to these collections of information unless the collections of information display a valid OMB control number.

175. The Final Rule replaces existing rules under Parts 161 and 37 with comparable rules at Part 358. Under the current requirements at Parts 161 and 37, Transmission Providers are posting certain information with respect to their marketing affiliates or wholesale merchant functions on their respective OASIS nodes or Internet websites. The final rule also requires the Transmission Providers to post the same information on their OASIS or Internet websites with respect to the Transmission

⁸² Under 18 CFR 284.13(b)(1) and (2), a pipeline must post on its Internet Web site, no later than the time of the first nomination under a transaction, firm contract information and interruptible agreement information, including the charged rate, the quantity of gas scheduled, receipt and delivery points, the identity of the shipper, and whether the shipper is affiliated.

⁸³ 5 U.S.C. 601-612 (2000).

⁸⁴ See 5 U.S.C. 601(3) (2000).

⁸⁵ 5 CFR 1320.11 (2003).

Providers' Energy Affiliates. This information helps potential customers and the Commission determine whether or not there has been discrimination in pipeline/affiliate/nonaffiliated transactions.

176. The Commission is submitting these posting requirements to OMB for its review and approval under Section 3507(d) of the Paperwork Reduction Act of 1995, 44 U.S.C. 3507(d) (2000).

Interested persons may obtain information on the reporting requirements by contacting the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426 (Attention: Michael Miller, Office of the Executive Director, 202-502-8415) or from the Office of Management and Budget (Attention: Desk Officer for the Federal Energy Regulatory Commission, fax: 202-395-7285, e-mail

pamelabeverly.oirasubmission@omb.eop.gov).

Public Reporting Burden

177. The Commission did not receive specific comments concerning its burden estimates and uses the same estimates here in the Final Rule. Comments on the substantive issues raised in the NOPR are addressed elsewhere in the Final Rule.

Data collection	Number of respondents	Number of responses	Hours per response	Total annual hours
	257	1	65	16,705

Total Annual Hours for Collection: (Reporting + Recordkeeping, (if appropriate)) = 16,705.

Information Collection Costs:

178. The Commission sought comments on the costs to comply with these requirements. No comments were received. The Commission is projecting the average annualized cost per respondent to be the following: total hours divided by 2,080 (total work hours in a year) times \$117,041 = \$939,985.53.

Annual Capital/Startup costs	\$0
Annualized Costs (Operations & Maintenance)	939,985
Total Annualized Costs	939,985

Title: FERC-592 and 717.

Action: Revision of Currently Approved Collection of Information.

OMB Control No: 1902-0157 and 1902-173.

Respondents: Business or other for profit.

Frequency of Responses: On occasion.

Necessity of the Information:

179. The information is necessary to ensure that all regulated transmission providers treat all transmission customers in a non-discriminatory basis. By requiring the posting of information regarding transmission, all non-affiliated customers have the ability to acquire information simultaneously with affiliated customers in a pro-competitive environment. The information also permits the market participants and the Commission to monitor the transmission market in a timely and efficient manner.

Internal Review

180. The Commission has reviewed the requirements pertaining to natural gas pipelines and transmitting electric utilities and determined the revisions in the final rule are necessary because of

the evolving energy market. The Commission is consolidating the standards of conduct to govern the relationships between regulated transmission providers and their affiliates that engage in or are involved in transmission transactions or manage or control transmission capacity. Although the current standards of conduct limit a Transmission Provider's ability to make or grant undue preferences to the wholesale merchant function of their businesses (in the electric area) or to their marketing affiliates, they do not cover the Transmission Providers' other non-marketing affiliates.

181. These requirements conform to the Commission's plan for efficient information collection, communication, and management within the gas and electric industries. The Commission has assured itself, by means of internal review, that there is specific, objective support for the burden estimates associated with the information requirements.

182. Interested persons may obtain information on the reporting requirements by contacting: Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, Attention: Michael Miller, Office of the Chief Information Officer, Phone: (202) 208-1415, fax: (202) 208-2425, e-mail: *Michael.Miller@ferc.gov*.

183. Comments on the requirements of the Final Rule may also be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503 [Attention: Desk Officer for the Federal Energy Regulatory Commission].

IX. Environmental Statement

184. Commission regulations require that an environmental assessment or an environmental impact statement be prepared for any Commission action that may have a significant adverse

effect on the human environment.⁸⁶ The Commission has categorically excluded certain actions from these requirements as not having a significant effect on the human environment.⁸⁷ This final rule falls within the categorical exclusions provided in the Commission's regulations.⁸⁸ Therefore, an environmental assessment is unnecessary and has not been prepared in this rulemaking.

X. Document Availability

185. 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.

186. 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.

187. 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) 502-6652, or by e-mail at *FERCOnlineSupport@ferc.gov*, for TTY (202) 502-8659.

⁸⁶ Regulations Implementing National Environmental Policy Act, 52 FR 47897 (Dec. 17, 1987); FERC Stats. & Regs. ¶30,783 (1987).

⁸⁷ 18 CFR 380.4 (2003).

⁸⁸ 18 CFR 380.4(a)(2)(ii) and 380.4(a)(5) (2003).

XI. Effective Date and Congressional Notification

188. This final rule will take effect on February 9, 2004. The Commission has determined with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget that this rule is a "non-major rule" within the meaning of Section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996.⁸⁹ The Commission will submit the final rule to both houses of Congress and the General Accounting Office.⁹⁰

List of Subjects

18 CFR Part 37

Electric power rates, Electric utilities, Reporting and recordkeeping requirements.

18 CFR Part 161

Natural gas, Reporting and recordkeeping requirements.

18 CFR Part 250

Natural gas, Reporting and recordkeeping requirements.

18 CFR Part 284

Continental Shelf, Natural gas, Reporting and recordkeeping requirements.

18 CFR Part 358

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

By the Commission. Commissioner Brownell dissenting in part with a separate statement attached.

Magalie R. Salas,
Secretary.

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

PART 37—OPEN ACCESS SAME-TIME INFORMATION SYSTEMS

■ 1. The authority citation for part 37 continues to read as follows:

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

■ 2. In part 37, the heading is revised to read as set forth above.

§ 37.4 [Removed and Reserved]

■ 3. Section 37.4 is removed and reserved.

§ 37.6 [Amended]

■ 4. In § 37.6(g)(3), the word "§ 37.4(b)(2)" is removed and the word "§ 358.4(c)" is added in its place and in § 37.6(g)(4), the word "§ 37.4(b)(5)(iii)" is removed and the word "§ 358.5(c)(4)" is added in its place.

PART 161—[REMOVED]

■ 5. Part 161 is removed in its entirety.

PART 250—FORMS

■ 6. The authority citation for part 250 continues to read as follows:

Authority: 16 U.S.C. 717–717w, 3301–3432; 42 U.S.C. 7101–7352.

§ 250.16 [Amended]

■ 7. In § 250.16(a), the word "§ 161.2" is removed and the word "§ 358.3" is added in its place and in § 250.16(e), the word "§ 161.3" is removed and the words "§§ 358.4 and 358.5" are added in its place.

PART 284—CERTAIN SALES AND TRANSPORTATION OF NATURAL GAS UNDER THE NATURAL GAS POLICY ACT OF 1978 AND RELATED AUTHORITIES

§ 284.13 [Amended]

■ 8. In § 284.13(a), the word "Part 161" is removed and the word "part 358" is added in its place.

§ 284.286 [Amended]

■ 9. In § 284.286(c), the words "§ 161.3(a), (b), (d), and (k) of this chapter and comply with § 161.3(c), (e), (f), (g), (h), and (l) of this chapter" are removed and the word "part 358" is added in their place.

■ 10. Subchapter S, consisting of part 358, is added to read as follows:

SUBCHAPTER S—STANDARDS OF CONDUCT FOR TRANSMISSION PROVIDERS

PART 358—STANDARDS OF CONDUCT

Sec.

- 358.1 Applicability.
- 358.2 General principles.
- 358.3 Definitions.
- 358.4 Independent functioning.
- 358.5 Non-discrimination requirements.

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.

§ 358.1 Applicability.

(a) This part applies to 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.

(b) This part applies to any public utility that owns, operates, or controls facilities used for the transmission of electric energy in interstate commerce.

(c) This part does not apply to a public utility Transmission Provider that is a Commission-approved Independent System Operator (ISO) or Regional Transmission Organization (RTO). If a public utility transmission owner participates in a Commission-approved ISO or RTO and does not operate or control its transmission facilities and has no access to transmission, customer or market information covered by § 385.5(b), it may request an exemption from this part.

(d) A Transmission Provider may file a request for an exemption from all or some of the requirements of this part for good cause.

§ 358.2 General principles.

(a) A Transmission Provider's employees engaged in transmission system operations must function independently from the Transmission Provider's marketing and sales employees, and from any employees of its 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 an Energy Affiliate.

§ 358.3 Definitions.

(a) *Transmission Provider* means:

(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.

(b) *Affiliate* means:

(1) Another person which controls, is controlled by or is under common control with, such person, and

(2) For any exempt wholesale generator, as defined under Section 32(a) of the Public Utility Holding Company Act of 1935, as amended, the same as provided in Section 214 of the Federal Power Act.

(c) *Control* (including the terms "controlling," "controlled by," and "under common control with") as used in this part and § 250.16 of this chapter, includes, but is not limited to, the possession, directly or indirectly and whether acting alone or in conjunction with others, of the authority to direct or cause the direction of the management or policies of a company. A voting

⁸⁹ 5 U.S.C. 804(2) (2000).

⁹⁰ 5 U.S.C. 801(a)(1)(A) (2000).

interest of 10 percent or more creates a rebuttable presumption of control.

(d) *Energy Affiliate* means an affiliate of a Transmission Provider 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;

(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;

(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 that natural gas or energy.

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

(e) *Marketing, sales or brokering* means a sale for resale of natural gas or electric energy in interstate commerce. 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, and

(2) A public utility Transmission Provider's energy sales unit, unless such unit engages solely in bundled retail sales.

(3) Marketing or sales does not include incidental purchases or sales of natural gas to operate interstate natural gas pipeline transmission facilities.

(f) *Transmission* means natural gas transportation, storage, exchange, backhaul, or displacement service provided pursuant to subpart A of part 157 or subparts B or G of part 284 of this chapter; and electric transmission, network or point-to-point service, reliability service, ancillary services or other methods of transportation or the interconnection with jurisdictional transmission facilities.

(g) *Transmission Customer* means any eligible customer, shipper or designated agent that can or does execute a transmission service agreement or can

or does receive transmission service, including all persons who have pending requests for transmission service or for information regarding transmission.

(h) *Open Access Same-time Information System or OASIS* refers to the Internet location where a public utility posts the information, by electronic means, required by part 37 of this chapter.

(i) *Internet Web site* refers to the Internet location where an interstate natural gas pipeline posts the information, by electronic means, required by §§ 284.12 and 284.13 of this chapter.

(j) *Transmission Function employee* means 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.

§ 358.4 Independent functioning.

(a) Separation of functions.

(1) 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.

(2) Notwithstanding any other provisions in this section, in emergency circumstances affecting system reliability, a Transmission Provider may take whatever steps are necessary to keep the system in operation. Transmission Providers must report to the Commission and post on the OASIS or Internet website, as applicable, each emergency that resulted in any deviation from the standards of conduct, within 24 hours of such deviation.

(3) The Transmission Provider is prohibited from permitting the employees of its Marketing or Energy Affiliates from:

(i) Conducting transmission system operations or reliability functions; and

(ii) Having access to the system control center or similar facilities used for transmission operations or reliability functions that differs in any way from the access available to other transmission customers.

(4) Transmission Providers are permitted to share support employees and field and maintenance employees with their Marketing and Energy Affiliates.

(b) Identifying affiliates on the public Internet.

(1) A Transmission Provider must post the names and addresses of its sales

and marketing units and Energy Affiliates on its OASIS or Internet Web site.

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

(3) A Transmission Provider must post comprehensive organizational charts showing:

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

(ii) For the Transmission Provider, the business units, job titles and descriptions, and chain of command for all positions, including officers and directors, with the exception of clerical, maintenance, and field positions. The job titles and descriptions must include the employee's title, the employee's duties, whether the employee is involved in transmission or sales, and the name of the supervisory employees who manage non-clerical employees involved in transmission or sales.

(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 sales unit or Energy Affiliate.

(iv) The Transmission Provider must update the information on its OASIS or Internet website, as applicable, required by §§ 358.4(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 merger is announced.

(vi) All OASIS or Internet website postings required by part 358 must comply, as applicable, with the requirements of § 37.3 or §§ 284.12(a) and (c)(3)(v) of this chapter.

(c) *Transfers*. Employees of the Transmission Provider, marketing or

sales unit 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 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 Function 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.

(d) *Books and records.* A Transmission Provider must maintain its books of account and records (as prescribed under parts 101, 125, 201 and 225 of this chapter) separately from those of its Energy Affiliates and these must be available for Commission inspections.

(e) *Written procedures.*

(1) By February 9, 2004, each Transmission Provider is required to file with the Commission and post on the OASIS or Internet website a plan and schedule for implementing the standards of conduct.

(2) Each Transmission Provider must be in full compliance with the standards of conduct by June 1, 2004.

(3) The Transmission Provider must post on the OASIS or Internet website, 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 June 1, 2004 or within 30 days of becoming subject to the requirements of part 358.

(4) Transmission Providers will distribute the written procedures to all Transmission Provider employees and employees of the Marketing and Energy Affiliates.

(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.

(6) Transmission Providers are required to designate a Chief Compliance Officer who will be responsible for standards of conduct compliance.

§ 358.5 Non-discrimination requirements.

(a) Information access.

(1) The Transmission Provider must ensure that any employee of the Transmission Provider engaged in marketing or sales or any employee of

any 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 the Transmission Provider engaged in marketing or sales or any employee of any 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) Prohibited disclosure.

(1) An employee of the Transmission Provider may not disclose to its marketing or sales employees, or to employees of the Transmission Provider's 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 Web site, through access to information not posted on the OASIS or Internet Web site that is not contemporaneously available to the public, or through information on the OASIS or Internet Web site that is not at the same time publicly available.

(2) A Transmission Provider may not share any information, acquired from nonaffiliated transmission customers or potential nonaffiliated 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.

(3) If an employee of the Transmission Provider discloses information in a manner contrary to the requirements of § 358.5(b)(1) and (2), the Transmission Provider must immediately post such information on the OASIS or Internet Web site.

(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.

(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.

(6) A Transmission Provider may share generation information necessary to perform generation dispatch with its Marketing and Energy Affiliate that does not include specific information about individual third party transmission transactions or potential transmission arrangements.

(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.

(8) A Transmission Provider is permitted to share crucial operating information with its Energy Affiliate to maintain the reliability of the transmission system.

(c) Implementing tariffs.

(1) A Transmission Provider must strictly enforce all tariff provisions relating to the sale or purchase of open access transmission service, if these tariff provisions do not permit the use of discretion.

(2) A Transmission Provider must apply all tariff provisions relating to the sale or purchase of open access transmission service in a fair and impartial manner that treats all transmission customers in a non-discriminatory manner, if these tariff provisions permit the use of discretion.

(3) A Transmission Provider must process all similar requests for transmission in the same manner and within the same period of time.

(4) The Transmission Provider must maintain a written log, available for Commission audit, detailing the circumstances and manner in which it exercised its discretion under any terms of the tariff. The information contained in this log is to be posted on the OASIS or Internet Web site within 24 hours of when a Transmission Provider exercises

its discretion under any terms of the tariff.

(5) The Transmission Provider may not, through its tariffs or otherwise, give preference to its own marketing or sales function or to any 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 Web site contemporaneously 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 Web site for 60 days from the date of posting.

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

List of Commenters

- Ad Hoc Marketers Group (Ad Hoc Marketers)
 AEC Storage and Hub Services, Inc.
 Alabama Electric Cooperative, Inc.
 Alabama Public Service Commission
 Allegheny Energy Service Corporation
 Allegheny Power
 Algonquin Gas Transmission, LP (Algonquin)
 Alliance Pipeline, LP (Alliance)
 Alcoa Power Generating, Inc.
 Apache Corporation
 American Antitrust Institute (AAI)
 American Electric Power Service Corporation (AEP)
 American Forest and Paper Association (AFPA)
 American Gas Association (AGA)
 American Iron & Steel Institute
 American Public Gas Association (APGA)
 American Public Power Association (APPA)
 Amoco Production Company and BP Energy Co. (Amoco/BP)
 Arkansas Electric Cooperative Corporation
 Association of Texas Intrastate Natural Gas Pipelines
 Atlanta Gas Light Company
 Atlantic City Electric Company and Delmarva Power and Light Co.
 Atmos Energy Corporation
 Avista Corporation (Avista)
 B-R Pipeline Company (B-R Pipeline)
 BP Energy Co. (BP)
 Bangor Hydro-Electric Company
 Basin Electric Power Cooperative, Inc. (Basin Electric)
 Bonneville Power Administration (BPA)
 Bowater, Inc.
 Businesses Advocating Tariff Equity
 California Dairy Coalition
 California Natural Gas Producers Association
 California Oil & Gas Association
 California Independent Petroleum Association
 California Public Utilities Commission (CPUC)
 Calpine Corporation (Calpine)
 Canadian Association of Petroleum Producers
 Carolina Power & Light Company (CP&L)
 CenterPoint Energy Gas Transmission Company (CEGT)
 Chattanooga Gas Company
 Cheyenne Light Fuel & Power Company
 Cinergy Services, Inc. (Cinergy)
 City of Memphis
 City of New Orleans
 CLECO Power LLC (Cleco)
 CMS Energy, Inc. (CMS)
 Coalition of Midwest Transmission Customers
 Colorado Springs Utilities (Colorado Springs)
 Commonwealth Edison Company
 Congressman Michael Oxley
 Connecticut DPUC (Connecticut Commission)
 Connecticut Industrial Energy Consumers (New England Pool)
 Connexus Energy
 Consolidated Edison Company of New York
 Delmarva Power & Light Co.
 Dairyland Power Cooperative
 Discovery Gas Transmission LLC (Discovery)
 Discovery Producer Services LLC
 Distrigas of Massachusetts Corporation (Distrigas of Massachusetts)
 Dominion Resources, Inc. (Dominion)
 DTE Energy
 Duke Energy Corporation (Duke Energy)
 Dynegy, Inc. (Dynegy)
 Dynegy Power Marketing, Inc.
 East Texas Electric Cooperative, Inc.
 Edison Electric Institute (EEI)
 El Paso Corporation
 El Paso Energy Partners, LP
 El Paso Merchant Energy, LP
 Electric Power Supply Association (EPSA)
 Electricity Consumers Resource Council
 Empire District Electric Co.
 Enbridge, Inc.
 Energy East Companies and Rochester Gas and Electric Corporation
 Entergy-Koch Trading, LP
 Entergy Services, Inc. (Entergy)
 Equitable Resources, Inc. (Equitable)
 Exelon Corporation (Exelon)
 Exelon Generation Co., LLC
 Federal Trade Commission (FTC)
 First Electric Cooperative Corp.
 FirstEnergy Corporation
 Florida Power Corporation (FPC)
 Florida Power & Light Company (FP&L)
 Florida Public Service Commission (Florida Commission)
 Fort Chicago Energy Partners, LP
 Gas Processors Association
 Georgia Industrial Group
 Green Mountain Power Corporation
 Gulf South Pipeline Company (Gulf South)
 Gulfstream Natural Gas System, LLC
 Hampshire Storage Company
 Idaho Public Utilities Commission (Idaho Commission)
 Illinois Commerce Commission (Illinois Commission)
 Illinois Oil & Gas Association
 Industrial Gas Users of Florida
 Independent Oil & Gas Association of West Virginia (IOGA)
 Independent Oil & Gas Association of Pennsylvania
 Independent Petroleum Association of America, including, California Natural Gas Producers Association, California Oil and Gas Association, Illinois Oil and Gas Association, International Association of Geophysical Contractors, Kansas Independent Oil and Gas Association, Michigan Oil and Gas Association, Ohio Oil and Gas Association, Pennsylvania Oil and Gas Association, Permian Basin Petroleum Association, Independent Oil and Gas Association of West Virginia and Wyoming
 Independent Producers Association (IPAA)
 Industrial Energy Consumers of Pennsylvania
 Industrial Energy Users
 Interstate Natural Gas Association of America (INGAA)
 International Association of Geophysical Contractors
 Kansas Independent Oil & Gas Association
 Keyspan Corporation (Keyspan)
 Kinder Morgan (KM)
 Kinder Morgan Interstate Gas Transmission LLC
 Kinder Morgan Interstate Pipelines
 Large Public Power Council
 LG&E Energy Corporation (LG&E)
 Long Island Lighting Company (LILCO)
 Long Island Power Authority (LIPA)
 M&N Management Company
 Maritimes & Northeast Pipeline, LLC (Maritimes & Northeast Pipeline)
 Michigan Oil & Gas Association
 Michigan Public Service Commission (Michigan Commission)
 Midwest Energy, Inc.
 Midwest ISO (MISO)
 Midwest United Energy LLC
 MIGC, Inc. (MIGC)
 Minnesota Department of Commerce (Minnesota Commission)
 Mirant Americas Energy Marketing (Mirant)
 Mississippi Public Utilities Staff (Mississippi Commission)
 Modesto Irrigation District (MID)
 Monongahela Power Company
 Montana Power Co.
 Montana-Dakota Utilities Company
 National Association of Regulatory Utilities Commissioners (NARUC)
 National Association of State Utility Consumer Advocates (NASUCA)
 National Energy Marketers Association (NEMA)
 National Fuel Gas Distribution Corporation
 National Fuel Gas Supply Corporation
 National Grid USA (National Grid)
 National Propane Gas Association
 National Rural Electric Cooperative Association (NRECA)
 Natural Gas Pipeline Co. of America
 Natural Gas Supply Association (NGSA)
 NEPOOL Industrial Customer Coalition
 New York Independent System Operator (NYISO)
 New York State Public Service Commission (New York Commission)

NICOR Gas
 Niagara Mohawk Power Corporation
 NiSource, Inc. (NiSource)
 North Carolina Utilities Commission (North Carolina Commission)
 Northeast Utilities Service Company
 Northeastern Independent Transmission Co.
 Northern States Power Company
 Northwest Natural Gas Company
 Ohio Oil & Gas Association
 Oklahoma Corporation Commission (Oklahoma Commission)
 Oklahoma Gas and Electric Company (OGE)
 Orlando Utilities Commission
 PacifiCorp
 PanCanadian Energy Services, Inc.
 PECO Energy Company
 Pennsylvania Oil & Gas Association
 Pennsylvania Public Utility Commission (Pennsylvania Commission)
 Permian Basin Petroleum Association
 Piedmont Natural Gas Company
 Pinnacle West Companies (Pinnacle West)
 Pinnacle West Capital Corporation
 PJM Industrial Customer Coalition
 Portland General Electric Company
 Portland Natural Gas Transmission System
 Potomac Edison Company
 PPL Companies
 Process Gas Consumers Group, including American Forest and Paper Association, American Iron and Steel Institute, Georgia Industrial Group, Industrial Gas Users of Florida, Florida Industrial Gas Users, U.S. Gypsum Co. (Industrials)
 Proliance Energy, LLC
 PSEG Companies
 Public Alliance for Community Energy
 Public Service Co. of Colorado
 Public Service Co. of North Carolina
 Public Utilities Commission of Ohio (Ohio Commission)
 Public Utilities Commission of Michigan (Michigan Commission)
 Puget Sound Energy, Inc.
 Questar Corporation
 Questar Market Resources, Inc.
 Questar Pipeline Co., Questar Gas Co., Questar Regulated Services Co. (Questar)
 Reliant Resource, Inc. (Reliant)
 Rural Utilities Service of the U.S. Department of Agriculture (Rural Utilities Service)
 Salt River Project
 SCANA Energy Marketing, Inc.
 SCANA Services, Inc.
 SCG Pipeline, Inc. (SCG)
 Seminole Electric Cooperative, Inc.
 Sempra Energy
 Shell Gas Transmission, LLC (Shell Gas)
 Shell Offshore, Inc. (Shell Offshore)
 South Carolina Electric & Gas Co.
 South Carolina Pipeline Corporation
 South Carolina Public Service Authority
 Southern California Edison Co.
 Southern Company Services, Inc. (Southern)
 Southwest Gas Corporation (Southwest Gas)
 Southwest Transmission Cooperative
 Southwestern Public Service Co.
 State of Arkansas
 State of Colorado
 State of Illinois
 State of New York
 State of Pennsylvania
 State of Washington
 State of Wyoming
 Superior Natural Gas Corporation

Teco Energy, Inc.
 Texas Eastern Transmission Company
 The New Power Company
 Transcanada Pipelines Limited
 Transmission Access Policy Study Group (TAPS)
 Transmission Group (Northern Natural Gas Co. *et al.*)
 Unaffiliated Marketers
 UtiliCorp United, Inc.
 United States Gypsum Company
 Upper Peninsula Power Company
 US Gypsum Corporation
 USG Pipeline Company
 Utah Associated Municipal Power Systems
 Utah Division of Public Utilities (Utah Commission)
 Vector Pipeline
 Vermont Department of Public Service (Vermont Commission)
 Viking Gas Transmission Co. (Viking)
 Virginia Natural Gas Company
 Walter Oil & Gas Corporation
 Wastach Energy Corporation
 Washington Gas Light Company
 Washington Utilities & Transportation Commission (Washington Commission)
 Wells Rural Electric Company
 West Penn Power Company
 West Virginia Energy Users Group
 Western Resources, Inc., including Kansas Power & Light (Western Resources)
 Westgas Interstate, Inc.
 Williams Companies (Williams)
 Williams Energy Marketing & Trading Co. (WEMT)
 Williston Basin Interstate Pipeline Company (Williston Basin)
 Wisconsin Electric Power Co.
 Wisconsin Gas Company
 Wisconsin Public Service Corporation
 Wyoming Independent Producers Association
 Wyoming Public Service Commission (Wyoming Commission)
 XCEL Energy Companies (Xcel)
 XCEL Energy Services, Inc.
 Brownell, Commissioner, *dissenting in part*
 1. The proposed changes to our standards of conduct generated a great amount of comment. There were many questions raised, clarifications requested and alternative proposals advocated. Many commenters argued that a general rule was unnecessary. I disagree. The current standards of conduct do not reflect the significant changes that have occurred in the electric and gas industries since they were first adopted. In particular, the current standards of conduct do not reflect the interplay between physical and financial transactions that is now present in the energy markets.
 2. We had a lot of process and debate. After carefully considering all the comments, we revised and clarified many of the proposed changes to the current standards of conduct. The revised standards of conduct adopted in the Final Rule are a positive step toward eliminating undue discrimination and undue preferences in the provision of interstate transmission service. In particular, the Final Rule:
 • Uses the same standards of conduct language for the interstate natural gas pipelines and public utility transmission providers;

• Adopts the “no conduit rule” for implementing information disclosure prohibitions (currently used by public utility transmission providers), which is more flexible than the “automatic imputation rule” (currently used by interstate natural gas pipeline transmission providers);
 • Prohibits the Transmission Provider from sharing employees and information with its Energy Affiliates, including affiliated asset managers, and trading and financial affiliates;
 • Prohibits the sharing of employees and information across industries (*e.g.*, between a natural gas pipeline and an affiliated generator); and
 • Requires mandatory training for employees and the designation of a Chief Compliance Officer.

I support these provisions of the Final Rule.

3. The Final Rule retains the existing exemption from Order No. 497 for affiliated local distribution companies (LDCs) and the existing exemption from Order No. 889 for the bundled retail sales function. In contrast, the Final Rule eliminates the existing exemption in Order No. 497 for affiliated producers, gatherers, processors, intrastate pipelines, and Hinshaw pipelines. The facts and equity support maintaining the existing exemption for affiliated producers, gatherers, processors, intrastate pipelines, and Hinshaw pipelines. Therefore, I will dissent on this one point.

4. There is no practical distinction in the relationship between a jurisdictional pipeline and its affiliated LDCs and the relationship between a jurisdictional pipeline and an affiliated intrastate or Hinshaw pipeline that warrants applying the standards of conduct in an asymmetrical manner. Furthermore, we exempt FERC-jurisdictional transmission providers from the definition of Energy Affiliates. Consequently, for example, affiliated jurisdictional pipelines are permitted to share transmission function employees and information. Again, there appears to be no significant difference in the relationships to support disparate treatment.

5. Under the current standards of conduct, a producer is exempt when selling gas solely from its own production and an LDC is exempt if it only makes on-system sales. There does not appear to be any reason that undue discrimination and undue preferences in the provision of interstate transmission service are more likely to occur with a producer than with an LDC. Furthermore, as the Final Rule notes, there was much discussion at the May 21, 2002 conference about the possibility that expanding the standards of conduct to producers, gatherers and processors would harm deepwater operations and future off-shore development efforts.

6. Lastly, there appears to be insufficient evidence to support eliminating the exemption for affiliated producers, gatherers, and processors. The Final Rule cites *Shell Offshore Inc. v. Transcontinental Gas Pipe Line Corp., et al.*, 100 FERC ¶ 61,254 (2002), *order on reh'g*, 103 FERC ¶ 61,177 (2003), *appeal filed* June 27, 2003 (D.C. Cir. No. 03–1179) as the basis for eliminating the exemption for producers, gatherers and

processors. I dissented in that case because, *inter alia*, the evidence of cooperative action was mixed.

7. For these reasons, I respectfully dissent in part.
Nora Mead Brownell,

Commissioner.

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