while within the Sanctuary, graywater as defined by section 312 of the FWPCA that is biodegradable;

(E) Vessel engine or generator exhaust; or

(F) Dredged material deposited at disposal sites authorized by the U.S. Environmental Protection Agency (EPA) (in consultation with the U.S. Army Corps of Engineers (COE)) prior to the effective date of Sanctuary designation (January 1, 1993), provided that the activity is pursuant to, and complies with the terms and conditions of, a valid Federal permit or approval existing on January 1, 1993. Authorized disposal sites within the Sanctuary are described in appendix C to this subpart.

* * * * *

[FR Doc. E8–6189 Filed 3–26–08; 8:45 am]

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 358

[Docket No. RM07–1–000]

Standards of Conduct for Transmission Providers

March 21, 2008.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is proposing to revise its Standards of Conduct for transmission providers to make them clearer and to refocus the rules on the areas where there is the greatest potential for affiliate abuse. By doing so, we will make compliance less elusive and facilitate Commission enforcement. We also propose to conform the Standards to the decision of the U.S. Court of Appeals for the D.C. Circuit in *National Fuel Gas Supply Corporation* v. *FERC*, 468 F.3d 831 (D.C. Cir. 2006). On January 18, 2007, the Commission issued a Notice of Proposed Rulemaking (initial NOPR), and received both initial and reply comments from interested persons. After giving consideration to these comments and to our own experience in enforcing the Standards, the Commission believes it to be necessary and appropriate to modify the approach proposed in the initial NOPR. The Commission is therefore issuing a new NOPR, and invites all interested persons to submit comments in response to the regulations proposed herein.

DATES: Comments are due May 12, 2008.

ADDRESSES: You may submit comments, identified by docket number by any of the following methods:

- *Agency Web Site: http://ferc.gov.* Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format.
- *Mail/Hand Delivery:* Commenters unable to file comments electronically must mail or hand deliver an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE., Washington, DC 20426.

FOR FURTHER INFORMATION CONTACT: Kathryn Kuhlen, Office of Enforcement, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, *Kathryn.Kuhlen@FERC.gov*, (202) 502–6855.

Table of Contents

	Paragraph No.
I. Introduction	1
II. Background	6
III. Discussion	11
A. The Need for Reform	11
B. The Independent Functioning Rule	22
C. The No Conduit Rule	46
D. The Transparency Rule	50
E. Miscellaneous	56
IV. Applicability of the Proposed Rule and Compliance Procedures	65
V. Information Collection Statement	67
VI. Environmental Analysis	73
VII. Regulatory Flexibility Act	74
VIII. Comment Procedures	75
IX. Document Availability	79
Appendix A: Table of Commenters and Abbreviations for Commenters.	
Appendix B: Comparison of Current and Proposed Regulatory Text.	

I. Introduction

1. The Federal Energy Regulatory Commission is proposing to reform its Standards of Conduct for Transmission Providers. The primary purpose of our proposed reforms is to strengthen the Standards by making them clearer and by refocusing the rules on the areas where there is the greatest potential for affiliate abuse. By doing so, we also will make compliance less elusive and subjective for regulated entities, and facilitate enforcement of the Standards by the Commission. We also propose to reform our regulations to comply with the U.S. Court of Appeals for the D.C. Circuit decision in *National Fuel Gas Supply Corp.* v. *FERC*, 468 F.3d 831 (D.C. Cir. 2006).

2. On January 18, 2007, the Commission issued a Notice of Proposed Rulemaking (initial NOPR) to modify the Standards. The primary purpose of the initial NOPR was to remedy the defects identified by the D.C. Circuit in *National Fuel,* particularly the court's rejection of the Standards' treatment of Energy Affiliates of natural gas pipelines. The Commission also sought to remedy other specific flaws in the Standards, such as by removing impediments to integrated resource planning. In proposing these reforms we did not, however, undertake a broader review of the Standards to determine whether they were continuing to prevent affiliate abuse in the manner most likely to foster compliance and enhance enforcement. Based on comments received on the NOPR, as well as the comments received at our recent

enforcement conference,[1] we now believe that such a broader review is necessary. We therefore propose further reforms herein and seek comment on them from all interested persons.

3. Our revised NOPR proposes to combine the best elements of the Standards adopted in Order Nos. 497 and 889 with those adopted by the Commission in Order No. 2004.[2] Order Nos. 497[3] and 889[4] established a functional separation between transmission and merchant personnel for natural gas and electric transmission providers that was relatively clear and that worked well for many years. Order No. 2004 altered this approach in three main ways: (i) First, to expand the scope of the Standards to include Energy Affiliates, (ii) second, to adopt a corporate separation approach to accommodate the addition of Energy Affiliates, and (iii) third, to adopt a single set of standards applicable to both natural gas and electric industries. The *National Fuel* court rejected the first reform as applied to the natural gas industry and, by doing so, undercut the need for the second reform. The court did not upset the third reason for reform and we continue to believe there is no reason why separate standards should apply to each industry, although our proposed regulations do take into account differences between the industries in discrete areas.

4. Nevertheless, we believe this single set of standards should more closely resemble the functional approach that was adopted in Order Nos. 497 and 889. Our experience with implementing and enforcing the Standards, as well as the record of this proceeding, demonstrates that this approach is the one most likely to foster compliance and strengthen enforcement of the Standards. The ''corporate separation'' adopted by Order No. 2004 has not proven workable and was adopted to facilitate the regulation of Energy Affiliates,[5] a step that is no longer appropriate given the decision in National Fuel.

5. In addition to combining the best elements of Orders 497, 889 and 2004, we also, as explained below, propose to simplify and streamline the Standards to facilitate compliance and enhance enforcement. With our new civil penalty authority, we are mindful of the fact that our regulations must be as clear as possible, as participants in the enforcement conference repeatedly noted. We also propose to strengthen enforcement of the Standards by proposing additional transparency to aid in the detection of affiliate abuse. Although we believe many of the existing elements of the Standards should be retained, the reforms we are proposing, together with the simplification and clarification we believe to be imperative, necessitate reissuing the entire part 358 of the Code of Federal Regulations as a stand-alone document.

II. Background

6. The Commission first adopted Standards of Conduct in 1988, in Order No. 497. These initial Standards prohibited interstate natural gas pipelines from giving their marketing affiliates or wholesale merchant functions undue preference over non-affiliated customers. Citing demonstrated record abuses, the U.S. Court of Appeals for the D.C. Circuit upheld these Standards in 1992.[6] The Commission adopted similar Standards for the electric industry in 1996, in Order No. 889, prohibiting public utilities from giving undue preference to their marketing affiliates or wholesale merchant functions. Both the electric and gas Standards sought to deter undue preference by: (i) Separating a transmission provider's employees engaged in transmission services from those engaged in its marketing services, and (ii) requiring that all transmission customers, affiliated and non-affiliated, be treated on a non-discriminatory basis.

7. Changes in both the electric and gas industries, in particular the unbundling of sales from transportation in the gas industry and the increase in the number of power marketers in the electric industry, led the Commission in 2003 to issue Order No. 2004, which broadened the Standards to include a new category of affiliate, the Energy Affiliate.[7] The new Standards were made applicable to both the electric and gas industries, and provided that the transmission employees of a transmission provider[8] must function independently not only from the company's marketing affiliates but from its Energy Affiliates as well, and that transmission providers may not treat either their Energy Affiliates or their marketing affiliates on a preferential basis. Order No. 2004 also imposed requirements to publicly post information concerning a transmission provider's Energy Affiliates.

8. On appeal by members of the natural gas industry, the U.S. Court of Appeals for the D.C. Circuit overturned the Standards as applicable to gas transmission providers, on the grounds that the evidence of abuse by Energy Affiliates cited by the Commission was not in the record.[9] The court noted that the dissenting Commissioners in Order No. 2004 had expressed the concern that the Order would diminish industry

[1] Conference on Enforcement Policy, Docket No. AD07–13–000 (Nov. 16, 2007) (enforcement conference).

[2] *Standards of Conduct for Transmission Providers*, Order No. 2004, FERC Stats. & Regs., Regulations Preambles 2001–2005 ¶ 31,155 (2003), *order on reh'g*, Order No. 2004–A, FERC Stats. & Regs., Regulations Preambles 2001–2005 ¶ 31,161 (2004), *order on reh'g*, Order No. 2004–B, FERC Stats. & Regs., Regulations Preambles 2001–2005 ¶ 31,166 (2004), *order on reh'g*, Order No. 2004–C, FERC Stats. & Regs., Regulations Preambles 2001–2005 ¶ 31,172 (2004), *order on reh'g*, Order No. 2004–D, 110 FERC ¶ 61,320 (2005), *vacated and remanded as it applies to natural gas pipelines* sub nom. *Nat'l Fuel Gas Supply Corporation* v. *FERC*, 468 F.3d 831 (D.C. Cir. 2006); *Standards of Conduct for Transmission Providers*, Order No. 690, 72 FR 2427 (Jan. 19, 2007), FERC Stats. & Regs ¶ 31,237, *order on reh'g,* Order No. 690–A, 72 FR 14235 (Mar. 27, 2007), FERC Stats. & Regs. ¶ 31,243 (2007); *see also Standards of Conduct for Transmission Providers,* Notice of Proposed Rulemaking, 72 FR 3958 (Jan. 29, 2007), FERC Stats. & Regs. ¶ 32,611 (2007).

[3] *Inquiry Into Alleged Anticompetitive Practices Related to Marketing Affiliates of Interstate Pipelines,* Order No. 497, 53 FR 22139 (1988), FERC Stats. & Regs., Regulations Preambles 1986–1990 ¶ 30,820 (1988); Order No. 497–A, *order on reh'g*, 54 FR 52781 (1989), FERC Stats. & Regs., Regulations Preambles 1986–1990 ¶ 30,868 (1989); Order No. 497–B, *order extending sunset date*, 55 FR 53291 (1990), FERC Stats. & Regs., Regulations Preambles 1986–1990 ¶ 30,908 (1990); Order No. 497–C, *order extending sunset date,* 57 FR 9 (1992), FERC Stats. & Regs., Regulations Preambles 1991–1996 ¶ 30,934 (1991), *reh'g denied*, 57 FR 5815 (1992), 58 FERC ¶ 61,139 (1992); *aff'd in part and remanded in part sub nom. Tenneco Gas* v. *FERC*, 969 F.2d 1187 (D.C. Cir. 1992) (collectively, Order No. 497).

[4] *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 Jan. 1991–June 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 July 1996–December 2000 ¶ 31,049 (Mar. 4, 1997); Order No. 889–B, *reh'g denied,* 62 FR 64715 (Dec. 9, 1997), 81 FERC ¶ 61,253 (Nov. 25, 1997) (collectively, Order No. 889).

[5] Order No. 2004 at P 92.

[6] *Tenneco Gas* v. *FERC*, 969 F.2d 1187 (D.C. Cir. 1992) (*Tenneco*).

[7] The new Standards defined an Energy Affiliate as 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. 18 CFR 358.3(d). Certain categories of entities were excluded from this definition in following subsections of the regulations.

[8] A Transmission Provider was defined 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 of part 157 or subparts B or G of part 284 of the same chapter of the regulations. 18 CFR 358.3(a).

[9] *National Fuel* at 841.

efficiencies without advancing the FERC policy of preventing unduly discriminatory behavior.[10]

9. The Commission issued an Interim Rule on January 9, 2007,[11] and set about developing new Standards that would cure the defects identified by the D.C. Circuit in *National Fuel.* On January 18, 2007, the Commission issued its initial NOPR,[12] requesting comment on whether the concept of Energy Affiliates should be retained for the electric industry, proposing the creation of two new categories of employees denominated as Competitive Solicitation Employees and Planning Employees, carrying over the Interim Rule's new definition of marketing to cover asset managers, and making numerous other proposals. The Commission received thousands of pages of both initial and reply comments from some 95 individuals, companies, and organizations, which are listed in Appendix A.

10. As noted above, consideration of these comments, coupled with our own experience in administering the Standards, has persuaded us to modify the approach advanced in the initial NOPR. For that reason, we now issue a new NOPR, and invite comment both on its general approach and on its specific provisions.

III. Discussion

A. The Need for Reform

11. The purpose of this revised NOPR is to strengthen the Standards by making our rules clearer and refocusing them on the areas where there is the greatest potential for affiliate abuse. In so doing, we will facilitate compliance by regulated entities and enhance Commission enforcement. We propose to accomplish this objective by combining the best elements of Order Nos. 497 and 889, on the one hand, and Order No. 2004, on the other. In particular, we propose to return to the approach of separating, by function, the transmission personnel from the marketing personnel that was adopted in Order Nos. 497 and 889 and worked well for many years, while also retaining a single set of standards for both natural gas and electric industries, as envisioned by Order No. 2004. We also propose to further clarify and streamline the Standards to enhance compliance and enforcement of our rules, and to increase transparency in the area of transmission/affiliate interactions to aid in the detection of any undue discrimination.

12. We believe these broader reforms are superior to the incremental reforms proposed in our initial NOPR for two principal reasons. First, we propose to return to the functional separation of transmission and merchant personnel adopted in Order Nos. 497 and 889, because it worked well for many years. Although Order No. 2004 abandoned this approach in favor of a ''corporate separation,'' it did so because of jurisdictional concerns created by the addition of Energy Affiliates to our regulations, *not* because the functional approach had proven inadequate in preventing affiliate abuse.[13]

13. Now that the D.C. Circuit has rejected the addition of Energy Affiliates for lack of evidence (and no commenter has provided sufficient evidence to reinstate it), it is no longer appropriate to retain the corporate separation approach adopted in Order No. 2004. Furthermore, there is good reason to rescind it. The corporate separation approach has proven so difficult to implement that it has generated scores of ''waiver'' requests (most of which were granted) and has otherwise frustrated compliance by diverting the industry's focus from the very reason why the Standards were necessary in the first place—the conflict of interest between the *functions* of transmission and merchant activities.

14. The initial NOPR was itself evidence of the problem we now seek to remedy. Since the adoption of Order No. 2004, the corporate separation approach had, as we found in the initial NOPR, impeded legitimate integrated resource planning and competitive solicitations.[14] To address this problem, we proposed there to create two new exemptions for these activities. Yet, by failing to address the underlying cause of that problem—the corporate separation approach—we, again, created additional exemptions and complexity to a rule already burdened with so many waivers, exemptions and complexity that both compliance and enforcement have been frustrated. By proposing to return to the functional approach that had proven effective prior to Order No. 2004, we can accommodate such legitimate activities without creating yet another set of exemptions.

15. Second, we believe this broader reform of our existing Standards is necessary to make them clearer in an era where the Commission possesses substantial civil penalty authority. Soon after the adoption of the Energy Policy Act of 2005 (EPAct 2005),[15] the Commission heard significant concerns from the regulated community that the existing Standards contained so many ambiguities that they impeded compliance and left companies—including those with the best cultures of compliance—exposed to significant civil penalties. We responded to those concerns by holding a public technical conference in Phoenix, Arizona, attended by all of the Commissioners serving at the time. The consistent message from regulated entities at this conference was best captured by an energy attorney who stated that ''there is no area [besides the Standards] where I practice law where there is a greater number of times I am asked the question and I don't have the answer, and that is a real problem when you are talking about corporate governance.'' [16]

16. Nearly two years later, we heard the same concerns at our enforcement conference in Washington, DC. Several panelists expressed concern about the ambiguities in our Standards. These concerns were also supported in comments submitted on behalf of six industry trade groups, who placed the Standards at the top of their list of ambiguous rules that hinder compliance.[17] As these six groups and another trade association emphasized, a ''[l]ack of clarity sows confusion, creates unnecessary risk and chills legitimate

[10] *Id.* at 838.

[11] *Standards of Conduct for Transmission Providers,* Order No. 690, 72 FR 2427 (Jan. 19, 2007); FERC Stats. & Regs. ¶ 31,237 (Jan. 9, 2007) (Interim Rule); *clarified by, Standards of Conduct for Transmission Providers,* Order No. 690–A, 72 FR 14235 (Mar. 27, 2007); FERC Stats. & Regs. ¶ 31,243 (2007) (Order on Clarification and Rehearing).

[12] *Standards of Conduct for Transmission Providers,* 72 FR 3958 (Jan. 29, 2007), FERC Stats. & Regs. ¶ 32,611 (2007) (initial NOPR).

[13] The Commission stated: ''While it may be less costly for some companies to implement the [functional] approach * * * 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.'' Order No. 2004 at P 93.

[14] Southern Company Services, Inc., among other commenters in the Order No. 2004 docket, described the difficulties that arise when all the employees of a marketing affiliate, including its planning employees, are prohibited from receiving transmission information: ''Planning new generation and transmission capacity requires selecting the right combination and location of both generation and transmission. Coordinated and integrated planning is required because the siting of new generation is integrally related to transmission considerations and vice versa * * *. Accordingly, the costs, characteristics and locations of generation and transmission must be considered together in order to ensure the provision of service to customers on a reliable and least cost basis.'' Comments of Southern Company Services, Inc., Docket No. RM01–10–000 at p. 16 (Dec. 20, 2001).

[15] Pub. L. No. 109–58, 119 Stat. 594 (2005).

[16] Standards of Conduct Conference and Workshop (April 7, 2006), transcript at p. 61.

[17] Comments at 20, submitted by The American Gas Association, Edison Electric Institute, Electric Power Supply Association, Independent Petroleum Association of America, Interstate Natural Gas Association of America, and Natural Gas Supply Association, Docket No. AD07–13–000 (Dec. 17, 2007).

market behavior because market participants are reticent to engage in certain types of transactions where the rules are unclear.'' [18]

17. We agree, and we have more than an adequate record to support the conclusion that the existing Standards are too complex to facilitate compliance or support our enforcement efforts. Since issuance of the NOPR in Order No. 2004, the Commission has held no less than four conferences devoted to explication and discussion of the Standards.[19] Of the ten requests for No Action Letters submitted to the Commission since 2005, seven have involved the Standards.[20] And Commission staff has received so many calls regarding the interpretation and application of the Standards, that the Commission has posted on its public Web site a 30-page document entitled ''Frequently Asked Questions about Order No. 2004.''

18. The complexity and unworkability of the current Standards is also evident in the fact that since issuance of Order No. 2004, the Commission has received 107 requests for waiver from various aspects of the Standards, the vast majority of which have been granted. Interpretation of the Standards has thus consumed thousands of hours of staff time. It has also proven so elusive to the industry that it has engendered numerous conferences by law firms and trade associations, greatly outstripping comparable areas of Commission compliance in resources and money.

19. The complexity and over breadth of the current Standards has also made it more difficult for transmission providers to reasonably manage their business, an effect which the Commission never intended. As the court in *Tenneco* noted, vertical integration can produce efficiencies of operation, and advantages given to an affiliate are not improper if they do not amount to exercises of market power.[21] Unnecessarily balkanizing employees one from another and erecting barriers to the free flow of information can thwart perfectly legitimate efficiencies, a consequence which disadvantages not only the companies involved but ultimately consumers as well, in the form of higher rates. Executives of transmission providers can also be impeded in making necessary business decisions for fear they may transgress the Standards by assembling needed data or by meeting to discuss the merits of potential investments. This fear has been exacerbated by the Commission's civil penalty authority, granted by Congress in EPAct 2005. As we explained above, the regulated community has consistently argued that the Standards are too ambiguous to facilitate compliance, particularly in an era where significant civil penalties may attach to violations.

20. Therefore, in this NOPR we take the approach of structuring the Standards to establish *per se* rules that address the greatest prospect for undue preference. However, this streamlined approach does not diminish our ability to rectify and sanction, where necessary, instances of undue discrimination and preference.[22] The core prohibitions against undue preference are rooted in sections 205 and 206 of the FPA and sections 4 and 5 of the NGA,[23] and the Commission possesses the full panoply of statutory remedies to address violations of these statutes, whether or not they are specifically addressed in the *per se* regulations of the Standards. Since enforcement of both the Standards and the statutory prohibitions against undue discrimination and preference will be greatly assisted by transparency, we also include in the proposed Standards provisions to make apparent any instances of communication and undue preference between transmission function employees and marketing function employees. These provisions require either the public posting of information regarding such communications or the maintenance of contemporaneous records for review by the Commission.

21. We propose regulations that adopt the three core elements which we believe to be appropriate for *per se* rules: The independent functioning rule, the no conduit rule, and the transparency rule. We address these below.

B. The Independent Functioning Rule

22. Order No. 2004 continued the policy, established in Order Nos. 497 and 889, of requiring transmission providers to function independently from their marketing employees or marketing affiliates. This practice has been well-established for close to twenty years, and it is our sense that both pipelines and public utilities understand the general concept of independent functioning. We continue to believe this policy is the most effective manner of preventing undue preference by a transmission provider, and we will carry forward the requirement of independent functioning in these proposed Standards.[24]

23. Nevertheless, we believe a basic alteration in its methodology is warranted. The Standards' existing method for separating transmission function employees from marketing function employees relies on the corporate functional approach,[25] under which a transmission provider must function independently from an affiliate which engages in marketing.[26] This is a departure from the method adopted in Order Nos. 497 and 889. Order No. 497 required that interstate natural gas pipelines, to the maximum extent practicable, ensure that their operating employees and the operating employees of their marketing affiliates function independently of each other.[27] Order No. 889 required that, except in emergency circumstances, the employees of the transmission provider engaged in transmission system operations must function independently of its employees, or the employees of any of its affiliates, who engage in wholesale merchant functions (*i.e.*, wholesale sales and purchases of electric energy).[28] Thus, the prohibition keyed off the job function of the employee, rather than by whom he or she was employed.

24. This approach was altered in Order No. 2004, which required transmission function employees to function independently of personnel employed by the transmission provider's marketing affiliates or Energy

[18] White Paper at 6, submitted by The American Gas Association, Edison Electric Institute, Electric Power Supply Association, Independent Petroleum Association of America, Interstate Natural Gas Association of America, Natural Gas Supply Association and Process Gas Consumers Group, Docket No. AD07–13–000 (Nov. 14, 2007).

[19] May 21, 2002 in Washington, DC; May 10, 2004 in Houston, Texas; May 6, 2005 in Chicago, Illinois; and April 7, 2006 in Scottsdale, Arizona.

[20] No Action Letters can be sought for matters involving the Standards of Conduct, Codes of Conduct (now Affiliate Restrictions), Market Behavior Rules, and the Anti-Manipulation Rules.

[21] *Tenneco* at 1201.

[22] Whereas failure to comply with a *per se* rule of the Standards automatically establishes a sanctionable violation, an alleged violation of the Federal Power Act (FPA), 16 U.S.C. 824d–824e (2000) or the Natural Gas Act (NGA), 15 U.S.C. 717c–717d (2000) would require an investigation into both the facts and the surrounding circumstances to determine if, in fact, an undue discrimination occurred.

[23] Sections 205 and 206 of the FPA state that no public utility shall make or grant an undue preference with respect to any transmission or sale of electric energy subject to the Commission's jurisdiction. Similarly, sections 4 and 5 of the NGA 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.

[24] *See* proposed 18 CFR 358.5(a).

[25] Order No. 2004 designates this approach as the Energy Affiliate approach. Order No. 2004 at P 92–94.

[26] *Id.* P 92–94.

[27] Order No. 497, formerly codified at 18 CFR 161.3(g).

[28] Order No. 889, formerly codified at 18 CFR 37.4(a).

Affiliates.[29] Because there are many individuals employed by transmission providers' marketing affiliates who are not involved in the core activities that give rise to the potential for undue preference, we have over the years exempted whole categories of employees from this restriction and allowed them to be shared between the transmission provider and its marketing affiliate. These include officers and members of the board of directors, support employees, field and maintenance employees, and risk management employees.[30] We observed that these employees are not generally in a position to give a marketing affiliate an undue preference, and that the sharing of these employees has allowed the transmission provider to realize efficiencies not otherwise available to it.[31] Carrying forward this approach in the initial NOPR, we suggested the creation of two new categories of exempted employees, the Planning Employee and the Competitive Solicitation Employee.[32]

25. This proliferation of exemptions has had the unfortunate side effect of removing the certainty that might otherwise be enjoyed as to which persons an employee may properly interact with and which persons he or she may not. Furthermore, it undermines the legitimacy of the Standards, as employees may find nonsensical the prohibition against interacting with personnel who have nothing to do with sensitive marketing or transmission information.

26. The crux of the problem is that currently the prohibited category of marketing affiliate includes *all* employees of the affiliate, whether engaged in sales or not. To avoid such broad inclusion, many commenters have proposed that the Commission adopt an ''employee functional approach'' rather than a corporate functional approach, whereby the Standards would apply to each individual employee based on that employee's job function, not on the company or division where the employee is employed.[33]

27. This proposal was also advanced by commenters in Order No. 2004. It was rejected at that time because the Standards were being expanded to cover Energy Affiliates, and it was felt that the employee functional approach might require a shared responsibility on the part of potentially non-jurisdictional entities.[34] That reason no longer exists. We believe the D.C. Circuit's reason for overturning the prohibitions relating to natural gas Energy Affiliates applies equally to electric Energy Affiliates, and we propose abandoning the concept of Energy Affiliate, as discussed more fully below. Therefore, the concerns of Order No. 2004 regarding jurisdictional access to Energy Affiliates are rendered moot.

28. The employee functional approach accomplishes directly the goal of identifying which employees ought not to interact with one another, whereas the corporate functional approach attempts to accomplish that objective indirectly, by focusing on the nature of the employing entity. This casts too wide a net and ensnares employees who do not perform sensitive functions. Commission staff has expended much effort in attempting to clarify for companies which employees may interact with one another and which may not. In one case, for example, coordination of generation dispatch and transmission service reservations were both conducted out of the same system operating center, in order to realize cost and communication efficiencies. This necessitated a series of orders by the Commission to deal with employee classification problems under the Standards.[35] In another instance, marketing affiliate employees who ran a generating plant needed access to a transmission substation but were barred from doing so under the Standards, even though they performed no marketing functions. A waiver was needed in this case,[36] and questions as to precisely which employees were covered by the waiver consumed a good deal of staff's attention.[37] Personnel in the nuclear power industry were so confused about permitted communications that the Commission, in order for companies to comply with the requirements of the U.S. Nuclear Regulatory Commission, had to issue an order granting permission for transmission providers to communicate with affiliated nuclear power plants.[38] The Commission has also expended considerable effort in clarifying for companies whether given entities qualify as Energy Affiliates, a status that barred their employees from interacting with transmission function employees.[39]

29. The employee functional approach, by pinpointing precisely which employees need to function independently one from another, has the added benefit of making the purpose of the prohibition more readily apparent. It should also make it easier for employees to comply with the Standards, since they will likely know an individual's job function, whereas they may not know by which subsidiary of an umbrella organization a given individual is employed.

30. Therefore, we propose adopting the employee functional approach, and define the two groups of employees who must function independently of each other as ''transmission function employees'' [40] and ''marketing function employees'' [41] (whether employed within the corporate structure of the transmission provider or by an affiliate of the transmission provider). The definitions of these terms are discussed in the following sections. We also propose to continue the general prohibition against marketing function employees conducting transmission functions, or having discriminatory access to the transmission provider's system control center.[42] Furthermore, we add the converse prohibition, that a

[29] Order No. 2004, formerly codified at 18 CFR 358.4(a)(1). In its comments, Edison Electric Institute describes the difficulty with this approach: ''The corporate functional approach * * * uses the evaluation of individual employees to determine what a whole corporation (or division, etc.) does. If an employee performs Energy or Marketing Affiliate Activities, the whole corporation (or division) is deemed an Energy or Marketing Affiliate, and every other employee within the corporation is then subject to the rules by association, regardless of what they do and the function they perform, unless they fit into an exempt category. Because these exempt categories are vague and difficult to implement the corporate-functional approach ends up with restrictions that apply to more employees than necessary to meet the objectives of the rules.'' Comments of the Edison Electric Institute, Docket No. RM07–1–000 at pp. 20–21 (Mar. 30, 2007).

[30] Much debate has also been engendered as to whether employees such as lawyers, accountants, and rate design personnel should be exempted. *See* initial NOPR at P 278–98.

[31] *See, e.g.,* Order No. 2004 at P 97.

[32] Initial NOPR at P 42 and 54.

[33] *See* EEI at 19 for a discussion of this approach. EEI was supported by Tucson Electric at 4, APS at 3, PSC of New Mexico at 1–2, Entergy at 1–2, E.ON at 7, Portland General at 1, Northwestern at 1. Other commenters support a similar functional approach: Idaho Power at 3, Southern Co. Services at 4–8, Keyspan at 3–4, SCE at 3–5, Western Utilities Compliance Group at 2–3. TAPS is in accord, providing the meaning of marketing is expanded. TAPS Reply at 7–8.

[34] Order No. 2004 at P 92.

[35] *See Audit of Standards of Conduct, Code of Conduct, OASIS & Transmission Practices, Duke Energy Corporation,* Docket No. PA03–15–000 at pp. 6–8 (Jan. 21, 2005).

[36] *Algonquin Gas Transmission, L.L.C.,* 111 FERC ¶ 61,099, at P 21–32 (2005).

[37] *See Audit of Standards of Conduct, Code of Conduct, and Open Access Transmission Tariff Requirements at Florida Power and Light Company,* Docket No. PA05–7–000 at pp. 6–10 (May 12, 2006).

[38] *Interpretive Order Relating to the Standards of Conduct,* 114 FERC ¶ 61,155 (2006) (Interpretive Order), clarified in 115 FERC ¶ 61,202 (2006).

[39] *See, e.g., Alcoa Power Generating Inc.,* 108 FERC ¶ 61,243, at P 29–35, 42–56, 136–46 (2004), reh'g granted in part as to unrelated issue, *Nat'l Fuel Gas Supply Corp.,* 116 FERC ¶ 61,048 (2006); *High Island Offshore System, L.L.C.,* 116 FERC ¶ 61,047, at P 59–68 (2006).

[40] *See* proposed section 358.3(i).

[41] *See* proposed section 358.3(d).

[42] *See* proposed 18 CFR 358.5(c)(1).

transmission function employee may not conduct marketing functions.[43]

1. Transmission Function Employee

31. We propose defining a transmission function employee as an employee, contractor, consultant or agent of a transmission provider who engages in transmission functions.[44] ''Transmission functions'' are defined as the conduct of transmission system operations and the planning, directing, organizing or carrying out of transmission operations, including the granting and denying of transmission service requests.[45]

32. We believe this definition, when coupled with the definition of ''marketing functions'' discussed below, addresses the concerns raised by the industry regarding the obstacles the Standards place in the way of system planning. We stressed in Order Nos. 890 and 890–A not only the critical importance of long-range planning, but also the desirability of a coordinated and open planning process.[46] Unnecessary restrictions on employee interactions militate against that objective. However, because we are returning to the functional separation approach adopted in Order No. 889, and because a marketing function employee is one who is actively and personally engaged in marketing activities, an employee who performs merely a planning function and is not ''engaged in'' making wholesale offers, bids or sales does not fall within the prohibited category. He or she is therefore free to discuss system planning, including state-mandated Integrated Resource Planning, with transmission function employees.

33. With respect to employee interactions regarding reliability functions, we deem it the first order of business on the part of a transmission provider to ensure reliability of operations. Indeed, pursuant to Congressional mandate in EPAct 2005, Reliability Standards have been promulgated by the Commission-certified Electric Reliability Organization[47] and approved by the Commission, violation of which can subject a transmission provider to substantial civil penalties of up to $1 million a day.[48] Several Reliability Standards require an electric transmission provider to coordinate operations with entities that may include marketing affiliates and, thus, marketing function employees.[49] We therefore provide an exception to the independent functioning rule for the exchange of information necessary to maintain or restore operation of the transmission system. Exchanges of information pursuant to this exception should be made only to the same extent that a transmission provider would exchange information with similarly situated marketing function employees of a non-affilated entity. We also propose requiring that a contemporaneous record be made of exchanges pursuant to this exception, except in emergency situations, when a record may be prepared after the fact.[50] Furthermore, transmission function employees will still be subject to the no conduit rule discussed below, and thus will be required to distinguish between information concerning reliability activities and other transmission function information.

34. If an employee spends any but a *de minimis* amount of time engaged in transmission functions, he or she will be considered a transmission function employee. However, a supervisor, officer or director who is not actively and personally engaged in transmission functions will not be considered a transmission function employee.[51] Such an individual will, of course, have access to transmission function information, and will be barred from sharing it with marketing function employees under the no conduit rule discussed below. Inasmuch as different organizations use different titles for the same job function, we decline to propose a cutoff for supervisory personnel based on job title, and instead propose a functional approach based on actual involvement in the activities themselves. For instance, if a transmission department supervisor is charged with the general responsibility of overseeing system control center personnel, but does not himself engage in system operations or grant or deny transmission service requests, he would not be a transmission function employee. But if he is involved in system operations or the processing of transmission service requests, or engages in decision-making regarding system operations or the processing of transmission service requests, he would be a transmission function employee even if he also has supervisory responsibilities.

2. Marketing Function Employee

35. The current Standards do not contain a definition of marketing function employee, although they do define ''marketing affiliate,'' ''marketing, sales or brokering,'' and ''marketing or brokering.'' We propose to simplify these concepts and, in accordance with our employee functional approach, eliminate the definition of marketing affiliate. We propose to define a marketing function employee as an employee, contractor, consultant or agent of a transmission provider or of an affiliate of a transmission provider who engages in marketing functions.[52] ''Marketing functions'' are defined as the sale for resale in interstate commerce, or the submission of offers or bids to buy or sell natural gas or electric energy or capacity, demand response, virtual electric or gas supply or demand, or financial transmission rights in interstate commerce, all as subject to certain exemptions.[53] We also propose to revise the existing definition of ''affiliate'' to conform to the current definition set forth in 18 CFR 35.43(a)(1).[54]

36. In the past, the following categories have been exempted from the definition of marketing: (i) Bundled retail sales, (ii) incidental purchases or sales of natural gas to operate interstate natural gas pipeline transmission facilities, (iii) sales of natural gas solely from the transmission provider's own production, (iv) sales of natural gas solely from the transmission provider's

[43] *See* proposed 18 CFR 358.5(c)(2).

[44] *See* proposed 18 CFR 358.3(i).

[45] *See* proposed 18 CFR 358.3(h).

[46] *Preventing Undue Discrimination and Preference in Transmission Service,* Order No. 890, FERC Stats. & Regs. ¶ 31,241, at P 425 (2007), *order on reh'g and clarification,* Order No. 890–A, FERC Statutes and Regulations ¶ 31,261, at P 171 (2007).

[47] The North American Electric Reliability Corporation was certified as the Electric Reliability Organization, pursuant to section 215 of the FPA, in *North American Electric Reliability Corp.,* 116 FERC ¶ 61,062, *order on reh'g and compliance,* 117 FERC ¶ 61,126 (2006).

[48] *Mandatory Reliability Standards for the Bulk-Power System,* Order No. 693, FERC Statutes and Regulations ¶ 31,242 (2007), *order on reh'g,* Order No. 693–A, 120 FERC ¶ 61,053 (2007), codified at 18 CFR part 40.

[49] *See, e.g.,* Reliability Standard TOP–003–0 (balancing authorities, transmission operators and generator operators shall plan and coordinate scheduled outages of system voltage regulating equipment and telemetering and control equipment); Reliability Standard TOP–002–2 (generator operator shall coordinate current-day, next-day and seasonal operations with its host balancing authority and transmission service provider).

[50] *See* proposed section 358.7(h).

[51] *See* proposed 18 CFR 358.3(i).

[52] *See* proposed 18 CFR 358.3(d).

[53] *See* proposed 18 CFR 358.3(c). This definition is a variant of a suggestion by TAPS. We note that it is unnecessary to include in the list of products another item mentioned by TAPS, that of ancillary services, as these are included in the definition of sales of electric energy. TAPS Reply at 8. We decline to include the suggested category of sites for generating capacity, as this category is far afield from the concept of marketing energy.

[54] *See* proposed 18 CFR 358.3(a). This definition was promulgated in *Cross-Subsidization Restrictions on Affiliate Transactions,* Order No. 707, 73 Fed. Reg. 11,013 (Feb. 29, 2008), FERC Stats. & Regs. ¶ 31,263 (2008).

own gathering or processing facilities, or (v) sales by an intrastate natural gas pipeline or local distribution company making an on-system sale. The comments did not suggest deleting these exemptions, and we propose to carry them forward in this reissued NOPR.[55]

37. We also note that a question has arisen whether providers of last resort (POLR), which are transmission providers that are charged with serving retail customers when the customers choose not to purchase from other suppliers, should likewise be exempted. We declined to accord POLRs a generic exemption in Order No. 2004–C, instead stating we would consider their status on a case-by-case basis. Commenters supporting the exemption pointed out that POLR service constitutes bundled retail sales, and thus should fall within the exemption for that category.[56] Commenters opposing the exemption presented theoretical instances of abuse, but not actual instances.[57] In the absence of actual evidence of abuse, we believe the general exemption for bundled retail sales should also apply to transmission providers acting as POLRs, and therefore propose to include POLRs in the list of exempt marketing functions.[58]

38. Similarly as with respect to transmission function employees, if an employee spends any but a *de minimis* amount of time engaged in marketing functions, he or she will be considered a marketing function employee. However, a supervisor, officer or director who is not actively and personally engaged in marketing functions will not be considered a marketing function employee.[59] For instance, if a manager has supervisory responsibility over employees engaged in making offers or sales of electric energy or natural gas, but does not engage in making offers or sales himself, he would not be a marketing function employee. However, if he both supervises others and engages in making offers or sales himself, or engages in decision-making regarding offers or sales, he would be a marketing function employee.

39. We note that our revised approach to the independent functioning rule resolves the question of whether asset managers should be subject to the Standards. In the initial NOPR, the Commission proposed expanding the definition of ''marketing, sales or brokering'' to include entities that manage or control transmission capacity, such as asset managers or agents. A number of comments were received on this subject, and several commenters noted that no evidence of abuse by asset managers had been presented in the initial NOPR record. These commenters point out that in the absence of such evidence, inclusion of asset managers in the category of proscribed affiliates would run afoul of the infirmity noted in National Fuel regarding Energy Affiliates.[60]

40. It is not necessary to reach this issue under our proposal, as our definition of marketing function employee reaches only those employees of an asset manager, whether that asset manager is a contractor, consultant, agent or affiliate, who may be directly engaged in wholesale marketing. Therefore, it is only those specific employees of an asset manager who must function independently of a transmission provider's transmission function employees. This simplification regarding asset managers illustrates another advantage to our proposed employee functional approach. If a company finds it more efficient to have fewer subsidiaries and combine multiple functions in a given affiliate, it need not avoid doing so simply to shield the affiliate's non-marketing employees from the restrictions imposed by the Standards.

3. Shared Employees

41. Employees such as attorneys, accountants, risk management personnel and rate design employees do not fall within the scope of the independent functioning rule, so long as they are acting in their roles as attorneys, accountants, risk management personnel or rate design employees, rather than as transmission function employees or marketing function employees. Thus, there is no longer a need for the concept of ''shared employees.'' Of course, as discussed below, such employees remain subject to the no conduit rule and may not pass non-public transmission function information to marketing function employees.

42. Furthermore, field employees will no longer need to be exempt from the independent functioning rule, as such employees, while qualifying as transmission function employees by virtue of being engaged in transmission system operations, will not be in a position to interact with marketing function employees. In those rare cases where marketing function employees may also operate generation and need to confer with transmission function employees, we propose a specific exception to the no conduit rule, as discussed below.

4. Permitted Interactions

43. We recognize, based on lengthy experience of our Audits and Investigations staff in the Office of Enforcement, that there may be instances where transmission function employees must communicate with marketing function employees.[61] For instance, it is not infrequently the case that the merchant function of a public utility not only engages in marketing the company's electric power, but also operates its generating plants. Under our proposal, the number of operational employees who would qualify as marketing function employees will be greatly reduced. However, it is possible, as noted above, that there may be some overlap between sales and operations. In such cases, it is essential that the employees who supervise the operation of the generating plants be able to discuss the plants' operational status with transmission function employees, as such information will affect flows and availability on the company's transmission system. Therefore, for these occasions as well as for the reliability situations discussed above, we include an exception to the independent functioning requirement for communications between transmission function employees and marketing function employees.[62] Exchanges of information pursuant to this exception, as in the case of exchanges regarding reliability, should be made only to the same extent that a transmission provider would exchange information with similarly situated marketing function employees of a non-affiliated entity. In order to prevent and monitor for potential abuse, we also include a requirement that contemporaneous records of such dispatch or reliability communications between transmission function employees and marketing function employees be maintained by the company and made available to Commission staff on request, as described in our discussion below on the transparency rule.[63] It will be the responsibility of the Chief Compliance

[55] *See* proposed 18 CFR 358.3(c)(1)–(5).

[56] Northwestern at 5–6, Ameren at 25–28.

[57] Illinois Commerce Commission Reply at 6–7, Retail Energy Supply Association at 5–7.

[58] *See* proposed 18 CFR 358.3(c)(1).

[59] *See* proposed 18 CFR 358.3(d).

[60] Nevada Companies at 13, citing P 21 of the NOPR. *See also* National Fuel Companies at 5–6, Spectra at 10–13, Williston at 9–10, Sequent at 4–5.

[61] As noted, we have already provided for necessary communications between employees of a transmission provider and its affiliated nuclear power plant in the Interpretive Order.

[62] *See* proposed 18 CFR 358.5(b).

[63] *See* proposed 18 CFR 358.7(h).

Officer to ensure that such records are made and retained.

5. Energy Affiliates

44. The concept of Energy Affiliates was added to the Standards in Order No. 2004. In that Order, we required pipelines and public utilities to function independently from their Energy Affiliates as well as from their marketing affiliates, and restricted the sharing of information by transmission providers with their Energy Affiliates. It was this addition which led the court in *National Fuel* to vacate the order with respect to the gas industry, on the grounds there was no record evidence of abuse by Energy Affiliates.

45. Our proposed adoption of the employee functional approach renders moot the question of whether the concept of Energy Affiliates should be retained for the electric industry. We no longer propose separating employees from transmission activities by virtue of their being employed by either a marketing affiliate or an Energy Affiliate, but rather by their job as a marketing function employee. Moreover, we note that commenters who supported retention of the concept of Energy Affiliates did not provide the Commission with evidence of actual abuse. That being the case, the same reasoning as was employed in *National Fuel* with respect to the natural gas industry would likely prevail on appeal of any order that restricted communications between public utilities and their Energy Affiliates. For that reason as well, we decline to apply the concept of Energy Affiliates to the electric industry.

C. The No Conduit Rule

46. We propose strengthening the proscriptions against the exchange of prohibited information in several ways. In addition to the current prohibition against transmission function employees disclosing non-public transmission function information to marketing function employees,[64] we propose prohibiting marketing function employees from receiving non-public transmission function information from any source.[65] And in addition to the current prohibition against a transmission provider using anyone as a conduit for the improper disclosure of non-public transmission function information, we propose prohibiting both an employee of a transmission provider and also an employee of an affiliate engaged in marketing functions from disclosing non-public transmission function information to marketing function employees.[66] The expansion of the no conduit rule[67] is designed to reach all sources of a prohibited informational exchange. It also encompasses many employees who do not fall within the scope of the independent functioning rule. For instance, although under our proposal there is no requirement that lawyers employed by a transmission provider need to function independently of the company's marketing function employees, such lawyers must avoid serving as a conduit for passing transmission function information to a marketing function employee.

47. As a safety valve, we also include an exemption to the no conduit rule that parallels the exemption provided under the independent functioning rule. Thus, the exchange of transmission function information with marketing function employees is permitted where the information regards generation necessary to perform generation dispatch, or is necessary to maintain or restore operation of the transmission system.[68] In such cases, a contemporaneous record is to be made of the exchange, except in emergency circumstances, when the record can be made after the fact.[69]

48. Compliance with proscriptions on the exchange of information should be greatly facilitated by the existing requirement that transmission providers designate a Chief Compliance Officer. Such officers are responsible, in the first instance, for fielding any questions from employees regarding the nature of transmission function information or the persons to whom it may be passed, for preventing prohibited exchanges of information, and for curing any prohibited exchanges by public posting of the information. We proposed in the initial NOPR that a transmission provider post the name of its Chief Compliance Officer on its OASIS or Internet Web site, due to difficulties Commission staff had experienced in identifying the Chief Compliance Officers of several transmission providers. We carry forward that proposal here.[70]

49. We also propose retaining from the existing regulations the requirement that transmission providers train their employees on compliance with the Standards, and propose carrying forward from the initial NOPR the requirement that completion of such training be certified. We also propose that such training be conducted annually.[71] Most employees should received some training, as all employees are forbidden from passing designated information to prohibited employees, but the bulk of the training will need to be concentrated on transmission function employees, marketing function employees, and those employees who are privy to transmission function information. Such employees would include lawyers, accountants, risk management personnel, and members of the rate design department. Since the actual restrictions in the Standards will now match the abuses sought to be avoided, such training should be relatively straightforward and easy for employees to comprehend.

D. The Transparency Rule

50. The reason behind the no conduit rule's prohibitions on receipt and disclosure of information is to prevent undue discrimination and undue preference by a transmission provider towards its marketing affiliate or division. But undue preferences can occur only if the prohibited information is not generally available to the competitors of such affiliates or divisions. Therefore, a transmission provider may comply with the prohibitions on passing transmission function information to marketing function employees by making such information publicly available. As EPSA remarks in its comments, the simultaneous disclosure of non-public transmission-related information to affiliates and to the public provides a ''Gordian Knot'' solution to undue discrimination in the provision of sensitive information.[72]

51. As currently provided in the regulations, in the event prohibited information is inadvertently passed to a prohibited employee, the violation can be cured by immediately posting such information on the transmission provider's Open Access Same-time Information System (OASIS) in the case of the electric industry, or on its Internet website, in the case of the natural gas

[64] The current Standards prohibit transmission provider's employees from disclosing non-public information about the transmission system to marketing or Energy Affiliates. 18 CFR 358.5(b).

[65] *See* proposed § 358.6(a)(2).

[66] *See* proposed § 358.6(a)(4).

[67] In the current Standards, the no conduit prohibition refers only to the use of another person by the transmission provider or its employees to pass prohibited information to a marketing affiliate or Energy Affiliate. 18 CFR 358.5(b)(7). In the proposed Standards, the term ''no conduit rule'' refers to the entire set of prohibitions on informational exchanges, including transmission provider employees, marketing affiliate employees and employees of other entities.

[68] *See* proposed 18 CFR 358.6(b).

[69] *See* proposed 18 CFR 358.7(h).

[70] *See* proposed 18 CFR 358.8(c)(2).

[71] *See* proposed 18 CFR 358.8(c)(1).

[72] EPSA at 4–5.

industry.[73] However, if the unauthorized disclosure includes non-public transmission customer information (a subset of transmission function information), we propose that the posting consist only of a notice that such information has been disclosed, in order to preserve its confidentiality and prevent further potential harm to that customer.[74] We also propose to carry forward from the existing regulations the exceptions for a marketing employee's specific requests for transmission service and for situations where a transmission customer voluntarily consents to the release of its information.[75] In those cases where, despite the independent functioning rule, transmission function employees must interact with marketing function employees, as where the latter are also responsible for the maintenance and dispatch of generating units or need to be involved in maintaining reliability, we have proposed requiring the contemporaneous recording of such conversations, so that the Commission may ascertain that no prohibited information was passed in the course of otherwise permissible discussions. Depending on the circumstances, such recordation could consist of hand-written or typed notes, electronic recording such as e-mails and text messages, telephone recordings, or the like. It is recommended that for all planned communications, the Chief Compliance Officer designate one of the attendees to such conversations as the person charged with the responsibility for recording the conversation or taking notes. The Chief Compliance Officer must be responsible for retaining these records in an accessible form, and the transmission provider must make them available to Commission staff upon request. The Commission proposes that the records be maintained for a period of five years.[76]

52. In accordance with the general aim of preventing undue preference, we propose retaining the existing regulation that a log be kept of any exercises of discretion or acts of waiver on the part of transmission providers. These should also be made available to Commission staff upon request.[77] Similarly, we proposed to retain the existing requirement that any offer of a discount must be posted on the transmission provider's OASIS or Internet Web site.[78]

53. We also propose certain modifications to the posting requirements for transmission providers. We propose the elimination of an organizational chart, which is no longer necessary in the absence of a requirement to bring Energy Affiliates within the scope of the Standards. However, affiliates that employ marketing function employees still need to be listed.[79] Another proposed modification is to provide for a temporary suspension of posting requirements in the case of emergencies.[80] Commission staff has received requests for waivers in the wake of Hurricane Katrina and other natural disasters, when transmission providers found it impossible to keep up with their normal posting requirements. At such times, they should not be further burdened with the necessity of seeking a waiver.

54. We also propose to continue the existing requirements concerning the posting of written implementation procedures for the Standards, certain merger information (modifying the information to account for the deletion of the concept of Energy Affiliates), and employee transfer information.[81]

55. The combination of public disclosure and contemporaneous recording required by the transparency rule should go a long way toward providing the Commission and market participants with the information needed to identify violations of the *per se* rules of the Standards, for which no further investigation would be needed. It also should enhance the ability of the Commission to monitor other behavior which may not be covered by the Standards themselves but which could be considered undue discrimination or preference under the FPA or NGA.

E. Miscellaneous

1. General Principles

56. We propose to modify the statement of general principles currently found in 18 CFR 358.2 to reflect statutory language regarding the prohibition against undue discrimination and undue preference.[82] We also propose to include statements of principle that reflect the three core rules we propose here, those being the independent functioning rule, the no conduit rule, and the transparency rule.[83]

2. Non-Discrimination Requirements

57. We propose to carry forward the existing regulations regarding the non-discrimination and non-preference requirements imposed on transmission providers, with some minor wording changes and combining of sections for simplicity and clarity.[84] While these requirements are in large part self-evident, as they reiterate statutory provisions, we believe that reiteration is helpful to emphasize the relationship of the Standards to the statutory prohibition against undue discrimination.

3. Applicability

58. In the paragraphs concerning applicability of the standards, we propose modifying § 358.1(a) to conform to the definitions proposed here, but otherwise to retain the restriction on applicability only to those pipelines that conduct transportation transactions with their marketing affiliates. We request comment as to whether this section and the following § 358.1(b), dealing with electric transmission providers, should be made parallel by deleting this provision (or in some other way). While a pipeline might conceivably have marketing affiliates with which it does not conduct transportation transactions, we note that pipelines need no longer be concerned with the inability to share information with the officers of such marketing affiliates, under our proposed reform of the independent functioning rule.

59. We propose to continue the existing exemption from the Standards for regional transmission organizations (RTOs) and independent system operators (ISOs). We also propose to continue the present ability of transmission owners that are members of RTOs and ISOs to apply for a waiver from the Standards if they do not operate or control their transmission facilities and have no access to transmission function information.[85]

60. The initial NOPR raised the question as to when a new natural gas transmission provider should become subject to the Standards. Under Order No. 497, a natural gas transmission provider became subject to the Standards when it commenced transportation transactions with its marketing or brokering affiliate.[86] In Order No. 2004–B, the Commission stated that a new interstate pipeline should observe the Standards when the pipeline is granted and accepts a certificate of public convenience and

[73] *See* proposed 18 CFR 358.7(a)(1).

[74] *See* proposed 18 CFR 358.7(a)(2).

[75] *See* proposed 18 CFR 358.7(b)–(c).

[76] *See* proposed 18 CFR 358.7(h).

[77] *See* proposed 18 CFR 358.4(4).

[78] *See* proposed 18 CFR 358.4(b).

[79] *See* proposed 18 CFR 358.7(e)(l).

[80] *See* proposed 18 CFR 358.7(g)(2).

[81] *See* proposed 18 CFR 358.7(d)–(f).

[82] The statutory language is contained in sections 205 and 206 of the FPA and sections 4 and 5 of the NGA.

[83] *See* proposed 18 CFR 358.2.

[84] *See* proposed 18 CFR 358.4.

[85] *See* proposed 18 CFR 358.1(c).

[86] Former 18 CFR 161.3.

necessity and becomes subject to the Commission's jurisdiction under the NGA.[87] This was one of the items appealed by the gas industry, and although it was not addressed in the *National Fuel* decision, it was vacated *sub silencio.* In the Interim Rule, the Commission did not require natural gas transmission providers to observe the Standards until such time as they commenced transportation transactions with their marketing affiliates.[88]

61. As we observed in the initial NOPR, we do not have any evidence that affiliate abuse has occurred in the time period before transportation commences. Therefore, we propose not to require new natural gas transmission providers to observe the Standards until the earlier of the date they have a rate on file with the Commission, or the date on which they commence transportation transactions. We propose to apply the same rule to electric transmission providers.[89]

4. Updates and Ministerial Corrections

62. We carry forward proposals from the initial NOPR to delete outdated references, such as those referring to the date for submitting a plan and a schedule for implementing the Standards.[90] We also revise language from the existing regulations where necessary to correct such ministerial matters as grammar and punctuation, and to account for the new definitions we propose here. Finally, we propose to reorganize sections where necessary to place related provisions in their logical sequence. For example, provisions regarding Energy Affiliates have been deleted, and provisions involving posting requirements have been gathered together in § 358.7, the transparency rule.

63. We propose modifying the section on definitions by providing new definitions that conform with the reforms proposed in this NOPR, deleting existing definitions no longer needed in light of our new proposals, and placing the definitions in alphabetical order.[91] We propose to carry forward the current definitions of ''transmission provider,'' but request comment on whether the separate definitions for electric and gas should be made parallel by referring to the applicable sections of the Code of Federal Regulations in each definition.[92]

64. Except as noted above, we propose retaining the bulk of the existing requirements for posting notices on the OASIS or Internet Web site, with minor wording revisions for clarity.[93] We propose retaining the requirement regarding the maintenance of books and records.[94] With minor wording changes to reflect our proposed new definitions, we also propose to retain the requirement that written procedures be posted on the OASIS or Internet Web site and be distributed to selected employees.[95] However, we propose to delete the current requirement that such written procedures also be filed with the Commission.

IV. Applicability of the Proposed Rule and Compliance Procedures

65. The Commission has a responsibility under FPA sections 205 and 206 and NGA sections 4 and 5 to ensure that the rates, charges, classifications, and service of public utilities (and any rule, regulation, practice, or contract affecting any of these) are just and reasonable and not unduly discriminatory or preferential, and to remedy undue discrimination and undue preference in the provision of such services. In fulfilling its responsibilities under FPA sections 205 and 206 and NGA sections 4 and 5, the Commission is required to address, and has the authority to remedy, undue discrimination and undue preference. Our action in this NOPR proposes to fulfill those responsibilities by proposing reforms to the Standards, which are designed to provide *per se* rules preventing undue discrimination and undue preference by transmission providers in the sale for resale of natural gas and electric energy.

66. The Commission proposes to apply the Final Rule in this proceeding to all transmission providers, who will be required to abide by its provisions, including the designation of a Chief Compliance Officer and the provision of training to its employees. Records of compliance are required to be maintained by the transmission provider for inspection by the Commission.

V. Information Collection Statement

67. The Office of Management and Budget (OMB) regulations require approval of certain information collection requirements imposed by agency rules.[96]

68. Previously, the Commission submitted to OMB the information collection requirements arising from the Standards of Compliance adopted in Order No. 2004. OMB approved those requirements.[97] The revisions to the Standards proposed in this issuance are modifications of already approved information collection procedures, and do not impose any significant additional information collection burden on industry participants. Many of the changes consist merely of the rewording of definitions and the reordering of the various information collection requirements. Some information collection requirements have been deleted, such as the posting of organizational charts. A requirement has been added concerning the maintenance of records regarding certain informational exchanges between transmission function employees and marketing function employees, as well as a requirement regarding the posting of contact information regarding the identification of the Chief Compliance Officer. Neither of these should impose a significant burden on the transmission providers. In fact, by proposing that the Standards will no longer govern the relationship between transmission providers and their Energy Affiliates, the overall information collection burden will likely decrease.

69. The Commission is submitting notification of the information collection requirements imposed in the NOPR to OMB for its review and approval under section 3507(d) of the Paperwork Reduction Act of 1995.[98] Comments are solicited on the Commission's need for this information, whether the information will have practical utility, the accuracy of provided burden estimates, ways to enhance the quality, utility, and clarity of the information to be collected, and any suggested methods of minimizing respondent's burden, including the use of automated information techniques.

70. OMB regulations require OMB to approve certain information collection requirements imposed by agency rule. The Commission is submitting notification of this proposed rule to OMB.

Title: FERC–592 and 717.

Action: Proposed Collection.

OMB Control No.: 1902–0157–1902–173.

Respondents: Business or other for profit.

[87] Order No. 2004–B at P 137.

[88] Interim Rule at P 26.

[89] *See* proposed 18 CFR 358.8(a).

[90] *See* proposed 18 CFR 358.8(b).

[91] *See* proposed 18 CFR 358.3.

[92] *See* proposed 18 CFR 358.3(k).

[93] *See* proposed 18 CFR 358.7(d)–(g).

[94] *See* proposed 18 CFR 358.8 (d).

[95] *See* proposed 18 CFR 358.7(d) and 358.8(b).

[96] 5 CFR 1320.11.

[97] Letter from OMB to the Commission (Jan. 20, 2004) (OMB Control Number 1902–0157); ''Notice of Action'' letter from OMB to the Commission (Jan. 20, 2004) (OMB Control Number 1902–0173).

[98] 44 U.S.C. 3507(d) (2000 and Supp. V 2005).

Frequency of Responses: On occasion.

Necessity of the Information: The information is necessary to ensure that all regulated transmission providers treat all transmission customers on a non-discriminatory basis.

Internal Review: The Commission has reviewed the requirements pertaining to natural gas pipelines and transmitting electric utilities and determined the proposed revisions are necessary to clarify the Standards, enhance compliance, increase efficiencies, and conform with a recent court decision.

71. These requirements conform to the Commission's plan for efficient information collection, communication, and management with the natural gas and electric utility 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.

72. 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) 502–8415, fax: (202) 208–2425, e-mail: *Michael.Miller@FERC.gov.*] Comments on the requirements of the proposed rule also may 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].

VI. Environmental Analysis

73. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[99] The Commission concludes that neither an Environmental Assessment nor an Environmental Impact Statement is required for this NOPR under § 380.4 of the Commission's regulations for certain actions. The actions proposed here fall within the categorical exclusions because this rule is clarifying and corrective, does not substantially change the effect of the regulations being amended and calls for information gathering and dissemination.[100] Therefore, an environmental assessment is unnecessary and has not been prepared for this rulemaking.

VII. Regulatory Flexibility Act

74. The Regulatory Flexibility Act of 1980 (RFA)[101] generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. Because most transmission providers do not fall within the definition of ''small entity,''[102] the Commission certifies that this rule will not have a significant economic impact on a substantial number of small entities. Furthermore, small entities may seek a waiver of these requirements, and those small entities that have already received a waiver of the Standards would be unaffected by the requirements of this proposed rulemaking.

VIII. Comment Procedures

75. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due May 12, 2008. Comments must refer to Docket No. RM07–1–000, and must include the commenter's name, the organization he or she represents, if applicable, and his or her address.

76. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's Web site at: *http://www.ferc.gov.* The Commission accepts most standard word processing formats. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

77. Commenters who are not able to file comments electronically must send an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE., Washington, DC 20426.

78. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this reissued NOPR are not required to serve copies of their comments on other commenters.

IX. Document Availability

79. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (*http://www.ferc.gov*) and in FERC'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.

80. From FERC's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft 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.

81. User assistance is available for eLibrary and the FERC's Web site during normal business hours from FERC Online Support at 202–502–6652 (toll free at 1–866–208–3676) or e-mail at: *ferconlinesupport@ferc.gov*, or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. E-mail the Public Reference Room at: *public.referenceroom@ferc.gov.*

List of Subjects in 18 CFR Part 358

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

By direction of the Commission.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

In consideration of the foregoing, the Commission proposes to revise part 358, Chapter I, Title 18, *Code of Federal Regulations,* to read as follows:

PART 358—STANDARDS OF CONDUCT

Sec.
358.1 Applicability.
358.2 General principles.
358.3 Definitions.
358.4 Non-discrimination requirements.
358.5 Independent functioning rule.
358.6 No conduit rule.
358.7 Transparency rule.
358.8 Implementation 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 and conducts transmission transactions with an affiliate that engages in marketing functions.

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

[99] Order No. 486, Regulations Implementing the National Environmental Policy Act of 1969, FERC Stats. & Regs. ¶ 30,783 (1987).

[100] 18 CFR 380.4(a)(2)(ii) and 380.4(a)(5) (2007).

[101] 5 U.S.C. 601–612 (2000 and Supp. V 2005).

[102] *See* 5 U.S.C. 601(3) and (6) (2000 and Supp. V 2005).

(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 system and has no access to transmission function information, 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 must treat all transmission customers, affiliated and non-affiliated, on a not unduly discriminatory basis, and must not make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage with respect to any transportation of natural gas or transmission of electric energy in interstate commerce, or with respect to the wholesale sale of natural gas or of electric energy in interstate commerce.

(b) A transmission provider's transmission function employees must function independently from its marketing function employees, except as permitted in this part or otherwise permitted by Commission order.

(c) Transmission function information may not be passed to or received by a transmission provider's marketing function employees, unless such information has been made public, except as permitted in this part or otherwise permitted by Commission order.

(d) A transmission provider must create, and maintain for a period of five years, records of permitted communications between transmission function employees and marketing function employees.

§ 358.3 Definitions.

(a) *Affiliate* of a specified company means:

(1) A division that operates as a functional unit of the specified company or, for any person other than an exempt wholesale generator:

(i) Any person that directly or indirectly owns, controls, or holds with power to vote, 10 percent or more of the outstanding voting securities of the specified company;

(ii) Any company 10 percent or more of whose outstanding voting securities are owned, controlled, or held with power to vote, directly or indirectly, by the specified company;

(iii) Any person or class of persons that the Commission determines, after appropriate notice and opportunity for hearing, to stand in such relation to the specified company that there is liable to be an absence of arm's-length bargaining in transactions between them as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the person be treated as an affiliate; and

(iv) Any person that is under common control with the specified company.

(v) For purposes of paragraph (a)(1)(iv) of this section, owning, controlling or holding with power to vote, less than 10 percent of the outstanding voting securities of a specified company creates a rebuttable presumption of lack of control.

(2) For any exempt wholesale generator (as defined under § 366.1 of this chapter), consistent with section 214 of the Federal Power Act (16 U.S.C. 824m), which provides that ''affiliate'' shall have the same meaning as provided in section 2(a) of the Public Utility Holding Company Act of 1935 (15 U.S.C. 79b(a)(11)):

(i) Any person that directly or indirectly owns, controls, or holds with power to vote, 5 percent or more of the outstanding voting securities of the specified company;

(ii) Any company 5 percent or more of whose outstanding voting securities are owned, controlled, or held with power to vote, directly or indirectly, by the specified company;

(iii) Any individual who is an officer or director of the specified company, or of any company which is an affiliate thereof under paragraph (a)(2)(i) of this section; and

(iv) any person or class of persons that the Commission determines, after appropriate notice and opportunity for hearing, to stand in such relation to the specified company that there is liable to be an absence of arm's-length bargaining in transactions between them as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the person be treated as an affiliate.

(b) *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.

(c) *Marketing functions* means the sale for resale in interstate commerce, or the submission of offers or bids to buy or sell natural gas or electric energy or capacity, demand response, virtual electric or gas supply or demand, or financial transmission rights in interstate commerce, subject to the following exemptions:

(1) Bundled retail sales, including sales of electric energy made by providers of last resort (POLRs),

(2) Incidental purchases or sales of natural gas to operate interstate natural gas pipeline transmission facilities,

(3) Sales of natural gas solely from the transmission provider's own production,

(4) Sales of natural gas solely from the transmission provider's own gathering or processing facilities, and

(5) Sales by an intrastate natural gas pipeline or local distribution company making an on-system sale.

(d) *Marketing function employee* means an employee, contractor, consultant or agent of a transmission provider or of an affiliate of a transmission provider who actively and personally engages in marketing functions. An officer, director or other supervisory employee is not considered to be a marketing function employee if he or she does not actively and personally engage in marketing functions.

(e) *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.

(f) *Transmission* means electric transmission, network or point-to-point service, ancillary services or other methods of electric transmission, or the interconnection with jurisdictional transmission facilities, under part 35 of this chapter; and 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.

(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) *Transmission functions* means transmission system operations and the planning, directing, organizing or carrying out of transmission operations, including the granting and denying of transmission service requests.

(i) *Transmission function employee* means an employee, contractor, consultant or agent of a transmission provider who actively and personally engages in transmission functions. An officer, director or other supervisory employee is not considered to be a transmission function employee if he or

she does not actively and personally engage in transmission functions.

(j) *Transmission function information* means information relating to transmission functions.

(k) *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.

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

(l) *Transmission service* means the provision of any transmission as defined in § 358.3(f).

§ 358.4 Non-discrimination requirements.

(a) *Implementing tariffs.* (1) A transmission provider must strictly enforce all tariff provisions relating to the sale or purchase of open access transmission service, if the 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 not unduly discriminatory manner, if the tariff provisions permit the use of discretion.

(3) A transmission provider may not, through its tariffs or otherwise, give undue preference to any person 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).

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

(5) A transmission provider must post on the OASIS or Internet Web site, as applicable, notice of each waiver of a tariff provision that it grants, and notice of each exercise of discretion that it exercises, detailing the circumstances and manner under which the waiver or exercise of discretion occurred. The posting must be made within one business day of the act of a waiver or exercise of discretion. The transmission provider must also maintain a log of the acts of waiver and exercises of discretion, and must make it available to the Commission upon request. The records must be kept for a period of five years from the date of each act of waiver or exercise of discretion.

(b) *Discounts.* A transmission provider must post any offer of a discount for any transmission service made on the OASIS or Internet Web site, as applicable, contemporaneous with the time that the offer is contractually binding. The posting must remain on the OASIS or Internet Web site for 60 days from the date of posting. The posting must include:

(1) The name of the customer involved in the discount and whether it is an affiliate or whether an affiliate is involved in the transaction;

(2) The rate offered;

(3) The maximum rate;

(4) The time period for which the discount would apply;

(5) The quantity of power or gas upon which the discount is based;

(6) The delivery points under the transaction; and

(7) Any conditions or requirements applicable to the discount.

§ 358.5 Independent functioning rule.

(a) *General rule.* Except as permitted in this part or otherwise permitted by Commission order, a transmission provider's transmission function employees must function independently of its marketing function employees.

(b) *Exemption for permitted information exchanges.* Notwithstanding the requirements of paragraph (a) of this section, a transmission provider's transmission function employees and marketing function employees may exchange certain information, in which case the transmission provider must make a contemporaneous record of the information exchange, subject to an exception for emergency circumstances, as provided in § 358.7(h). The permitted information is as follows:

(1) Information regarding generation necessary to perform generation dispatch, or

(2) Information necessary to maintain or restore operation of the transmission system.

(c) *Separation of functions.* (1) A transmission provider is prohibited from permitting its marketing function employees to:

(i) Conduct transmission functions; or

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

(2) A transmission provider is prohibited from permitting its transmission function employees to conduct marketing functions.

§ 358.6 No conduit rule.

(a) *Prohibited disclosure and receipt.* (1) A transmission provider's transmission function employees are prohibited from disclosing non-public transmission function information to their transmission provider's marketing function employees.

(2) A transmission provider's marketing function employees are prohibited from receiving non-public transmission function information from any source.

(3) A transmission provider is prohibited from using anyone as a conduit for the disclosure of non-public transmission function information to its marketing function employees.

(4) An employee of a transmission provider, and an employee of an affiliate of a transmission provider that is engaged in marketing functions, is prohibited from disclosing non-public transmission function information to any of the transmission provider's marketing function employees.

(b) *Exemption for permitted information exchanges.* Notwithstanding the requirements of paragraph (a) of this section, a transmission provider's transmission function employees and marketing function employees may exchange certain information, in which case the transmission provider must make a contemporaneous record of the information exchange, subject to an exception for emergency circumstances, as provided in § 358.7(h). The permitted information is as follows:

(1) Information regarding generation necessary to perform generation dispatch, or

(2) Information necessary to maintain or restore operation of the transmission system.

§ 358.7 Transparency rule.

(a) *Contemporaneous disclosure.* (1) If a transmission provider discloses non-public transmission function information, other than non-public transmission customer information, in a manner contrary to the requirements of § 358.6(a), the transmission provider must immediately post the information that was disclosed on the OASIS or Internet Web site, as applicable.

(2) If a transmission provider discloses non-public transmission customer information in a manner contrary to the requirements of § 358.6(a), the transmission provider must immediately post notice on the OASIS or Internet website, as applicable, that non-public transmission customer information was disclosed.

(b) *Exception for specific transaction information.* A transmission provider is

not required to contemporaneously disclose information covered by § 358.6(a) if the information relates solely to a marketing function employee's specific request for transmission service.

(c) *Voluntary consent provision.* A transmission customer may voluntarily consent, in writing, to allow the transmission provider to disclose the transmission customer's information to the transmission provider's marketing function employees. If the transmission customer authorizes the transmission provider to disclose its information to marketing function employees, the transmission provider must post notice on the OASIS or Internet website of that consent along with a statement that it did not provide any preferences, either operational or rate-related, in exchange for that voluntary consent.

(d) *Posting written procedures on the public Internet.* A transmission provider must post on the OASIS or Internet website, as applicable, current written procedures implementing the standards of conduct.

(e) *Identification of affiliate information on the public Internet.*

(1) A transmission provider must post on its OASIS or Internet website, as applicable, the names and addresses of all its affiliates that employ or retain marketing function employees.

(2) A transmission provider must post on its OASIS or Internet website, as applicable, a complete list of the employee-staffed facilities shared by the transmission provider and any of its affiliates that employ or retain marketing function employees. The list must include the types of facilities shared and the addresses of the facilities.

(3) The transmission provider must post information concerning potential merger partners as affiliates that may employ or retain marketing function employees, within seven days after the potential merger is announced.

(f) *Identification of employee information on the public Internet.*

(1) A transmission provider must post on its OASIS or Internet website, as applicable, the job titles and job descriptions of its transmission function employees, with the exception of clerical, maintenance, and field positions.

(2) A transmission provider must post a notice on the OASIS or Internet website, as applicable, of any transfer of a transmission function employee to a position as a marketing function employee, or any transfer of a marketing function employee to a position as a transmission function employee. The information posted under this section must remain on the OASIS or Internet Web site, as applicable, for 90 days. No such job transfer may be used as a means to circumvent any provision of this part. The information to be posted must include:

(i) The name of the transferring employee,

(ii) The respective titles held while performing each function (i.e., as a transmission function employee and as a marketing function employee), and

(iii) The effective date of the transfer.

(g) *Timing and general requirements of postings on the public Internet.*

(1) A transmission provider must update on its OASIS or Internet Web site, as applicable, the information required by § 358.7 within seven business days of any change, and post the date on which the information was updated.

(2) In the event an emergency, such as a flood, fire or hurricane, severely disrupts a transmission provider's normal business operations, the posting requirements in this part may be suspended by the transmission provider. If the disruption lasts longer than one month, the transmission provider must so notify the Commission and may seek a further exemption from the posting requirements.

(3) All OASIS or Internet Web site postings required by this part must comply, as applicable, with the requirements of § 37.6 or § 284.12(a) and (b)(3)(v) of this chapter, and must be sufficiently prominent as to be readily accessible.

(h) *Recordation of permitted information exchanges.* Notwithstanding the requirements of §§ 358.5(a) and 358.6(a), a transmission provider's transmission function employees and marketing function employees may exchange certain information, in which case the transmission provider must make and retain a contemporaneous record of all such exchanges except in emergency circumstances, in which case a record must be made of the exchange as soon as practicable after the fact. The transmission provider shall make the record available to the Commission upon request. The record may consist of hand-written or typed notes, electronic records such as e-mails and text messages, recorded telephone exchanges, and the like, and must be retained for a period of five years. The permitted information is as follows:

(1) Information regarding generation necessary to perform generation dispatch, or

(2) Information necessary to maintain or restore operation of the transmission system.

§ 358.8 Implementation requirements.

(a) *Effective date.* A transmission provider must be in full compliance with the standards of conduct by the earlier of:

(1) The date it has a rate on file with the Commission, or

(2) The date it commences transmission transactions.

(b) *Compliance measures and written procedures.*

(1) A transmission provider must implement measures to ensure that the requirements of §§ 358.5(a) and 358.6(a) are observed by its employees and by the employees of its affiliates.

(2) A transmission provider must distribute the written procedures referred to in § 358.7(d) to all its transmission function employees, marketing function employees, officers, directors, supervisory employees, and any other employees likely to become privy to transmission function information.

(c) *Training and compliance personnel.*

(1) A transmission provider must provide annual training on the standards of conduct to all the employees listed in paragraph (b)(2) of this section. The transmission provider must provide training on the standards of conduct to new employees in the categories listed in paragraph (b)(2) of this section, within the first 30 days of their employment. The transmission provider must require each employee who has taken the training to certify electronically or in writing that s/he has completed the training.

(2) A transmission provider must designate a Chief Compliance Officer who will be responsible for standards of conduct compliance. The transmission provider must post the name of the Chief Compliance Officer and provide his or her contact information on the OASIS or Internet Web site, as applicable.

(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 affiliates that employ or retain marketing function employees, and these must be available for Commission inspections.

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

Appendix A: Table of Commenters and Abbreviations for Commenters

An asterisk indicates that the commenter filed both initial and reply comments.

1. Missouri Public Service Commission	Missouri PSC.
2. Comments of the State of Alaska on Notice of Proposed Rulemaking	Alaska.
3. Rulemaking Comments of New Mexico Attorney General Office	New Mexico AG.
4. Rulemaking Comment of National Association of Regulatory Utility Commissioners*	NARUC.
5. Notice of Intervention of California Public Utilities Commission*	California PUC.
6. Initial Comments of * * * the Public Utilities Commission of Ohio	PUC of Ohio.
7. Joint Comments of the Washington Utilities and Transportation Commission, the Idaho Public Utilities Commission, and the PUC of Oregon*.	Washington, Idaho and Oregon state commissions.
8. Georgia Public Service Commissioner Stan Wise	Commissioner Wise.
9. Rulemaking Comment of South Carolina Public Service Authority	Santee Cooper.
10. Initial Comments of the Natural Gas Supply Association*	NGSA.
11. Initial Comments of the American Gas Association*	AGA.
12. Rulemaking Comment of Interstate Natural Gas Association of America*	INGAA.
13. Comments of Texas Pipeline Association	Texas Pipeline Ass'n.
14. Comments of the American Public Gas Association*	APGA.
15. Initial Comments of the National Fuel Companies*	National Fuel Companies.
16. Rulemaking Comment of Spectra Energy Transmission, LLC	Spectra.
17. Rulemaking Comments of Enbridge Energy Partners, L.P. and Enbridge, Inc	Enbridge.
18. Initial Comments of Williams Four Corners LLC	Williams.
19. Rulemaking Comment of Questar Market Resources, INC	Questar Market Resources.
20. Rulemaking Comment of Questar Gas Company	Questar Gas Co.
21. Comments of Boardwalk Pipeline Partners, LP	Boardwalk.
22. Rulemaking Comments of Williston Basin Interstate Pipeline Company	Williston.
23. Comments Of NiSource Inc	NiSource.
24. Rulemaking Comment of Alliance Pipeline L.P	Alliance.
25. Rulemaking Comment of USG Pipeline Company, et al	USG.
26. Initial Comments of Exxon Mobil Corporation	ExxonMobil.
27. Rulemaking Comment of DCP Midstream, LP	DCP Midstream.
28. Initial Comments of El Paso Corporation	El Paso.
29. Rulemaking Comment of Northwest Natural Gas Company and KB Pipeline Company	Northwest Natural.
30. Initial Comments of Southwest Gas Corporation	Southwest Gas.
31. Rulemaking Comment of New Jersey Resources Corporation	NJ Resources.
32. Initial Comments of Sequent Energy Management, LP	Sequent.
33. Comments of CenterPoint Energy Gas Transmission Company	CenterPoint.
34. Comments of KO Transmission Company	KO Transmission.
35. Rulemaking Comment of Dominion Resources Services, Inc	Dominion Resources.
36. Comments of Suez Energy North America, Inc	Suez.
37. Comments of Edison Electric Institute*	EEI.
38. Rulemaking Comment of the Large Public Power Council*	LPPC.
39. Comments of the Electric Power Supply Association*	EPSA.
40. Rulemaking Comment of Transmission Dependent Utility Systems*	TDU Systems.
41. Comments of the American Public Power Association*	APPA.
42. Rulemaking Comments of National Rural Electric Cooperative Association	NRECA.
43. Rulemaking Comment of Southwest Area Transmission Sub-Regional Planning Group*	SWAT.
44. Rulemaking Comment of Retail Energy Supply Association*	Retail Energy Supply Ass'n.
45. Rulemaking Comment of Transmission Access Policy Study Group*	TAPS.
46. Rulemaking Comment of the Western Utilities*	Western Utilities Compliance Group.
47. Rulemaking Comment of Idaho Power Company	Idaho Power.
48. Rulemaking Comment of Tucson Electric Power Company	Tucson Electric.
49. Initial Comments of Nevada Power Company and Sierra Pacific Power Company	Nevada Companies.
50. Rulemaking Comment of Arizona Public Service Company	Arizona PSC.
51. Comments of Public Service Co. of New Mexico	PSC of New Mexico.
52. Joint Initial Comments of Community Power Alliance Members (i.e., Entergy Services, Inc.; Salt River Project Ag. Imp. and Power Dist.; Progress Energy; and, Southern Co.)*.	CPA.
53. Initial Comments of Southern Company Services, Inc	Southern Co. Services.
54. Comments of Entergy Services, Inc	Entergy.
55. Rulemaking Comment of The AES Corporation	AES.
56. Rulemaking Comment of E.ON U.S. LLC	E.ON.
57. Comments of Reliant Energy, Inc	Reliant.
58. Comments of DTE Energy Company	DTE.
59. Rulemaking Comments of PSEG Energy Resources & Trade LLC, et al	PSEG.
60. Rulemaking Comment of KeySpan Corporation	KeySpan.
61. Rulemaking Comment of Bonneville Power Administration*	Bonneville.
62. Comments of the Transmission Agency of Northern California*	TANC.
63. Rulemaking Comment of Portland General Electric Company	Portland General.
64. Rulemaking Comment of Florida Power & Light Company	Florida Power & Light.
65. Rulemaking Comment of FPL Group, Inc	FPL Group.
66. Rulemaking Comment of Otter Tail Power Company	Otter Tail.
67. Comments of Wisconsin Electric Power Company	Wisconsin Electric.
68. Rulemaking Comment of Puget Sound Energy, Inc	Puget Sound.
69. Rulemaking Comment of Exelon Corporation	Exelon.
70. Rulemaking Comment of NSTAR Electric & Gas Corporation	NSTAR.
71. Comments of NorthWestern Corporation	NorthWestern.
72. Rulemaking Comment of the Indicated New York Transmission Owners	Indicated NY TOs.
73. Comments of FirstEnergy Service Company	FirstEnergy.
74. Rulemaking Comments of American Transmission Company LLC	American Trans. Co.

75. Joint Comments of Progress Energy, Inc., ElectriCities of North Carolina, Inc. and North Carolina Electric Membership Corporation.	Progress.
76. Motion To Intervene And Comments of Pacific Gas & Electric Company	PG&E.
77. Comments of Ameren Services Company	Ameren.
78. Initial Comments of Oklahoma Gas and Electric Company	Oklahoma Gas & Electric.
79. Rulemaking Comment of Southern California Edison Company	SCE.
80. Rulemaking Comment of Morgan Stanley Capital Group Inc.*	MSCGI.
81. Comments of National Grid USA	National Grid.
82. Rulemaking Comment of MidAmerican Energy Company, PacifiCorp, Kern River Gas Transmission Company, and Northern Natural Gas Company.	MidAmerican.
83. Initial Comments of SCANA Corp.	SCANA.
84. Rulemaking Comment of Xcel Energy Services Inc	Xcel.
85. Comments of Sempra	Sempra.
86. Florida Public Service Commission (Reply comments only)	Florida PSC.
87. ITC—Mich. Electric Transmission (Reply comments only)	ITC.
88. Federal Trade Commission (Reply comments only)	FTC.
89. Alabama PSC (Reply comments only)	Alabama PSC.
90. Chevron (Reply comments only)	Chevron.
91. Aux Sable Liquids (Reply comments only)	Aux Sable.
92. Calypso/Broadwater (Reply comments only)	Calypso.
93. Anadarko*	Anadarko.
94. BG E&P Alaska (Reply comments only)	BG E&P Alaska.
95. Fayetteville (Reply comments only)	Fayetteville.

[FR Doc. E8–6261 Filed 3–26–08; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 655

Employment Standards Administration

Wage and Hour Division

29 CFR Parts 501, 780, and 788

RIN 1205–AB55

Temporary Agricultural Employment of H–2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement; Extension of Comment Period

AGENCIES: Employment and Training Administration, Wage and Hour Division, Employment Standards Administration, Labor.

ACTION: Proposed rule; extension of comment period.

SUMMARY: The Employment and Training Administration and the Employment Standards Administration recently issued a proposed rule to modernize the application process for and enforcement of temporary alien agricultural (H–2A) labor certifications. 73 FR 8538 (Feb. 13, 2008). The proposed rule provided a comment period through March 31, 2008. The agencies have received several requests to extend the comment period and have decided to extend the comment period through April 14, 2008.

DATES: The comment period for the notice of proposed rulemaking published February 13, 2008 (73 FR 8538) is extended through April 14, 2008. Interested persons are invited to submit written comments on the proposed rule on or before April 14, 2008.

ADDRESSES: You may submit comments, identified by Regulatory Information Number (RIN) 1205–AB55, by any one of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov:* Follow the Web site instructions for submitting comments.
- *Mail:* Please submit all written comments (including disk and CD–ROM submissions) to Thomas Dowd, Administrator, Office of Policy Development and Research, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–5641, Washington, DC 20210.
- *Hand Delivery/Courier:* Please submit all comments to Thomas Dowd, Administrator, Office of Policy Development and Research, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–5641, Washington, DC 20210.

Please submit your comments by only one method. The Department will post all comments received on *http://www.regulations.gov* without making any change to the comments, including any personal information provided. The *http://www.regulations.gov* Web site is the Federal e-rulemaking portal and all comments posted there are available and accessible to the public. The Department cautions commenters not to include their personal information such as Social Security Numbers, personal addresses, telephone numbers, and e-mail addresses in their comments, as such submitted information will become viewable by the public via the *http://www.regulations.gov* Web site. It is the responsibility of the commenter to safeguard his or her information. Comments submitted through *http://www.regulations.gov* will not include the commenter's e-mail address unless the commenter chooses to include that information as part of his or her comment.

Postal delivery in Washington, DC, may be delayed due to security concerns. Therefore, the Department encourages the public to submit comments via the Web site indicated above.

Docket: For access to the docket to read background documents or comments received, go to the Federal eRulemaking portal at: *http://www.regulations.gov.* The Department will also make all the comments it receives available for public inspection at the ETA Office of Policy Development and Research at the above address during normal business hours. If you need assistance to review the comments, the Department will provide you with appropriate aids such as readers or print magnifiers. The Department will make copies of the rule available, upon request, in large print and as electronic file on computer disk. The Department will consider providing the proposed rule in other formats upon request. To schedule an appointment to review the comments and/or obtain the rule in an alternate format, contact the Office of Policy Development and Research at (202) 693–3700 (VOICE) (this is not a