

**DEPARTMENT OF ENERGY**

**Federal Energy Regulatory Commission**

**18 CFR Part 358**

[Docket No. RM07-1-000; Order No. 717]

**Standards of Conduct for Transmission Providers**

Issued October 16, 2008.

**AGENCY:** Federal Energy Regulatory Commission.

**ACTION:** Final rule.

**SUMMARY:** The Federal Energy Regulatory Commission is amending its

regulations adopted on an interim basis in Order No. 690, in order to make them clearer and to refocus the rules on the areas where there is the greatest potential for abuse. The Final Rule is designed to foster compliance, facilitate Commission enforcement, and conform the Standards of Conduct to the decision of the U.S. Court of Appeals for the DC Circuit in *National Fuel Gas Supply Corporation v. FERC*, 468 F. 3d 831 (DC Cir. 2006). Specifically, the Final Rule eliminates the concept of energy affiliates and eliminates the corporate separation approach in favor of the employee functional approach used in Order Nos. 497 and 889.

**DATES:** *Effective Date:* This rule will become effective November 26, 2008.

**FOR FURTHER INFORMATION CONTACT:**

Kathryn Kuhlen, Office of Enforcement, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, [Kathryn.Kuhlen@FERC.gov](mailto:Kathryn.Kuhlen@FERC.gov), (202) 502-6855.

Jamie A. Jordan, Office of Enforcement, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, [Jamie.Jordan@FERC.gov](mailto:Jamie.Jordan@FERC.gov) (202) 502-6628.

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Before Commissioners: Joseph T. Kelliher, Chairman; Svedeen G. Kelly, Marc Spitzer, Philip D. Moeller, and Jon Wellingshoff.	
<b>I. Introduction</b>	
1. This Final Rule amends the Standards of Conduct for Transmission Providers (the Standards of Conduct or the Standards) to make them clearer and to refocus the rules on the areas where there is the greatest potential for abuse. The Standards have substantially evolved over the twenty years since they were first adopted for the gas industry in 1988. During that time, the Commission added numerous exceptions and additions to the original regulations (and to the regulations adopted for the electric industry in 1996), including revisions made in Order No. 2004, <sup>1</sup> in which the Commission combined the separate Standards for the gas and electric industry, expanded the scope of the Standards to include the new concept of energy affiliates, and adopted a corporate separation approach to the relationship of transmission providers and their marketing arms. The cumulative effect of many of these changes rendered the Standards as a whole difficult for regulated entities to apply and for the Commission to enforce. Furthermore, on appeal of Order No. 2004, the U.S. Court of Appeals for the DC Circuit disapproved of the expansion of the Standards to include energy affiliates, and vacated Order No. 2004 as it applied to the gas industry. <sup>2</sup>	
2. The reforms adopted in this Final Rule are designed to eliminate the elements that have rendered the Standards difficult to enforce and apply. They combine the best elements of Order No. 2004 (especially the integration of gas and electric Standards, an element not contested in	
<i>National Fuel</i> ), with those of the Standards originally adopted for the gas industry in Order No. 497 <sup>3</sup> and for the electric industry in Order No. 889. <sup>4</sup> Specifically, the Final Rule (i) eliminates the concept of energy affiliates and (ii) eliminates the corporate separation approach in favor of the employee functional approach used in Order Nos. 497 and 889. In addition, the reforms adopted here conform the Standards to the <i>National Fuel</i> opinion. At bottom, these reforms, by making the Standards clearer and by refocusing them on the areas where there is the greatest potential for affiliate abuse, will make compliance less elusive and subjective for regulated entities, and will facilitate enforcement of the Standards by the Commission.	
<b>II. Background</b>	
3. 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 preferences over non-affiliated customers. Citing demonstrated record abuses, the U.S. Court of Appeals for the DC Circuit upheld these Standards in 1992. <sup>5</sup> The Commission adopted similar Standards for the electric industry in 1996, in Order No. 889, prohibiting public	
utilities from giving undue preferences to their marketing affiliates or wholesale merchant functions. Both the electric and gas Standards sought to deter undue preferences 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.	
4. 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. <sup>6</sup> The new Standards were made applicable to both the electric and gas industries, and provided that the transmission employees of a transmission provider <sup>7</sup> 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.	
5. On appeal by members of the natural gas industry, the U.S. Court of Appeals for the DC Circuit overturned the Standards as applicable to gas transmission providers, on the grounds that the evidence of energy affiliate	
<sup>1</sup> <i>Standards of Conduct for Transmission Providers</i> , Order No. 2004, FERC Stats. & Regs., Regulations Preambles 2001–2005 ¶ 31,155 (2003), <i>order on reh'g</i> , Order No. 2004–A, FERC Stats. & Regs., Regulations Preambles 2001–2005 ¶ 31,161 (2004), <i>order on reh'g</i> , Order No. 2004–B, FERC Stats. & Regs., Regulations Preambles 2001–2005 ¶ 31,166 (2004), <i>order on reh'g</i> , Order No. 2004–C, FERC Stats. & Regs., Regulations Preambles 2001–2005 ¶ 31,172 (2004), <i>order on reh'g</i> , Order No. 2004–D, 110 FERC ¶ 61,320 (2005), <i>vacated and remanded as it applies to natural gas pipelines sub nom. Nat'l Fuel Gas Supply Corporation v. FERC</i> , 468 F.3d 831 (DC Cir. 2006) ( <i>National Fuel</i> ).	
<sup>2</sup> <i>National Fuel</i> , 468 F. 3d at 845.	
<sup>3</sup> <i>Inquiry Into Alleged Anticompetitive Practices Related to Marketing Affiliates of Interstate Pipelines</i> , Order No. 497, 53 FR 22139 (1988), FERC Stats. & Regs., Regulations Preambles 1986–1990 ¶ 30,820 (1988); Order No. 497–A, <i>order on reh'g</i> , 54 FR 52781 (1989), FERC Stats & Regs., Regulations Preambles 1986–1990 ¶ 30,868 (1989); Order No. 497–B, <i>order extending sunset date</i> , 55 FR 53291 (1990), FERC Stats. & Regs., Regulations Preambles 1986–1990 ¶ 30,908 (1990); Order No. 497–C, <i>order extending sunset date</i> , 57 FR 9 (1992), FERC Stats. & Regs., Regulations Preambles 1991–1996 ¶ 30,934 (1991), <i>reh'g denied</i> , 57 FR 5815 (1992), 58 FERC ¶ 61,139 (1992); <i>aff'd in part and remanded in part sub nom. Tenneco Gas v. FERC</i> , 969 F.2d 1187 (DC Cir. 1992) (collectively, Order No. 497) ( <i>Tenneco</i> ).	
<sup>4</sup> <i>Open Access Same-Time Information System (Formerly Real-Time Information Network) and Standards of Conduct</i> , Order No. 889, 61 FR 21737 (May 10, 1996), FERC Stats. & Regs., Regulations Preambles January 1991–June 1996 ¶ 31,035 (1996); Order No. 889–A, <i>order on reh'g</i> , 62 FR 12484 (Mar. 14, 1997), FERC Stats. & Regs., Regulations Preambles July 1996–December 2000 ¶ 31,049 (1997); Order No. 889–B, <i>reh'g denied</i> , 62 FR 64715 (Dec. 9, 1997), 81 FERC ¶ 61,253 (1997) (collectively, Order No. 889).	
<sup>5</sup> <i>Tenneco</i> , 969 F. 2d at 1214.	
<sup>6</sup> 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; (2) manages or controls transmission capacity of a transmission provider in U.S. energy or transmission markets; (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.	
<sup>7</sup> 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 or part 157 or subparts B or G of part 284 of the same chapter of the regulations. 18 CFR 358.3(a).	

abuse cited by the Commission was not in the record.<sup>8</sup> The court noted that the dissenting Commissioners in Order No. 2004 had expressed concern that the Order would diminish industry efficiencies without advancing the FERC policy of preventing unduly discriminatory behavior.<sup>9</sup>

6. The Commission issued an Interim Rule on January 9, 2007,<sup>10</sup> which repromulgated the portions of the Standards not challenged in *National Fuel*. The Commission then set about determining how to respond to the DC Circuit's order on a permanent basis. On January 18, 2007, the Commission issued its initial NOPR,<sup>11</sup> 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.

7. Consideration of these comments, coupled with the Commission's own experience in administering the Standards, persuaded the Commission to modify the approach advanced in the initial NOPR. For that reason, the Commission issued a new NOPR on March 27, 2008,<sup>12</sup> and invited comment both on its general approach and on its specific provisions. In the NOPR, the Commission proposed to return to the approach of separating by function transmission personnel from marketing personnel, an approach that had been adopted in Order Nos. 497 and 889. The Commission also proposed to clarify and streamline the Standards in order to enhance compliance and enforcement, and to increase transparency in the area of transmission/affiliate interactions that would aid in the detection of any undue discrimination. Comments were received from 62 companies and organizations, which are listed in

<sup>8</sup> *National Fuel*, 468 F. 3d at 841.

<sup>9</sup> *Id.* at 838.

<sup>10</sup> *Standards of Conduct for Transmission Providers*, Order No. 690, 72 FR 2427 (Jan. 19, 2007); FERC Stats. & Regs. ¶ 31,237 (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).

<sup>11</sup> *Standards of Conduct for Transmission Providers*, 72 FR 3958 (Jan. 29, 2007), FERC Stats. & Regs. ¶ 32,611 (2007) (initial NOPR).

<sup>12</sup> *Standards of Conduct for Transmission Providers*, 73 Fed. Reg. 16,228 (March 27, 2008), FERC Stats. & Regs. ¶ 32,630 (2008) (NOPR).

Appendix A.<sup>13</sup> The vast majority of the comments were laudatory both of the Commission's efforts to simplify and clarify the Standards, and of the general approaches taken by the Commission to achieve that goal.

8. Notwithstanding general agreement with the Commission's overall approach, many commenters submitted requests for clarification and modifications. In most instances, the modifications proposed were advanced with the stated goal either to make the Standards even clearer, or to address matters which some entities believed had fallen between the cracks in the transition from the existing Standards to a more streamlined approach. The Commission has carefully considered these comments and agrees that in several areas, modifications to the regulatory text are needed. This Final Rule adopts the overall approach set forth in the NOPR, but modifies the regulatory text to better achieve the goals of clarity and enforceability. It also provides clarifications in several areas in order to aid regulated entities in applying the Standards.

### III. Discussion

#### A. Overall Approach

##### 1. Commission Proposal

9. The NOPR proposed to simplify and clarify the Standards, and in particular to: (i) Eliminate the concept of energy affiliates, and (ii) eliminate the corporate separation approach to separating a transmission provider's transmission function employees from its marketing function employees, instead returning to the employee functional approach utilized in Order Nos. 497 and 889. The NOPR pointed out that the corporate separation approach had proven difficult to implement, as evidenced by the scores of waiver requests submitted to the Commission, and impeded legitimate integrated resource planning and competitive solicitations, as reflected in the concerns raised by the electric industry in particular and also by state commissions. The Commission also found that the existing Standards are too complex to facilitate compliance or support enforcement efforts, and have had the unintended effect of making it more difficult for transmission providers to reasonably manage their businesses.

##### 2. Comments

10. The vast majority of commenters agreed with the Commission's goals of

<sup>13</sup> The acronyms used throughout are defined in Appendix A.

simplifying the Standards in order to achieve greater clarity, efficiencies of operation, and ease of compliance. They also applauded the proposed return to the employee functional approach, stating that it would better promote regulatory certainty than had the corporate separation approach.<sup>14</sup>

11. No commenters proposed that the corporate separation approach be continued, and no commenters requested continuation of the energy affiliate concept. The FTC, however, contended that behavioral rules, including the employee functional approach, cannot fully achieve independent functioning because such an approach remains vulnerable to subtle events of discrimination and preference that may be difficult to detect and document.<sup>15</sup> The FTC and ITC recommend instead that the Commission require vertically integrated firms to structurally unbundle transmission and place operation of the transmission function in the hands of the relevant Regional Transmission Organization (RTO) or Independent System Operator (ISO).<sup>16</sup>

##### 3. Commission Determination

12. The overwhelming support from commenters on the NOPR's overall approach confirms the Commission's conviction that simplifying and clarifying the Standards in the manner proposed will best achieve the twin goals of compliance and enforcement. The Commission therefore adopts the employee functional approach, as set forth in the regulatory text, and eliminates the concept of energy affiliates. Specifics and definitions regarding the employee functional approach, as well as other matters, are discussed below. With respect to the comments of the FTC and ITC, there has been no demonstration that the proposed rules are inadequate to address the potential for undue preferences. Nor do we believe this proceeding is the proper forum to

<sup>14</sup> Most commenters expressly support the change in approach to the independent functioning rule from "corporate separation" to "employee functional," including ALCOA; Ameren; AGA; APPA; ATC; Arizona PSC; Bonneville; CenterPoint; Chandeaur; California PUC (particularly supporting the Commission's efforts to remove impediments to integrated resource planning); Destin; Dominion Resources; Duke; E.ON; EEL; El Paso; EPSA; Idaho Power; FirstEnergy; INGAA; Iroquois; Kinder Morgan; LPPC; MidAmerican; NARUC; National Grid; NGS; New York PSC; Nisource; NCPA; PG&E; PSEG; Puget Sound; SMUD; Salt River; SCE; Southern Co. Services; Spectra; TAPS; TANC; TDU Systems; Vectren; WA UTC; Western Utilities Compliance Group; Wisconsin Electric; and Xcel.

<sup>15</sup> FTC at 6-7.

<sup>16</sup> FTC at 9-10; ITC Reply at 4-5.

address issues as complex and far-reaching as those raised by the FTC and ITC.

### B. Jurisdiction and Applicability of the Standards

#### 1. Applicability to Pipelines Operating Under Part 157

##### a. Commission Proposal

13. In the NOPR, the Commission carried forward from the existing Standards the essence of the language in section 358.1 governing the applicability of the Standards to interstate natural gas pipelines. The proposed text reads in pertinent part: "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." Likewise, the definition of transmission provider in proposed section 358.3(k), insofar as it pertains to the gas industry, reads as follows: "Any interstate natural gas pipeline that transports gas for others pursuant to subpart A of part 157 or subparts B or G of part 284 of this chapter."

##### b. Comments

14. Hampshire Gas and Northwest Natural object that the texts of proposed sections 358.1(a) and 358.3(k) bring within the ambit of the Standards certain gas pipelines that did not fall within the Standards as issued under Order No. 497.<sup>17</sup> They contend that the NOPR's use of the word "or" instead of "and" in proposed section 358.1(a) expands the ambit of the regulations to any pipeline that transports gas either under subpart A of part 157 or under subpart B or G of part 284. Both commenters note that a pipeline operating only under part 157 does not have the authority to provide open access transportation, as it may only transport for specific authorized shippers, and thus it is not possible for a part 157 pipeline to engage in discrimination in favor of an affiliate. Hampshire and Northwest Natural urge the Commission to change the Standards' applicability to cover only those pipelines that operate under both parts 157 and 284.<sup>18</sup>

##### c. Commission Determination

15. The current Standards, as well as the proposed Standards, contain the word "or" instead of "and" in sections

358.1(a) and 358.3(k)(2). The fact that the Commission is returning to the employee functional approach used in Order No. 497 does not automatically mean, however, that it must resurrect all other aspects of Order No. 497. Each provision must be considered on a case-by-case basis. The Commission has evaluated the comments contending that part 157 pipelines should not be included in the ambit of section 358.1(a), and determines that their position is well-taken. Pipelines operating only under part 157 cannot discriminate in favor of an affiliate, because such pipelines can only transport for specific shippers authorized by their certificates. Put another way, in this Final Rule, we are concerned about the relationship between pipelines and their shippers where the pipelines are providing transportation service pursuant to part 284 blanket certificate authorization and open access rules, which give the pipelines the flexibility to discriminate in favor of their affiliates because they may commence and terminate service without *ex ante* review by market participants or the Commission. By contrast, the very few pipelines that are not part 284 open-access transporters must receive shipper-specific certificate authorization from the Commission, which must find the service is required by the public convenience and necessity under Section 7 of the Natural Gas Act. Accordingly, part 157 transporters do not have the flexibility that could lead to discriminating unduly in favor of their affiliates. The Commission will therefore eliminate the reference to part 157, leaving only interstate pipelines that transport gas for others pursuant to subparts B or G of part 284 subject to the Standards and within the scope of the definition of transmission provider. Accordingly, the Standards now apply to those pipelines subject to the Commission's open access rules under part 284.

#### 2. Applicability to Pipelines With No Marketing Affiliate Transactions

##### a. Commission Proposal

16. The NOPR requested comment as to whether the statement of the Standards' applicability to interstate pipelines in section 358.1(a) should parallel the statement of the Standards' applicability to the electric industry set forth in section 358.1(b).<sup>19</sup> The language in question reads: "and conducts transmission transactions with an affiliate that engages in marketing functions."

##### b. Comments

17. INGAA asserts that the cited language is essential, because it exempts those pipelines with affiliates that have marketing function employees, but with which the pipeline conducts only non-transmission transactions. INGAA argues that these non-transmission transactions do not pose the potential for the types of abuse the rules seek to prevent. According to INGAA, the cited language also ensures that the proposed Standards operate within the boundaries set forth in *National Fuel*, by not extending coverage to relationships and transactions for which the Commission has no record evidence of undue discrimination or preference.<sup>20</sup>

18. NGSAA argues that the limitation in the current language implies an exemption from the Standards for sales of gas in which the gas is not shipped using capacity held or controlled by the seller's affiliated transmission provider. NGSAA urges the Commission to either: (i) Clarify that the No Conduit Rule (and the Standards generally) would nonetheless apply to such gas sellers when they share the same facilities or trading floor with marketing function employees who are not exempt from the Standards, or (ii) require entities that house exempt marketing function employees in the same facility as non-exempt marketing function employees to provide some physical separation between the two groups, to prevent uncontrolled flow of restricted information.<sup>21</sup>

19. While agreeing with INGAA, other commenters would apply the conditional language in section 358.1(a) to public utilities as well as pipelines, thereby limiting the Standards' application to both public utilities and interstate natural gas pipelines that conduct transportation transactions with marketing affiliates.<sup>22</sup>

##### c. Commission Determination

20. The Commission agrees with INGAA that there is no evidence in the record to suggest that pipelines that do not conduct transmission transactions with an affiliate engaged in marketing functions are in a position to engage in the type of affiliate abuse to which the Standards are directed. Therefore, the Commission will retain the language in section 358.1(a) that sets forth this limitation.

21. The Commission disagrees with NGSAA's contention that certain sales of gas have, by implication, been made

<sup>17</sup> Hampshire Gas at 6–9; Northwest Natural at 3–7.

<sup>18</sup> *Id.*

<sup>19</sup> NOPR at P 58.

<sup>20</sup> INGAA at 9–12.

<sup>21</sup> NGSAA Reply Comments at 12–14.

<sup>22</sup> Nisource at 25–28; DCP Midstream at 2; Southwest Gas at 18–20.

exempt. The Commission is not exempting any sales of gas; the Standards apply to conduct, not to products. Section 358.1 addresses which pipelines and which electric utilities fall within the ambit of the Standards. A pipeline may have some marketing affiliates with which it conducts transmission transactions, and some with which it does not. A pipeline that conducts transmission transactions with a marketing affiliate must comply with the Standards, including the No Conduit Rule.

22. If a pipeline has affiliates of both types (some with which it conducts transmission transactions and some with which it does not), the pipeline must ensure that there is no prohibited communication with marketing function employees, in accordance with the requirements of the No Conduit Rule. The pipeline can determine how best to ensure compliance with the regulation, and we decline to order physical separation of employees on a generic basis. We might consider it on a case-specific basis, however, in the event the Commission found a violation.<sup>23</sup>

23. The Commission agrees with those commenters that suggest parallelism between the electric and gas industries could be achieved by also applying to public utilities the limitation applicable to pipelines. Because the core abuse to which the Standards are directed is that of undue preference in favor of an affiliate (defined to include divisions of the transmission provider as well as separate corporate entities), a public utility that does not engage in any transmission transactions with a marketing affiliate should be excluded from the Standards' coverage, just as should a pipeline. Therefore, the Commission modifies the language of section 358.1(b) accordingly.

### 3. Commencement Date

#### a. Commission Proposal

24. The Commission proposed in section 358.8(a) that a transmission provider must comply with the Standards as of the earlier of the date it has a rate on file with the Commission or the date it commences transmission transactions.

#### b. Comments

25. INGAA and APGA disagree with the commencement date proposed in section 358.8(a). INGAA asserts that the Standards should not apply to a pipeline unless and until the pipeline engages in transportation transactions with a marketing or brokering affiliate.

INGAA believes that proposed section 358.8(a) is inconsistent with the Standards' purpose of preventing preferential treatment and with proposed section 358.1(a), which applies the Standards only to pipelines conducting transmission transactions with an affiliate engaging in marketing functions.<sup>24</sup> Conversely, APGA would have the Standards apply to a newly-certificated pipeline as soon as the pipeline begins soliciting customers or negotiating contracts, rather than deferring compliance until such time as the pipeline commences transportation.<sup>25</sup>

#### c. Commission Determination

26. The Commission believes that INGAA's comments on this point are well-taken. Under section 358.1, a pipeline that does not conduct transmission transactions with an affiliate that engages in marketing functions need not comply with the Standards. In this Final Rule, we expand that same provision to apply to public utilities as well, as discussed above. Therefore, we will modify the effective date upon which a transmission provider must be in full compliance with the Standards to provide that a transmission provider must comply with the Standards on the date it commences transmission transactions with an affiliate that engages in marketing functions. See section 358.8(a).

### 4. Waivers From Coverage of the Standards

#### a. Commission Proposal

27. In the NOPR, the Commission did not address the issue of whether existing waivers from the Standards should apply to the new Standards.

#### b. Comments

28. Numerous commenters request that the Commission clarify that existing waivers from the application of the current Standards remain in effect upon finalization of this rulemaking, to the extent they remain relevant.<sup>26</sup> Questar

<sup>24</sup> INGAA at 58–61.

<sup>25</sup> APGA at 8–10.

<sup>26</sup> AGA at 26; INGAA at 61–62; New York PSC at 5–6; National Grid at 28–29; Northwest Natural at 6–7; Questar at 2; TDU Systems at 18; Unitil at 4–5. New York PSC adds that without such confirmation, existing sales activities authorized under the standing waivers may be disrupted at the expense of the public interest. New York PSC at 5. New York PSC offers the example of National Fuel Gas Distribution Corporation (NFGD), which it states received a waiver to make off-system sales from contract storage located on an affiliated pipeline system to marketers who resell that gas to NFGD's retail customer under a New York PSC-approved retail choice program. New York PSC

further requests that exemptions and waivers granted under Order No. 2004 be functionally adapted to the rules as proposed in the NOPR.<sup>27</sup>

29. Northwest Natural requests that the Commission broaden existing waivers from "partial" to "full" for pipelines that provide transportation for a single affiliated shipper.<sup>28</sup> Similarly, USG believes that pipelines transporting gas only for affiliated shippers should be exempted from the rules. It recommends that the Commission either amend proposed section 358.1(a) to exclude pipelines that do not serve unaffiliated customers, amend the exceptions to the proposed definition of "marketing functions," or grant USG and B–R Pipeline a waiver.<sup>29</sup>

30. With regards to the Commission's continued willingness to consider requests for waivers, Unitil seeks clarification that the Commission will continue to consider requests for waivers by entities that would have qualified for waivers under the requirements of Order Nos. 889, 497, or 2004.<sup>30</sup> TDU Systems supports the Commission's proposal to allow transmission owners who are members of RTOs and ISOs, do not operate or control their transmission facilities, and have no access to transmission function information, to request waivers from the Standards.<sup>31</sup>

#### c. Commission Determination

31. The Commission agrees that it would be both burdensome and unfair to require entities that have already received waivers from the Standards on a case-by-case basis to file their requests again. Therefore, existing waivers relating to the Standards shall continue in full force and effect.

32. The determination as to whether a waiver is appropriate for an entity that serves only a single, affiliated customer is best made on an individual basis. Any entity that believes it is entitled to a waiver may apply for one, and any entity that has already received a full or partial waiver may continue to rely upon it. This Final Rule is not the appropriate vehicle to grant or modify individual waivers for specific entities, as requested by Questar and USG. We note, however, that many of the waivers previously granted transmission providers may be rendered moot by the revisions made here to the Standards.

states that uncertainty regarding status of the waiver may compel NFGD to terminate those sales. *Id.* at 5–6.

<sup>27</sup> Questar at 2.

<sup>28</sup> Northwest Natural at 7.

<sup>29</sup> USG at 10–12.

<sup>30</sup> Unitil at 4–5.

<sup>31</sup> TDU Systems at 17.

<sup>23</sup> *C.f.*, e.g., *Southern Co. Serv. Inc.*, 117 FERC ¶ 61,021 (2006).

33. The Commission clarifies that nothing in this Final Rule precludes an entity from seeking a waiver. Indeed, section 358.1(d) specifically so provides. If an entity believes it is entitled to a waiver but has not yet applied for one, it is thus free to do so. The appropriateness of granting such a waiver will be based on the facts and circumstances of the individual case, examined in light of the specific provisions and stated principles of the Standards adopted in this Final Rule.

### C. Independent Functioning Rule

34. In the NOPR, the Commission proposed to continue the policy, established in Order Nos. 497 and 889 and referred to as the Independent Functioning Rule, of requiring the transmission function employees of a transmission provider to function independently of the marketing employees of the transmission provider. However, the NOPR proposed eliminating the corporate separation approach to the Independent Functioning Rule, which was adopted in Order No. 2004, and replacing it with the employee functional approach previously utilized in Order Nos. 497 and 889. Under the NOPR proposal, the relevant consideration for purposes of applying the Independent Functioning Rule is the function performed by the employee himself (or herself). Thus, while under the current Standards any employee of a marketing or energy affiliate is prohibited from interacting with transmission function employees, the proposed Standards restricted the category of employees who must function independently from transmission function employees to those who actively and personally engage in marketing functions.

35. To implement this approach, the NOPR proposed definitions of certain key terms, the principal two being “transmission functions” and “marketing functions.” The definitions of “transmission function employee,” “marketing function employee,” “transmission function information” and “marketing function information” all keyed off these two core definitions.

36. Commenters generally approved of the NOPR approach, but raised certain concerns about the manner of its implementation and about the proposed definitions of terms. They also requested clarification on various matters. These topics are addressed below.

## 1. Transmission Functions

### a. Commission Proposal

37. The NOPR proposed to define “transmission functions” as “transmission system operations and the planning, directing, organizing or carrying out of transmission operations, including the granting and denying of transmission service requests.” See proposed section 358.3(h).

### b. Comments

38. ALCOA requests clarification that the word “planning” in the definition of transmission function applies only to planning associated with transmission operations. ALCOA proposes that the Commission refine the term “planning,” as used in this definition, so that it is limited to current, near-term and real-time operations, and requests that the Commission exclude long-range system planning.<sup>32</sup>

39. In asserting that the proposed definition of transmission functions is ambiguous, National Grid urges the Commission to adopt a more precise definition of “transmission function” that encompasses those activities that directly affect open access, *i.e.*, real-time control of the transmission system; planning of electric transmission facilities or expansions; and the receipt, processing and granting of transmission service requests.<sup>33</sup> For other functions that could reasonably be interpreted to relate to transmission, National Grid posits, the No-Conduit Rule will prevent abuses.<sup>34</sup> Furthermore, National Grid requests clarification of the scope of the phrases “operations,” “transmission system operations,” and “transmission operations.”<sup>35</sup>

### c. Commission Determination

40. The proposed NOPR definition of “transmission functions” carries over the principal concepts contained in the existing definition of “transmission function employee” (there is no definition of the term “transmission functions” in the existing Standards). We agree, however, that additional language may be needed to clarify that the Commission intends the definition

<sup>32</sup> ALCOA at 4.

<sup>33</sup> National Grid would exclude the planning of gas transmission from the scope of the definition because pipeline open seasons allow all interested parties to seek capacity in gas expansion projects; it states that such conversations therefore do not create concerns about preferential sharing of information. Alternatively, it suggests that the definition of transmission function could expressly exempt natural gas transmission planning discussions that involve projects subject to an open season. National Grid at 9–10.

<sup>34</sup> National Grid at 7–11.

<sup>35</sup> *Id.* at 9.

to apply to day-to-day operations, not long-range planning. Therefore, we will modify the definition in section 383.3(h) to read: “the planning, directing, organizing or carrying out of day-to-day transmission operations, including the granting and denying of transmission service requests.” This modification focuses the definition on those areas most susceptible to affiliate abuse. Furthermore, information about long-range activities, such as planned transmission lines, are likely already to be in the public sphere.<sup>36</sup> The definition we adopt in this Final Rule is directed at short-term real time operations, including those decisions made in advance of real time but directed at real time operations. To the extent the Commission’s prior cases and No Action Letters are in accord with this principle, they may be consulted for guidance as to individual activities in question.

## 2. Transmission Function Employee

### a. Commission Proposal

41. In the NOPR, the Commission proposed to define transmission function employee as: “an employee, contractor, consultant or agent of a transmission provider who actively and personally engages in transmission functions.” See proposed section 358.3(i).

### b. Comments

42. Many commenters disagreed with the proposed classification of field, maintenance, and construction employees as “transmission function employees”<sup>37</sup> for a variety of reasons, including the fact that field employees do not actively and personally engage in system operations<sup>38</sup> and do not have access to transmission information.<sup>39</sup> Similarly, MidAmerican requests that the definition of transmission function employee expressly exclude the following categories: Engineers who plan, design and oversee construction of transmission facilities; construction workers who build transmission facilities; engineers who make engineering decisions regarding the operation and maintenance of transmission facilities; engineers who determine whether transmission

<sup>36</sup> Issues relating to long-range planning are governed by other Commission actions, such as in Order No. 890 for electric utilities and in the long-standing policies regarding open seasons subject to certificate policies for gas pipelines. See, *e.g.*, *Gulf Crossing Pipeline Co., LLC*, 123 FERC ¶ 61,100 at P 105 (2008).

<sup>37</sup> ATC at 18; Dominion Resources at 14; EEI at 54; Puget Sound at 7–8; INGAA; Nisource; Southern Co. Services at 24–25.

<sup>38</sup> Southern Co. Services at 25.

<sup>39</sup> Puget Sound at 8.

requests can be accommodated by the existing transmission system; utility line workers who operate, repair and maintain transmission facilities according to orders; and clerical staff and mapping personnel who draw plans for and process communications about transmission facilities.<sup>40</sup>

43. To mirror the language in the preamble of the NOPR, Bonneville suggests that a transmission or marketing function employee be one who actively and personally engages in “more than a *de minimis* amount of” transmission or marketing functions.<sup>41</sup> In addition, E.ON seeks more clarity on the scope of the *de minimis* exception proposed in the preamble, so as to avoid contrasting interpretations by transmission providers.<sup>42</sup>

44. Wisconsin Electric is unclear as to whether the standards applicable to transmission function employees also apply to employees engaged in certain reliability functions. More specifically, Wisconsin Electric requests clarification that balancing authority employees are not transmission function employees or agents under the proposed rules.<sup>43</sup>

45. Commenters also raised concerns regarding the use of the phrase “actively and personally engages.” EEI requests that the Commission clarify that an employee is not “actively and personally engaged” in transmission or marketing functions so long as the employee is not engaged in such activities on a day-to-day basis. Furthermore, EEI believes that precedent under Order No. 889 regarding the “day to day activities” standard should continue to apply, except for certain precedent that undermined the “day-to-day” standard as it applied to officers.<sup>44</sup> Idaho Power requests that the Commission explain any difference between the term “actively and personally engages in” and the “directing, organizing, or executing” classification standard of Order No. 889.<sup>45</sup>

### c. Commission Determination

46. The Commission agrees that field, maintenance and construction workers, as well as engineers and clerical workers, are not normally involved in the day-to-day operations of the transmission system. Therefore, they would not fall within the scope of the definition of transmission function employee, unless in addition to

functioning in their stated capacity they also engaged in the day-to-day operation of the transmission system.

47. The Commission declines to add a further exclusion in the regulatory text for *de minimis* involvement. As discussed in the section on officers, directors and supervisors, the Commission has determined to add the phrase “day-to-day” to further clarify the scope of activity covered by the definition. This addition should capture the concerns of the commenters who requested inclusion of the phrase *de minimis*. However, as noted in the preamble of the NOPR, if a non-transmission function employee were pressed into service on an isolated occasion to perform a transmission function, perhaps under emergency conditions, such *de minimis* involvement would not convert him into a transmission function employee. The remote possibility that such a scenario would occur does not warrant adding exclusion language to the text, which would unduly elevate the exclusion and raise more questions than it answers.

48. Similarly, the question of whether balancing authority personnel are included in the definition of transmission function employees depends on the circumstances. If the transmission provider also serves as a balancing authority, and an employee’s duties encompass both transmission provider and balancing authority activities, such an employee would be a transmission function employee (provided his or her duties are encompassed by the definition of transmission function employee). If, however, the two functions are separate, and the employee performs no duties outside of those specific to a balancing authority employee, he or she would not be considered a transmission function employee.

49. The phrase “actively and personally” applies to marketing function employees as well as transmission function employees, and its application arises most notably with respect to supervisory personnel. The comments relating to that phrase, and the Commission’s determination with respect to it, are set forth below in the section entitled Supervisors, Managers and Corporate Executives.

### 3. Marketing Functions

#### a. Commission Proposal

50. The NOPR proposed defining marketing functions 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,” 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.

#### b. Comments

51. Several commenters recommend that the Commission consider the differences between the electric and gas industries and adopt separate definitions of the term marketing functions for each of the industries.<sup>46</sup>

#### i. Electric Industry

52. Commenters from the electric industry raised concerns about the inclusion of “bids to buy” in the definition of marketing functions, and the effects of such inclusion on planning activities. Commenters also sought clarification and modification as to various individual components of the definition, and identified a number of issues regarding the bundled retail sales exemption and the inclusion of POLRs in that exemption.

#### (a) Bids to Buy and Other Terms Listed in the Definition

53. Dominion Resources believes that the definition, as it applies to the electric industry, should be limited to sales for resale or purchases for resale of electricity in interstate commerce,<sup>47</sup> while NiSource proposes limiting the definition to wholesale sales of electricity.<sup>48</sup> On the other hand, TAPS believes that the definition of marketing functions is too narrow, in that it only covers purchases that involve the “submission of offers or bids to buy or sell.” It argues that the definition of marketing functions should include purchases, as well as sales, for resale of energy, in order to ensure that all transmission provider activities in wholesale markets, including the purchase of electric energy, capacity,

<sup>40</sup> MidAmerican at 11–12.

<sup>41</sup> Bonneville at 4–5. See also AGA at 18.

<sup>42</sup> E.ON at 12–13.

<sup>43</sup> Wisconsin Electric at 6.

<sup>44</sup> EEI at 5–6, 11–12; Entergy at 2–3.

<sup>45</sup> Idaho Power at 6–7.

<sup>46</sup> INGAA at 14; NGSAA at 10–11; Nisource at 10; AGA at 11–13; Williston at 3.

<sup>47</sup> Dominion Resources at 11–13.

<sup>48</sup> NiSource at 10.

and physical and financial transmission rights and other energy related products for bundled retail load, are covered by the Standards. TAPS requests that the proposed definition be modified to include purchases, regardless of whether they are accomplished through the submission of a bid or offer.<sup>49</sup>

54. Some commenters requested clarification of various terms used in the definition of marketing functions. First, commenters ask the Commission to clarify that the scope of the term “demand response” is limited to the bidding or supply of demand response in a FERC jurisdictional context, and does not cover the development of a retail customer demand response program or a balancing authority’s dispatch of demand response for reliability.<sup>50</sup> Dominion Resources requests that the definition exclude regulated utilities demand/load response programs in their regulated service territories, as being part of their integrated resource planning.<sup>51</sup>

55. Second, commenters request clarification of the term “capacity” as used in the marketing functions definition. Dominion Resources and EEI request that the term refer to generation and not transmission capacity.<sup>52</sup> Some commenters seek further clarifications on other terms used in the definition of marketing functions. Dominion Resources and MidAmerican request that the Commission confirm that certain terms carry the same meaning in the Standards as they do in Commission-administered organized markets, or, alternatively, that the terms should be interpreted in a manner that limits the definition to activities that occur in interstate commerce. These terms include: (i) “Virtual electric or gas supply or demand;” (ii) “financial transmission rights;” (iii) “offer” or “bid;” (iv) “demand response;” and (v) “bundled retail sales.”<sup>53</sup> Similarly, NiSource requests that the definition of marketing functions, as it applies to the natural gas industry, should exclude the terms demand response, virtual bids, and allocations of financial transmission rights.<sup>54</sup>

56. APPA and TAPS are concerned that the definition of marketing functions, although it includes financial transmission rights, excludes resale of a public utility transmission provider’s physical electric system transmission

rights. These commenters believe that the omission allows transmission provider employees engaging in such transmission activities to communicate with other personnel on a preferential basis regarding the availability of new firm transmission rights.<sup>55</sup> TAPS further asserts that the definition should include transmission reservations and scheduling of transmission.<sup>56</sup>

#### (b) Exclusions

57. Commenters express varying opinions on the proposed exclusion in section 358.3(c)(1) for “bundled retail sales, including sales of electric energy made by providers of last resort (POLRs).” National Grid and EEI generally supported the exemption.<sup>57</sup> National Grid recommends, however, that the proposed exemption be revised to read “bundled retail sales or retail sales of electric energy made by providers of last resort,” rather than treating POLR sales as a subset of bundled retail sales.<sup>58</sup> Ameren believes that the POLR exclusion should apply to all procurement or sale of energy by a POLR in support of its POLR function, and urges the Commission to clarify that incidental sales or purchases of energy by a POLR that benefit POLR customers who are required to meet reliability or RTO requirements are not activities within the scope of marketing functions, even if made on an unbundled basis.<sup>59</sup>

58. On the other hand, EPSA and TAPS both oppose a blanket exemption for POLRs.<sup>60</sup> TAPS asserts that the Commission has denied waivers to some affiliated POLRs in the past, and the waivers it has granted have been fact-specific.<sup>61</sup> TAPS likewise opposes a blanket exclusion for all bundled retail sales,<sup>62</sup> suggesting it be limited to cases in which the retail marketing function has been separated from the wholesale marketing function,<sup>63</sup> and EPSA would eliminate an exclusion both for POLRs and for all bundled retail sales insofar as the exclusion would apply to utilities engaged in both bundled retail sales and wholesale sales.<sup>64</sup> TAPS requests that the Commission clarify that the bundled retail sales exemption does not extend to activities of the transmission provider’s merchant function.<sup>65</sup>

59. Many commenters request clarifications on the scope of the bundled retail sales exclusion. EEI requests that the Commission confirm that the exclusion covers purchases in support of retail sales only as long as the resale of excess purchased power is made by separate employees.<sup>66</sup> WA UTC urges the Commission to include in the exclusion the incidental wholesale power purchases and sales a utility serving bundled retail load must make to balance its variable output resources with variations in its actual bundled retail loads.<sup>67</sup>

60. Several commenters sought additional exclusions from the marketing functions definition as it applies to the electric industry. California PUC recommends that the Commission exclude from the marketing functions definition utility employees engaged in state-regulated activities, such as engaging in purchases necessary to serve bundled retail load or to meet the requirements of state-mandated programs, because these activities are overseen by state regulators.<sup>68</sup> MidAmerican asks the Commission to clarify that all planning personnel, whether or not engaged in state-mandated integrated resource planning, be excluded from the definition of marketing functions.<sup>69</sup>

61. LPPC requests that the definition of marketing functions expressly exclude electricity exchanges, arguing they are often necessary to accomplish a transmission transaction, such as when access to renewable sources of power requires crossing multiple systems.<sup>70</sup>

#### ii. Natural Gas Industry

62. Commenters from the natural gas industry raised concerns about the inclusion of “bids to buy” in the definition of marketing functions, as had commenters from the electric industry. They also seek modifications of existing exclusions and the addition of new exclusions, and request clarification as to whether various activities that arise in the gas industry are encompassed by the definition.

<sup>49</sup> TAPS at 11–14.

<sup>50</sup> Arizona PSC at 6; EEI at 48; SCE at 8–9; Western Utilities at 10.

<sup>51</sup> Dominion Resources at 12–13.

<sup>52</sup> *Id.* at 12; EEI at 49.

<sup>53</sup> Dominion Resources at 12; MidAmerican at 9–10.

<sup>54</sup> NiSource at 10–11.

<sup>55</sup> APPA at 6–9; TAPS at 28–31.

<sup>56</sup> TAPS at 30.

<sup>57</sup> National Grid at 12–13; EEI at 34.

<sup>58</sup> National Grid at 12–13.

<sup>59</sup> Ameren at 22–24.

<sup>60</sup> EPSA at 6–8; TAPS at 26–28.

<sup>61</sup> TAPS at 26–27.

<sup>62</sup> *Id.* at 15–25.

<sup>63</sup> *Id.*

<sup>64</sup> EPSA at 7–8.

<sup>65</sup> TAPS at 25–26.

<sup>66</sup> EEI at 34.

<sup>67</sup> WA UTC at 8–10.

<sup>68</sup> California PUC at 10. California PUC also asks the Commission not to exempt any interactions between a utility’s transmission function employees and the employees of a utility’s unregulated affiliates, on the grounds that state regulators do not oversee the activities of a utility’s unregulated affiliates. *Id.*

<sup>69</sup> MidAmerican at 8–9.

<sup>70</sup> LPPC at 15–16.

## (a) Bids To Buy and Other Terms Listed in the Definition

63. Many commenters believe that purchases should be excluded from the definition of marketing functions as it applies to the natural gas industry, arguing that their inclusion would extend the Standards beyond the limits set by *National Fuel*.<sup>71</sup> Southwest Gas requests that the Commission clarify that the definition of marketing functions covers only the sale of gas in interstate commerce,<sup>72</sup> and AGA and Dominion Resources request that marketing functions be defined in terms of natural gas sales for resale in interstate commerce.<sup>73</sup> AGA and Southwest Gas believe this approach appropriately excludes natural gas hedging activities.<sup>74</sup> NGSA, rather than deleting purchases from the definition itself, requests that purchase be included in the exclusions to the definition in proposed sections 358.3(c)(3–5).<sup>75</sup>

64. Several commenters believe that the phrase “natural gas or electric energy or capacity” is ambiguous as to whether it encompasses natural gas capacity, which they argue should not be included in the definition.<sup>76</sup> NGSA believes that an extension of the concept to natural gas is not supported and is unnecessary due to the extensive regulations governing pipeline capacity marketing.<sup>77</sup> Southwest Gas requests that, if the Commission intends to include pipeline capacity in the definition, it amend proposed section 358.3(c)(5) to expressly exempt a purchase or release of interstate pipeline capacity by a local distribution company (LDC).<sup>78</sup>

## (b) Exclusions

65. With respect to the exclusion for bundled retail sales, New York PSC requests that the Commission add to the exclusion the purchasing of natural gas to make such sales.<sup>79</sup>

66. With respect to the exclusions for sales of gas from one’s own production or from one’s own gathering or processing facilities, some commenters

assert that these exclusions have been narrowed from the prior Standards without explanation. First, commenters observe that proposed sections 358.3(c)(3) and (c)(4) exclude sales of natural gas from a transmission provider’s own production, gathering or processing facilities, whereas the prior Standards extended the exclusion to also include sales of natural gas from gathering and processing facilities that are owned by the transmission provider’s affiliate.<sup>80</sup> INGAA finds no reason to distinguish between a transmission provider’s directly and indirectly owned gathering and processing facilities. INGAA and others request that these proposed exclusions be modified to encompass sales and purchases of gas from the production, gathering or processing facilities owned by either a transmission provider or its affiliate.<sup>81</sup>

67. Calypso urges the Commission either to clarify that the term “transmission provider’s own production” encompasses a transmission provider’s foreign-sourced natural gas, or that the Commission extend the exclusion to cover such gas.<sup>82</sup>

68. With respect to the exclusion for sales by an intrastate natural gas pipeline or LDC making an on-system sale, some commenters would expand the exclusion to cover sales by LDCs that are off-system but entered into with non-affiliated pipelines,<sup>83</sup> to exclude intrastate and Hinshaw pipelines that must buy enough gas to meet predicted peak loads and sometimes must make off-system sales when circumstances create surpluses,<sup>84</sup> and to exclude 7(f) companies, arguing the Commission recognized in Order No. 2004 that there is no reason to treat 7(f) companies differently than LDCs with respect to this exclusion.<sup>85</sup> Alternatively, to the extent the Commission believes exclusion of additional sales would create a potential area of abuse, INGAA recommends that the transactions be evaluated on a case-by-case basis.<sup>86</sup> On the other hand, AGA disapproves of the proposed exclusion, because it believes it creates potential for abuse and is inconsistent with the NGA’s prohibition

against undue discrimination.<sup>87</sup> Southwest Gas believes that Hinshaw pipelines should be excluded from the Standards altogether, arguing that doing so would be consistent with Order No. 497 and the Commission’s treatment of Hinshaw pipelines as LDCs under the NGPA.<sup>88</sup>

69. INGAA and Unitil also object that certain sales by LDCs, intrastate pipelines and other shippers necessary to maintain balances are captured in the proposed definition of marketing functions, and argue that Order No. 2004 excluded these sales as operational through the concept of energy affiliates. INGAA believes the Commission should restore this exclusion.<sup>89</sup> Unitil argues further that Order No. 2004–A excluded from the Standards *de minimis* off-system sales related to an LDC’s balancing requirements.<sup>90</sup>

70. Questar requests that exchanges of gas for the purpose of reducing transmission costs be excluded from the definition of marketing functions.<sup>91</sup>

71. Commenters contend that, as proposed, the Standards may be read to cover a natural gas pipeline’s relationship with its electric marketing affiliates or employees, or with its other employees who are not making sales of natural gas.<sup>92</sup> As remedies, MidAmerican proposes to exclude the activities of an LDC, including those affiliated with an electric transmission provider,<sup>93</sup> and TDU Systems proposes to remove from the definition of marketing functions the purchase or sale of natural gas by an electric transmission provider.<sup>94</sup>

## (c) Clarifications

72. Several commenters raise concerns that, as proposed, the NOPR would apply the Standards to a pipeline’s relationship with affiliates that do not hold capacity on the affiliate pipeline.<sup>95</sup> These commenters request that the Commission clarify that the Standards apply only to the relationship between the pipeline and affiliates that hold or control capacity on the affiliate pipeline.

73. Spectra asks the Commission to clarify that the definition of marketing functions excludes affiliated foreign pipelines that either do not participate

<sup>71</sup> Salt River at 7–9; INGAA at 14; Nisource at 10.

<sup>72</sup> Southwest Gas at 5–9.

<sup>73</sup> AGA at 12–13; Dominion Resources at 7–8.

<sup>74</sup> AGA at 12–13; Southwest Gas at 14–15.

Southwest Gas further requests confirmation that the proposed definition reflect its view that financial transactions designed to hedge price risk associated with on-system retail sales are an important tool for an LDC’s provision of economical retail sales service, citing to Order No. 2004–C. *Id.*

<sup>75</sup> NGSA at 13.

<sup>76</sup> National Grid at 11–12; NGSA at 9–11; Williston at 13–14; Southwest Gas at 16–17.

<sup>77</sup> NGSA at 11–13.

<sup>78</sup> Southwest Gas at 16–17.

<sup>79</sup> New York PSC at 3.

<sup>80</sup> INGAA at 15; NGSA at 14–15; Williston at 14–15.

<sup>81</sup> *Id.*

<sup>82</sup> Calypso at 2–4.

<sup>83</sup> INGAA at 18–19; SCANA at 3–4; AGA at 14–15; National Grid at 13–14; New York PSC at 3–4; Northwest Natural at 7–8; Dominion Resources at 8; Duke at 8–9; Southwest Gas at 12–13.

<sup>84</sup> INGAA at 18–19; SCANA at 3–4.

<sup>85</sup> Southwest Gas at 18.

<sup>86</sup> INGAA at 20.

<sup>87</sup> AGA at 5–8.

<sup>88</sup> Southwest Gas at 17–18.

<sup>89</sup> INGAA at 16–17.

<sup>90</sup> Until at 6–7.

<sup>91</sup> Questar at 4–5.

<sup>92</sup> INGAA at 14; MidAmerican at 16–18; TDU Systems at 14–15.

<sup>93</sup> MidAmerican at 16–18.

<sup>94</sup> TDU Systems at 14–15.

<sup>95</sup> INGAA at 17–18; USG at 7–10; Spectra at 5–7; PSEG at 10–11; AGA at 14–16.

in the U.S. energy markets or that are interconnected with U.S. pipelines, but are subject to a foreign country's regulation, stating that the current Standards exclude them from the definition of energy affiliate.<sup>96</sup>

74. SCANA requests clarification that if an LDC sells gas to an asset manager in connection with establishing an asset management arrangement for its off-system sales, the LDC is not engaging in a marketing function or compromising its supposed status as an entity exempt from the Standards.<sup>97</sup>

#### c. Commission Determination

75. The definition of "marketing functions" was designed to encompass both the electric and gas industries, as do the Standards as a whole. The list of activities in proposed section 358.3(c) therefore listed concepts that are not only applicable to both industries, but also concepts applicable to one or the other. For instance, virtual bidding is currently limited to the electric industry, as are financial transmission rights. The many requests for clarification by commenters, however, suggest this combined definition is confusing, exacerbated by the fact that some concepts have different meanings in the two industries, such as the word "capacity." Therefore, in order to avoid any further confusion regarding such matters, the Commission agrees with those commenters who request separate definitions for the electric and gas industries, and modifies the regulatory text at section 358.3(c) to so provide. We also clarify several of the terms used in the definitions, as requested by commenters, and discuss separately below other issues pertaining to the electric or gas industries.

#### i. Electric Industry

76. Besides modifying section 358.3(c) to provide a separate definition of marketing functions for public utilities and their affiliates, the Commission revises the definition to read as follows: "the sale for resale in interstate commerce, or the submission of offers to sell in interstate commerce, of electric energy or capacity, demand response, virtual transactions, or financial or physical transmission rights, all as subject to an exclusion for bundled retail sales, including sales of electric energy made by providers of last resort (POLRs) acting in their POLR capacity." See section 358.3(c)(1).

(a) Bids To Buy and Other Terms Listed in the Definition

77. Importantly, in addition to separating electric from gas, this definition removes "bids to buy" from the category of marketing functions. Many commenters requested this exclusion, for reasons that include the jurisdictional reach of the Commission and *National Fuel* concerns. The Commission agrees that restricting the definition of marketing functions to include only sales, rather than purchases, more closely matches the statutory prohibitions against undue preferences.<sup>98</sup> Furthermore, the removal of purchases from the definition of marketing functions frees companies to conduct the informational exchanges necessary to engage in integrated resource planning,<sup>99</sup> and eliminates the difficulties which might otherwise be experienced by executive personnel who have overall procurement responsibilities that include both transmission and marketing. At the same time, it preserves protection against affiliate abuse, as it is those employees who are making wholesale sales of electricity, not purchases, who can improperly benefit from transmission function information obtained from the affiliated transmission provider. (The issue of long-range planning is discussed more fully below in the section entitled Long-Range Planning and Procurement.) It also addresses the concern of California PUC that purchases of power to serve bundled retail load or to meet the requirements of state-mandated programs should not be considered marketing functions.

78. The Commission also clarifies what is meant by certain of the categories listed within the definition of marketing functions, or that are subsumed in the categories listed. The Commission clarifies that inclusion of the term "demand response" in this definition is not intended to interfere with demand response programs that a load-serving entity (LSE) has established

<sup>98</sup> Statutory coverage encompasses any transmission or sale of electric energy subject to the Commission's jurisdiction, and any transportation or sale of natural gas subject to the Commission's jurisdiction; sales subject to the Commission's jurisdiction being sales for resale in interstate commerce. Sections 205 and 206 of the Federal Power Act (FPA), 16 U.S.C. 824d-824e (2000), Sections 4 and 5 of the Natural Gas Act (NGA), 15 U.S.C. 717c-717d (2000).

<sup>99</sup> Many commenters requested that long-range planning be excluded from the scope of the Standards. Comments on this topic are set forth below in the section entitled Long-Range Planning and Procurement.

for its customers.<sup>100</sup> Confusion over the terms "capacity," "virtual" and "financial transmission rights" are eliminated by restricting their application to the electric industry. The Commission also agrees with APPA and TAPS that inasmuch as physical as well as financial transmission rights may be sold by marketing function employees, physical transmission rights should be added to the definition of marketing functions, and so modifies the regulatory text. Ancillary services, when referring to sales for resale as opposed to an integrated public utility's actions in calling on its own generation or demand response resources for ancillary services purposes, are included within the definition of marketing functions as sales for resale either of generation or demand response. For example, a number of RTOs and ISOs have established or are in the process of establishing ancillary services markets, and sales into these markets would fall within the definition of marketing functions.<sup>101</sup>

79. We decline to grant APPA's and TAPS's further request that we add to the definition of marketing functions both the making of transmission reservations and the scheduling of transmission. These activities are beyond the scope of electric energy sales. However, we note that marketing function employees making sales of energy will need to schedule transmission for such sales (at least outside of organized electric energy markets), and thus those individuals will most likely already fall within the definition of marketing function employees and within the scope of the Independent Functioning Rule.

#### (b) Exclusions

80. Some commenters objected to the proposed inclusion of POLRs in the exclusion for bundled retail sales, while others suggested the exclusion should be broader and encompass all procurement or sales by a POLR in support of its POLR function. As the Commission explained in the NOPR, actual instances of abuse in this regard have not been presented, even though entities have been granted waivers to exempt their POLR activities from the

<sup>100</sup> If concerns remain despite this clarification, interested persons may present them to the Commission on a case-by-case basis.

<sup>101</sup> See, e.g., *Midwest Independent Transmission System Operator, Inc.*, 122 FERC ¶ 61,172 (2008), *reh'g granted in part and denied in part and clarification granted*, 123 FERC ¶ 61,297 (2008); *New England Power Pool*, 115 FERC ¶ 61,175 (2006), *reh'g denied*, 117 FERC ¶ 61,106 (2006); *Atlantic City Electric Company*, 86 FERC ¶ 61,248 (1999), *clarification granted*, 86 FERC ¶ 61,310 (1999).

<sup>96</sup> Spectra at 7-8.

<sup>97</sup> SCANA at 3-6.

Standards.<sup>102</sup> Inasmuch as entities acting as POLRs are providing bundled retail service, it is appropriate to include POLR sales in the definition of bundled retail sales. However, we decline to extend the exclusion to cover all procurement or sale of energy by a POLR in support of its POLR function, as requested by Ameren. POLRs should not have special exclusions not shared by other providers of bundled retail service. (However, we note that insofar as Ameren is concerned about *procurement* of energy for POLR purposes, that concern is mooted by our removal of purchases from the definition of marketing functions.) We also decline Ameren's request to exclude incidental sales of energy by a POLR. Public utilities serving retail load often make off-system wholesale sales, which are not covered by the exclusions for bundled retail sales and which are susceptible to affiliate abuse. Likewise, off-system wholesale sales made by POLRs should not be excluded. Furthermore, activities made by a POLR that is not acting within its POLR capacity are not covered by the exclusion.

81. We also decline to extend the exclusion for bundled retail sales to include incidental off-system sales by a utility serving bundled retail load, as requested by WA UTC. Once the utility is making wholesale sales off-system, it is no longer serving retail load but engaging in marketing transactions, and should be treated no differently than other marketers making wholesale sales. Otherwise, a utility could purchase quantities of power excess to its needs and then sell the power off-system, free of the restrictions pertaining to marketing function employees that are imposed by the Standards.

82. The Commission also declines to grant LPPC's request that exchanges of electricity designed to work around scarce transmission should be excluded from the definition of marketing functions. It is not always obvious whether such exchanges should be classified as transmission or as the purchase and sale of generation. The determination of that question often turns on the specifics of the transactions in question,<sup>103</sup> making a blanket exclusion inappropriate. An entity seeking guidance for its individual situation may file for a waiver or pursue other means of resolution, such as a No

Action Letter or a General Counsel opinion letter.<sup>104</sup> Further, as noted with respect to Ameren's request regarding POLR purchases and sales, to the extent such exchanges involve purchases, those purchases are not included in the definition of marketing functions which we adopt in this Final Rule.

#### ii. Natural Gas Industry

83. In accordance with our determination to provide separate definitions for the electric and gas industries, the Commission adopts the following definition of marketing functions for pipelines and their affiliates: "the sale for resale in interstate commerce, or the submission of offers to sell in interstate commerce, of natural gas, subject to the following exclusions: (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 a seller's own production, (iv) Sales of natural gas solely from a seller's own gathering or processing facilities, and (v) Sales by an intrastate natural gas pipeline, by a Hinshaw pipeline exempt from the Natural Gas Act, or by a local distribution company making an on-system sale." This revised definition reflects our response to the various requests made by the commenters pertaining to the natural gas aspects of the definition of marketing functions, as discussed below.

##### (a) Bids to Buy and Other Terms Listed in the Definition

84. The major alteration in the definition from that proposed in the NOPR is the elimination of "bids to buy." As with the case of the electric industry, this elimination will address jurisdictional and *National Fuel* concerns.

85. The Commission agrees with the commenters who contend that "capacity" is a term that should be confined to the electric industry insofar as the definition of marketing functions is concerned; that in fact had been the intent of the NOPR. Accordingly, the term is removed from the gas specific definition.

##### (b) Exclusions

86. New York PSC's requested clarification, regarding whether the exclusion for bundled retail sales

should include the purchase of natural gas to make such sales, has been rendered unnecessary by the Commission's determination to exclude purchases from the definition of marketing functions.

87. The Commission agrees with INGAA's observation that in the reworking of the regulatory text, the NOPR inadvertently limited two of the existing exclusions applicable to sales from a *transmission provider's* production or gathering or processing facilities, thus not also encompassing sales from an *affiliate's* production or gathering or processing facilities. Exclusions (iii) and (iv) should not focus on the transmission provider but on the seller. Therefore, we modify exclusion (iii) to read "sales of natural gas solely from a seller's own production," and exclusion (iv) to read "sales of natural gas solely from a seller's own gathering or processing facilities."

88. The Commission also agrees with Calypso's request for clarification that foreign-sourced gas be included in the exclusion for sales of natural gas from an entity's own production. Whether the gas is foreign or domestic, the operative consideration is whether it is from the entity's own production.

89. The Commission likewise grants Spectra's request for confirmation that sales by foreign LDCs are covered by the exclusion for sales by an intrastate natural gas pipeline or local distribution company making an on-system sale.

90. In regard to Southwest Gas' request for a similar clarification regarding Hinshaw pipelines, the Commission determines that exclusion (v) for intrastate pipelines should also apply to Hinshaw pipelines,<sup>105</sup> which are exempted from coverage under section 1(c) of the NGA,<sup>106</sup> and modifies the wording of the exclusion accordingly.

91. Several commenters request that the Commission add a new exclusion to the definition of marketing functions, to encompass off-system sales by LDCs on non-affiliated pipelines. The Commission declines to do so. If the LDC in question makes sales of gas off-system for resale, that sale qualifies as a marketing function. As discussed above, however, if a pipeline does not conduct transmission transactions with an affiliate that engages in marketing functions, it is not subject to the Standards under section 358.1(a).

<sup>102</sup> See *High Island Offshore System, L.L.C.*, 116 FERC ¶ 61,047 (2006); *Cinergy Services Inc.*, 111 FERC ¶ 61,512 (2005); *Exelon Corp.*, 123 FERC ¶ 61,167 (2008).

<sup>103</sup> See, e.g., *Utah Assoc. Mun. Power Sys.*, 83 FERC ¶ 61,337 (1998); *El Paso Elec. Co.*, 115 FERC ¶ 61,312 (2006).

<sup>104</sup> A comprehensive discussion of the various sources of guidance available from the Commission and its staff is set forth in our recent Interpretative Order Modifying No-Action Letter Process and Reviewing Other Mechanisms for Obtaining Guidance. See *Obtaining Guidance on Regulatory Requirements*, 123 FERC ¶ 61,157 (2008).

<sup>105</sup> Hinshaw pipelines are interstate pipelines in which all the gas is consumed within one state and the pipeline is subject to regulation by a state commission.

<sup>106</sup> 15 U.S.C. 1(c) (2006).

Therefore, if the LDC in question does not conduct transmission transactions with an affiliated interstate pipeline, its off-system sales on an unaffiliated pipeline are irrelevant insofar as the Standards are concerned. In support of its request for this new exclusion, AGA cites Order No. 497-A and a waiver granted to National Fuel Gas Supply Corporation in 1993.<sup>107</sup> In Order No. 497-A, however, the Commission affirmatively stated that when a pipeline or LDC sells gas off-system, it is a marketer of that gas within the scope of the rule.<sup>108</sup> The referenced waiver addressed the issue of applicability, not the definition of marketing, pointing out that a pipeline that does not conduct transportation transactions with its affiliated marketer is not subject to the Standards.<sup>109</sup> It is thus inapposite to AGA's point (and in accord with our observation above on applicability).

92. Similarly, several commenters express concern that the definition of marketing functions may sweep within its scope LDCs that do not sell gas from capacity held or controlled by them on their affiliated pipeline. As discussed above, the Standards do not apply to pipelines that do not conduct transmission transactions with an affiliate that engages in marketing functions, and such pipelines therefore need not concern themselves with the definition.

93. Questar's request that exchanges of gas for the purpose of reducing transportation costs be excluded from the definition of marketing functions<sup>110</sup> is the analog on the gas side of LPPC's request concerning exchanges on the electric side, and the same reasoning and result apply. However, we note that the procurement of gas during the exchange would not be covered by the definition of marketing functions, inasmuch as purchases are no longer included. This also applies to the situation in which the receipt of a "field exchange" serves to supply on-system bundled retail customers.<sup>111</sup>

#### (c) Clarifications

94. Spectra contends that a foreign entity that does not participate in United States energy markets had been

<sup>107</sup> AGA at 14–15, citing Order No. 497-A at p. 31,592 and *Nat'l Fuel Gas Supply Corp.*, 64 FERC ¶ 61,192 (1993).

<sup>108</sup> Order No. 497-A at p. 31,592.

<sup>109</sup> *Id.* p. 31,590–91.

<sup>110</sup> Questar at 4–5.

<sup>111</sup> A field exchange is the exchange of natural gas in the field from company-owned production for equivalent quantities of gas that is closer to the entity's distribution system, made to lower the delivered costs of gas for on-system retail sales. *Alcoa Power Generating Inc.*, 108 FERC ¶ 61,243 (2004) at P 179.

excluded from the definition of energy affiliate, and requests that such exclusion continue to apply. The revised Standards have discarded the concept of energy affiliate, so there is no need to address Spectra's request. As to whether such an entity would be subject to the Standards, section 358.1 controls the question of applicability, as discussed above.

95. INGAA and SCANA request that not only should on-system sales by LDCs be excluded from the definition of marketing functions, but off-system sales should be as well, on the grounds such sales are entered into by non-marketing affiliates. However, the categorization of the affiliate is immaterial. If employees of an LDC make an off-system sale for resale in interstate commerce, they qualify as marketing function employees (assuming they are employed by a marketing affiliate of a transmission provider with which the affiliate conducts transmission transactions).

96. INGAA's and other commenters' contention that a pipeline should only be concerned with interactions with its gas marketing function employees, not with affiliated electric marketing function employees, is misplaced (or has been subsumed in the exclusion of energy affiliate from coverage of the Standards). Gas marketing function employees would not be making a sale for resale to electric marketing function employees, who would be purchasing the gas for consumption and thus in a retail capacity. Therefore, the definition of marketing function would not be triggered.

97. SCANA inquires whether pipelines and LDCs may remove themselves from coverage of the Standards by contracting with asset managers to make their off-system sales, and Southwest Gas requests clarification regarding the definition of "marketing function employees" in relation to asset management agreements. The Commission clarifies that under the Independent Functioning Rule and the No Conduit Rule, it would be the employees of the asset manager, acting as agents or contractors for the pipeline or LDC, rather than employees of the pipeline or LDC, who would qualify as marketing function employees after the asset arrangement was consummated, inasmuch as they would be the persons making all the subsequent sales for resale. The inclusion of agents and contractors in the definition of transmission function employee or marketing function employee is discussed in more detail below in the section entitled Elimination of Shared Employees Concept.

#### 4. Marketing Function Employee

##### a. Commission Proposal

98. The NOPR proposed defining a marketing function employee as "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." See proposed section 358.3(d).

##### b. Comments

99. Xcel seeks clarification as to whether the employees who purchase natural gas and interstate pipeline capacity to deliver fuel to the utility's electric generation fleet are marketing function employees under the revised definition.<sup>112</sup>

100. Several commenters request amendments to the definition of marketing function employees that would limit its application. AGA, Destin, and EPSA recommend that the Commission limit the definition of a marketing function employee to employees who actively and personally engage in marketing functions "involving an affiliated transmission provider" to ensure that the Standards are narrowly directed at the activities that give rise to concerns of undue preference.<sup>113</sup> EPSA would also include employees who engage in marketing functions on behalf of a transmission provider located within its affiliated transmission provider's electric control area.<sup>114</sup>

101. Other commenters request clarifications regarding which employees are included in the definition of marketing function employees. Arizona PSC suggests that the employees who perform competitive solicitations should not be categorized as marketing function employees, because their inclusion may unnecessarily limit their ability to obtain the non-public transmission function information necessary to make competitive solicitations as efficient and cost effective as possible.<sup>115</sup> MidAmerican seeks clarification that generator operating personnel are not a subcategory of marketing function employees.<sup>116</sup> Finally, EEI seeks clarification on which types of "analysts," such as forecasters and employees who coordinate strategic planning and regulatory services, would

<sup>112</sup> Xcel at 20–21.

<sup>113</sup> AGA at 16; Destin at 8; EPSA at 6.

<sup>114</sup> EPSA at 6.

<sup>115</sup> Arizona PSC at 5.

<sup>116</sup> MidAmerican at 7.

be considered marketing function employees under the proposed rule.<sup>117</sup>

### c. Commission Determination

102. The Commission adopts the proposed definition of marketing function employee in section 358.3(d), with the addition of the adverbial phrase “on a day-to-day basis.” A discussion of the comments which prompted this addition is set forth in the section on Supervisors, Managers and Corporate Executives. In this section, we address the other concerns of commenters with respect to the definition.

103. Xcel’s requested clarification as to whether employees who purchase natural gas for their electric fleet are marketing function employees is rendered moot inasmuch as we have deleted purchases from the definition of marketing functions, and such employees would thus not be marketing function employees. (Furthermore, such a purchase would be one made at retail, rather than wholesale, and thus not subject to the definition of marketing function for that reason as well.)

104. We decline to limit the definition of marketing function employee by adding a requirement that the employee be engaged in marketing functions “involving an affiliated transmission provider.” An employee making off-system sales could potentially use non-public transmission function information to its advantage. However, as described in more detail above, if a transmission provider does not conduct any transmission transactions with an affiliate that engages in marketing functions, it does not fall within the scope of the Standards under section 358.1.

105. EPSA’s concerns regarding the definition of marketing function employee in relation to transactions with affiliates that do not conduct transmission transactions with their affiliated transmission provider within the latter’s electric control area mixes two unrelated concepts. Whether a transmission provider conducts transmission transactions with a marketing affiliate governs the question of the applicability of the Standards under section 358.1, not the definition of marketing function employee. If a transmission provider does not fall within the scope of the Standards under that provision, it need not concern itself with the definitions relating to the Standards’ proscribed activities.

106. Arizona PSC’s concerns regarding competitive solicitations are resolved by the removal of purchases

from the definition of marketing functions. We also clarify, in response to Arizona PSC’s request, that generating operator personnel are not marketing function employees, unless they also engage in marketing functions. The question of whether analysts (such as forecasters and employees who coordinate strategic planning and regulatory services) are marketing function employees can be answered by reference to the definition itself. If such analysts are not actively and personally involved on a day-to-day basis in the sale for resale of electric energy (or the other items mentioned in the definition), they are not marketing function employees.

### 5. Supervisors, Managers and Corporate Executives

#### a. Commission Proposal

107. The second sentence of the proposed NOPR definitions of transmission function employee and marketing function employee stated that an officer, director or other supervisory employee is not considered to be a transmission function or marketing function employee if he or she does not actively and personally engage in transmission or marketing functions. See proposed sections 358.3(d) and (i).

#### b. Comments

108. Concerns surrounding whether officers, directors or supervisors could be classified as marketing or transmission function employees generated many comments, more than on almost any other issue. Many commenters agree with the NOPR formulation that officers, directors and other supervisory employees that do not “actively and personally engage” in marketing or transmission functions should be exempted from the definition of a marketing function employee or transmission function employee.<sup>118</sup> Idaho Power, on the other hand, asserts that the explicit carve-out of officers, directors and other supervisors who do not “actively and personally engage” in the functions is redundant and therefore superfluous.<sup>119</sup>

109. Some commenters raise concerns about the application of the “actively and personally engaged” standard to different types of corporations. Salt River, for example, requests clarification that high-level officials of vertically integrated utilities will not be deemed either transmission or marketing function employees for approving department budgets or signing large

value contracts.<sup>120</sup> In addition, INGAA requests guidance on how to apply the definitions of transmission and marketing function employees to organizations of varying sizes and structure, considering the different levels of involvement that supervisory employees must have depending on the size of the organization.<sup>121</sup>

110. Several commenters recommended alternative approaches to determine whether officers, directors or other supervisory employees should be classified as marketing or transmission function employees. For example, many commenters requested that the Commission re-introduce the concept of “day-to-day” involvement, used in Order No. 2004, to make the distinction between an “employee” and a supervisor or executive.<sup>122</sup>

111. National Grid, however, suggests using a corporate governance approach to make the distinction, as follows: Managers and employees negotiating deals and undertaking certain activities would fall within the definition of transmission or marketing function employee; senior executives and members of risk management committees who oversee the managers and employees would not.<sup>123</sup> Vectren believes that any confusion might be eliminated by deleting “supervisory” from the proposed definition.<sup>124</sup>

112. Numerous commenters seek additional guidance on the *de minimis* language used in the preamble of the NOPR.<sup>125</sup> Commenters object that the NOPR guidance regarding *de minimis* involvement does not indicate what amount and kind of activity exceeds the threshold. They request a more precise discussion with specific activities that would require classifying the employee as either marketing or transmission.<sup>126</sup> Both Idaho Power and Bonneville request that the Commission include the *de minimis* language directly in the

<sup>120</sup> Salt River at 10–14.

<sup>121</sup> INGAA at 33.

<sup>122</sup> NGSAs at 25–28; Southern Co. Services at 15–20; LPPC at 13. Southern Co. Services further requests the Commission to eliminate what it regards as the confusing precedent regarding the treatment of shared officers set forth in *Ameren Serv. Co.*, 87 FERC ¶ 61,145 (1999). Southern Co. Services at 15–20.

<sup>123</sup> INGAA also comments on the status of risk management personnel in the context of the concept of “shared employees.” INGAA at 36–40.

<sup>124</sup> TDU Systems at 10.

<sup>125</sup> EPSA at 6; Idaho Power at 7; MidAmerican at 12; National Grid at 17, PG&E at 16–18; Puget Sound at 4–6.

<sup>126</sup> Idaho Power at 7; NGSAs at 5, National Grid at 17, PG&E at 16–18; Puget Sound at 4–6. INGAA requests a list of factors the Commission will consider in evaluating whether a particular employee qualifies as a marketing or transmission function employee. INGAA at 25–28.

<sup>118</sup> See AGA at 18, Ameren at 20–22, Duke at 4–5; SCE at 9–10; Vectren at 3–4; INGAA at 21.

<sup>119</sup> Idaho Power at 7–8.

<sup>117</sup> EEI at 49.

regulatory text and provide guidance as to its meaning.<sup>127</sup>

113. Commenters also requested further guidance from the Commission as to which type of conduct would classify a supervisory employee as actively and personally engaged in one of these functions.<sup>128</sup> Many of these commenters seek assurance from the Commission that officers, directors and other supervisory employees will not be classified as marketing or transmission function employees by fulfilling their fiduciary duties and informing themselves of business operations.<sup>129</sup> Southern Co. Services is concerned that some may construe the “actively and personally engaged” standard to be the same as the standard used to determine professional conflicts of interest, which would inhibit effective corporate governance.<sup>130</sup>

114. Commenters request that the Commission confirm that if an officer, director, or other supervisory employee engages in the following activities, they will not be classified as marketing or transmission function employees. These activities include (i) passive involvement in contracting, so long as employees do not take an active role in the decision-making process and do not disclose non-public transmission information;<sup>131</sup> (ii) occasional participation in routine customer meetings;<sup>132</sup> (iii) executing and/or approving large wholesale sales or purchase agreements consistent with the officer’s delegated approval authority and fiduciary obligations on behalf of the company;<sup>133</sup> and (iv) participating

in the formulation of an overall wholesale strategy for a utility, and establishing general parameters for negotiation of wholesale contracts.<sup>134</sup> Similarly, MidAmerican requests that the definition clarify that it excludes officers and personnel who do not have first line reporting relationships with transmission or marketing function personnel.<sup>135</sup>

115. Instead of specifically addressing each type of conduct, INGAA recommends that the Commission adopts a rule of reason approach to determining, on a case-by-case basis, whether or not an executive’s or supervisor’s conduct was a good faith attempt to fulfill his corporate responsibilities.<sup>136</sup>

#### c. Commission Determination

116. In an effort to provide clarity in this area, which has long been the subject of much discussion and concern, the Commission in the NOPR included a second sentence in the definition of both transmission and marketing function employees that specifically addressed corporate executives and supervisory personnel. The proposed sentence provided that such employees were not considered to be transmission or marketing function employees if they were not actively and personally engaged in such functions, and was included to provide reassurance to officers, directors and supervisors that a mere oversight role did not render them transmission or marketing function employees. As Idaho Power points out, however, the sentence is redundant, as no employee, contractor or agent not so engaged is considered to be a transmission or marketing function employee. Therefore, we delete the sentence from the definitions of transmission and marketing function employees.

117. The Commission’s intention in introducing the phrase “actively and personally engaged,” which is retained in the first sentence of each definition, was similar to that implicit in use of the phrase “day-to-day.”<sup>137</sup> The concept underlying both is simply this: If an employee regularly carries out or supervises the details of the activities in question, he or she is actively and personally engaged in them; if he or she merely signs off on the activities without having directed or organized the activities, he or she is not personally engaged in them. Thus, for example,

supervisors who are not involved in the negotiation of a gas or electric energy sale, and who do not oversee or provide input into the details of the negotiations being carried out by another employee (e.g., by editing and revising material elements of a contract), but rather simply approve the contract governing the sale, are not marketing function employees. Furthermore, as we noted in the preamble of the NOPR, *de minimis* involvement in transmission and marketing functions will not render a person a transmission or marketing function employee. Therefore, a supervisor who on rare occasions has tangential involvement in a negotiation, such as being called in to meet the negotiating parties from the other side, is not thereby rendered a marketing function employee.

118. That said, the Commission will add the phrase “day-to-day” to the definition of transmission and marketing function employees, in order to provide even greater certainty. Our addition of the phrase “day-to-day” also obviates the need to add the phrase *de minimis* in the regulatory text.

119. As noted, INGAA posits a number of hypotheticals involving varying percentages of time that a supervisor spends reviewing trades, and seeks guidance as to when such involvement would rise to the level of rendering him a marketing function employee. It is unnecessary to address each of these hypotheticals, because the key to the question lies in the fact that if a supervisor is simply signing off on a deal negotiated or proposed by someone else, and is not involved in overseeing and providing input into the negotiations, he is not himself engaged in the marketing function activity. Likewise, upper level management personnel who review contracts over a certain dollar amount are not converted into deal-makers themselves, simply by virtue of that review. This is also true for other personnel, such as attorneys, accountants and other advisors who may examine a contract for its conformity to legal, accounting or other requirements. Such review does not render them marketing function employees.

120. It may be objected that a lower level supervisor on the trading floor could hardly ignore proscribed transmission function information with which he is familiar in reviewing a deal. However, the closer the supervisory employee is to the trading activity, the more likely it is that he will be overseeing and providing input into the trades, and not simply signing off on a deal, and thus would be considered a marketing function employee.

<sup>127</sup> Idaho Power at 7; Bonneville at 4–5.

<sup>128</sup> E.ON at 10, AGA at 20, El Paso at 1; Idaho Power at 7; TDU Systems at 8–9; Western Utilities at 4–5; Williston at 12–13. INGAA presents hypothetical examples of varying levels of supervisory involvement in a number of different transactions, seeking guidance as to what level of involvement distinguishes supervisory personnel from those that fall within the definition of marketing function employee. INGAA at 30–32.

<sup>129</sup> INGAA at 112; LPPC at 11–12; Western Utilities at 4–5; Idaho Power at 7, National Grid at 17, PG&E at 16–18; Puget Sound at 4–6; E.ON at 10. AGA would add fulfilling obligations associated with corporate delegation policy or strategic or long-term planning. AGA at 20. Nisource asserts that the Commission has permitted transmission providers to allow senior managers, officers or directors to have ultimate responsibility for transmission operations and wholesale merchant functions, as long as they do not participate in directing, organizing or executing transmission system operations or reliability functions or wholesale merchant functions. Nisource at 13.

<sup>130</sup> Southern Co. Services at 21–22.

<sup>131</sup> TDU Systems at 9–11; SCANA at 7–8. TDU Systems also asks that the Commission clarify and expand its explanation of the activities that would cause a supervisor or director to be regarded as actively and personally engaged in transmission functions. TDU Systems at 9.

<sup>132</sup> SCANA at 7–8.

<sup>133</sup> Duke at 5–6.

<sup>134</sup> *Id.*

<sup>135</sup> MidAmerican at 12.

<sup>136</sup> INGAA at 112.

<sup>137</sup> The phrase “day-to-day” appears in the definition of transmission function employee in the existing Standards. 15 CFR 358.3(j).

121. A principal goal of the reforms made in this Final Rule is to provide greater certainty to regulated entities and their employees regarding the scope of the Independent Functioning Rule and the No Conduit Rule. The carefully circumscribed nature of the definitions of transmission functions and of transmission and marketing function employees should provide greater clarity than is contained in the existing Standards with regard to the permissible activities of supervisors, managers, and corporate executives. We suggest that if a situation truly does appear to be a close call, that in itself should be a red flag that suggests conservatism in applying the rule. In this area, it is best to err on the side of caution.<sup>138</sup>

122. For further clarification as to what is included in the day-to-day operation of the transmission system (and thus which employees would be considered transmission function employees), we mention the following examples, in addition to the granting and denying of service requests already specified in the definition: Coordinating the actual physical flows of power or gas, balancing load with energy or capacity, isolating portions of the system to prevent cascades, imposing transmission loading relief, and the like. Supervisors who are not actively and personally engaged in activities of these or a similar nature would not be considered to be transmission function employees. In regard to AGA's and Duke's requests for clarification regarding the roles of managers and officers who are involved in corporate governance, strategic and long-range planning, and development of general negotiating parameters for wholesale contracts, we clarify that these types of activities go beyond the day-to-day activities that characterize transmission function employees and marketing function employees, and participation in them would not make an employee a transmission function employee or a marketing function employee.

## 6. Elimination of Shared Employees Concept

### a. Commission Proposal

123. In the NOPR, the Commission noted that the corporate separation approach instituted in Order No. 2004 made it difficult for companies to transact needed business because all the employees of a marketing affiliate would be walled off from the

transmission provider's transmission function employees. The corporate separation approach required the creation of whole categories of employees who could be shared between the transmission provider and the marketing affiliate, such as officers and members of the board, field and maintenance employees, and risk management employees.<sup>139</sup> Issues have also arisen under the existing Standards as to whether such employees as lawyers, accountants, and rate design personnel should be exempted. The NOPR's substitution of the employee functional approach in place of the corporate separation approach eliminates the need for shared employees, since it is now only marketing function employees who must function independently from transmission function employees. Therefore, the regulatory text omitted any mention of shared employees.

### b. Comments

124. The elimination of the concept of shared employees seemed to have confused some commenters. Idaho Power requests that the Commission clarify what it means when it states in the NOPR that there is no longer a need for the concept of shared employees, considering that those employees' roles have not changed.<sup>140</sup> EPSA requests that the Commission either amend all other orders that reference shared employees or address the ambiguity in the Final Rule by stating the concept no longer exists in Commission regulations.<sup>141</sup> However, NiSource requests that the Commission confirm that the categories of employees identified by Order No. 2004 as "shared" continue to exist with the same status under the proposed Standards.<sup>142</sup>

125. Wisconsin Electric and INGAA request additional guidance on how some formerly "shared employees" would be classified. These employees include attorneys, accountants, risk management personnel, and regulatory personnel who must approve the transactions made by marketing function employees.<sup>143</sup> Wisconsin Electric and INGAA request that these employees should not be classified as marketing or transmission function employees and INGAA proposes that the Commission modify the definitions of transmission and marketing function

employees to expressly exclude risk management employees.<sup>144</sup>

126. Similarly, PSEG requests clarification as to the comment in paragraph 41 of the NOPR that rate design employees fall within the current Standards' concept of "shared employees." PSEG asks whether this comment indicates that the Commission is abandoning what PSEG states was its position in Order No. 2004-C as to considering certain rate design functions to be transmission functions.<sup>145</sup> PSEG also requests that the Commission clarify that employees who are shared between affiliated transmission and marketing functions and whose primary purpose is to develop and implement policy for the companies, advocate policies in various forums, or engage in strategic planning or financial decision making do not fall within the definitions of "transmission function employee" or "marketing function employee."<sup>146</sup>

127. EPSA asks the Commission to clarify whether the Independent Functioning Rule extends to consultant companies that offer both transmission and marketing services for corporate companies.<sup>147</sup> In addition, National Grid asks whether contractor firms who are retained to provide services may be considered transmission and marketing function employees.<sup>148</sup> Although National Grid does not believe contracting firms should be tied to a function, EPSA and National Grid would subject employees of these respective companies to the No Conduit Rule as appropriate.<sup>149</sup>

128. Idaho Power seeks clarification that despite the elimination of the shared employee concept, those employees who were formerly considered shared employees will still be subject to the No Conduit Rule.<sup>150</sup>

### c. Commission Determination

129. As discussed in the NOPR, the substitution of the employee functional approach for the corporate separation approach renders continuation of the concept of "shared employees" unnecessary. Since only those individuals who engage in transmission or marketing functions now fall within the scope of the Independent Functioning Rule, support personnel of the type formerly included in the concept of shared employees, and who

<sup>138</sup> As observed above, entities also have several avenues by which to receive guidance on such issues from the Commission or Commission staff. See *Obtaining Guidance on Regulatory Requirements*, 123 FERC ¶ 61,157 (2008).

<sup>139</sup> NOPR at P 24.

<sup>140</sup> Idaho Power at 9.

<sup>141</sup> EPSA at 5.

<sup>142</sup> NiSource at 11–12.

<sup>143</sup> INGAA at 36–40; Wisconsin Electric at 4–5; LPPC at 18–19.

<sup>144</sup> INGAA at 36–40.

<sup>145</sup> PSEG at 7.

<sup>146</sup> PSEG at 5.

<sup>147</sup> EPSA at 6.

<sup>148</sup> National Grid at 20.

<sup>149</sup> EPSA at 6; National Grid at 20.

<sup>150</sup> Idaho Power at 9.

do not meet those definitions, do not. Therefore, there is no need to further exempt them under the outmoded rubric of shared employees.

130. We decline to amend prior orders that mention shared employees; guidance from prior orders will be applicable or not depending on whether those orders address concepts that survive the revisions made in this Final Rule. We also decline to grant NiSource's request that employees formerly classified as "shared" continue in that classification. This would entail resurrecting the concept, and is unnecessary.

131. Commenters raise questions as to whether various types of employees formerly classified as shared employees are beyond the scope of the Independent Functioning Rule, citing such employees as attorneys, accountants, risk management personnel, regulatory personnel, rate design personnel, and strategic planning personnel. Again, the determination depends on the answer to a more fundamental question: Do such employees function in their stated roles, or do they also actively and personally perform day-to-day transmission functions or marketing functions? If they do not perform transmission functions or marketing functions, they are not subject to the Independent Functioning Rule. Therefore, if an attorney is rendering legal advice, he may consult with both transmission function employees and marketing function employees. Likewise, a risk management employee may develop risk guidelines for both transmission function employees and marketing function employees. And regulatory personnel may present before regulatory bodies filings that cover both transmission and marketing issues. Of course, all such employees would remain subject to the No Conduit Rule, and are prohibited from transmitting transmission function information to marketing function employees.

132. We disagree with PSEG's contention that the Commission is abandoning its position in Order No. 2004-C, which PSEG characterizes as determining that certain rate design functions qualified as transmission functions. Order No. 2004-C specifically stated that we would consider "the actual duties and responsibilities of employees in determining whether they are transmission function employees."<sup>151</sup> Here, as well, if a rate design employee were also assigned the responsibility for performing transmission functions, he or she would be a transmission function

employee. However, if the rate design employee is merely calculating rates to propose to the appropriate regulatory body, the employee would not be a transmission function employee; as discussed above, we are restricting the definition of transmission functions to the day-to-day operation of the transmission system.

133. We grant EPSA's and National Grid's requests for clarification as to whether consultants and contractors are subject to the Independent Functioning Rule, and whether their firms are as well. Agents and outside consultants and contractors who serve as transmission function employees must function independently of marketing function employees, and vice versa. However, the fact that given individuals employed by a consulting firm may function in one of the two categories does not bar other individuals employed by the same firm from functioning in the other category. Of course, consultants and contractors functioning as transmission function employees may not interact with consultants and contractors functioning as marketing function employees, and all such consultants and contractors must abide by the No Conduit Rule.

134. We also grant Idaho Power's request for clarification that employees formerly classified as shared employees are still subject to the No Conduit Rule. Not only are these employees subject to the No Conduit Rule, but so are all employees, regardless of their status or classification.

## 7. Long-Range Planning and Procurement

### a. Commission Proposal

135. The corporate separation approach of the former Standards created difficulties for public utilities engaged in long-range planning, and this difficulty was one of the impetuses that led to the reforms instituted in this Final Rule. Because such planning activities frequently encompass both transmission and generation issues, and because under the existing Standards none of the employees of a marketing or energy affiliate (except for shared employees) could interact with the transmission function employees of a transmission provider, it was difficult for planning personnel to gather needed information and to consult with appropriate personnel in order to make decisions on such basic matters as whether to build generation or to buy power. It was never the intent of the Commission to interfere with legitimate planning activities, something that is vital for the continued efficient

operation of both the electric and natural gas industries.

136. The NOPR proposed substituting the employee functional approach for the corporate separation approach to the Independent Functioning Rule, thus permitting most company employees to interact with one another, and eliminating the wholesale walling off of all marketing and energy affiliate employees from the transmission function employees of the transmission provider.

### b. Comments

137. Many commenters seek additional clarification from the Commission regarding the effect of the proposed Standards on long-range planning, and urge the Commission to clarify that employees do not become marketing or transmission function personnel by engaging in activities such as integrated resource planning (IRP), competitive solicitations, or non-competitive solicitations that are conducted under state supervision.<sup>152</sup>

138. Some commenters ask the Commission to clarify whether "transmission functions" includes long-range operations of the transmission system. SMUD and Idaho Power request that the proposed Standards exclude long-term transmission system planning, and the specific activities involved in that planning, from the definitions transmission function.<sup>153</sup> TDU Systems, on the other hand, requests that the Standards do apply to transmission function employees who engage in long-term transmission planning. However, TDU Systems also believes that transmission function employees should be permitted to provide limited information to marketing function employees regarding the feasibility of generation proposals.<sup>154</sup>

139. SCANA requests that neither generation-related employees that are physically located onsite at the generating facilities nor employees that are responsible for short and long-term resource planning be classified into one of the functions.<sup>155</sup>

140. Many commenters also object to the Commission's inclusion of "submission of offers or bids to buy or sell" in the proposed definition of

<sup>152</sup> EEI at 33; California PUC at 4, 7-8; Entergy at 2; TANC at 4-5; SCE at 7-8; Vectren at 6-8, 10.

<sup>153</sup> SMUD at 2; Idaho Power at 12-13.

<sup>154</sup> TDU Systems at 5, 11-12.

<sup>155</sup> SCANA at 10-15. Similarly, PG&E requests that the Commission confirm that the transmission function employees who have the responsibility to serve retail load may work cooperatively to plan transmission and generation on an integrated basis as required to meet state mandates. PG&E at 8.

<sup>151</sup> Order No. 2004-C at P 30.

marketing functions. These commenters identify numerous barriers that the inclusion of this phrase would place on long-range planning.<sup>156</sup> These stated barriers include (i) preventing employees engaged in resource procurement from having access to transmission planning information to meet their state obligations;<sup>157</sup> (ii) limiting a company's ability to design and implement effective demand response programs for retail load;<sup>158</sup> (iii) restricting employees from accessing transmission information needed to engage in competitive solicitations for service to retail native load;<sup>159</sup> (iv) restricting integrated resource planning and competitive procurement employees from accessing transmission information needed to engage in power purchases and requests for proposals to serve native load;<sup>160</sup> and (v) interfering with the ability of planning employees to obtain non-public transmission function information necessary to make solicitations as efficient and cost effective as possible.<sup>161</sup>

141. Many commenters also seek clarifications regarding whether certain activities are considered long-range planning or marketing functions. Idaho Power requests clarification that employees performing non-transmission function planning may consult with transmission function employees, without compromising their non-transmission-function-employee status.<sup>162</sup> Xcel asks the Commission to clarify (i) how the marketing function definition applies to both short-term and long-term transactions and to IRP related gas activities;<sup>163</sup> (ii) that marketing function excludes offers to buy or sell natural gas transportation or storage capacity that is the product of long-range planning to serve the native retail load of the gas LDC or to deliver natural gas fuel to electric generating plants owned or controlled by the

utility;<sup>164</sup> and (iii) that the proposed standards allow utilities the flexibility to pursue self-build or build/transfer options without running afoul of the Independent Functioning Rule.<sup>165</sup>

142. Many commenters also propose amendments to the proposed standards to remedy their concerns. Multiple commenters propose to remove "buy" from section 358.3(c), asserting that the Commission does not have direct authority over purchases.<sup>166</sup> PG&E's proposed resolution is to amend the definition by introducing language limiting the scope of the definition to wholesale purchases and sales.<sup>167</sup> Salt River suggests defining "marketing functions" simply as sales for resale.<sup>168</sup> To ensure that demand response is construed as a planning, rather than marketing, function, LPPC requests an additional exception for development, administration or implementation of demand response programs, including the issuance of requests for proposals or the awarding of contracts for demand response.<sup>169</sup> Commenters stress that these modifications are sufficient because such employees would remain subject to the No Conduit Rule to protect improper disclosure of protected information.<sup>170</sup>

143. Commenters request that the Commission clarify that the Standards do not prevent transmission providers from sharing transmission planning information with unaffiliated network service transmission customers. TAPS requests that the Commission clarify that the proposed Standards do not preclude transmission providers from providing unaffiliated network customers' planning personnel with the same types of information as is made available to the planning personnel of the transmission provider and its affiliates.<sup>171</sup> TAPS, TDU Systems and APPA request assurances that unaffiliated planning representatives involved in the regional joint planning process contemplated by Order 890 have the same access to transmission

information as does the transmission provider's own generation planners and affiliates.<sup>172</sup>

#### c. Commission Determination

144. As stated in the NOPR, one of the principal concerns the Commission had with the current Standards was the barriers they appear to have erected to coordinated resource planning, the critical importance of which the Commission stressed in Order Nos. 890 and 890-A.<sup>173</sup> Public utilities complained they were finding it difficult to gather together the necessary personnel and data to efficiently analyze their long-range needs for both transmission and generation, due to the strictures imposed by the corporate separation approach to the Independent Functioning Rule. For that reason, as well as others, the Commission revised the scope of the Independent Functioning Rule to encompass only transmission function employees and marketing function employees, thereby concentrating the rule on the area that presented the greatest potential for undue preferences.

145. Commenters expressed approval of the Commission's efforts to remove unnecessary barriers to resource planning, but many raised concerns that some barriers still remain. Others sought clarification as to the implications of the proposed Standards on the transparency of the resource planning process. These concerns fall in two main areas: whether "transmission functions" include long-range operation of the transmission system, thereby implicating employees involved in long-range transmission planning; and whether the definition of "marketing functions" should include the phrase "submission of offers or bids to buy or sell," rather than simply "offers to sell." A few commenters also raised concerns about access by third parties to transmission function information in the context of open planning programs.

146. As stated earlier in connection with the discussion of the definition of "transmission functions," the Commission in this Final Rule clarifies that the term refers to the day-to-day operation of the transmission system, and has modified the definition accordingly. Long-range planning regarding the transmission system would not be included, and employees

<sup>156</sup> Puget Sound at 5-6.

<sup>157</sup> *Id.*; NARUC at 7.

<sup>158</sup> LPPC at 13-14.

<sup>159</sup> Salt River at 8-10; NARUC at 7; SCE at 7-8; Xcel at 13-14; PG&E at 12-14; EEI at 31-34.

<sup>160</sup> Salt River at 8-10; EEI at 31-36; LPPC at 8; Southern Co. Services at 12-13. Southern Co. Services contends that including these activities in the definition would conflict with state law requiring IRP and requests for proposal (RFP). Southern Co. Services at 11. Southern Co. Services requests that the Commission modify the definition of marketing functions to exclude RFP. *Id.* at 14.

<sup>161</sup> Western Utilities at 7-8; SCE at 8.

<sup>162</sup> Idaho Power at 12-13.

<sup>163</sup> Xcel at 14-16; SCANA at 10-15. Xcel believes that short-term wholesale purchase transactions should be treated comparably with long-term capacity and energy acquisitions to serve native load, since the function is the same: serving native load. Xcel at 14-16.

<sup>164</sup> Xcel at 15-16.

<sup>165</sup> Xcel at 16-18. Xcel also questions whether the marketing function definition should apply to the Xcel Energy Transmission Access Group, which it states acts as the transmission service customer in arranging the long-term transmission service requirements for retail and wholesale native load customers of all four Xcel Energy Operating Companies. Xcel notes that this group does not offer, bid, buy, or sell electric energy or natural gas nor does it take positions on financial transmission rights in organized markets. Xcel at 19-20.

<sup>166</sup> Western Utilities at 8-9; Salt River at 8-9; SCE at 8.

<sup>167</sup> PG&E at 12-14.

<sup>168</sup> Salt River at 8-10.

<sup>169</sup> LPPC at 13-14.

<sup>170</sup> Salt River at 8-10.

<sup>171</sup> TAPS at 38.

<sup>172</sup> TAPS at 38; TDU Systems at 4; APPA at 6.

<sup>173</sup> NOPR at P 32. See *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 clarifications*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261, at P 171 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008).

engaged in such long-range planning, provided they were not also actively and personally involved in the day-to-day operation of the transmission system, would not be considered transmission function employees. Therefore, the Independent Functioning Rule would not apply to them.

147. Idaho Power Company requests clarification that long-range planning functions such as integrated resource planning and preparation of system impact studies not be considered transmission functions. We reiterate that so long as these activities do not implicate the day-to-day operation of the transmission system, they are not transmission functions. SMUD likewise questions whether long-range transmission planning is included in the definition; our amendment in this Final Rule clarifies that it is not. And SCANA requests that employees who perform generation-related resource planning not be considered transmission function employees (or marketing function employees). These employees do not perform day-to-day transmission operations, and thus are not transmission function employees. Furthermore, they are not engaged in sales of energy for resale, and thus are not marketing function employees under our revised definition of the term.

148. As discussed above, the Commission has determined to remove "bids to buy" from the definition of marketing functions, in large part because the Commission's jurisdiction centers on sales for resale in interstate commerce, not on purchases. It is also unnecessary to include purchases in the scope of the rule in order to categorize marketers making off-system sales as marketing function employees; personnel making purchases destined to serve off-system sales would be so categorized by virtue of their involvement in the sale portion of the transaction. The removal of purchases from the definition of marketing functions addresses the concerns of the many commenters who feared that barriers to long range resource planning might still remain under the proposed Standards.

149. LPPC is concerned that inclusion of demand response in the definition of marketing functions could interfere with the development of demand response programs as a part of long-range planning. As discussed above, the Commission does not intend to interfere with demand response programs that an LSE has established for its customers, and inclusion of the term demand response in the definition would thus not impede planning for demand response programs. PG&E's request to

exclude from the definition of marketing functions those purchases made to serve bundled native load or pursuant to state obligations is mooted by our limitation of the definition to sales and not purchases.

150. Our revised definition of transmission functions, limiting it to the day-to-day operation of the transmission system, should enable the free flow of the type of transmission information needed for planning purposes. And the removal of purchases from the definition of marketing functions should expand the category of personnel who are permitted access to the type of information necessary to engage in long-range system planning and competitive solicitations, whether conducted pursuant to state mandate or not.

151. Idaho Power Company seeks guidance as to whether long-range planning personnel will be able to discuss information with transmission function employees. If the planning personnel do not otherwise qualify as marketing function personnel, they may hold such discussions. However, if the transmission employees in question have access to transmission function information and share it with the planning personnel, under the No Conduit Rule the planning personnel may not pass such information on to marketing function personnel.

152. In Order No. 890, the Commission deferred consideration of the impediments to the planning process which some commenters therein stated were created by the Standards.<sup>174</sup> Our modifications to the proposed definition of transmission functions (limiting such functions to the day-to-day operation of the transmission system) and to the proposed definition of marketing functions (removing purchases from the definition) address those concerns. TAPS and TDU Systems, however, raise a separate concern, asserting that the ability of public utilities to enjoy the relatively free flow of information permitted under the revised Standards may encourage them to refrain from sharing such information with non-affiliated entities in the planning process. We reiterate our commitment, set forth in Order No. 890, as to the desirability of a coordinated and open planning process.<sup>175</sup> This proceeding is not the proper forum to address the appropriate extent of participation by interested entities in the planning processes of public utilities. However, as we stated in Order No. 890, the transmission provider must make available to any

interested party the same data, information, and models it uses in the transmission planning process.<sup>176</sup>

## 8. Exclusion for Permitted Information Exchanges

### a. Commission Proposal

153. In the NOPR, the Commission proposed an exclusion to both the Independent Functioning Rule and the No Conduit Rule for information that we believed required communication between transmission function employees and marketing function employees. Two categories of information were implicated: information regarding generation necessary to perform generation dispatch, and information necessary to maintain or restore operation of the transmission system. The Commission proposed that in situations requiring the exchange of such information, contemporaneous records be made of the communication, except in cases of emergency, when recordation was to be made as soon after the fact as practicable. The NOPR also proposed that the records of the communications be retained for a period of five years. See proposed sections 358.5(b), 358.6(b), 358.7(h).

### b. Comments

154. Commenters raised the general concern that the provisions designating the proposed permitted interactions are drafted too narrowly to fully cover the types of communications they purport to exclude.<sup>177</sup> With respect to generation dispatch, MidAmerican believes that the exclusion should cover all communications necessary to perform generation dispatch, and suggests eliminating the words "regarding generation."<sup>178</sup> ALCOA suggests the exclusion should cover the situation where transmission function employees perform generation dispatch.<sup>179</sup> NiSource asks the Commission to delineate which generation-related information is exempted.<sup>180</sup> Bonneville contends that communications necessary to provide generation inputs for ancillary and control area services should be permissible, and not subject to the contemporaneous record requirement.<sup>181</sup>

155. Commenters also seek clarification on the type of generation

<sup>176</sup> *Id.* at P 471.

<sup>177</sup> See, e.g., NiSource at 21–22; MidAmerican at 15–16.

<sup>178</sup> MidAmerican at 15.

<sup>179</sup> ALCOA at 6.

<sup>180</sup> NiSource at 23.

<sup>181</sup> Bonneville at 6.

<sup>174</sup> Order No. 890 at n.269.

<sup>175</sup> *Id.* at P 425.

information transmission function employees may share with generation employees. E.ON and PSEG seek confirmation that employees engaged in generation-related activities may receive transmission function information from transmission function employees.<sup>182</sup> Likewise, EEI requests that the Commission clarify that the exclusion for information necessary to maintain or restore operation of the transmission system includes information necessary for the scheduling of transmission-related generation outages.<sup>183</sup> PSEG further requests that the Commission address the circumstance where employees performing generation-related activities are the same employees performing trading activities.<sup>184</sup>

156. Numerous commenters requested clarification on the scope of the reliability exemption.<sup>185</sup> National Grid requests clarification that the reliability exclusion is not limited to those communications related only to transmission system reliability,<sup>186</sup> and other commenters believe the exclusion should cover all types of reliability communications.<sup>187</sup> PSEG requests, instead, specific examples of permitted reliability communications.<sup>188</sup> E.ON suggests that these excluded communications for reliability purposes can only be made to the same extent that a transmission provider would communicate with a similarly situated non-affiliated entity engaged in wholesale merchant operations.<sup>189</sup>

157. Destin contends that the proposed rule discriminates against natural gas transmission providers, averring that the two types of permitted information apply only to electric transmission providers.<sup>190</sup>

158. Ameren notes that elsewhere in the proposed regulations, the Commission uses the terms “permitted information” or “permitted information exchanges.” Ameren requests that the Commission be consistent throughout the Final Rule.<sup>191</sup>

<sup>182</sup> PSEG at 8; E.ON at 21.

<sup>183</sup> EEI at 53; ATC at 10; Wisconsin Electric at 6–7.

<sup>184</sup> PSEG at 9.

<sup>185</sup> See, e.g., National Grid at 10–11; PSEG at 17–18; NiSource at 22–23; ATC at 4; EEI at 51–52; Destin at 13; E.ON at 19–20; MidAmerican at 14. Reliability Standards refer to the standards promulgated by the North American Electric Reliability Corporation (NERC) and approved by the Commission.

<sup>186</sup> National Grid at 10–11.

<sup>187</sup> See, e.g., National Grid at 10–11; MidAmerican at 14; Ameren at 25; Wisconsin Electric at 6–7.

<sup>188</sup> PSEG at 6.

<sup>189</sup> E.ON at 19–20; see also TAPS at 45.

<sup>190</sup> Destin at 12.

<sup>191</sup> Ameren at 27.

159. Some commenters propose alternative methods of defining permitted exchanges. Western Utilities urges the Commission to recategorize the descriptions proposed in sections 358.5(b), 358.6(b) and 358.7(h) as a permissible subset of non-public transmission function information.<sup>192</sup> SCE prefers a modification to section 358.6(b) that describes a particular set of safe harbor exchanges.<sup>193</sup>

160. EEI contends that the Commission’s exclusions for permitted information exchanges should be phrased as “exemptions” rather than “permitted communications” to clarify that other forms of communication, such as social conversations, are not implicitly barred because they are not identified as “permitted” communications.<sup>194</sup>

161. SCANA would like confirmation that if generation dispatch employees are part of the company’s transmission function, not its marketing function, then communications between such employees and non-dispatch-oriented transmission function employees necessary to perform generation dispatch and to maintain or restore operation of the transmission system are permissible.<sup>195</sup>

162. SCE requests that the Commission include the phrase “non-public transmission” to the exclusion for permitted information exchanges to avoid the unintended implication that all exchanges between marketing function employees and transmission function employees are banned except the specific exchanges described.<sup>196</sup>

163. PSEG seeks clarification that marketing function employees may communicate with employees of a gas LDC that is not affiliated with a gas transmission provider. PSEG asserts that communications in such a circumstance are essential for generation dispatch purposes and pose no threat of prohibited communications.<sup>197</sup>

164. Ameren requests that the Commission clarify that proposed section 358.6(b) does not preclude support personnel from sharing information related to a marketing affiliate’s specific transmission service request.<sup>198</sup> Ameren also asks the Commission to clearly state in the Final Rule that the permitted information exclusion includes the operating

information exemption it states is permitted under Order No. 2004.<sup>199</sup>

165. Many commenters express confusion with respect to the record requirement arising from proposed sections 358.2(d) and 358.7(h). Commenters request clarification that the record retention requirement is limited to the two narrow categories of permitted communications identified in section 358.7(h).<sup>200</sup> Likewise, National Grid requests the Commission confirm that the contemporaneous record requirement applies only to the types of communications addressed in sections 358.5(b), 358.6(b) and 358.7(h).<sup>201</sup>

166. Some commenters expressed the concern that the contemporaneous record requirement presents too great an administrative burden.<sup>202</sup> NiSource would eliminate the contemporaneous requirement, stating the Commission neither explains why the records are necessary, nor justifies the burden placed on transmission providers.<sup>203</sup>

167. Other commenters seek clarifications on the mechanics of the record requirement. Idaho Power and Puget Sound ask whether a recorded phone line satisfies the recordation requirement.<sup>204</sup> Puget Sound requests that the Commission not require indexing of these recorded communications.<sup>205</sup> ATC requests that the Commission expressly clarify that permitted communications need not also be contemporaneously posted on the OASIS.<sup>206</sup>

168. Commenters disagree on how much detail should be required for cross-functional meeting records. Puget Sound prefers to record only who attended, the agenda, verification that no discussion of nonpublic transmission function information took place, and any items circulated for the meeting, instead of keeping detailed records.<sup>207</sup> Similarly, E.ON would like assurance that these meeting records need not contain a “word-for-word” transcription, so long as the key points are addressed.<sup>208</sup> EPSA, however, believes that there should be an actual transcript or recording of any interaction between restricted employees.<sup>209</sup>

<sup>199</sup> *Id.*

<sup>200</sup> See, e.g., Idaho Power at 9–10; National Grid at 22–24; MidAmerican at 13; Xcel at 22.

<sup>201</sup> National Grid at 22–23.

<sup>202</sup> See, e.g., NiSource at 19; Destin at 13; ATC at 16.

<sup>203</sup> NiSource at 19.

<sup>204</sup> Idaho Power at 9–10; Puget Sound at 11.

<sup>205</sup> Puget Sound at 12–13.

<sup>206</sup> ATC at 8.

<sup>207</sup> Puget Sound at 13.

<sup>208</sup> E.ON at 23.

<sup>209</sup> EPSA at 10–11.

<sup>192</sup> Western Utilities at 10–11.

<sup>193</sup> SCE at 6.

<sup>194</sup> EEI at 50.

<sup>195</sup> SCANA at 8–10.

<sup>196</sup> SCE at 6–7.

<sup>197</sup> PSEG at 6, 10–11.

<sup>198</sup> Ameren at 27.

169. INGAA contends that this recordation requirement implies, through the use of the word “exchange,” that it extends to information received from the marketing function employee.<sup>210</sup> INGAA asks the Commission to clarify that the recordation requirement applies only to non-public transmission information provided to a marketing function employee, and not to information received from a marketing function employee.<sup>211</sup>

170. Wisconsin Electric urges the Commission to consider adopting a six-month time period, after which disclosure of non-public transmission function information to a marketing employee is no longer a violation.<sup>212</sup> And Williston requests that the five-year retention requirement for the contemporaneous records of its communications be reduced to three years.<sup>213</sup>

171. Williston believes that the new Standards should allow whatever steps are necessary to be taken during an emergency, without regard to the record requirement.<sup>214</sup> Likewise, ATC and EEI state that any contemporaneous records created after an emergency should simply be assembled only to the extent possible and to the best knowledge of that company at that time, and that no extraordinary duties should be imposed to meet the Standards’ requirements.<sup>215</sup>

172. Williston asserts that requiring records for non-emergency communications places more onerous controls on the sharing of information, without justification.<sup>216</sup> Williston also requests assurances that in situations where such communications are provided to the Commission, that they will remain non-public.<sup>217</sup>

173. National Grid proposes that the Commission eliminate the proposed requirement that each company’s Chief Compliance Officer direct and manage contemporaneous recordings, and allow each company to individually determine how best to comply with the contemporaneous record requirement.

#### c. Commission Determination

174. As discussed above, the Commission is eliminating the corporate separation approach to the Independent Functioning Rule, and transmission function employees are no longer barred from interacting with *all* the employees

of a marketing or energy affiliate (only marketing function employees). Therefore, the occasions where transmission function employees will legitimately need to interact in a professional capacity with employees barred from doing so under the Independent Functioning Rule is greatly reduced from the current Standards. This is especially true in the critical areas of reliability and generation dispatch, as it is rarely marketing function personnel who engage in these activities. However, to cover any isolated circumstances that may remain, such as in the case of smaller utilities whose employees may perform multiple job duties, the Commission proposed in the NOPR an exclusion to the Independent Functioning Rule and the No Conduit Rule to ensure that where certain critical functions were concerned, employees would not hesitate to interact with one another for fear of violating the Standards.

175. The bulk of the confusion which seems to have arisen over the exclusion, as expressed in the comments, centers on generation dispatch. Because dispatch is not inherently a marketing function, and because persons engaged in marketing are very unlikely to also be engaged in generation dispatch, commenters have assumed the Commission meant the exclusion to cover some broader situation. That is not the case. It was intended only for those rare instances, such as with smaller utilities, where some overlap of duties might exist.

176. To avoid any further confusion, the Commission eliminates from section 358.7(h) the exclusion pertaining to generation dispatch, and instead broadens the exclusion for reliability to include generation concerns. The Commission further broadens the exclusion for reliability to include compliance with reliability standards generally. The proposed first exclusion is thus eliminated and the proposed second exclusion is split into two parts, to read as follows: “information pertaining to compliance with Reliability Standards approved by the Commission,” and “information necessary to maintain or restore operation of the transmission system or generating units, or that may affect the dispatch of generating units.” Furthermore, to avoid duplication, the Commission deletes the redundant statements of the exclusion in sections 358.5(b) and 358.6(b). The Commission also deletes the statement of the exclusion from section 358.2, as it contains a level of detail inappropriate for a statement of general principles. The statements of both the exclusion

and the retention requirement pertaining to it are now contained in section 358.7(h), under the Transparency Rule.

177. The Commission agrees with SCE that the phrase “non-public information” should be added to the statement of the exclusion, to avoid the implication that exchanges of public information must also be recorded, and modifies the text accordingly. Likewise, the Commission clarifies, in response to a request from INGAA, that it is transmission function information that is not to be disclosed, and as to which the exclusion applies, and modifies the language of the exclusion accordingly. However, we remind INGAA that with respect to the Independent Functioning Rule, it is the interaction of transmission function employees and marketing function employees that is at issue. Such interactions ought not to occur, except for non-business related activities or in connection with the exclusion under discussion.

178. Some commenters are concerned that acceptable interactions among employees not covered by the exclusion might be inadvertently swept into the recordation requirement by use of the term “permitted.” To avoid any confusion over the scope of the term, the heading will read: “Exclusion for and recordation of certain information exchanges.” We point out, however, that while transmission function employees and marketing function employees may talk about personal matters, which certainly need not be recorded, they are required to function independently from one another with respect to their work activities. Therefore, their interactions should be limited to social activities or to the necessary discussion of information that falls within the exclusion discussed. And, as indicated, in the latter case appropriate recordation is to be made.

179. SCANA states that the employees of its affiliated utility who perform generation dispatch are included in the utility’s transmission function, and requests guidance as to their status as it pertains to the exclusion. The Commission confirms that if such employees are not performing marketing functions, they may freely interact with other transmission function employees, and need not be concerned with the exclusion in question.

180. PSEG seeks clarification that marketing function employees may communicate with employees of a gas LDC that is not affiliated with a gas transmission provider. Such communications would not involve transmission function employees or the dissemination of transmission function

<sup>210</sup> INGAA at 55–58.

<sup>211</sup> INGAA at 57–58.

<sup>212</sup> Wisconsin Electric at 7–8.

<sup>213</sup> Williston at 11.

<sup>214</sup> Williston at 9–10.

<sup>215</sup> ATC at 16; EEI at 4.

<sup>216</sup> Williston at 10.

<sup>217</sup> *Id.* at 11.

information to an affiliated marketing function employee, and thus would be permissible.

181. The Commission confirms that the exclusion does not implicate the processing of transmission service requests from an affiliate, which is permissible. Ameren requests the Commission to carry over into the revised Standards the following provision: "A transmission provider is permitted to share information necessary to maintain the operations of the transmission system with its Energy Affiliates." This provision is no longer needed, due to the elimination of the concept of energy affiliates and the restrictions pertaining to such affiliates.

182. Some commenters suggest the recordation requirements of the exclusion create an added burden on their operations. To the contrary, the Standards greatly reduce the burdens on operations. Under the existing Standards, transmission function employees must function independently from *all* the employees of a marketing affiliate, not just the marketing function employees. It can readily be seen that limiting the restriction on interactions to marketing function employees virtually eliminates the need for the exclusion itself. And in those rare cases noted in the exclusion where interaction between transmission function employees and marketing function employees may be required, the transmission provider is not prohibited from allowing the interaction, it simply must keep a record to enable the Commission to ascertain whether the communications fell within the scope of the exclusion or not.

183. The Commission clarifies that the recording of any meetings and exchanges of information under the exclusion need not take any particular form; thus, a recorded phone line is sufficient. The Commission declines to require a transcript, as one commenter suggests, as this would be impracticable. The important element of the requirement is to make a record of what generally was discussed, and the date and persons involved. Puget Sound requests that entities not be required to index the communications. No particular extraction method for the data is required; however, communications subject to the exclusion must be retrievable in some fashion, in order for Commission staff to review them if necessary.

184. The Commission agrees that an entity may designate someone other than its chief compliance officer as the person responsible for managing the recordings under the exclusion, and eliminates that restriction from the

regulatory text. The five-year holding period matches that set forth in proposed section 358.4, and will be retained. This period, rather than the requested three-year period that governs the retention of certain shipper data under 18 CFR 284.12 (2008), will better enable Commission staff to access the information in the course of periodic audits or other interactions with the entity in question, which may occur on an infrequent basis.<sup>218</sup>

185. With respect to emergency circumstances during which contemporaneous recordation cannot be made, the Commission clarifies that after-the-fact recordation need be assembled only to the extent possible; we recognize that the thoroughness of such notes or other recordation will vary greatly depending on the nature and extent of the emergency.

186. The Commission declines to adopt a time period for the possible transition of non-public information to public information. The continued usefulness of such information to an affiliated marketing function employee will depend on the circumstances, and thus does not lend itself to a generic rule. The Commission also notes that its regulations govern whether information it receives is treated as non-public or otherwise; as a general matter, information received in connection with investigations is so treated.<sup>219</sup>

187. Lastly, Destin suggests the proposed exclusion by its terms discriminates against the gas industry. That is not correct. The definition of transmission in section 358.3(f) includes gas transportation as well as electric transmission. Therefore, information necessary to maintain or restore operation of the transmission system refers to pipelines as well as to electric transmission.

#### D. The No Conduit Rule

188. In the NOPR, the Commission proposed carrying forward the no conduit prohibition of the existing Standards, but modified it to encompass

<sup>218</sup> It is also consistent with the time period adopted by the Commission in Order No. 677, amending the retention period for price data under 18 CFR 284.288(b) and 284.403(b) (natural gas) and 18 CFR 35.37(d) (electricity), *Revisions to Record Retention Requirements for Unbundled Sales Service, Persons Holding Blanket Marketing Certificates, and Public Utility Market-Based Rate Authorization Holders*, FERC Stats. & Regs. ¶ 31,218 (2006); Order No. 670 prohibiting market manipulation under 18 CFR part 1c, *Prohibition of Energy Market Manipulation*, FERC Stats. & Regs. ¶ 31,202 (2006); and the generally applicable five-year statute of limitations where a penalty provision does not impose its own statute of limitations. See FERC Stats. & Regs. ¶ 31,218 at n.6.

<sup>219</sup> See 18 CFR part 1b (2008). See also 18 CFR 388.112 and 388.113 (2008).

only marketing function employees, not all employees of a marketing or (for the electric industry) an energy affiliate, as the persons who could not receive transmission function information. As in the case of the analogous reform to the Independent Functioning Rule, this change restricts the category of individuals who should be walled off from transmission function information to those who can capitalize on it in the form of an undue preference.

#### 1. Commission Proposal

189. The Commission proposed prohibiting employees of a transmission provider from disclosing non-public transmission function information to the transmission provider's marketing function employees (defined to include employees of an affiliate). The Commission also proposed prohibiting the receipt of transmission function information by a transmission provider's marketing function employees. See proposed section 358.6.(a).

#### 2. Comments

190. EPSA agrees with all the NOPR proposals designed to strengthen the No Conduit Rule and approves broadening the scope of the term "non-public" as much as feasible.<sup>220</sup>

191. SCE states that the prohibition set forth in proposed section 358.6(a)(1), prohibiting transmission function employees from disclosing non-public transmission function information to marketing function employees, is redundant, since all employees are so prohibited under proposed section 358.6(a)(4). SCE recommends that the provision be amended by substituting the words "non-marketing function employees and affiliate employees" for "transmission function employees" and deleting the proposed section 358.6(a)(4).<sup>221</sup>

192. Many commenters object that the prohibition against receiving non-public transmission function information "from any source" is, in one or more ways, unworkable and unenforceable.<sup>222</sup> SCE claims the proposed section is also unfair because of what it sees as the Commission's intent to approach violations to the proposed Standards as *per se* violations.<sup>223</sup> Commenters argue

<sup>220</sup> EPSA at 8.

<sup>221</sup> SCE at 6.

<sup>222</sup> See, e.g., AGA at 23–25, ALCOA at 6–8, Ameren at 29–30, Arizona PSC at 3–5, Bonneville at 9–10, E.ON. at 14–15, EEI at 42–44, Entergy at 3, Idaho Power at 10, INGAA at 43–45, INGAA Response at 3, NiSource at 19–20, PG&E at 22, PSEG at 15–16, Puget Sound at 10–11, SCE at 2–5, Southern Co. Services at 25–26, Western Utilities at 5–7, and Wisconsin Electric at 9.

<sup>223</sup> SCE at 3.

that transmission providers cannot control whether affiliated marketing function employees receive non-public transmission function information from third parties, and many commenters further contend that the receiving marketing function employee may not have a way to know whether the information is non-public.<sup>224</sup> SCE states that because the proposed prohibition operates against marketing function employees who work for transmission providers and not against those who do not, the Commission is providing the latter a competitive advantage in that they can receive information the former cannot.<sup>225</sup> Western Utilities also complains that no posting "cure" provision has been provided for improper disclosures by a third party to a marketing function employee.<sup>226</sup>

193. Many commenters recommend either amending this prohibition or eliminating it. Some commenters believe that the other sections of the No Conduit Rule adequately ensure that improper transfers of non-public information will not occur, and request that the Commission eliminate the proposed prohibition.<sup>227</sup> SCE prefers amending the provision to prohibit disclosure or access to, rather than receipt of, non-public transmission function information.<sup>228</sup> INGAA suggests, and others agree, that the prohibition "from any source" be eliminated and substituted with language limiting the provision to information received from a transmission function employee of the transmission provider.<sup>229</sup>

194. NGSAs believes that the language of the No Conduit Rule prohibits distribution of non-public transmission information only to a pipeline's in-house marketing function, but does not reach marketing function employees of an affiliate. NGSAs proposes

<sup>224</sup> Western Utilities observes that the rule could potentially require a marketing function employee to maintain detailed records of all transmission function information he or she hears, and spend significant amounts of time investigating each item to ascertain whether it is non-public. SCE and Western Utilities state the prohibition could also be interpreted as preventing a marketing function employee from attending any meeting involving an ISO, NERC or Regional Entity because of the potential for disclosure of non-public information. SCE at 4; Western Utilities at 6.

<sup>225</sup> SCE at 5.

<sup>226</sup> Western Utilities at 7.

<sup>227</sup> NiSource at 19–20; Vectren at 6; Williston at 11–12.

<sup>228</sup> SCE at 5.

<sup>229</sup> INGAA at 45; PSEG at 15; E.ON at 3; Southern Co. Services at 26; E.ON at 3. Western Utilities contends that while the transmission provider cannot impose or enforce a compliance program on unaffiliated third parties, it may be liable under the proposed rule for prohibited disclosures by third parties. Western Utilities at 5.

amendments that it believes ensure that the prohibition reaches both.<sup>230</sup> On the other hand, AGA does not believe that the No Conduit Rule should apply to non-jurisdictional marketing affiliates.<sup>231</sup>

195. Destin is concerned that the No Conduit Rule requires a transmission provider to ensure compliance by the marketing function employees, a task it contends is impracticable in the context of a large and diverse corporate family. Destin believes the proposed Standards effectively adopt a strict liability standard for transmission providers with respect to any violations that may be committed by a marketing affiliate, and that could subject a company to a double penalty for a violation.<sup>232</sup> Dominion Resources agrees with Destin and queries whether the Commission has the authority to enforce violations of the Standards by employees of a transmission provider's affiliates.<sup>233</sup>

196. TDU Systems requests that the Final Rule clarify that generation planners are subject to the No Conduit Rule.<sup>234</sup>

197. Finally, Vectren asks the Commission to modify section 358.2(c) to change it from passive voice to active voice, in order to make it consistent with other subsections of section 358.2 and to clarify who must comply with the provision.<sup>235</sup>

### 3. Commission Determination

198. The Commission believes that the No Conduit Rule is at least equally as critical to the regulatory scheme of the Standards as is the Independent Functioning Rule, and adopts it in this Final Rule. However, we find that certain of the commenters' objections to the proposed regulatory text are well-taken, and modify it to (i) eliminate redundancies and (ii) address the concerns of those who interpret the rule as reaching the unwitting receipt of transmission function information by marketing function employees.

199. We agree with SCE that the first subsection of the rule, proposed section 358.6(a)(1), which prohibits transmission function employees from disclosing non-public transmission function information to their transmission provider's marketing function employees, is redundant. This prohibition is necessarily included in the broader prohibition of the fourth subsection, proposed section

358.6(a)(4), which prohibits any employee of the transmission provider or of its marketing affiliates from making such disclosures. Therefore, we revise the regulatory text to eliminate the proposed first prohibition, and rearrange the remaining list of prohibitions.

200. Many commenters object to the prohibition in proposed section 358.6(a)(2), which prohibits marketing function employees from receiving non-public transmission function information from any source. They argue that such receipt could be unwitting, or forced upon the employees unwillingly. In light of the difficulties in determining whether a marketing function employee may have willingly and knowingly received such information, or rather whether he inadvertently received it, the Commission will eliminate this prohibition in section 358.6. The statement of the No Conduit Rule in the general principles section, section 358.2, is likewise revised to reflect this modification.

201. We further clarify that contractors, consultants or agents, as well as employees, are covered by the prohibition in section 358.6(b), and modify the regulatory text accordingly. We also modify the corresponding regulatory text in the statement of general principles, section 358.2(c).

202. NGSAs contends that marketing function employees of an affiliate would not be reached under the No Conduit Rule. That is not the case. Marketing function employees are defined in section 358.3(d) to include employees, contractors, consultants or agents not only of the transmission provider, but also of an affiliate of the transmission provider.

203. Destin claims that the proposed rule makes transmission providers responsible for the actions of their affiliates with respect to the disclosure of transmission function information. That is also not the case. Only one of the prohibitions is solely directed against transmission providers, and it prohibits them from using anyone as a conduit for improper disclosures, something that is clearly within their power. Of course, to the extent transmission providers have corporate control over an affiliate, they are expected to require the affiliate to abide by the Standards.

204. TDU Systems requests clarification that generation planners are subject to the No Conduit Rule. The Commission confirms that not only are generation planners subject to the No Conduit Rule, but so are all other employees of a transmission provider or its marketing affiliate. In response to

<sup>230</sup> NGSAs Reply Comments at 10–11.

<sup>231</sup> AGA at 3.

<sup>232</sup> Destin at 4–6.

<sup>233</sup> Dominion Resources at 15.

<sup>234</sup> TDU Systems at 5–6.

<sup>235</sup> Vectren at 11.

Vectrin's request that the active voice be used in section 358.2(c) (the statement of general principles relating to the No Conduit Rule), the Commission believes no change is appropriate. The preceding two general principles refer to affirmative obligations, whereas the principle in question refers to an obligation to refrain from taking certain actions, which lends itself to the passive voice.

#### E. Transparency Rule

205. In addition to the Independent Functioning Rule and the No Conduit Rule, the NOPR proposed a Transparency Rule, the provisions of which are designed to alert interested persons and the Commission to potential acts of undue preference. Most of the various posting requirements of the existing Standards were placed in this section, and in some cases modified to streamline them and conform them to the new approaches proposed in the NOPR. The various posting requirements are discussed below.

#### 1. Waivers and Exercises of Discretion

##### a. Commission Proposal

206. The Commission proposed carrying forward most of the existing provisions regarding the non-discrimination requirements of section 358.4, including the provisions regarding the posting of waivers and exercises of discretion. These provisions were proposed to remain under section 358.4.

##### b. Comments

207. Many commenters contend that the requirement that pipelines log and post all "exercises of discretion" is vague, unnecessarily broad, and overly burdensome.<sup>236</sup> Both Williston and INGAA argue that the NOPR expands this requirement without justification.<sup>237</sup> INGAA and NiSource request that the Commission eliminate the requirement altogether.<sup>238</sup>

208. As an alternative to eliminating the requirement, several commenters request that the Commission further clarify its scope.<sup>239</sup> INGAA requests that the Commission clarify that a pipeline need not post all acts of discretion inherent in its day-to-day operations. INGAA and Kinder Morgan request clarification that the provision does not cover information that must be posted

under other regulatory or tariff requirements, arguing that would create duplicative posting requirements.<sup>240</sup> Many commenters request clarification that the provision does not apply to acts of discretion regarding tariff provisions that, by their own terms, allow for discretion in their application.<sup>241</sup> INGAA and Dominion Resources assert that subsequent acts of discretion within the tariff's parameters should be presumed non-discriminatory, unless and until someone raises a concern.<sup>242</sup>

209. Other commenters propose to limit the scope of this posting requirement in varying ways. NGSAs propose that the Commission adopt the following rule of thumb: That the pipeline need not post each individual use of a waiver that is generic in application, posted, available to all shippers and cannot be denied when requested; but that the pipeline should post non-generic waivers that are not applied on every request or that are shipper-specific.<sup>243</sup> Alternatively, Williston believes that only a discretionary waiver of a tariff provision that specifically provides for discretionary waiver need be posted.<sup>244</sup> Similarly, Dominion Resources contends that only waivers should be posted, and not "acts of discretion," noting that myriad acts of discretion are continually being made.<sup>245</sup> Chandeaur believes that the retention of documents requirement should refer only to the log of the acts of waiver and exercises of discretion, contending that retention requirements and reproduction specifications for Internet Web site information is addressed in the Commission's regulations at section 284.12(b)(3)(v).<sup>246</sup>

210. Commenters also suggest other modifications to this requirement. NGSAs urge that the Commission clarify that the non-discrimination posting requirements set forth in proposed section 358.4 apply uniformly to all gas industry transmission providers, regardless of whether the transmission provider has marketing affiliates or whether those marketing affiliates transact business on the pipeline.<sup>247</sup> In

addition, NGSAs request that the Commission establish a standardized format for the posting of offers of a discount and discretionary waivers, to ensure that the disclosures are more accessible and include all relevant information.<sup>248</sup> And Williston requests that the Commission reduce the retention period to three years, instead of five.<sup>249</sup>

211. Commenters also request modifications to the proposed requirement regarding posting of discounts, set forth in section 358.4(b). Chandeaur believes that proposed section 358.4(b) contains unnecessary overlap with the existing regulatory text in section 250.16(d) of the Commission's regulations, and requests that the Commission adopt the approach of having only one subparagraph within the regulation setting out the elements required to meet the reporting burden for Form 592.<sup>250</sup>

212. ATC believes that the discount requirement should not apply to transmission providers that participate in an RTO or ISO, if the discount is granted by the RTO or ISO without the consent or approval of the transmission provider.<sup>251</sup>

##### c. Commission Determination

213. Proposed section 358.4, which generally deals with non-discrimination requirements, also contains the posting requirements for notices of waivers, notices of exercises of discretion, and discounts. Inasmuch as these posting aspects of the proposed section relate to the Transparency Rule, we move them to section 358.7, which includes the other posting requirements under the Standards. Further, in response to NGSAs's request, we clarify that section 358.4 as a whole, as well as the posting requirements moved to section 358.7, apply to all transmission providers, in accordance with the limitations set forth in section 358.1.

214. Commenters had no objections to the general requirements of section 358.4, other than regarding waivers, exercises of discretion and discounts. The Commission is persuaded by the arguments of many commenters that a blanket requirement to post all waivers and exercises of discretion goes beyond what is needed to alert customers and others to possible acts of undue discrimination or preferences in favor of an affiliate. Furthermore, such posting is

pipelines and not only to a particular subset of pipelines.

<sup>248</sup> NGSAs Reply Comments at 16-17.

<sup>249</sup> Williston at 15-17.

<sup>250</sup> Chandeaur at 6.

<sup>251</sup> ATC at 14.

<sup>240</sup> INGAA at 52-53; Kinder Morgan at 6.

<sup>241</sup> See, e.g., INGAA at 53-54; NGSAs Reply Comments at 5-7; Spectra at 9-10; Dominion Resources at 19; NiSource at 18.

<sup>242</sup> INGAA at 53-54; Dominion Resources at 19.

<sup>243</sup> NGSAs Reply Comments at 7.

<sup>244</sup> Williston at 16.

<sup>245</sup> Dominion Resources at 17-20.

<sup>246</sup> Chandeaur at 5.

<sup>247</sup> NGSAs Reply Comments at 3-5. NGSAs alternatively requests, in the event the Commission believes the scope of this request falls outside of this proceeding, that the Commission initiate an expedited "companion proceeding" that seeks to apply the posting requirements generally to all

<sup>236</sup> See, e.g., INGAA at 50; NiSource at 17; NGSAs Reply Comments at 5-7; Kinder Morgan at 5-6; Spectra at 9-10; Williston at 15-17.

<sup>237</sup> Williston at 15-17; INGAA at 50.

<sup>238</sup> INGAA at 50; NiSource at 17.

<sup>239</sup> See, e.g., INGAA at 50; NGSAs Reply Comments at 5-7; Kinder Morgan at 5-6; Spectra at 9-10; Williston at 15-17.

in some cases redundant to the posting requirements set forth elsewhere in our regulations. Therefore, although the Commission confirms the substantive non-discrimination requirements of section 358.4, we modify the posting requirements in a number of ways.

215. As a preliminary matter, the Commission clarifies that for these purposes, a waiver is considered to be a determination to do or not do something that is specifically required to be done or not done by the transmission provider's tariff. An act of discretion, on the other hand, is an action that is within the scope of the tariff provision in question, and which typically involves an exercise of judgment on the part of the transmission provider. The Commission has in some cases approved tariffs for interstate pipelines that grant the pipeline the right to waive compliance with provisions of its tariff, typically for a given entity for a limited term.<sup>252</sup> We will continue to require transmission providers to record in a log such waivers, if granted in favor of an affiliate, and to post the log on the transmission provider's Internet Web site (however, if a specific waiver is approved by Commission order, such waiver need not be posted as it will already be public). We also add a definition of waiver to the regulatory text, to read: "Waiver means the determination by a transmission provider, if authorized by its tariff, to waive any provisions of its tariff for a given entity." See section 358.3(m). Limiting the recording of waivers to those in favor of an affiliate will reduce the administrative burden on the pipeline, while capturing any instances of potential undue discrimination.

216. The Commission further determines that transmission providers need not post exercises of discretion that are within the scope of a tariff provision, unless in any given instance such posting is required under any other of our regulations. Such acts are already permitted by the tariff, and therefore fall within the scope of matters which the Commission has approved.

Furthermore, a transmission provider, in particular a pipeline, makes many of these judgment calls every day on an ongoing basis; recording all these matters would place a substantial administrative burden on it.

217. The Commission declines to modify the proposed five-year retention requirement for recordation of the acts of waiver, as the five-year period will

better enable Commission staff to monitor compliance.<sup>253</sup> Records may be examined only periodically, as when an audit is performed, and therefore earlier deletion could impede the necessary review. However, we observe that the volume of material to be retained should be substantially reduced, in light of the Final Rule's more circumscribed reporting requirements.

218. The Commission further clarifies that where the information called for under the posting requirements of the Standards is duplicative of information required to be posted by transmission providers under other provisions of our regulations or orders, such as the posting requirements of 18 CFR part 284 and 18 CFR part 37, only a single posting is required, and the transmission provider is to follow the posting requirements, inclusive of substance, venue, and timing, of the other regulations or orders. We believe the posting requirements contained in such regulations or orders are sufficient to fulfill the transparency goals of the Standards of Conduct. Inasmuch as discount information is required to be posted both for the gas and electric industries under other provisions of our regulations, we delete proposed section 358.4(b), which had set forth proposed requirements for the posting of discount information. Also, if a transmission owner is a member of an RTO or ISO and has not participated in the granting of a discount by the RTO or ISO, it would not be subject to the obligation to post such discounts.

## 2. Other Posting Requirements

### a. Commission Proposal

219. In addition to the posting requirements relating to the non-discrimination provisions of section 358.4, the NOPR proposed streamlining and updating other posting requirements imposed on transmission providers by the Standards, and modifying them to take into account elimination of the concept of energy affiliates.

### b. Comments

#### i. Contemporaneous Disclosure

220. INGAA requests the Commission to modify section 358.7(a), which requires the contemporaneous posting of improper disclosures of non-public transmission function information, to also provide for posting of a notice of a marketing function employee's receipt of non-public transmission function information (unless the Commission

deletes proposed section 358.6(a)(2) of the No Conduit Rule prohibiting such receipt).<sup>254</sup> NGSAA disagrees with INGAA that posting be made of a notice only, and not the disclosure itself, when the information received by a marketing function employee comes from a third party and not from the affiliated transmission provider.<sup>255</sup> It further requests that the Commission require that the marketing function employee immediately alert its affiliated transmission provider when it becomes aware it has received non-public transmission information, so that the transmission provider may post the disclosure.<sup>256</sup>

221. EEI supports the proposed provision requiring a transmission provider that discloses non-public transmission customer information to only post notice that such non-public transmission customer information was disclosed, and not the contents of the information. EEI proposes that a similar distinction be applied to Critical Energy Infrastructure Information (CEII) that has been inadvertently disclosed.<sup>257</sup> Likewise, National Grid proposes posting only a notice when disclosure of the information itself may breach some other public policy goal.<sup>258</sup>

222. ATC requests that the regulatory language be revised to indicate the transmission provider must post immediately "upon discovery of disclosure," rather than upon the actual disclosure.<sup>259</sup>

#### ii. Specific Transaction Information

223. Many commenters request that the Commission clarify the exclusion to contemporaneous disclosure of non-public transmission function information that proposed section 358.7(b) provides for a marketing function employee's specific request for transmission service.<sup>260</sup> MidAmerican proposes that the definition of "transmission customer" be modified to add that they could be either affiliated or unaffiliated.<sup>261</sup> Although Ameren supports proposed section 358.7(b), it seeks clarification that the transaction-specific exclusion includes information that relates to its ability to take service on an ongoing basis, including outages or other system conditions.<sup>262</sup> Dominion Resources requests that the Commission modify the exclusion so that

<sup>254</sup> INGAA at 45; INGAA Response at 3.

<sup>255</sup> NGSAA Reply Comments at 8.

<sup>256</sup> *Id.*

<sup>257</sup> EEI at 54.

<sup>258</sup> National Grid at 26–27.

<sup>259</sup> ATC at 2, 12.

<sup>260</sup> NOPR at P 58.

<sup>261</sup> MidAmerican at 18–19.

<sup>262</sup> Ameren at 33.

<sup>252</sup> See, e.g., CenterPoint Energy Gas Transmission Company FERC Gas Tariff, Sixth Revised Volume No. 1, § 15.1.

<sup>253</sup> See also our discussion above concerning the five-year retention period for certain information exchanges under section 358.7(h).

transmission function employees may discuss with marketing function employees any information that relates solely to service provided by the transmission provider to the employer of the marketing function employee, or requests for such service.<sup>263</sup>

### iii. Voluntary Consent Provision

224. SCE requests that section 358.7(c), providing for a transmission customer's voluntary consent to disclosure of its customer information, be moved to section 358.5(c), which deals with the separation of functions under the Independent Functioning Rule, to suggest a limitation for non-affiliated customers.<sup>264</sup>

225. MidAmerican asks the Commission to clarify that the proposed voluntary consent provision is unnecessary for generation output where the host utility has a legal obligation to purchase the output of the generator. It also requests the Commission to modify the provision to clarify that the rule refers specifically to the transmission "function" and disclosure of "non-public transmission" information.<sup>265</sup>

### iv. Identification of Affiliate Information

226. APGA and EPSA urge the Commission to retain the requirement to post organizational charts under section 358.7(e),<sup>266</sup> which deals with identification of affiliate information, and APGA requests the charts be color-coded as well.<sup>267</sup> APGA submits that the elimination of the energy affiliates concept does not eliminate the need for such a color-coded organizational chart.<sup>268</sup>

227. With respect to the requirement that a pipeline post the names and addresses of all its affiliates that employ or retain marketing function employees,<sup>269</sup> INGAA requests that the Commission confirm that the posting requirements are limited to information related only to those marketing affiliates that hold or control capacity on their affiliated pipeline, and that this posting requirement does not apply to a marketing function that does not hold capacity on its affiliated pipeline. INGAA requests that if the Commission so confirms, it should amend the provision to make the distinction clear.<sup>270</sup>

228. MidAmerican requests that proposed section 358.7(e)(2), which requires a listing of employee-staffed facilities shared by the transmission provider and marketing function employees, be limited only to those buildings where the transmission provider and its marketing function employees conduct customary duties, so as to exclude facilities where marketing function employees visit only on occasion.<sup>271</sup> Similarly, ATC requests that the Commission clarify the definition of "employee-staffed facilities" to limit its applicability to places at which both transmission function and marketing function employees have offices or are regularly located.<sup>272</sup>

### v. Identification of Employee Information

229. MidAmerican requests that the provision in proposed section 358.7(f) that requires a transmission provider to post on its OASIS or Internet Web site the job titles and job descriptions of its transmission function employees, with the exception of clerical, maintenance, and field positions,<sup>273</sup> be clarified to indicate which positions are excluded as "clerical, maintenance and field positions."<sup>274</sup>

230. EEI believes that this posting requirement should conform to the employee functional approach. EEI asserts that the proposed requirement, if left in place, would grandfather much of the inefficiency and confusion of the corporate separation approach.<sup>275</sup>

### vi. Timing and General Requirements of Postings

231. SCE recommends that the Commission eliminate the distinction in proposed section 358.7(g) between Internet Web sites and OASIS, and allow electric utilities as well as pipelines to post information on their Internet Web sites.<sup>276</sup> SCE states that, as a member of an ISO, it does not maintain its own OASIS.<sup>277</sup> ALCOA requests that the Commission recognize

that marketing function employees are not granted access to OASIS, and provide an avenue for them to cure the prohibited disclosure of non-public information.<sup>278</sup>

232. With respect to the suspension of posting requirements during an emergency, SCE recommends that "earthquake" be added to the list of emergencies that qualify as allowing a transmission provider to suspend posting requirements.<sup>279</sup>

233. While supporting the Commission's decision to suspend posting requirements in the event of an emergency, Chandeaur requests clarification on the method of implementation for this requirement.<sup>280</sup> And E.ON states that the Commission should retain the existing exclusion from posting for emergency circumstances.<sup>281</sup>

### vii. Other

234. Commenters raised concerns about potential conflicts between the proposed posting requirements in the NOPR and the posting requirements in the NAESB standards. The Arizona PSC urges the Commission to clarify, pending revision of the NAESB standards, that the existing NAESB standards do not impose a posting requirement that is different from the modified posting requirements under the new rules.<sup>282</sup> In addition, Chandeaur suggests that the Commission provide a waiver of those NAESB standards that relate to the format and content of postings which it contends will be outdated after the effective date of the new Standards.<sup>283</sup>

### c. Commission Determination

#### i. Contemporaneous Disclosure

235. Section 358.7(a)(1) requires that if non-public transmission function information is disclosed to a marketing function employee, the transmission provider must post the information on its Web site. Some commenters object to the posting requirement where non-public information is disclosed by the transmission provider, arguing that such posting will provide an advantage to a competitor. We disagree. Such posting, by making the information public, will place the competitor and the transmission provider's affiliated marketer on an even footing. Therefore, this provision will be retained.

<sup>271</sup> MidAmerican at 19–20.

<sup>272</sup> ATC at 15.

<sup>273</sup> NOPR at P 59–60.

<sup>274</sup> MidAmerican at 11–12.

<sup>275</sup> EEI at 55–56.

<sup>276</sup> The definition of Internet Web site in proposed section 358.3(b) indicated that pipelines post the information required under sections 284.12 and 284.13 on their Internet Web site, and the definition of OASIS in proposed section 358.3(e) indicated that public utilities post the information required under part 37 on their OASIS. Various subsections of proposed section 358.7 continued this distinction between pipelines and public utilities for the posting requirements under the Standards. *See, e.g.,* proposed sections 368.7(a)(1), (a)(2), (c), (d), (e)(1), (e)(2), (f)(1), (f)(2) and (g)(1).

<sup>277</sup> SCE at 10.

<sup>278</sup> ALCOA at 7–8.

<sup>279</sup> SCE at 11.

<sup>280</sup> Chandeaur at 7.

<sup>281</sup> E.ON at 22–23.

<sup>282</sup> Arizona PSC at 7; *see also* EEI at 53.

<sup>283</sup> Chandeaur at 8.

<sup>263</sup> Dominion Resources at 21.

<sup>264</sup> SCE at 7.

<sup>265</sup> MidAmerican at 19.

<sup>266</sup> APGA at 3–4; EPSA at 11.

<sup>267</sup> APGA at 3–4.

<sup>268</sup> APGA at 3–4.

<sup>269</sup> NOPR at P 59.

<sup>270</sup> INGAA at 54–55.

236. Western Utilities and INGAA raise concerns over the posting provision in instances where a marketing affiliate receives non-public transmission function information from a third party. Since we are eliminating that particular prohibition of the No Conduit Rule, no change to the posting provision is necessary. However, we note that if a transmission provider uses anyone as a conduit for improper disclosures, such an event would be considered an improper disclosure and should be posted.

237. The Commission proposed in section 358.7(a)(2) that only a notice be posted in the event non-public transmission customer information is improperly disclosed, rather than requiring posting of the disclosure itself, to prevent a further breach of confidentiality. We extend this distinction between posting of a notice and posting the disclosure itself to include CEII,<sup>284</sup> as well as any other information that the Commission by law has determined is to be subject to limited dissemination. However, we decline to extend it to cover information where disclosure may be deemed to breach some other public policy goal, as requested by National Grid. This standard is too imprecise to have practical application. If a transmission provider is concerned about disclosure in any given instance, it may seek guidance from the Commission.

238. We decline to adopt ATC's proposal that with respect to non-public transmission information that was improperly disclosed, the transmission provider must post it immediately "upon discovery of disclosure," rather than upon the actual disclosure. The provision by its terms imposes the posting requirement on a transmission provider that wrongfully discloses such information, and it would be anomalous to assume the transmission provider was not aware of its own actions. A corporation can only act through its agents and employees, and those actions are taken on behalf of the corporation. Therefore, knowledge of the disclosure is imputed to the transmission provider, which is responsible both for the disclosure and for the posting.

<sup>284</sup> This limitation does not affect our determinations made elsewhere regarding the need to disclose information that may contain CEII, or the appropriate methods for entities to access such CEII, nor our adoption of mandatory reliability standards for CEII. See, e.g., Order 890 at P 403–404; *Mandatory Reliability Standards for Critical Infrastructure Protection*, Order No. 706, 73 Fed. Reg. 7368 (Feb. 7, 2008), 122 FERC ¶ 61,040, *reh'g denied and clarification granted*, Order No. 706–A, 123 FERC ¶ 61,174 (2008).

#### ii. Specific Transaction Information

239. Section 358.7(b) provides an exemption to the disclosure requirement for requests for transmission service made by a marketing function employee. The Commission agrees that the language should be modified to clarify that transmission function employees may discuss with marketing function employees the latter's specific request for transmission service (but not non-public matters beyond the specific request, such as outages or other system conditions). We therefore add the following sentence: "A transmission provider's transmission function employee may discuss with its marketing function employee a specific request for transmission service submitted by the marketing function employee."

#### iii. Voluntary Consent Provision

240. The Commission declines to move the provision regarding the posting of voluntary employee consents in section 358.7(c) to the Independent Functioning Rule, as requested by SCE. The provision in question relates to posting, and is therefore appropriately included in the Transparency Rule. We also decline to include a specific exclusion to the customer consent provision for contracts involving generator output, as requested by MidAmerican. The posting requirements are general in application, and ought not to be so detailed as to cover every special circumstance that may apply to only one or a limited number of transmission providers. To do so would make the regulations unwieldy and subject to constant change. Therefore, we decline to include an exclusion covering a customer's consent for contracts involving generator output.

241. Furthermore, we decline to distinguish between affiliated and non-affiliated customers in connection with the voluntary consent provision. The intent of the provision is to permit any customer to disclose customer information to marketing function employees of the transmission provider, should it desire to do so. Of course, an affiliated customer will already be aware of information pertaining to its own marketing affiliate, but there conceivably could be other marketing affiliates of the same transmission provider as to which the customer may wish to give its consent for disclosure.

242. The Commission agrees that the voluntary consent provision refers to *non-public* customer information (including a customer's transmission

request and accompanying information), and adds this phrase to section 358.7(c).

#### iv. Identification of Affiliate Information

243. Section 358.7(e)(1) provides that a transmission provider post the names and addresses of all its affiliates that employ or retain marketing function employees. The Commission declines to revert to a requirement to post an organizational chart of all affiliates of a transmission provider, and further declines to extend this to a color-coded chart. With the elimination from the Standards of the concept of energy affiliates, it is only necessary to be concerned with the marketing affiliates of a transmission provider. Therefore, an entire organizational chart is unnecessary, and an undue burden on transmission providers.

244. With respect to INGAA's request that information need not be posted about affiliates that do not, for instance, hold or control capacity on its affiliated pipeline, the Commission notes that the proposed provision applies to affiliates "that employ or retain marketing function employees." If an activity falls within one of the exclusions to the definition of marketing functions set forth in proposed section 358.3(c), its employees will not by definition be marketing function employees, and the posting rule would not apply. If, however, the activities do not fall within any of the exclusions to the definition, and the affiliate employs or retains marketing function employees, the posting provision would apply.

245. We agree with MidAmerican and ATC that the posting requirements in section 358.7(e)(2) regarding shared facilities need not include facilities where transmission function employees and marketing function employees do not both transact their job-related activities, and modify the regulatory text accordingly. We further clarify that the phrase "employee-staffed facilities" is meant to exclude facilities where individuals do not typically transact business, such as substations.

#### v. Identification of Employee Information

246. The Commission agrees with EEI that the proposed provision in section 358.7(f)(1) covering the posting of job titles and names of transmission function employees should conform more closely to the employee functional approach. Furthermore, in accordance with the clarification made in this Final Rule, such jobs as maintenance and field positions are not considered transmission functions, unless the employees also engage in the day-to-day operation of the transmission system.

Therefore, we will modify the wording of this provision to refer only to “transmission function employees,” and delete the reference to clerical, maintenance and field positions.

vi. Timing and General Requirements of Postings

247. Section 358.7(g)(1) requires updated posting on a transmission provider’s OASIS or Internet Web site. The Commission agrees with SCE that transmission owners who are members of RTOs or ISOs might not have their own OASIS. Furthermore, some interested entities or individuals might not have access to a transmission provider’s OASIS. We therefore modify the venue for posting to require that the posting of information required under the Standards for both public utilities and interstate pipelines is to be made on the transmission provider’s Web site, where it will be accessible to all interested entities. The various sections within the Transparency Rule are amended to conform to this change.

248. Section 358.7(g)(2) provides suspension of postings in the case of emergencies. The Commission does not deem it necessary to list every conceivable natural disaster in this provision, but will add “earthquakes” to the list, as requested by SCE. Chandeaur requests clarification as to the method of implementation of this provision. In the event the transmission provider needs suspension of postings beyond one month, it should publicly file with the Commission for a further period of suspension, in accordance with the provisions of part 385 of the Commission’s regulations.

vii. Other

249. Chandeaur suggests the Commission provide an anticipatory waiver of any changes to NAESB standards which may be made relating to the format and content of posting requirements, should they be inconsistent with the Standards here adopted. The NAESB standards currently adopted by the Commission are set forth in 18 CFR sections 38.2 and 284.12 (2008), and relate to matters other than the Standards of Conduct. The provisions applicable to electric utilities in section 38.2 include the Business Practices for Open Access Same-Time Information Systems (OASIS), which relate to requests for transmission service. The provisions applicable to pipelines in section 284.12 include information which is to be posted on the pipeline’s Internet Web site, covering such matters as the name of shippers taking service, the rate charged, the duration of the contract,

receipt and delivery points, quantity, whether the shipper is an affiliate of the pipeline, and the like. These postings generally differ from the postings required under the Standards of Conduct. As discussed above, to the extent any of the information required under the Standards of Conduct is also required under other regulations or orders, duplicative postings are not required. Therefore, no anticipatory waiver of the type requested by Chandeaur is needed or appropriate.

F. Other Definitions

250. In addition to the definitions discussed above, the NOPR either carried over or modified a number of definitions contained in the current Standards, including “affiliate,” “transmission,” “transmission customer,” “transmission function information,” and “transmission provider.”

1. Affiliate

a. Commission Proposal

251. The Commission proposed to modify its definition of “affiliate” to conform to the new definition of affiliate set forth in 18 CFR 35.43(a)(1).<sup>285</sup> The only addition in the NOPR to that definition was the inclusion of “a division that operates as a functional unit of the specified company.” See proposed section 358.3(a).

b. Comments

252. INGAA contends that the NOPR changed the definition of affiliate to be consistent with an order that addresses only electric transmission providers, and therefore is not a definition fairly applicable to the natural gas industry.<sup>286</sup> INGAA and Iroquois request that the rules return to the longstanding definition of affiliate in the Standards and also retain the prior, integrally related definition of “control.”<sup>287</sup> Iroquois adds that the proposed definition does not reflect the established scheme’s rebuttable presumption of control, thereby expanding the reach of the Standards. To the extent the Commission declines to revert to the prior definitions of affiliate and control, Iroquois requests that the Commission modify the proposed definition to reinstate the concept that the definition of control

<sup>285</sup> This definition was promulgated in *Cross-Subsidization Restrictions on Affiliate Transactions*, Order No. 707, 73 FR 11,013 (Feb. 29, 2008), FERC Stats. & Regs. ¶ 31,264 (2008), *order on reh’g*, 73 FR 43,072 (July 24, 2008), FERC Stats. & Regs. ¶ 31,272 (2008).

<sup>286</sup> INGAA at 12–13; *see also* Williston at 12.

<sup>287</sup> INGAA at 12–13; Iroquois at 14.

establishes a rebuttable presumption, and also continue any exemptions from the definition of affiliate that were granted under the prior Standards.<sup>288</sup>

253. Both INGAA and Iroquois request that the Commission provide clarification as to how the definition would apply to interstate pipelines jointly owned by two or more otherwise non-affiliated companies.<sup>289</sup> INGAA would like confirmation that, in the event an affiliate of one joint owner of a pipeline holds capacity on that pipeline, such relationship does not create an affiliation between the affiliates of the entities who are the joint owners.<sup>290</sup>

254. TDU Systems asserts that the definition of affiliate should not include members of generation and transmission cooperatives.<sup>291</sup>

255. Arizona PSC proposes a modification to the proposed definition to cure what it finds to be an inconsistency between the NOPR’s definition and the definition of “affiliate” in Order No. 707. It would eliminate the words “division that operates as a functional unit” from proposed section 358.3(a)(1). Both Arizona PSC and EEI contend that this deletion is consistent with the NOPR’s employee functional approach.<sup>292</sup>

c. Commission Determination

256. Much of the concern over the definition of affiliate appears to stem from a misapprehension that affiliates themselves are still subject to the Independent Functioning Rule. As discussed throughout this Final Rule, it is only marketing function employees who are required to operate independently of a transmission provider’s transmission function employees. Nonetheless, the concept of affiliate does retain importance, since marketing function employees by definition must be employed by the transmission provider *or by its affiliates* (unless the marketing function employees are contractors).<sup>293</sup>

257. Because the Standards follow a different regulatory scheme than Order

<sup>288</sup> Iroquois at 7–13.

<sup>289</sup> *Id.* 13–14; INGAA at 13.

<sup>290</sup> INGAA at 13. For example, INGAA posits, if non-affiliated Companies A and B form a joint venture that holds Pipeline C, INGAA contends that transmission relationships between a marketing affiliate of Company A and Pipeline C do not create an affiliation between that marketing affiliate and other affiliates of Company B, because there is no common ownership and control between the marketing entity and Company B’s affiliates. *Id.*

<sup>291</sup> TDU Systems at 13–14.

<sup>292</sup> Arizona PSC at 6–7; EEI at 47.

<sup>293</sup> Inclusion of contractors in the definition of marketing function employee is discussed in the section entitled Elimination of Shared Employees Concept.

No. 707, the definition of affiliate here does not necessarily need to be identical to the more detailed definition set forth in Order No. 707. As regulated entities have become familiar with the existing definition, the Commission sees no necessity to alter it. Therefore, the Commission will reinstate the major features of the definition of “affiliate” found in the existing Standards, including the ability to rebut a presumption of control. See section 358.3(a)(1). The requests for the Commission to comment on the specifics of hypothetical corporate arrangements are accordingly answered by reference to that provision.

258. The existing definition of exempt wholesale generators refers both to regulations and the FPA as the source of the definition, and does not provide for updating. We modify the definition so as to refer to the currently applicable section of the regulations defining exempt wholesale generators, section 366.1, and provide that such definition or any successor definition shall govern. See section 358.3(a)(2).

259. Arizona PSC and EEI would eliminate the inclusion of a division (as opposed to a separate corporate entity) from the definition of affiliate. This inclusion, which is contained in the existing Standards, covers those marketing function employees who may be employed by the transmission provider itself, rather than by an affiliate of the transmission provider. Therefore, the provision will be retained.

## 2. Transmission

### a. Commission Proposal

260. The Commission proposed to streamline the current definition of transmission by defining it as “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 or part 284 of this chapter.” See proposed section 358.3(f).

### b. Comments

261. Many commenters raise concerns related to the Commission’s inclusion of ancillary services in the definition of transmission. TAPS suggests that the Commission distinguish between a transmission provider’s offering ancillary services to its customers pursuant to its Open Access Transmission Tariff, which it states is a transmission function, and offering

ancillary services competitively, which it views as a marketing function.<sup>294</sup> NCPA requests that in those markets where ancillary services are procured pursuant to a bidding process, the rules treat ancillary services as part of the marketing function and not as part of the transmission function.<sup>295</sup> EEI requests clarification that the definition covers only those “ancillary services” and “interconnection” that are offered in connection with jurisdictional transmission service.<sup>296</sup> Wisconsin Electric requests that the Commission deem the provision of ancillary services as a function outside of the operation of the Standards.<sup>297</sup>

262. NiSource requests clarification as to whether generation is considered a subtype of transmission. It asserts that generation information is not a subtype of transmission or marketing function information and therefore should not be subject to the rules or included in its exclusions.<sup>298</sup>

### c. Commission Determination

263. The Commission agrees that inclusion of ancillary services in the definition of transmission, which is carried forward from the existing Standards, needs clarification. Ancillary services can either be transmission or covered under the definition of marketing functions, as discussed above. Therefore, we clarify that ancillary services, as used in the definition of transmission, refers to the use of an integrated public utility’s own generation or demand response resources to provide ancillary services, and does not refer to the sale for resale of generation or demand response resources for ancillary services purposes.

264. NiSource raises a concern as to whether the proposed exclusion for communications regarding generation dispatch in proposed section 358.7(h) suggests we regard generation as a form of transmission. NiSource’s concern is addressed by the modifications made in this Final Rule to that exclusion; however, we further clarify that generation is typically not a transmission function. Of course, operation of the transmission system may impact generation, and therefore some transmission function information may well implicate generation concerns. It was for that reason the above-cited exclusion was added to the Standards. See section 358.7(h).

<sup>294</sup> TAPS at 31–33.

<sup>295</sup> NCPA at 3–4.

<sup>296</sup> EEI at 44–46.

<sup>297</sup> Wisconsin Electric at 3–4.

<sup>298</sup> Nisource at 14–16.

265. The Commission removes the reference to subpart A of part 157, in accordance with its elimination of this reference from section 358.1(a), but otherwise adopts the NOPR definition of transmission. See section 358.3(f).

## 3. Transmission Customer

### a. Commission Proposal

266. The Commission proposed to carry forward the existing definition of “transmission customer” to mean “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.” See proposed section 358.3(g).

### b. Comments

267. MidAmerican requests that the Commission modify this definition so that it expressly includes affiliated and non-affiliated customers, shippers or designated agents.<sup>299</sup>

### c. Commission Determination

268. The Commission adopts proposed section 358.3(g). MidAmerican’s requested addition is unnecessary, as on its face the definition of transmission customer does not distinguish between affiliated and non-affiliated customers. To the extent clarification on this point is desired, we clarify that all customers that fit the definition are included.

## 4. Transmission Function Information

### a. Commission Proposal

269. The Commission proposed to define “transmission function information” to mean “information relating to transmission functions,” thus keying off the new definition of “transmission function” set forth in the proposed Standards. See proposed section 358.3(j).

### b. Comments

270. Several commenters request that the Commission include in its definition specific examples or categories of information that it deems to be transmission information.<sup>300</sup> EEI and Southern Co. Services suggest that the Commission use the guidance found in section 358.5(b)(1) of the current Standards as a basis for amending the definition,<sup>301</sup> and SCE provides a

<sup>299</sup> MidAmerican at 10–11.

<sup>300</sup> ATC at 11–12; EEI at 46; Southern Co. Services at 26–27; SCE at 10–11.

<sup>301</sup> EEI at 46; Southern Co. Services at 26–27.

proposed amendment that includes its recommended examples.<sup>302</sup>

271. National Grid and PSEG inquire whether the scope of the definition is the same as, more broad or more narrow than the scope of the definition of "transmission" information in the current Standards.<sup>303</sup>

272. Southern Co. Services asserts that proposed sections 358.6(a)(1) and 358.7(a) create ambiguity as to whether all "customer information" is "transmission information," and requests clarification of the definition of "transmission information."<sup>304</sup>

Bonneville requests clarification as to whether the definition is limited to non-public transmission information.<sup>305</sup> And TDU Systems requests clarification that accounting records necessary for rate design do not constitute transmission function information.<sup>306</sup>

273. Spectra requests the Commission to amend the definition to indicate it does not include information relating to a marketing function employee's specific request for transmission service or interconnection.<sup>307</sup>

#### c. Commission Determination

274. The Commission adopts the NOPR definition of transmission function information as information relating to "transmission functions," which is the core definition where the crux of the requirements of the Independent Functioning Rule and the No Conduit Rule is found, and where any issues regarding interpretation should be focused. Indeed, as there is no debate on the meaning of "information," the Commission could have eliminated section 358.3(j) entirely. The Commission is retaining this section, however, to reinforce the prohibition on the improper disclosure of non-public transmission function information.

275. Nevertheless, to provide clarity, the Commission will give examples of transmission function information, drawn from the current Standards. These include, for example, available transmission capability, price, curtailments, storage, and balancing. In response to the request for clarification by National Grid and PSEG, we observe that not all elements found in the existing Standards are relevant, due to the restriction in this Final Rule of the term "transmission functions" to day-to-day operations.

276. We clarify that transmission customer information is a subset of

transmission function information, as it is submitted in connection with a request for transmission service. We also clarify that rate design, in and of itself, is not a transmission function under the Standards.

277. The term transmission function information is not limited to non-public information; however, it is only non-public transmission function information which the No Conduit Rule prohibits being passed to marketing function employees.

278. Spectra requests the definition be amended to exclude information relating to a marketing function employee's specific request for service. We decline to do so. Such information is indeed transmission function information, as discussed above. Spectra's concerns, however, are addressed by section 358.7(b), which permits discussions regarding such requests between transmission function and marketing function employees.

#### 5. Transmission Provider

##### a. Commission Proposal

279. The Commission proposed to define "transmission provider" as:

(1) Any public utility that owns, operates or controls facilities used for the transmission of electric energy in interstate commerce; or

(2) Any interstate natural gas pipeline that transports gas for others pursuant to subpart A of part 157 or subparts B or G of part 284 of this chapter.

(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.

See proposed section 358.3(k).

##### b. Comments

280. Hampshire requests that subsection (3) of the definition be modified to apply to "storage companies that already have been authorized by FERC to charge market-based rates based on a showing that they lacked market power," arguing the definition should not include the additional criteria listed. The criterion that the storage facility not have captive customers and not have market power is duplicative, according to Hampshire, because if the facility has captive customers then it has market power by definition. Hampshire further contends that the limitation against exclusive franchises is extraneous because the

Natural Gas Act does not permit exclusive franchises.<sup>308</sup>

281. The US DOI argues that the proposed language does not recognize that certain federal agencies may own transmission facilities without having functional responsibility for them. It requests that the Commission clarify that it is the operator of the transmission facility, and not the federal agency that owns the transmission facility, that is the transmission provider subject to the Standards.<sup>309</sup>

##### c. Commission Determination

282. As a preliminary matter, the Commission will delete the reference to Part 157 from the definitions of transmission and transmission provider. See sections 358.3(f) and (k). This corresponds to our deletion of the same reference in section 358.1, the applicability provisions of the Standards, as discussed above.

283. We will also accept Hampshire's proposed modification with respect to exclusive franchises and the Commission's jurisdiction over storage facilities under the NGA. While the Commission does not necessarily agree with Hampshire's description regarding market-based rates,<sup>310</sup> the Commission does agree that the exclusion of natural gas storage providers authorized to charge market-based rates, which is an exclusion carried over from Order Nos. 497 and 2004 and not opposed in the comments, needs no further qualification. We modify proposed section 358.3(k)(3) accordingly.

284. Lastly, we clarify that if a transmission provider is merely an owner of facilities but performs none of the functions of a transmission provider, it is in the same position as a public utility transmission owner that participates in a Commission-approved RTO or ISO. Section 358.1(c) provides that such a participating transmission owner may seek a waiver from the Standards. Similarly, if any other transmission owner meets the definition of transmission provider but does not operate or control its transmission system and has no access to transmission function information, it may request a waiver from the Standards, in whole or in part.

##### G. Per Se Violation

285. In the course of the NOPR's discussion on the need for reform of the Standards, the Commission observed

<sup>302</sup> SCE at 10–11.

<sup>303</sup> National Grid at 20–22; PSEG at 16–17.

<sup>304</sup> Southern Co. Services at 27.

<sup>305</sup> Bonneville at 5–6.

<sup>306</sup> TDU Systems at 16.

<sup>307</sup> Spectra at 11–12.

<sup>308</sup> Hampshire Gas at 9–12.

<sup>309</sup> US DOI at 1–2.

<sup>310</sup> See *Rate Regulation of Certain Natural Gas Storage Facilities*, Order No. 678, 71 Fed. Reg. 36612 (June 27, 2006), FERC Stats. & Regs. ¶ 11,220 (2006).

that while the Standards establish *per se* rules, the Commission still possesses statutory authority to rectify and sanction, where necessary, instances of undue discrimination and preference even if they are not specifically addressed in the *per se* regulations of the Standards. This authority is derived from sections 205 and 206 of the FPA and sections 4 and 5 of the NGA.

#### 1. Commission Proposal

286. No proposal was made in the NOPR regarding *per se* rules; the Commission merely pointed out the fact that the proposed Standards, just as do the current Standards, contain *per se* rules.

#### 2. Comments

287. Several commenters request that the Commission clarify how the proposed *per se* rules will be enforced. Idaho Power and Puget Sound requests confirmation that transmission providers will continue to have the opportunity to defend themselves against allegations of violations of the Standards, and that it is not the case that the Commission intends there will be violations of the *per se* rules "for which no further investigation would be needed."<sup>311</sup>

288. INGAA and LPPC likewise note confusion about the NOPR's use of "*per se*" because, they contend, in other contexts the term refers to the establishment of a set of facts that automatically creates a violation of law without reference to other or additional facts. INGAA urges that the Commission reject a *per se* approach and adopt a "rule of reason" approach to ascertaining violations of the Standards, in which the regulated entity may show legitimate purpose for or lack of harm caused by the subject behavior.<sup>312</sup>

289. Commenters also raise concerns about the interplay between the Standards and the statutory prohibitions on undue discrimination and preference. Specifically, many commenters argue that the *per se* concept means a transmission provider may be accused of undue discrimination and preference even where its activity was permissible under the Standards.<sup>313</sup> Southern Co. Services would like the Commission to clarify that the Standards occupy the field for the potential types of undue discrimination and preference addressed in the Standards, so that compliance with the Standards would create a safe harbor

with respect to activities that fall within the scope of the Standards.<sup>314</sup>

290. Ameren cautions the Commission against arbitrarily expanding the scope of the behavior that is deemed to violate the Standards on a case-by-case basis, noting that this could raise notice and due process issues.<sup>315</sup> E.ON asserts that an undue preference analysis for subjects already covered by the Standards would greatly complicate training efforts.<sup>316</sup>

291. Both INGAA and LPPC note that many of the rules within the Standards are not amenable to a *per se* approach to enforcement because they are non-specific and broad.<sup>317</sup>

292. Puget Sound raises additional questions about the enforcement of the Standards, *e.g.*, how a *per se* violation may be distinguishable from noncompliance with other rules; whether disclosure by a transmission provider of non-public information to its marketing function is a *per se* violation and, if so, does the posting requirement cure the *per se* violation; whether a marketing function employee who receives transmission information from an unaffiliated third party is guilty of a *per se* violation; and whether inadvertent disclosure of non-public information to a marketing function employee is sanctionable.<sup>318</sup>

#### 3. Commission Determination

293. In response to commenters' confusion regarding the NOPR's reference to the term *per se*, the Commission clarifies that we did not mean to establish a new standard of review or impose different evidentiary burdens specific to these rules. Under these regulations, the Commission would still have to prove that a violation occurred, and an accused maintains the right to demonstrate that such a violation did not occur. Further, if it is established that a violation has occurred, such matters as whether the violations were inadvertent or, under the facts of the case, harmless, will be taken into account by the Commission in determining whether any remedy or sanction is appropriate.

294. Some commenters request the Commission to declare that the Standards occupy the field with respect to the area of undue preferences, and that matters not specifically covered by the Standards may not be found to be violations of the undue preferences

prohibition in the FPA or the NGA. This we decline to do. There are potentially an infinite number of ways undue preferences might arise, and the Standards are not intended to be exhaustive. It is possible that an entity might embark on a course of conduct not contemplated by the Standards, which could be found upon investigation to constitute a violation of the statutory undue preference prohibitions. In such case, the entity's compliance with the Standards in other aspects would not serve as a defense.

295. Puget Sound asks whether posting would cure a transmission provider's disclosure of non-public transmission function information to a marketing function employee. Posting the information does not change the fact that a violation occurred, but it would be a vital consideration that the Commission would certainly take into account in deciding whether any remedy or sanction would be appropriate. We observe also, by way of further clarification, that if the transmission provider failed to post the disclosed information, this would constitute a second and separate violation, in this case of section 358.7(a)(1).

#### H. Training Requirements

##### 1. Commission Proposal

296. The NOPR proposed modifications to the training requirements for the Standards, requiring annual training for transmission function employees, marketing function employees, officers, directors, supervisory employees, and any other employees likely to become privy to transmission function information; and requiring training on the Standards to new employees within the first 30 days of their employment. See proposed section 358.8(c)(1).

##### 2. Comments

297. Commenters raised various concerns about the scope of the proposed training requirements. Destin believes that the requirements are overly broad and unduly burdensome; arguing that a transmission provider cannot engage in affiliate abuse with employees that do not use its transmission services.<sup>319</sup> Ameren states that the Commission's training requirement should apply only to employees who engage in transmission or marketing functions, as well as officers, directors and support or other employees who can be expected to have access to non-public transmission information.

<sup>311</sup> Idaho Power at 4–5, quoting NOPR at P 55; Puget Sound at 9–10.

<sup>312</sup> INGAA at 3–4.

<sup>313</sup> Southern Co. Services at 23–24; Ameren at 6, 8; E.ON at 7; EEI at 41–42.

<sup>314</sup> Southern Co. Services at 23–24; see also EEI at 41–42; E.ON at 7.

<sup>315</sup> Ameren at 6, 18.

<sup>316</sup> E.ON at 8.

<sup>317</sup> INGAA at 8; LPPC at 17–18.

<sup>318</sup> Puget Sound at 10.

<sup>319</sup> Destin at 8.

Ameren also states that a transmission provider should provide focused levels of training to certain specific classes of employees.<sup>320</sup>

298. Commenters seek clarification as to which employees must be trained, and some suggest modifications to the proposed regulatory text. MidAmerican and National Grid seek confirmation that the rule excludes supervisors of departments that have nothing to do with transmission.<sup>321</sup> To clarify the regulatory text, National Grid proposes setting out that the training requirement applies to (i) transmission function employees; (ii) marketing functioning employees; and (iii) officers, directors, supervisory employees, and any other employees likely to become privy to transmission function information.<sup>322</sup>

299. Some commenters request clarification as to which types of employees are captured by the "likely to become privy to transmission function information" language in sections 358.8(b)(2) and 358.8(c)(1).<sup>323</sup> Xcel urges the Commission to modify proposed section 358.8(b)(2) by requiring a transmission provider to distribute materials only to those employees likely to become privy to non-public transmission information, instead of to any and all transmission function information.<sup>324</sup>

300. Commenters urge the Commission to modify the proposed regulation so as to eliminate the requirement to train marketing function employees. INGAA requests that marketing function employees should be excluded, arguing such training is infeasible and unnecessary in certain corporate structures.<sup>325</sup> In addition, Williston questions the need to conduct annual training for employees who do not have access to non-public or privileged information and/or marketing function employees. If a transmission provider is required to train marketing function employees of its affiliates, Williston asserts this is an expansion of the current rules. If not, Williston questions whether a transmission provider would have employees that fit under the definition of marketing function employees that would need to be restricted from having access to company information.<sup>326</sup>

301. Commenters raise concerns over whether field and maintenance employees fall into the training

requirements and request that the Commission exclude these employees. INGAA notes that field and maintenance employees may pick up transmission information in the nature of irrelevant raw data from time to time, and could therefore fall within the training requirement as set forth in the proposed provision.<sup>327</sup> INGAA argues that these employees do not have access to information of a commercial value and including them within the training requirement would be an unwarranted burden. INGAA requests that the proposed provision be amended to exclude these employees.<sup>328</sup>

302. Commenters also request clarification on the application of these training requirements to agents, contractors, and consultants.<sup>329</sup> TDU Systems recommends that agents, contractors, and consultants be trained only once per year, even if engaged by more than one transmission provider during that time, provided that they receive a copy of the current written compliance procedures for each of the relevant transmission providers.<sup>330</sup> INGAA requests that the Commission clarify that contractor training may be limited to those specific contractors who may be considered transmission function employees if they worked directly for the pipeline.<sup>331</sup>

303. Commenters request additional guidance on the timing of the required training. National Grid requests confirmation that companies may satisfy the annual training requirement by providing training once a year for all employees, rather than providing training on a rolling basis, to ensure that each relevant employee attends training at least once within each 365-day cycle.<sup>332</sup> Ameren requests that the Commission clarify that employees trained within 12 months of the Final Rule's issuance do not need to be trained again until a year passes from the date of their most recent training.<sup>333</sup>

304. E.ON urges the Commission to clarify that annual Standards training should be mandatory only for transmission and marketing function employees, and that employees who do not engage in transmission and marketing functions should be allowed to be trained on a less frequent basis.<sup>334</sup> NiSource requests that the requirement in section 358.8(c) that new employees

be trained within 30 days of hire be modified to require training within 60 days of hire, arguing that the 30 day limitation is overly burdensome.<sup>335</sup>

305. The PUC of Ohio proposes that the Standards include a requirement that transmission providers post on their Internet Web sites a general overview of their unique training programs and schedules and the name of the designated chief compliance officer.<sup>336</sup>

### 3. Commission Determination

306. The Commission endeavored in the NOPR to limit training to those employees who would be most likely to be exposed to transmission function information, or those to whom the disclosure of such information is strictly prohibited. Obviously, transmission function employees and marketing function employees are the two core categories of employees that should be most cognizant of the rules. Although we have deleted the prohibition against marketing function employees receiving transmission function information, due to the possibility such receipt could be inadvertent, it is expected that if someone attempted to pass such information to a marketing function employee, the marketing function employee would not only refuse it but would report the individual to the company's chief compliance officer or other appropriate individual.

307. Officers, directors, and supervisory employees also have a clear need for an understanding of the Standards, as it is likely they will either be in a position to interact with both transmission function employees and marketing function employees, or be responsible for responding to any questions or concerns about the Standards from the employees who report to them. Other employees likely to become privy to transmission function information will vary from company to company; likely categories would include rate and regulatory personnel, lawyers, accountants, risk management personnel, and the like. This list is by no means exhaustive, but rather is included for illustrative purposes.

308. Either a transmission provider or its affiliate should provide training to marketing function personnel employed by the affiliate; failure to do so would leave a major class of employees without the requisite training. As to whether field and maintenance workers should receive training, that would depend on the circumstances of the

<sup>320</sup> Ameren at 31–32.

<sup>321</sup> MidAmerican at 20–21; NationalGrid at 22.

<sup>322</sup> NationalGrid at 22.

<sup>323</sup> MidAmerican at 20–21; Williston at 17–18.

<sup>324</sup> Xcel at 22.

<sup>325</sup> INGAA at 49–50.

<sup>326</sup> Williston at 17–18.

<sup>327</sup> INGAA at 47.

<sup>328</sup> *Id.* at 47; *see also* Vectren at 9–10.

<sup>329</sup> INGAA at 48; TDU Systems at 16–17.

<sup>330</sup> TDU Systems at 16–17.

<sup>331</sup> INGAA at 48.

<sup>332</sup> National Grid at 25–26.

<sup>333</sup> Ameren at 35.

<sup>334</sup> E.ON at 25.

<sup>335</sup> NiSource at 28.

<sup>336</sup> PUC of Ohio at 3.

particular transmission provider. As noted above, field and maintenance personnel are not considered transmission function employees if they are functioning in their stated capacity and do not engage in the day-to-day operation of the transmission system. However, if it is likely they may become privy to transmission function information, then training on the Standards would be appropriate and called for under section 358.8(c)(1).

309. Commenters seek clarification regarding the training of agents, contractors and consultants. If such individuals are acting within one of the categories specified for the provision of training to employees, then such individuals should receive the training as if they were permanent hires. If the consultants are hired on a short-term basis and provide proof that they have received the appropriate training from another transmission provider within the requisite period, then further training would not be necessary until the following year, although they should receive the specific written compliance materials applicable to each transmission provider. Furthermore, it is not necessary for the transmission provider to track annual dates for each employee; if the transmission provider prefers, it may train all its employees, or all its employees in a given category, at a certain time each year. New employees, after their initial training, can be fit within this schedule.

However, the employee should not go longer than a year without participating in training.

310. We decline to lengthen the period for initial training from 30 days to 60 days, as requested by one commenter. It is especially important for new hires to receive the training, as they may not have been exposed to it before, as would be the case with existing employees. We also note that it is unnecessary to add a requirement to post training programs on the transmission provider's Internet Web site. Training is for the benefit of the transmission provider's employees, not the public at large. And as proposed section 358.8(c)(2) already requires posting the name of the transmission provider's chief compliance officer, it is unnecessary to add a further requirement in this regard.

### *I. Compliance Date*

#### 1. Commission Proposal

311. The NOPR did not set forth a date by which existing transmission providers must be in full compliance with the new Standards (as noted above, a new transmission provider must be in

compliance on the date it commences transmission transactions with an affiliate that engages in marketing functions).

#### 2. Comments

312. Commenters propose that the Commission allow 60 to 90 days after issuance of the Final Rule for its implementation by existing transmission providers.<sup>337</sup>

#### 3. Commission Determination

313. The Commission determines that the new Standards shall be effective 30 days from the date of publication in the **Federal Register**, and so provides in the section on Effective Date and Congressional Notification. The Commission further determines that transmission providers must be in full compliance with the Standards by that date, with the exception of the posting and training requirements, with which transmission providers must be in full compliance no later than 60 days from publication in the **Federal Register**, as set forth in that same section. The Commission does not envision that extensive changes would be needed by transmission providers in order to come into compliance; many if not most of the procedures they already have in place to comply with the existing Standards will be transferable with little modification.

### *J. Miscellaneous Matters*

#### 1. Comments

314. Commenters raise a variety of miscellaneous matters as follows:

- Ameren asks the Commission consider extending the use of the employee functional approach to the Code of Conduct/affiliate restrictions promulgated by Order No. 697 and set forth in 18 CFR 35.39 of the Commission's regulations.<sup>338</sup>
- NGSAs asserts that third parties should never be privy to non-public pipeline information. It contends that in the rare circumstances in which a pipeline finds it necessary to share non-public information with a third party (e.g., joint project development planning), the third party should be subject to a confidentiality agreement.<sup>339</sup>
- PUC of Ohio asserts that civil forfeiture should not be recovered by the operating company in such a way that the expense of recovery is passed to the customers (as opposed to the shareholders). It proposes that the Commission require "ring fencing" so

that an operating company and its customers are insulated from other operations involving the corporation, and are only allocated those expenses that relate directly to an established benefit.<sup>340</sup>

- NARUC recommends that the Commission monitor implementation of the Standards by requiring filed compliance plans and through the conduct of regular audits and reports.<sup>341</sup>

- MidAmerican requests that the Commission clarify that Order No. 2004 and any Commission guidance and case law issued pursuant to it should not constitute precedent for the new Standards. MidAmerican is concerned that unless the Commission clearly rescinds its prior precedent developed around Order No. 2004, companies will struggle to determine whether a precedent applies to a provision in the new Standards.<sup>342</sup>

- E.ON requests that the Commission clarify whether transmission providers can continue to rely on existing guidance regarding public meetings convened by utility companies. If the Commission concludes that it is appropriate to start from a "clean slate" on public meetings, then E.ON requests that the Commission provide additional relevant guidance.<sup>343</sup>

#### 2. Commission Determination

315. Ameren's request to extend the employee functional approach, NGSAs's concerns regarding the dissemination of information to non-affiliated third parties, and the PUC of Ohio's concern regarding the recovery of civil forfeitures, are all beyond the scope of this Final Rule, and the Commission declines to adopt their proposals or modify the Standards accordingly.

316. The Commission also declines to impose the filing of compliance plans with the Commission, as requested by NARUC. Under section 358.8(b)(2), transmission providers are required to post on their Internet Web site written procedures implementing the Standards. It is thus unnecessary to require additional filings with the Commission. The Commission, however, is committed to ensuring compliance with its rules and regulations, and will thus seriously consider auditing on a regular basis transmission providers' compliance with the Standards. Also, of course, the Commission will investigate any credible allegation of violation of the Standards. To that end, the Commission

<sup>337</sup> TDU Systems at 17; Wisconsin Electric at 9-10; Ameren at 35.

<sup>338</sup> Ameren at 36.

<sup>339</sup> NGSAs at 16.

<sup>340</sup> PUC Ohio at 3.

<sup>341</sup> NARUC at 4-5.

<sup>342</sup> MidAmerican at 5-7.

<sup>343</sup> E.ON at 25.

reminds market participants of the Enforcement Hotline,<sup>344</sup> which was established twenty years ago to enforce the promulgation of the original Standards in Order No. 497.

317. On the issue of guidance, the Commission will not impose a blanket provision stating that guidance issued by the Commission with respect to previous Standards has no precedential effect. Many of the Standards have been carried forward into the new regulations, and others are similar. The determination of whether previous statements and rulings made by the Commission may be useful in providing guidance as to the new Standards must be made on a case-by-case basis, and is very dependent on which provision of the Standards is in question.

318. E.ON's related concern about public meetings, to the extent it does not entail matters relating to the Independent Functioning Rule and the No Conduit Rule, is beyond the scope of this Final Rule. To the extent E.ON's concern does involve those provisions, it may look for guidance to the discussions in this Final Rule regarding them, as well as to the regulatory text.

#### IV. Information Collection Statement

319. The Office of Management and Budget (OMB) regulations require approval of certain information collection requirements imposed by agency rules.<sup>345</sup>

320. 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.<sup>346</sup> 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.

321. The Commission is submitting notification of the information collection requirements imposed in this Final Rule to OMB for its review and approval under section 3507(d) of the Paperwork Reduction Act of 1995.<sup>347</sup> 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.

322. 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.

*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.

323. 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.

324. 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](mailto:Michael.Miller@FERC.gov). Comments on the requirements of the Final 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).

#### V. Environmental Analysis

325. 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.<sup>348</sup> The Commission concludes that neither an Environmental Assessment nor an Environmental Impact Statement is required for this Final Rule 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.<sup>349</sup> Therefore, an environmental assessment is unnecessary and has not been prepared for this rulemaking.

#### VI. Regulatory Flexibility Act

326. The Regulatory Flexibility Act of 1980 (RFA)<sup>350</sup> 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,"<sup>351</sup> 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.

#### VII. Document Availability

327. 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>)

<sup>348</sup> Order No. 486, *Regulations Implementing the National Environmental Policy Act of 1969*, FERC Stats. & Regs. ¶ 30,783 (1987).

<sup>349</sup> 18 CFR 380.4(a)(2)(ii) and 380.4(a)(5) (2008).

<sup>350</sup> 5 U.S.C. 601-612 (2000 and Supp. V 2005).

<sup>351</sup> See 5 U.S.C. 601(3) and (6) (2000 and Supp. V 2005).

<sup>344</sup> See 18 CFR 1b.21 (2008).

<sup>345</sup> 5 CFR 1320.11.

<sup>346</sup> 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).

<sup>347</sup> 44 U.S.C. 3507(d) (2000 and Supp. V 2005).

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.

328. 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.

329. 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](mailto: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](mailto:public.referenceroom@ferc.gov).

#### VIII. Effective Date and Congressional Notification

330. These regulations are effective 30 days from the date of publication in the **Federal Register**. Transmission providers must be in full compliance with them by that date, with the exception of the posting and training requirements, with which transmission providers must be in full compliance no later than 60 days from the date of publication in the **Federal Register**.

331. The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of OMB, that this rule is not a "major rule" as defined in section 351 of the Small Business Regulatory Enforcement Fairness Act of 1996.

#### List of Subjects in 18 CFR Part 358

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

By the Commission.

**Nathaniel J. Davis, Sr.,**  
*Deputy Secretary.*

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

■ 1. Part 358 is revised 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 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 and conducts transmission transactions with an affiliate that engages in marketing functions.

(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 a waiver from this part.

(d) A transmission provider may file a request for a waiver 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) A transmission provider and its employees, contractors, consultants and agents are prohibited from disclosing, or using a conduit to disclose, non-public transmission function information to the transmission provider's marketing function employees.

(d) A transmission provider must provide equal access to non-public

transmission function information to all its transmission function customers, affiliated and non-affiliated, except in the case of confidential customer information or Critical Energy Infrastructure Information.

#### § 358.3 Definitions.

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

(1) Another person that controls, is controlled by or is under common control with, the specified entity. An affiliate includes a division of the specified entity that operates as a functional unit.

(2) For any exempt wholesale generator (as defined under § 366.1 of this chapter), affiliate shall have the meaning set forth in § 366.1 of this chapter, or any successor provision.

(3) "Control" as used in this definition means the direct or indirect authority, whether acting alone or in conjunction with others, to direct or cause to direct the management policies of an entity. A voting interest of 10 percent or more creates a rebuttable presumption of control.

(b) *Internet Web site* refers to the Internet location where an interstate natural gas pipeline or a public utility posts the information, by electronic means, required under this part 358.

(c) *Marketing functions means:*

(1) in the case of public utilities and their affiliates, the sale for resale in interstate commerce, or the submission of offers to sell in interstate commerce, of electric energy or capacity, demand response, virtual transactions, or financial or physical transmission rights, all as subject to an exclusion for bundled retail sales, including sales of electric energy made by providers of last resort (POLRs) acting in their POLR capacity; and

(2) in the case of interstate pipelines and their affiliates, the sale for resale in interstate commerce, or the submission of offers to sell in interstate commerce, natural gas, subject to the following exclusions:

(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 a seller's own production,

(iv) Sales of natural gas solely from a seller's own gathering or processing facilities, and

(v) Sales by an intrastate natural gas pipeline, by a Hinshaw interstate pipeline exempt from the Natural Gas Act, or by a 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 on a day-to-day basis in marketing functions.

(e) *Open Access Same Time Information System* or *OASIS* refers to the Internet location where a public utility posts the information required by part 37 of this chapter, and where it may also post the information required to be posted on its Internet Web site by this part 358.

(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 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 the planning, directing, organizing or carrying out of day-to-day 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 on a day-to-day basis 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 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.

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

(m) *Waiver* means the determination by a transmission provider, if authorized by its tariff, to waive any provisions of its tariff for a given entity.

#### § 358.4 Non-discrimination requirements.

(a) 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.

(b) 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.

(c) 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).

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

#### § 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) *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) 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.

(b) An employee, contractor, consultant or agent of a transmission provider, and an employee, contractor, consultant or agent 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.

#### § 358.7 Transparency rule.

(a) *Contemporaneous disclosure.* (1) If a transmission provider discloses non-public transmission function information, other than information

identified in paragraph (a)(2) of this section, in a manner contrary to the requirements of § 358.6, the transmission provider must immediately post the information that was disclosed on its Internet Web site.

(2) If a transmission provider discloses, in a manner contrary to the requirements of § 358.6, non-public transmission customer information, critical energy infrastructure information (CEII) as defined in § 388.113(c)(1) of this chapter or any successor provision, or any other information that the Commission by law has determined is to be subject to limited dissemination, the transmission provider must immediately post notice on its Web site that the information was disclosed.

(b) *Exclusion for specific transaction information.* A transmission provider's transmission function employee may discuss with its marketing function employee a specific request for transmission service submitted by the marketing function employee. The transmission provider is not required to contemporaneously disclose information otherwise covered by § 358.6 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 non-public 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 its Internet Web site 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 its Internet Web site 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 Internet Web site the names and addresses of all its affiliates that employ or retain marketing function employees.

(2) A transmission provider must post on its Internet Web site a complete list of the employee-staffed facilities shared by any of the transmission provider's transmission function employees and 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 Internet Web site the job titles and job descriptions of its transmission function employees.

(2) A transmission provider must post a notice on its Internet Web site 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 its Internet Web site 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 Internet Web site the information required by this part 358 within seven business days of any change, and post the date on which the information was updated. A public utility may also post the information required to be posted under part 358 on its OASIS, but is not required to do so.

(2) In the event an emergency, such as an earthquake, 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 Internet Web site postings required by this part must be sufficiently prominent as to be readily accessible.

(h) *Exclusion for and recordation of certain information exchanges.* (1) Notwithstanding the requirements of §§ 358.5(a) and 358.6, a transmission provider's transmission function employees and marketing function employees may exchange certain non-public transmission function information, as delineated in § 358.7(h)(2), 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.

(2) The non-public information subject to the exclusion in § 358.7(h)(1) is as follows:

- (i) Information pertaining to compliance with Reliability Standards approved by the Commission, and
- (ii) Information necessary to maintain or restore operation of the transmission system or generating units, or that may affect the dispatch of generating units.

(i) *Posting of waivers.* A transmission provider must post on its Internet Web site notice of each waiver of a tariff provision that it grants in favor of an affiliate, unless such waiver has been approved by the Commission. The posting must be made within one business day of the act of a waiver. The transmission provider must also maintain a log of the acts of waiver, 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.

**§ 358.8 Implementation requirements.**

(a) *Effective date.* A transmission provider must be in full compliance with the standards of conduct on the date it commences transmission

transactions with an affiliate that engages in marketing functions.

(b) *Compliance measures and written procedures.* (1) A transmission provider must implement measures to ensure that the requirements of §§ 358.5 and 358.6 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 its Internet Web site.

(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.

Commenter	Abbreviation
Alcoa Inc .....	ALCOA.
Ameren Services Company .....	Ameren.
American Gas Association .....	AGA.
American Public Gas Association .....	APGA.
American Public Power Association .....	APPA.
American Transmission Company LLC .....	ATC.
Arizona Public Service Company .....	Arizona PSC.
Bonneville Power Administration .....	Bonneville.
California Public Utilities Commission .....	California PUC.

Commenter	Abbreviation
Calypso U.S. Pipeline, LLC and Calypso LNG, LLC	Calypso.
CenterPoint Energy Gas Transmission Company	CenterPoint.
Chandeleur Pipeline Company and Sabine Pipeline Lince LLC	Chandeleur.
DCP Midstream, LLC	DCP Midstream.
Destin Pipeline Company, L.L.C	Destin.
Dominion Resources, Inc	Dominion Resources.
Duke Energy Corporation	Duke.
E.ON U.S. LLC	E.ON.
Edison Electric Institute	EEL.
El Paso Corporation	El Paso.
Electric Power Supply Association	EPSA.
Entergy Services Inc	Entergy.
Federal Trade Commission	FTC.
FirstEnergy Service Company	FirstEnergy.
Hampshire Gas Company and Washington Gas Light Company	Hampshire.
Idaho Power Company	Idaho Power.
International Transmission Company	ITC.
Interstate Natural Gas Association of America	INGAA.
Iroquois Gas Transmission System, L.P	Iroquois.
Kinder Morgan Interstate Pipelines	Kinder Morgan.
Large Public Power Council	LPPC.
MidAmerican Energy Electric Utilities	MidAmerican.
National Association of Regulatory Utility Commissioners	NARUC.
National Grid USA	National Grid.
Natural Gas Supply Association	NGSA.
New York Public Service Commission	New York PSC.
NiSource, Inc	NiSource.
Northern California Power Agency	NCPA.
Northwest Natural Gas Company and KB Pipeline Company	Northwest Natural.
Pacific Gas and Electric Company	PG&E.
PSEG Companies	PSEG.
Public Utilities Commission of Ohio	PUC of Ohio.
Puget Sound Energy, Inc. and Avista Corporation	Puget Sound.
Questar Gas Company	Questar.
Sacramento Municipal Utility District	SMUD.
Salt River Project Agricultural Improvement and Power District	Salt River.
SCANA Corporation	SCANA.
Southern California Edison Company	SCE.
Southern Company Services, Inc	Southern Co. Services.
Southwest Gas Corporation	Southwest Gas.
Spectra Energy Transmission, LLC and Spectra Energy Partners, LP	Spectra.
Transmission Access Policy Study Group	TAPS.
Transmission Agency of Northern California	TANC.
Transmission Dependent Utility Systems	TDU Systems.
U.S. Department of the Interior	US DOI.
Unitil Corporation	Unitil.
USG Pipeline Company, et al	USG.
Vectren Corporation	Vectren.
Washington Utilities and Transportation Commission	WA UTC.
Western Utilities	Western Utilities.
Williston Basin Interstate Pipeline Company	Williston.
Wisconsin Electric Power Company	Wisconsin Electric.
Xcel Energy Services Inc	Xcel.

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