

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Informal Staff Advice on Regulatory Requirements Docket No. PL06-4-001

INTERPRETIVE ORDER MODIFYING NO-ACTION LETTER PROCESS

(Issued October 19, 2006)

1. The Commission modifies its November 18, 2005 Order¹ that established a “no-action” letter (NAL) process to request and obtain informal staff advice on certain matters. In the NAL Interpretive Order, the Commission clarified that section 388.104(a) of its regulations² could be used to obtain advice as to whether Staff will recommend that the Commission take no enforcement action with respect to specific proposed transactions, practices or situations that may raise issues under the Commission’s regulations relating to the Standards of Conduct for Transmission Providers,³ Market Behavior Rules⁴ and the Commission’s Prohibition of Energy Market Manipulation Rules.⁵ The NAL Interpretive Order also set forth the process and procedures to be followed in seeking and obtaining a response to a NAL request.

¹ *Interpretive Order Regarding No-Action Letter Process*, 113 FERC ¶ 61,174 (2005) (NAL Interpretive Order).

² 18 C.F.R. § 388.104(a) (2006).

³ 18 C.F.R. Part 358 (2006).

⁴ *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 at Appendix A (2003), *reh’g denied*, 107 FERC ¶ 61,175 (2004) (electric power) (Market Behavior Rules Order), *Amendments to Blanket Sales Certificates*, Order No. 644, FERC Stats. & Regs. ¶ 61,153, *reh’g denied*, 107 FERC ¶ 61,174 (2004) (natural gas); appeal as to both pending *sub nom. Col. Office of Consumer Counsel v. FERC*, No. 04-1238 (D.C. Cir.).

⁵ *Prohibition of Energy Market Manipulation*, Order No. 670, FERC Stats. & Regs. ¶ 31,202, *reh’g denied*, 114 FERC ¶ 61,300 (2006) (Anti-Manipulation Rule).

2. In response to regulations and orders the Commission issued after the NAL Interpretive Order and questions that have arisen concerning the NAL process, the Commission modifies and clarifies the NAL process as follows: electric power sales codes of conduct set forth in an electric seller's market-based rate tariff or rate schedule, codes of conduct relating to sales of natural gas by interstate pipelines and others pursuant to blanket certificates, and the Market Behavior Rules, as codified in the Commission's regulations, are appropriate NAL subject matter; Staff will not provide advice on a matter not covered by the NAL process unless it is inextricably intertwined with appropriate NAL subject matter; only prospective and continuing transactions (not completed transactions) are appropriate NAL subject matter; and Staff may allow entities to withdraw NAL requests, but Staff retains the discretion to decline to allow withdrawal if the issuance of a NAL response can provide guidance on recurring questions of importance to the industry.

I. Background

3. Since the Commission issued the NAL Interpretive Order, Staff has issued several NAL responses.⁶ Staff has informally responded to numerous questions regarding the appropriate subject matter for NAL requests and the procedures to be followed in seeking a NAL response. To provide further clarity to all entities with respect to these matters, the Commission modifies the NAL process as set forth below.

II. Modifications to No-Action Letter Process

4. The first issue we consider is whether the NAL process will continue to include questions regarding codes of conduct and all of the Market Behavior Rules. The NAL Interpretive Order initially limited NAL subject matter to questions relating to whether particular transactions, practices, situations or other matters would violate the Standards of Conduct, the Market Behavior Rules, or the Anti-Manipulation Rule. However, the scope of the NAL Interpretive Order was subsequently affected by three Commission orders. First, in Order No. 674,⁷ the Commission amended 18 C.F.R. Part 35 (2005) to codify Market Behavior Rules 1, 3, 4, and 5.⁸ Second, in Order No. 673,⁹ the

⁶ NAL responses may be accessed at the Commission's website at <http://www.ferc.gov/legal/no-action-letters.asp>

⁷ *Conditions for Public Utility Market-Based Rate Authorization Holders*, Order No. 674, FERC Stats. & Regs. ¶ 31,208 (2006).

⁸ These rules had previously been incorporated in electric market-based rate sellers' tariffs.

⁹ *Amendments to Codes of Conduct for Unbundled Sales Service and for Persons Holding Blanket Marketing Certificates*, Order No. 673, FERC Stats. & Regs. ¶ 31,207 (2006).

Commission rescinded sections 284.288(a), (d) and (e), and 284.403(a), (d) and (e) of the Commission's codes of conduct regulations for natural gas sellers.¹⁰ Finally, the Commission's *Order Revising Market-Based Rate Tariffs and Authorizations* (Rescission Order),¹¹ a companion order to Order No. 674, was responsible for the rescission of Market Behavior Rules 2 and 6.

5. In the Market Behavior Rules Order, the Commission amended all market-based rate tariffs and authorizations to include the Market Behavior Rules.¹² In particular, Market Behavior Rule 6 directed that electric sellers not violate, or collude with others in actions that violate, sellers' market-based codes of conduct. Since the NAL Interpretive Order included the Market Behavior Rules as appropriate subject matter and Market Behavior Rule 6 required compliance with the codes of conduct, the codes of conduct were within the scope of the NAL process prior to the Rescission Order issued on February 16, 2006. However, once Market Behavior Rule 6 was rescinded by the Rescission Order, electric sellers' codes of conduct were no longer within the scope of the NAL process because they were no longer subject to the Market Behavior Rules. Since we believe that these codes of conduct should be subject to the NAL process, and consistent with the intent of the NAL Interpretive Order, the Commission hereby finds that the codes of conduct for both electric and gas sellers are appropriate NAL subject matter, despite the fact that they no longer fall under the Market Behavior Rules.

6. Similarly, with the rescission of certain Market Behavior Rules in the Rescission Order and the codification of Market Behavior Rules 1, 3, 4 and 5, the codified Market Behavior Rules are no longer clearly included as NAL subject matter. Consistent with the intent of the NAL Interpretive Order, the Commission clarifies that the codified Market Behavior Rules are appropriate NAL subject matter.

7. A second issue that has arisen since the NAL Interpretive Order is whether Staff can provide guidance on transactions or activities that are not themselves subject to the NAL process, but are ancillary to matters that are subject to the NAL process. The Commission believes that Staff should consider these matters on a case-by-case basis. We do not believe that the NAL process should, as a general matter, be expanded to consider these ancillary matters. However, there may be limited circumstances where guidance regarding them is appropriate. Specifically, where such ancillary matters are inextricably intertwined with the issues that fall under the NAL process, declining to provide guidance regarding the ancillary matters may defeat the purpose of providing guidance on the matters that fall under the NAL process. Accordingly, the Commission

¹⁰ 18 C.F.R. 284.288(a), (d) and (e) and 284.403(a), (d) and (e) (2005).

¹¹ *Order Revising Market-Based Rate Tariffs and Authorizations*, 114 FERC ¶ 61,165, *reh'g denied*, 115 FERC ¶ 61,053 (2006).

¹² *Market Behavior Rules Order*, 105 FERC ¶ 61,218 (2006).

clarifies that when a NAL request includes one or more questions about subject matters that are not covered by the NAL process, Staff has discretion to consider such questions to the extent they are inextricably intertwined with an appropriate NAL question.

8. A third issue that has arisen since the NAL Interpretive Order relates to transactions or activities that pre-date a particular NAL request. The Commission created the NAL process to provide an opportunity for regulated companies to obtain guidance that would assist them in remaining in compliance with the Commission's regulations. We did not intend the process to serve as a vehicle for regulated companies to obtain Staff opinions on whether prior conduct was lawful or not. Accordingly, the Commission clarifies that the NAL process is not appropriate for prior transactions or practices. However, the NAL process will continue to consider existing practices and anticipated or proposed future practices and transactions.

9. A fourth issue that has arisen since the NAL Interpretive Order is whether a company requesting a NAL can withdraw its request, such as when it believes Staff would be inclined to issue a negative response to the request. Since adoption of the NAL Interpretive Order, Staff's practice has been to allow parties to withdraw their NAL requests prior to issuance of a NAL response. This approach has been consistent with the intent of the NAL Interpretive Order because it encourages companies to seek guidance regarding their transactions and practices, thereby enhancing the goal of assisting companies with compliance with Commission regulations. We clarify here that Staff may continue this practice, *i.e.*, to allow withdrawal of an NAL request at any point in the NAL process prior to the issuance of a NAL response. However the Commission also clarifies that Staff retains discretion to disallow withdrawal if it believes that the issuance of the NAL response has the potential to provide guidance on recurring questions of importance to the industry.

10. Finally, the Commission notes that it will continue the current practice of not charging a fee for the submission of NAL requests. As the NAL program continues, however, we may reconsider whether a fee is appropriate. For example, if the Commission determines at a future date to expand the issues that are the subject of the NAL process, it may consider whether a fee is appropriate.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.