

118 FERC ¶ 61,031
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 358

(Docket No. RM07-1-000)

(January 18, 2007)

AGENCY: Federal Energy Regulatory Commission; DOE

ACTION: Notice of Proposed Rulemaking

SUMMARY: The purpose of this Notice of Proposed Rulemaking is to propose permanent regulations regarding the standards of conduct consistent with the decision of the United States Court of Appeals of the District of Columbia in National Fuel Gas Supply Corporation v. FERC, 468 F.3d 831 (2006), regarding natural gas pipelines. On January 9, 2007, the Commission issued an interim rule regarding the standards of conduct in response to the court's decision. The Commission is soliciting comments regarding whether or not the interim rule should be made permanent for natural gas transmission providers. The Commission is also soliciting comments regarding comparable changes for electric utility transmission providers: specifically, whether or not the standards of conduct should govern the relationship between electric utility transmission providers and their energy affiliates. Also, the Commission is proposing to: revise the definition of marketing, sales or brokering; make permanent the changes adopted in the interim rule for risk management employees and discretionary waivers; remove the regulations that permit the transmission provider to share information necessary to maintain the operations of its transmission system with its energy affiliates;

add and revise various regulations to facilitate integrated resource planning and competitive solicitations; revise the regulations to require each transmission provider to post the name of its chief compliance officer, to delete outdated references, and to require that transmission provider employees certify that they have completed standards of conduct training; and, revise the definition of affiliate regarding exempt wholesale generators.

DATES: Comments must be filed on or before [insert date that is 45 days after date of publication in the **FEDERAL REGISTER**]. Reply comments must be filed on or before [insert date that is 65 days after date of publication in the **FEDERAL REGISTER**].

ADDRESSES: You may submit comments identified by Docket No. RM07-1-000, by one of the following methods:

- Agency Web Site: <http://ferc.gov>. Follow the instructions for submitting comments via the eFiling link found in the Comment Procedures Section of the preamble.
- Mail: Commenters unable to file comments electronically must mail or hand deliver an original and 14 copies of their comments to the Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street, N.E., Washington, D.C. 20426. Please refer to the Comment Procedures Section of the preamble for additional information on how to file paper comments.

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SUPPLEMENTARY INFORMATION:

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

NOTICE OF PROPOSED RULEMAKING

(January 18, 2007)

I. Introduction

1. The Federal Energy Regulatory Commission (Commission) is proposing to adopt standards of conduct regulations that govern the relationship between natural gas transmission providers and their marketing affiliates in light of the decision of the United States Court of Appeals for the District of Columbia Circuit concerning the standards of conduct for transmission providers under Order No. 2004.¹ In National Fuel Gas Supply Corporation v. FERC (National Fuel),² the court determined that the Commission did not support the standards of conduct's definition of energy affiliate and vacated Order Nos. 2004, 2004-A, 2004-B, 2004-C and 2004-D (collectively referred to as Order No. 2004)

¹ On November 25, 2003, the Commission added Part 358 to the its regulations adopting standards of conduct that apply uniformly to natural gas and electric utility transmission providers. Standards of Conduct for Transmission Providers, Order No. 2004, FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,155 (2003), order on reh'g, Order No. 2004-A, FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,161 (2004), order on reh'g, Order No. 2004-B, FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,166 (2004), order on reh'g, Order No. 2004-C, FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,172, order on reh'g, Order No. 2004-D, 110 FERC ¶ 61,320 (2005), remanded as it applies to natural gas pipelines, National Fuel Gas Supply Corporation v. FERC, 468 F.3d 831, (D.C. Cir. Nov. 17, 2006).

² National Fuel, slip op. at 4.

as applied to natural gas pipelines and remanded the orders to the Commission.³

Specifically, the court rejected the Commission's attempt to extend the standards of conduct beyond pipelines' relationships with their marketing affiliates to also govern pipelines' relationships with numerous non-marketing affiliates, such as producers, gatherers, and local distribution companies (energy affiliates). In light of this, the court found moot the other issues raised on appeal.⁴

2. On January 9, 2007, the Commission issued an interim rule that promulgated temporary regulations consistent with the court's decision, but designed to prevent a regulatory gap with respect to standards of conduct for natural gas transmission providers and their marketing affiliates.⁵ The purpose of this Notice of Proposed Rulemaking (NOPR) is to propose permanent regulations consistent with the court's decision regarding natural gas pipelines. The Commission is also soliciting comments regarding whether or not to make comparable changes for electric utility transmission providers. With respect to both industries, the Commission seeks evidence regarding the scope of the rules, including application of the rules to energy affiliates. This issuance will provide a forum to develop the appropriate record for any future action. Moreover, because we are initiating a rulemaking proceeding, the Commission also takes this

³ Id.

⁴ Id.

⁵ Standards of Conduct for Transmission Providers, Order No. 690, 72 FR [____] (Jan. 19, 2007); FERC Stats. & Regs. ¶ 31,327 (Jan. 9, 2007).

opportunity to propose additional changes to the standards of conduct, including, among other things, proposing provisions to facilitate integrated resource planning and competitive solicitations for electric utility transmission providers.

3. In this NOPR, the Commission proposes to make permanent the interim regulations that made the standards of conduct inapplicable to the relationship between natural gas pipeline transmission providers and their energy affiliates. The Commission also proposes to: (1) to revise the definition of marketing, sales or brokering at § 358.3(e) of the Commission's regulations; (2) make permanent the changes adopted in the interim rule for § 358.4(a)(6) of the Commission's regulations regarding risk management employees and §§ 358.5(c)(4)(i) and (ii) of the Commission's regulations regarding discretionary waivers; (3) remove § 358.5(b)(8) of the Commission's regulations, which permits the transmission provider to share information necessary to maintain the operations of its transmission system with its energy affiliates; (4) add and revise various sections to facilitate integrated resource planning and competitive solicitations; (5) revise § 358.4(e) of the Commission's regulations to require each transmission provider to post the name of its chief compliance officer, to delete outdated references, and to require that transmission provider employees certify that they have completed standards of conduct training; and (6) revise the definition of affiliate regarding exempt wholesale generators at § 358.3(b)(2) of the Commission's regulations.

A. Order No. 2004

4. Prior to Order No. 2004, the Commission had two separate sets of regulations governing standards of conduct for transmission providers. The regulations applicable to natural gas pipelines were issued in Order No. 497 in 1988,⁶ under sections 4 and 5 of the Natural Gas Act.⁷ In 1996, the Commission issued Order No. 889,⁸ which created standards of conduct regulations applicable to electric utilities under sections 205 and 206 of the Federal Power Act.⁹ Both rules had the same goal -- to prevent transmission providers from wielding their market power over transmission to give undue preference or unduly discriminatory treatment in favor of their marketing affiliates over non-

⁶ Inquiry Into Alleged Anticompetitive Practices Related to Marketing Affiliates of Interstate Pipelines, Order No. 497, 53 FR 22139 (1988), FERC Stats. & Regs., Regulations Preambles 1986-1990 ¶ 30,820 (1988); Order No. 497-A, order on reh'g, 54 FR 52781 (1989), FERC Stats. & Regs., Regulations Preambles 1986-1990 ¶ 30,868 (1989); Order No. 497-B, order extending sunset date, 55 FR 53291 (1990), FERC Stats. & Regs., Regulations Preambles 1986-1990 ¶ 30,908 (1990); Order No. 497-C, order extending sunset date, 57 FR 9 (1992), FERC Stats. & Regs., Regulations Preambles 1991-1996 ¶ 30,934 (1991), reh'g denied, 57 FR 5815 (1992), 58 FERC ¶ 61,139 (1992); aff'd in part and remanded in part sub nom. Tenneco Gas v. FERC, 969 F.2d 1187 (D.C. Cir. 1992).

⁷ 15 U.S.C. 717c and 717d; see also former 18 CFR part 161 (2003).

⁸ Open Access Same-Time Information System (Formerly Real-Time Information Network) and Standards of Conduct, Order No. 889, 61 FR 21737 (May 10, 1996), FERC Stats. & Regs., Regulations Preambles Jan. 1991- June 1996 ¶ 31,035 (Apr. 24, 1996); Order No. 889-A, order on reh'g, 62 FR 12484 (Mar. 14, 1997), FERC Stats. & Regs., Regulations Preambles 1996-2000 ¶ 31,049 (Mar. 4, 1997); Order No. 889-B, reh'g denied, 62 FR 64715 (Dec. 9, 1997), 81 FERC ¶ 61,253 (Nov. 25, 1997).

⁹ 16 U.S.C. 824d and 824e; see also former 18 CFR 37.4 (2003).

affiliates. Both rules employed the same general approach, e.g., requiring employees engaged in transmission services to function independently from employees of its marketing affiliates and imposing prohibitions restricting transmission providers from sharing certain information with their marketing affiliates. The rules were designed to ensure that affiliated and non-affiliated transmission customers were treated on an equal basis. However, the standards of conduct under Order Nos. 497 and 889 contained some differences, particularly with respect to the information sharing prohibitions and posting requirements.

5. In Order No. 2004, the Commission revised the standards of conduct so that one set of regulations applied uniformly to both natural gas and electric utility transmission providers and their affiliates.¹⁰ In doing so, the Commission noted several reasons for issuing new standards of conduct.¹¹ In Order No. 2004, the Commission also expanded the coverage of the standards of conduct to govern the relationships between transmission

¹⁰ 18 CFR 358.3(a)(1) and (2) (definition of transmission provider).

¹¹ Order No. 2004 at P 6-15.

providers and energy affiliates.¹² Previously, the standards of conduct governed the relationships between transmission providers and their marketing affiliates.¹³

B. Matters Appealed

6. Five issues were appealed from Order No. 2004: (1) the extension of the standards of conduct to cover the relationship between natural gas transmission providers and their energy affiliates under § 358.3(d); (2) the scope of the restrictions on sharing risk management employees between natural gas pipeline transmission providers and their marketing/energy affiliates under § 358.4(a)(6); (3) the scope of the restrictions on sharing lawyers between natural gas pipeline transmission providers and their marketing/energy affiliates; (4) the scope of the requirement for natural gas pipeline transmission providers to post all discretionary acts under § 358.5(c)(4); and (5) the timing as to when newly certificated pipelines become subject to the standards of conduct.

¹² Section 358.3(d) defined energy affiliate as any affiliate which is engaged or involved in transmission transactions; manages or controls pipeline capacity; buys, sells, trades or administers natural gas or electric energy in domestic energy or transmission markets; and engages in financial transactions relating to the sale or transmission of natural gas or electric energy in such markets. 18 CFR 358.3(d).

¹³ Under Order No. 497, marketing included affiliates and business divisions engaged in making sales for resale of natural gas in interstate commerce (former 18 CFR 161.2(c)); and under Order No. 889, marketing covered affiliates and business divisions engaged in making sales for resale of electric energy in interstate commerce (former 18 CFR 37.3(e)).

C. The Court's Decision

7. In National Fuel, the court vacated Order No. 2004 as applicable to natural gas pipelines because of the expansion of the standards of conduct to include energy affiliates. The court explained that the Commission relied on both theoretical grounds and on record evidence to justify this expansion. The court concluded that the Commission's record evidence did not withstand scrutiny and, thus, concluded the expansion was arbitrary and capricious in violation of the Administrative Procedure Act.¹⁴ The court vacated Order No. 2004 as applicable to natural gas pipelines. In light of this disposition, the court did not address the other four issues raised on appeal regarding Order No. 2004.

II. Discussion

8. The NOPR proposes to make changes to Part 358 (discussed in greater detail below) consistent with National Fuel, seeks comment on other issues, and clarifies that waivers or exemptions that the Commission issued under Order No. 2004 remain valid and are not negatively impacted by the National Fuel decision.

A. Partially Repromulgating Part 358

9. Order No. 2004 codified many case-by-case exceptions that had evolved during the implementation of Order Nos. 497 and 889. These provisions included: codifying

¹⁴ National Fuel, slip op. at 4.

exceptions to the independent functioning requirement;¹⁵ revising information sharing prohibitions to reflect practical considerations¹⁶ and emergency circumstances;¹⁷ codifying a training requirement;¹⁸ revising and imposing new posting requirements to improve transparency;¹⁹ and requiring transmission providers to designate a chief compliance officer.²⁰ The NOPR proposes to re-adopt those sections of Part 358 that were not appealed and not found infirm in National Fuel.

B. The Definition of Energy Affiliates

10. Because the court's decision focused on the Commission's lack of evidence to support expanding the standards of conduct to govern the relationship between natural gas transmission providers and their non-marketing affiliates, the interim rule added a new provision stating that the standards of conduct do not govern the relationship between natural gas transmission providers and their energy affiliates.²¹ In this NOPR,

¹⁵ 18 CFR 358.4.

¹⁶ 18 CFR 358.5(b)(6) and (8).

¹⁷ 18 CFR 358.4(a)(2).

¹⁸ 18 CFR 358.4(e)(5).

¹⁹ 18 CFR 358.5(a) and (b).

²⁰ 18 CFR 358.4(e)(6).

²¹ Interim 18 CFR 358.1(e) states: "The Standards of Conduct in this part do not govern the relationship between a natural gas Transmission Provider and its energy affiliates."

consistent with the court's decision, the Commission proposes to retain this provision on a permanent basis for natural gas transmission providers. We seek comment on whether this is sufficient to protect customers.

11. The Commission also is seeking comment on the current restrictions relating to energy affiliates of electric utility transmission providers. The court in National Fuel did not address this issue because electric utility transmission providers did not appeal Order No. 2004. However, the Commission believes it is important to address the issue here.

12. The Commission has reviewed the existing regulations, the rationale for promulgating them, and other modifications being discussed herein concerning whether or not to eliminate the restrictions on energy affiliates of electric utility transmission providers. If we were to eliminate these restrictions, the non-marketing energy affiliates of electric transmission providers would no longer be subject to the standards of conduct. However, since we have not yet received comments on the issue or engaged in outreach, this NOPR does not suggest regulatory text on this issue. We intend to carefully examine any comments received on this issue and weigh them heavily in our deliberations on a Final Rule.

13. When the Commission adopted the definition of energy affiliate in Order No. 2004, the Commission focused most closely on examples of the potential for undue discrimination in favor of energy affiliates of natural gas pipelines, rather than of electric

utility transmission providers.²² Although the Commission noted certain violations of Order No. 889 by electric utility transmission providers,²³ these instances involved undue preferences given to an electric transmission provider's merchant function. As we discuss further below, the definition of marketing affiliate expressly includes an electric transmission provider's merchant function and the Commission sees no reason to delete that important protection.²⁴ Furthermore, in an area where the Commission made findings of undue discrimination that was not covered by Order No. 889 – undue preferences given to asset managers – we are proposing, as discussed below, to broaden the definition of marketing affiliate so that the standards of conduct explicitly prohibit such undue preferences.

14. Over the past three years, the Commission has engaged in extensive outreach and consultation with the industry regarding the standards of conduct. This outreach has included three public technical conferences (held in Houston, Chicago, and Scottsdale, Arizona) and numerous meetings between industry participants and our staff. Over the course of this outreach, we have received information and comments on many important issues arising under the standards of conduct. However, this outreach did not cover the issue addressed here – energy affiliate restrictions for electric utility transmission

²² Order No. 2004 at P 10-11.

²³ Order No. 2004 at P 14.

²⁴ 18 CFR 358.3(c)(2).

providers. Accordingly, the Commission seeks comment on whether applying the standards of conduct to the relationship between electric utility transmission providers and their marketing affiliates, but not to their energy affiliates would be sufficient to protect customers. Commenters who believe that it is appropriate to retain the standards of conduct for the relationship between electric utility transmission providers and their energy affiliates should submit evidence to support continued application of the definition of energy affiliates to electric utility transmission providers. Commenters who believe that we should not apply the standards of conduct to the relationship between electric utility transmission providers and their energy affiliates should provide support for their position that customers will be sufficiently protected from undue discrimination.

15. Commenters should include a focus on the type of energy affiliate that they are discussing. Making the standards of conduct inapplicable to electric utility transmission providers and their energy affiliates would affect the relationship between a transmission provider and the following types of non-marketing energy affiliates (except as otherwise noted):

- a. affiliated asset managers;²⁵
- b. affiliated transmission customers that do not make sales for resale;²⁶

²⁵ See 18 CFR 358.3(d)(1) (“involved in transmission transactions”). Below, the Commission proposes to separately make the relationship between transmission providers and asset managers subject to the standards of conduct by expanding the definition of marketing affiliate.

²⁶ See 18 CFR 358.3(d)(1) (“engages in... transmission transactions”); Order No. 2004-A at P 44.

- c. affiliated gas entities, e.g., affiliated producers, affiliated gatherers, affiliated gas Local Distribution Companies (LDCs), and affiliated intrastate pipelines;
- d. affiliated financial institutions that do not engage in physical transactions, but only financial transactions;²⁷
- e. affiliated entities that aggregate and re-sell transmission capacity without making sales for resales of energy;²⁸
- f. affiliated electric LDCs;²⁹
- g. affiliated electronic trading platforms;³⁰ and,
- h. affiliated entities that buy, trade or administer electric energy.³¹

The Commission seeks comments on whether the standards of conduct should continue to apply to these relationships.

16. In addition, the Commission seeks comment, particularly from companies subject to both sets of standards, on whether it is desirable to maintain consistency between the standards of conduct applicable to natural gas transmission providers and electric utility

²⁷ See 18 CFR 358.3(d)(4).

²⁸ See 18 CFR 358.3(d)(1).

²⁹ See 18 CFR 358.3(d)(5); Order No. 2004-C at P 24-25

³⁰ See 18 CFR 358.3(d)(1); Order No. 2004-A at P 4.

³¹ See 18 CFR 358.3(d)(3) (“buys, sells, trades or administers electric energy”). The Commission believes that the relationship with affiliates that make wholesale sales of electric energy in interstate commerce is governed by the definition of marketing. See 18 CFR 358.3(k).

transmission providers. We note that retaining the energy affiliate restriction for electric transmission providers, but not for natural gas transmission providers, would create, for some companies, inconsistent rules for different subsidiaries within a holding company. For example, an energy affiliate of an electric utility transmission provider would be restricted in communicating with that transmission provider, but if a natural gas transmission provider owned that same energy affiliate there would be no such restriction. Similarly, if a holding company owned both electric utility and natural gas transmission providers, two differing sets of rules would apply within the same holding company system. The electric transmission provider would be precluded from dealing with all energy affiliates in that system, whereas the natural gas pipeline company would not. Uniformity could lessen the compliance burden on the industry and ease oversight of compliance by the Commission staff, but the Commission recognizes that uniformity does not override the Commission's mandate for customer protection.

17. Under the Natural Gas Act and the Federal Power Act, the Commission has the statutory mandate to prevent and remedy undue discrimination.³² Even absent the standards of conduct regulations promulgated under that authority, the Commission has

³² Sections 4 and 5 of the Natural Gas Act, 15 U.S.C. 717c and 717e, state that no natural gas company shall make or grant an undue preference or advantage with respect to any transportation or sale of natural gas subject to the Commission's jurisdiction. Similarly, under sections 205 and 206 of the Federal Power Act, 16 U.S.C. 824d and 824e, no public utility shall make or grant an undue preference with respect to any transmission or sale subject to the Commission's jurisdiction.

the authority to prevent and remedy a transmission provider's undue preference or advantage granted in favor of its affiliates. If a transmission provider provides an undue preference or advantage in favor of an affiliate that is not covered by the standards of conduct, that undue preference may still be prohibited by the Natural Gas Act or Federal Power Act.

18. We are not disturbing the fundamental protections to consumers and competitors of electric transmission providers that were adopted in Order No. 889 and retained in Order No. 2004. It will continue to be unlawful for electric utility transmission providers to provide any undue preference to their merchant function or any affiliate that owns generation or sells electricity. These are the core protections that customers and competitors have long supported and that we retain here. It also will continue to be unlawful for electric transmission providers to provide any undue preference to an affiliate selling or trading natural gas. Each of these protections is covered explicitly by the definition of marketing affiliate and is left undisturbed.

C. Revising the Definition of Marketing, Sales or Brokering

19. The interim rule adopted a temporary regulation for natural gas pipeline transmission providers at § 358.3(l) that mirrored the exceptions to the definition of

marketing that were found in Order No. 497.³³ Accordingly, marketing means a sale of natural gas to any person or entity by a seller that is not an interstate pipeline, except when: (1) the seller is selling gas solely from its own production; (2) the seller is selling gas solely from its own gathering or processing facilities; or (3) the seller is an intrastate natural gas pipeline or a local distribution company making an on-system sale. The NOPR proposes to remove the interim regulation codified at § 358.3(l) and incorporate those exceptions in the definition of “Marketing, sales or brokering” for natural gas transmission providers currently located at § 358.3(e).

20. The electric utility and natural gas industries differ in certain respects that are relevant to the energy affiliate issue. The Commission is proposing, consistent with the National Fuel decision, to revise the definition of marketing affiliate to include certain exceptions that were adopted in Order No. 497, but deleted in Order No. 2004. These exceptions would remove standards of conduct restrictions for a natural gas pipeline with respect to an affiliate's sales of gas from its own production, gathering or processing facilities. However, sales of electricity from a transmission provider's own "production"

³³ Interim 18 CFR 358.3(l) states:

Marketing or brokering means a sale of natural gas to any person or entity by a seller that is not an interstate pipeline, except when:

(1) the seller is selling gas solely from its own production;

(2) The seller is selling gas solely from its own gathering or processing facilities;

or

(3) The seller is an intrastate natural gas pipeline or a local distribution company making an on-system sale.

facilities – i.e., the generating plants operated by its merchant function – were already covered in Order No. 889 and, hence, Order No. 2004 did not represent a change in this regard. Thus, we do not propose to disturb this longstanding customer protection, and will therefore retain the Order No. 2004 definition of marketing affiliate that explicitly covers an electric utility transmission provider's merchant function. We also note that the gathering and processing exceptions are also inapplicable to electric utility transmission providers and, hence, require no comparable change. We seek comment on these revised definitions of marketing affiliate for natural gas and electric transmission providers.

21. The Commission also is proposing to expand the definition of marketing, sales or brokering to include entities that manage or control transmission capacity, such as asset managers or agents.³⁴ Frequently, asset managers and agents are involved extensively in transmission transactions, they stand in the shoes of the transmission customer and act as nominating/balancing agent, and have access to all the transmission customer's transmission information.³⁵ The Commission is proposing to include asset

³⁴ Generally, asset managers manage or control gas or electric assets, often including a transmission customer's capacity. Agents frequently are authorized to act in the place of transmission customers with respect to specified transmission-related activities such as nominations, scheduling or billing.

³⁵ In the investigation of Cleco Corporation, Commission staff observed that corporation's asset manager performed the following services for Cleco Corporation: (1) transmission scheduling services; (2) resource coordination and delivery of power trading and ancillary services; (3) fuel purchases for generation use; (4) marketing and customer relations services; (5) commodity trading; (6) monitoring, energy management, (continued)

managers/agents within the definition of marketing based on information gathered during investigations by the Commission's Enforcement staff. In each of these matters, staff investigated, among other issues, asset managers/agents that were also marketing affiliates and whether the asset managers received an undue preference from their affiliated transmission providers. All of these matters concluded with settlements approved by the Commission, including the payment by American Electric Power Company, Inc. (AEP) of \$21 million, the largest civil penalty in Commission history,³⁶ and the payment by Cleco Corporation of the largest civil penalty under section 214 of the Federal Power Act.³⁷ The third settlement, involving South Carolina Electric and Gas Company (SCEG), resulted in SCEG agreeing to a compliance plan.³⁸ Because these investigations were resolved by settlements, the Commission never made any specific findings that asset managers/agents and their affiliates engaged in undue discrimination. Still, the activities identified by staff provide a sufficient basis for the Commission to propose to include asset managers/agents in the definition of marketing affiliates. That is the case even though the settled investigations involved asset managers

scheduling, dispatch and accounting and billing services; (7) interaffiliate billing; (8) retail and wholesale marketing; and (9) energy trading. Cleco Corporation, 104 FERC ¶ 61,025 (2003) (Cleco).

³⁶ American Electric Power Company, Inc., 110 FERC ¶ 61,061 (2005).

³⁷ See Cleco, *supra* note 35.

³⁸ South Carolina Electric & Gas Company, 111 FERC ¶ 61,217 (2005).

who were also marketing affiliates. However, a review of the voluntary consent postings³⁹ on several transmission providers' OASIS and Internet Web sites shows that sometimes asset managers are marketing affiliates, but that sometimes they are not.⁴⁰

22. The Commission believes that the standards of conduct should govern the relationship between transmission providers and their affiliated asset managers. It would likely be unduly discriminatory to permit a transmission provider to inform its affiliated asset manager about an upcoming curtailment or outage, unless all other non-affiliated asset managers or transmission customers have comparable access to that information. Including affiliated asset managers/agents in the definition of marketing would ensure that all asset managers are treated in a comparable fashion. The Commission is soliciting comments on whether to include this provision in the definition of marketing and encourages commenters to identify potential harm of including or not including asset

³⁹ Currently, 18 CFR 358.5(b)(4) requires a transmission provider to post notice if a non-affiliated transmission customer voluntarily consents, in writing, to allow the transmission provider to share the non-affiliated transmission customer's information with a marketing or energy affiliate. 18 CFR 358.5(b)(4).

⁴⁰ For example, El Paso Natural Gas Company's voluntary consent postings on its Internet Web site identify that non-affiliated customers have voluntarily consented to allow El Paso to disclose their respective information to El Paso's marketing and energy affiliates, e.g., El Paso Field Services, L.P. (an energy affiliate) and El Paso Marketing L.P. (a marketing affiliate.) <http://tebb.epenergy.com/ebbepg/notices/noticeView.asp?sPipelineCode=EPNG&sSubC> (Dec. 8, 2006). Similar notices of asset management agreements or agency agreements can be found at the voluntary consent links of the OASIS or Internet Web sites for National Fuel Gas Supply Corp., Texas Eastern Transmission, LP, Tennessee Gas Pipeline Company, Potomac Electric Power Company, and Dominion Transmission Inc.

managers/agents in the definition of marketing. For that purpose, proposed § 358.3(e) reads as follows:

Marketing, sales or brokering means a sale for resale of natural gas or electric energy in interstate commerce in U.S. energy or transmission markets. Marketing also includes managing or controlling transmission capacity of a third-party as an asset manager or agent.

(1) A sales and marketing employee or unit includes:

(i) An interstate natural gas pipeline's sales operating unit, to the extent provided in § 284.286 of this chapter, and

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

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

(3) Marketing means a sale of natural gas to any person or entity by a seller that is not an interstate pipeline, except where:

(i) The seller is selling gas solely from its own production;

(ii) The seller is selling gas solely from its own gathering or processing facilities; or

(iii) The seller is an intrastate natural gas pipeline or a local distribution company making an on-system sale.

D. Exceptions to the Independent Functioning Requirement -- Risk Management Employees and Lawyers

23. Section 358.4 requires, except in emergency circumstances, the transmission function employees⁴¹ of the transmission provider to function independently of the

⁴¹ Section 358.3(j) of the Commission's regulations currently defines transmission function employee as an employee, contractor, consultant or agent of a transmission
(continued)

marketing affiliates' employees. Notwithstanding this requirement, since 1988, the Commission has developed a body of case law, permitting certain types of employees to be shared between a transmission provider and its marketing affiliate. At the request of industry participants, Order No. 2004 reiterated these holdings by codifying exceptions to the independent functioning requirement that permit the sharing of officers and members of the board of directors (directors),⁴² support employees,⁴³ field and maintenance employees,⁴⁴ and risk management employees.⁴⁵ Although industry participants urged the Commission to codify a general exception regarding the sharing of lawyers, the Commission did not do so stating that, if a lawyer participated in transmission policy decisions on behalf of a transmission provider, he or she would be considered a transmission function employee (and hence, not permissibly shared).⁴⁶

24. In describing these exceptions, the Commission stated that the sharing of these non-transmission functions allowed the transmission provider to realize the benefits of

provider who conducts transmission system operations or reliability functions, including, but not limited to, those who are engaged in day-to-day duties and responsibilities for planning, directing, organizing or carrying out transmission-related operations.

⁴² 18 CFR 358.4(a)(5).

⁴³ 18 CFR 358.4(a)(4).

⁴⁴ 18 CFR 358.4(a)(4).

⁴⁵ 18 CFR 358.4(a)(6).

⁴⁶ Order No. 2004-A at P 157.

cost saving through integration where the shared employees do not have duties or responsibilities relating to transmission, and generally would not be in a position to give a marketing affiliate an undue preference.⁴⁷ The Commission also stated that the exception allowing the sharing of officers and directors facilitated corporate governance activities, but that, to the extent a senior officer or director conducts transmission functions or is involved in planning, directing or organizing transmission functions, the officer's or director's status does not automatically exempt him/her from also being a transmission function employee.⁴⁸ In Order No. 2004-A, the Commission stated that, although it permitted the sharing of these categories of employees, it would evaluate, in compliance audits and investigations, employees' actual duties to determine whether the transmission provider is appropriately applying the exception.⁴⁹ In other words, regardless of an individual's title or how his or her responsibilities are labeled, if that individual is engaged in day-to-day duties and responsibilities for planning, directing, organizing or carrying out transmission-related operations, that individual is a transmission function employee (and may not be permissibly shared).

25. Petitioners appealed the codification of the exception for permissibly shared risk management employees and the preamble discussion in Order No. 2004 regarding

⁴⁷ Order No. 2004 at P 97.

⁴⁸ Order No. 2004-B at P 57.

⁴⁹ Order No. 2004-A at P 134.

permissibly shared lawyers. As mentioned above, in National Fuel, the court did not address these matters, and, accordingly, sub silencio, invalidated these aspects of Order No. 2004. Accordingly, the Commission is seeking comment on whether to make permanent changes adopted by the interim rule by retaining § 358.4(a)(6).⁵⁰ The Commission also seeks comments on whether to make this change applicable to electric public utility transmission providers. The Commission is also seeking comments on whether additional guidance with respect to permissibly shared employees, such as shared risk management employees, lawyers and officers and directors, would be helpful given the different structure, sizes and operations of the various transmission providers.

E. Discretionary Tariff Provision

26. In Order No. 2004, the Commission required each transmission provider to maintain a log detailing the circumstances and manner in which it exercised discretion under any terms of its tariff and post that information on its OASIS or Internet Web site.⁵¹ The regulatory language in Order No. 2004 was substantively identical to the requirement under Order No. 889, but it was different than the requirement under Order No. 497. Former § 161.3(k) promulgated in Order No. 497 required a pipeline to

⁵⁰ Interim 18 CFR 358.4(a)(6) reads: “Transmission Providers are permitted to share risk management employees that are not engaged in Transmission Functions or sales or commodity functions with their Marketing and Energy Affiliates. This provision does not apply to natural gas transmission providers.”

⁵¹ 18 CFR 358.5(c)(4).

maintain a written log of waivers that the pipeline grants with respect to tariff provisions that provide for such discretionary waivers and provide the log to any person requesting it within 24 hours of the request. On appeal, one of the petitioners claimed that § 358.5(c)(4) was broader than former § 161.3(k), arguing that there was a significant difference between granting waivers of tariff provisions that provide for such discretionary waivers (former § 161.3(k)) and exercising discretion under any terms of its tariff (§ 358.5(c)(4)).

27. To comply with the court's mandate in National Fuel, the interim rule modified § 358.5(c)(4)(i)⁵² so that it only applies to electric transmission providers and added a separate provision for natural gas transmission providers at § 358.5(c)(4)(i) that provides that natural gas transmission providers must maintain a written log of waivers that the natural gas transmission provider grants with respect to tariff provisions that provide for such discretionary waivers and provide the log to any person requesting it within 24 hours of the request. The purpose of the discretionary waiver posting requirement is to enable transmission customers to determine whether they are similarly situated and potentially entitled to comparable treatment by the transmission provider.

⁵² Section 358.5(c)(4)(i) provides that Electric Transmission Providers must maintain a written log, available for Commission audit, detailing the circumstances and manner in which they exercised their discretion under any terms of the tariff. The information contained in this log is to be posted on the OASIS or Internet Web site within 24 hours of when a Transmission Provider exercises its discretion under any terms of the tariff. 18 CFR 358.5(c)(4)(i).

28. As mentioned above, in National Fuel, the court did not address this matter, and, accordingly, sub silencio, invalidated this aspect of Order No. 2004. The Commission is faced with making permanent this requirement for electric transmission providers, while having different requirements for natural gas transmission providers. Accordingly, the Commission is seeking comment on whether to make permanent changes adopted in the interim rule by retaining §§ 358.5(c)(4)(i) and (ii) and seeking suggestions on what type of requirement is appropriate to give similarly situated customers sufficient information to determine whether they are being treated in a non-discriminatory fashion with respect to a transmission provider's discretionary activities. The Commission also encourages commenters to include suggestions on how we can craft the scope of the discretionary waiver requirement to minimize the burden on transmission providers while balancing the need for transparency in the market.

F. Timing of When a New Natural Gas Transmission Provider Becomes Subject to the Standards of Conduct

29. Under Order No 497, a natural gas transmission provider became subject to the standards of conduct when the transmission provider commenced transportation transactions with its marketing or brokering affiliate.⁵³ In the preamble of Order No. 2004, the Commission stated that newly certificated transmission providers would become subject to the standards of conduct when the transmission providers begin soliciting business or negotiating contracts as those are activities which the Commission

⁵³ Former 18 CFR 161.1 (2003).

considers transmission function activities. In Order No. 2004-B, the Commission stated that a new interstate pipeline should observe the standards of conduct when the pipeline is granted and accepts a certificate of public convenience and necessity and becomes subject to the Commission's jurisdiction under the Natural Gas Act.⁵⁴ The Commission stated that its goal was to ensure that newly formed pipelines provide non-discriminatory treatment and limit their ability to unduly favor their marketing and energy affiliates.⁵⁵ The timing of applicability of the standards of conduct was one of the items appealed, but not addressed in the National Fuel decision and vacated sub silencio. In the interim rule, the Commission did not require natural gas transmission providers to observe the standards of conduct until they commence transportation transactions with their marketing affiliates.

30. The issue on appeal was whether the Commission could apply the standards of conduct to a holder of a certificate that has not yet commenced transportation of natural gas. The Commission does not have any evidence that affiliate abuse has occurred in the time period before transportation commences, but believes there is clearly an incentive for the transmission provider to give an undue preference to its affiliates. A transmission provider must observe the non-discrimination provisions of sections 4 and 5 of the Natural Gas Act (and sections 205 and 206 of the Federal Power Act). The Commission

⁵⁴ Order No. 2004-B at P 136.

⁵⁵ Order No. 2004-C at P 46.

seeks comment on when a transmission provider should be required to comply with the standards of conduct and is proposing the following modification to § 358.4(e)(2).

Each Transmission Provider must be in full compliance with the standards of conduct within 30 days of becoming subject to the Commission's jurisdiction.

G. Revising § 358.5(b)(8)

31. Currently, § 358.5(b)(8) states that a transmission provider is permitted to share information necessary to maintain the operations of the transmission system with its energy affiliates. In the Order No. 2004 proceeding, natural gas commenters asked the Commission to adopt a provision allowing communication of operational information with energy affiliates, such as producers, gatherers or LDCs. They argued that prohibiting the sharing of operational information might endanger the reliability of the gas transmission systems.⁵⁶ Accordingly, Order No. 2004 codified current § 358.5(b)(8). In Order No. 2004, the Commission provided additional clarification explaining that this provision permits a transmission provider to share day-to-day, operational-type information with interconnected energy affiliates necessary to maintain the pipelines' operations, such information includes confirmations, nominations and schedulers with upstream producers and gathering facilities, operational data relating to interconnection points and communications related to the maintenance of interconnected facilities. The Commission added that it expected that these types of communications would take place

⁵⁶ For electric transmission providers, a provision allowing communications relating to generation dispatch exists at 18 CFR 358.5(b)(6) of the Commission's regulations.

between the operators of the pipeline or gas control facilities.⁵⁷ As the Commission is proposing that the standards of conduct will no longer govern the relationship between natural gas transmission providers and their energy affiliates, it appears that this provision is no longer necessary because communications between a natural gas transmission provider and its affiliated/interconnected gatherer(s), producer(s) and LDCs are not restricted by the standards of conduct. Therefore, the Commission proposes to delete § 358.5(b)(8) from the regulations and seeks comments on this proposal.

H. Changes to Facilitate Integrated Resource Planning and Competitive Solicitations

32. Since Order No. 2004 was issued, industry participants have sought staff guidance on standards of conduct requirements to assist with their compliance efforts. To provide further guidance, the Commission held three standards of conduct technical conferences, the most recent being held on April 7, 2006, and staff posted a “Frequently Asked Questions” (FAQs) page on the Commission’s Internet Web site. Following the April 7, 2006 technical conference, staff began a series of outreach meetings with various industry participants, including public utilities, industry trade associations and state commissions, to discuss ways for the Commission to address the applicability of the standards of conduct in the context of business activity that the Commission did not address in Order No. 2004, such as integrated resource planning and competitive solicitations.

⁵⁷ Order No. 2004-A at P 203.

33. To address integrated resource planning and competitive solicitations, the Commission proposes to make changes to the standards of conduct intended to make public utilities’⁵⁸ integrated resource planning and procurement more accurate and efficient, particularly in their consideration of electric transmission. The standards of conduct apply to “any public utility that owns, operates or controls facilities used for the transmission of electric energy in interstate commerce,” but do not apply to independent system operators (ISOs) or regional transmission organizations (RTOs).⁵⁹ In conducting integrated resource planning, a public utility evaluates its current and future mix of generation, transmission, demand-side management and other resources to meet future demand while minimizing costs, ensuring reliability, and complying with a state’s environmental requirements. As an example, integrated resource planning may help a public utility or state commission choose to meet load growth through the addition of a new generation resource, a new demand resource, or through new transmission resources. There is a wide variety of methods for conducting integrated resource planning. Some states require public utilities to periodically submit an integrated resource plan. Such

⁵⁸ Under section 201(e) of the Federal Power Act, a public utility is “any person who owns or operates facilities subject to the jurisdiction of the Commission.” 16 U.S.C. 824(e). The standards of conduct apply to a public utility that is a transmission provider, which is defined as “any public utility that owns, operates or controls facilities used for the transmission of electric energy in interstate commerce” in addition to certain interstate natural gas pipelines. 18 CFR 358.3(a).

⁵⁹ 18 CFR 358.1(b).

submissions are typically subject to some review and comment by the public and review and approval by the applicable state commission.

34. The Commission believes that improved coordination between transmission planning, generation planning and demand response programs, which are the main elements of integrated resource planning, is necessary to improve the economics and reliability of the transmission grid. In the next several years, reliability concerns are expected to grow as transmission investment has lagged behind load growth.⁶⁰ As recently stated by North American Electric Reliability Council (NERC), “[b]ulk power system reliability and adequacy depends on close coordination of generation and transmission planning and demand response programs.”⁶¹ The Commission also understands that some states are requiring greater consideration of transmission in public utilities’ integrated resource planning. In consideration of these developments, the Commission seeks to ensure that the evaluation of transmission in public utilities’

⁶⁰ After an extensive assessment, the NERC recently concluded that “[e]xpansion and strengthening of the transmission system continues to lag demand growth and expansion of generating resources in most areas.” NERC, 2006 LONG-TERM RELIABILITY ASSESSMENT, at p. 7 (Oct. 16, 2006). See also Promoting Transmission Investment through Pricing Reform, Order No. 679, 71 FR 43293 (July 31, 2006), FERC Stats. & Regs. ¶ 31,222, at P 10 (July 20, 2006) (citations omitted) (observing that transmission investment has declined while load has doubled), order on reh’g, Order No. 679-A, 117 FERC ¶ 61,327 (Dec. 22, 2006).

⁶¹ NERC, 2006 LONG-TERM RELIABILITY ASSESSMENT, at p. 8; see also id. at p. 13 (“In the long term, reliable transmission will depend upon the close coordination of generation and transmission planning and construction and the adoption of longer term planning horizons....”).

planning and procurement is as accurate and efficient as possible. The Commission proposes to create a category of employees under the standards of conduct, “planning employees,” who are permitted to engage in all aspects of “integrated resource planning” for bundled retail load, to receive non-public transmission information, and to interact with transmission function employees, provided that the integrated resource planning is conducted pursuant to state mandate.

35. The Commission also understands that transmission concerns are becoming a greater factor in resource procurement. A public utility’s integrated resource plan often serves as the road map for the public utility’s resource procurement. For instance, a public utility may present an integrated resource plan that specifically calls for long-term procurement of a certain type of energy resource through a competitive solicitation. Such competitive solicitations may also be subject to state review and, if they result in the award of long-term contract to an affiliate, review by the Commission.⁶² The Commission understands the importance of ensuring that the evaluation of transmission in procurement is as accurate and efficient as possible. The Commission also proposes to create a category of employees under the standards of conduct, “competitive solicitation employees,” who are permitted to conduct competitive solicitations intended to serve bundled retail load, and to receive non-public transmission information and to interact

⁶² See, e.g., Southern California Edison on behalf of Mountainview Power Co., LLC, 106 FERC ¶ 61,183, at P 58 (2004) (setting forth criteria for section 205 review of affiliate sales for contracts of one-year or longer), order on reh’g, 109 FERC ¶ 61,086, order on reh’g, 110 FERC ¶ 61,319 (2005).

with transmission function employees in order to evaluate proposals submitted in a competitive solicitation.

36. These Commission proposals to relax the standards of conduct to facilitate integrated resource planning and competitive solicitations are consistent with the treatment of bundled retail load in the standards of conduct as outlined in Order No. 2004. The standards of conduct exempt from the definition of marketing affiliate employees, those employees involved “solely in bundled retail sales.”⁶³ As such, bundled retail sales employees are not subject to the standards of conduct in most respects. In an extension of this policy, the Commission’s proposals are restricted to integrated resource planning for, and competitive solicitations to procure supply to serve, bundled retail load.

37. In proposing to facilitate integrated resource planning and competitive solicitations through changes to the standards of conduct, the Commission is mindful of the goal of the standards of conduct to prevent undue preferences, specifically by preventing transmission providers from providing unduly preferential treatment to their marketing and energy affiliates. Thus, the Commission will place restrictions on both planning employees and competitive solicitation employees in order to prevent those employees from providing an undue preference to the transmission provider’s marketing and energy affiliates. The Commission seeks to strike a balance between the goal of

⁶³ 18 CFR 358.3(e)(2).

diminishing opportunities for undue preferences with the goal of improving the efficiency and accuracy of integrated resource planning and competitive solicitations. Along these lines, as discussed below, the Commission seeks comment on whether or not the proposal to limit the new categories of planning employees and competitive solicitation employees to perform their functions only for bundled retail load is necessary to prevent undue discrimination.

1. Integrated Resource Planning – Planning Employees

38. In its outreach regarding integrated resource planning, staff heard a common refrain from public utilities, that the standards of conduct restrict their ability to conduct integrated resource planning because they restrict access to non-public transmission information and restrict transmission function employees from interacting with employees conducting integrated resource planning. Similarly, in its comments on the Open Access Transmission Tariff (OATT) Reform NOPR,⁶⁴ the National Association of Regulatory Utility Commissioners called for “allow[ing] communications between resource and transmission planners for the purpose of developing long-term resource

⁶⁴ Preventing Undue Discrimination and Preference in Transmission Service, Docket No. RM05-25-000, 71 FR 32635 (June 6, 2006), 71 FR 39251 (July 12, 2006), FERC Stats. & Regs. ¶ 32,603 (May 19, 2006) (OATT Reform NOPR).

planning documents to satisfy State-commission integrated resource planning requirements.”⁶⁵

39. The information sharing prohibitions of the standards of conduct affect the type of transmission information that planners use to conduct integrated resource planning. Public utilities relying on marketing or energy affiliate employees to perform their integrated resource planning are prohibited from obtaining non-public transmission information from the transmission provider and, instead, use publicly-available information. In staff’s outreach sessions, some public utilities raised concerns, for example, that this prohibition precludes long-term planners from obtaining information about generation projects in the interconnection queue, or from obtaining information regarding planned retirements of generation. With incomplete transmission information, public utilities contended, transmission analysis for integrated resource planning is incomplete. As a result, they added, the IRP process is less efficient and more costly, and the resulting integrated resource plan is inferior. Public utilities contended, in effect, that the information sharing prohibitions of the standards of conduct create a gap between the transmission information needed to conduct integrated resource planning and the transmission information available to their employees who conduct integrated resource planning.

⁶⁵ Comments of National Association of Regulatory Utility Commissioners, Preventing Undue Discrimination and Preference in Transmission Service, Docket No. RM05-25-000, at p. 12 (filed Aug. 8, 2006).

40. Public utilities also asserted that the independent functioning requirement of the standards of conduct hinders integrated resource planning because the requirement prohibits planners from working with transmission function employees and taking advantage of their understanding of the transmission system.

41. The Commission seeks comment on whether and how the standards of conduct preclude those who conduct integrated resource planning from obtaining needed transmission information. Commenters should explain what types of information, if any, cannot reach such planners under the current standards of conduct and how such information assists in creating an accurate integrated resource plan. The Commission also seeks comment on whether planning employees would also need access to non-public customer information in addition to non-public transmission information.

42. The Commission proposes to create a new category of employees called “planning employees” who would be permitted to direct, organize, and carry out all aspects of integrated resource planning including aspects related to transmission and generation planning. For the purpose of conducting integrated resource planning, planning employees would be permitted to receive non-public transmission information (but not non-public customer information) from the transmission provider and to interact with transmission function employees.⁶⁶ In order to allow planning employees to interact

⁶⁶ To the extent that transmission function employees disclose non-public transmission information that is not related to integrated resource planning, the transmission provider must observe the posting requirements of 18 CFR 358.5(b)(2).

with transmission function employees, planning employees would be exempt from the independent functioning requirement. The Commission seeks comment on the creation of this category, including the potential benefit and harm to the market.

43. To ensure that an undue preference is not given to marketing or energy affiliates, the Commission also proposes several restrictions and limitations. As part of this proposal, the Commission would add a definition for the term “integrated resource planning” to the standards of conduct, which would serve to describe and delineate the types of resource planning activities in which planning employees could participate. The definition is intended to include all integrated resource planning to serve bundled retail load conducted by public utilities that is mandated by the states. The Commission does not intend to exclude from this definition any state’s mandated integrated resource planning to serve bundled retail load.⁶⁷

44. We understand that some public utilities conduct integrated resource planning that is not subject to state review. Under the proposed regulations, if a public utility conducts integrated resource planning that is not required by state mandate, it could not take advantage of the planning employees category. The Commission also seeks comment on this limitation. For example, are there states that do not have an explicit integrated resource planning mandate, but that, nonetheless, review and approve integrated resource plans prepared and submitted by the public utilities?

⁶⁷ The Commission also understands that some states refer to integrated resource planning by different terms.

45. The Commission also proposes to limit the definition of “integrated resource planning” to planning that is designed to meet “future bundled retail load obligations.” This limitation cabins the work of planning employees to work on bundled retail load obligations and, thereby, precludes them from working on a public utility’s other load obligations, such as wholesale load obligations arising from contract. By this limitation, the Commission seeks to ensure that the benefits of this proposal accrue to a public utility in service of its retail customers and not to benefit a utility in competition with other wholesale market participants. We seek comments on whether or not this limitation is necessary to prevent undue discrimination.

46. To further restrict opportunities for planning employees to provide undue preferences to the transmission provider’s marketing or energy affiliates, planning employees would be subject to the “no-conduit rule;” that is, they could not relay any non-public transmission information received to any marketing or energy affiliate. Planning employees also would be restricted from participating in the sales or purchases of energy, capacity, ancillary services or transmission services to ensure that they did not use their access to transmission information and to transmission function employees to benefit the public utility or its affiliates in transactions with other market participants. In other words, if the integrated resource planning involves bundled retail load and is the result of a state mandate, the planning and the employees conducting it are not subject to all of the usual restrictions of the standards of conduct, although they would be subject to other restrictions outlined here.

47. The Commission seeks comment on whether planning employees should be restricted to planning for bundled retail load or whether they should also be permitted to plan for Provider of Last Resort (POLR) load, grandfathered wholesale requirements contracts, and wholesale full requirements load. Commenters addressing this issue should indicate the type of load for which they conduct integrated resource planning or for which their state requires integrated resource planning, e.g., only for bundled retail load, or for bundled retail load, POLR load, and wholesale requirements load.⁶⁸ We note that for purposes of Order No. 888 and the Commission's enforcement practices, we have treated pre-1996, grandfathered wholesale requirements contracts similar to how we have treated bundled retail load.⁶⁹ We seek comments on whether or not the Commission should continue this practice for integrated resource planning. Commenters should also address whether the Commission could sufficiently facilitate integrated resource planning by limiting the definition of integrated resource planning in the regulations to planning

⁶⁸ Here, the Commission delineates integrated resource planning by type of load or contract. Staff research indicates that some state regulations do not delineate the scope of their integrated resource planning requirement in the same way. For instance, some states require that a utility conduct integrated resource planning for its "customers" without any delineation between wholesale or retail customers. Other states require planning for "wholesale customers" without delineation between wholesale requirements customers and other wholesale customers. To assist in clarification of this issue, commenters should delineate precisely the scope of a state's planning requirements

⁶⁹ Cf. 18 CFR 35.28(c)(2)(i) and (ii).

only for bundled retail load. Commenters should address whether it is more cost-effective and efficient to permit planning employees to conduct integrated resource planning for obligations other than bundled retail sales and what, if any, protections should be put in place to guard against undue preferences to marketing and energy affiliates. Does limiting planning employees to bundled retail sales load unnecessarily divide a utility's integrated resource planning?

48. Under this proposal, public utility transmission providers that no longer have bundled retail load obligations but have POLR obligations because they operate in states that have retail access or retail choice would not be permitted to share non-public transmission information to conduct integrated resource planning.⁷⁰ In Order No. 2004-A, the Commission rejected a generic request to treat POLR service obligations under state law as equivalent to a transmission provider's bundled retail sales obligations, which would have exempted POLR service from the definition of marketing affiliate.⁷¹ The Commission also indicated that it would entertain case-by-case requests for exemption of POLR service. In several instances, the Commission has granted requests by transmission providers that, under specific conditions, the POLR service should be

⁷⁰ The standards of conduct apply to merchant functions that are engaged in sales or purchases of power that will be resold at retail under state retail choice programs. Order No. 2004 at P 78.

⁷¹ See Order No. 2004-A at P 127.

accorded the same treatment as bundled retail sales.⁷² The Commission seeks comment on whether utilities with POLR service obligations also should be allowed to take advantage of the planning employees category, or whether expanding the category to include POLR service obligations might harm competition or give marketing or energy affiliates an undue preference.

49. Finally, we are concerned that planning employees not be used in a manner that unduly discriminates against non-affiliated wholesale suppliers. Specifically, in permitting planning employees access to non-public transmission information and to transmission function employees, we are concerned that such access could be used to favor utility-owned generation over purchases from non-affiliates. For example, in the IRP process, planning employees could use non-public transmission information to evaluate only self-build options and ignore any consideration of purchases from third parties. Such an action would be inconsistent with the underlying purpose of the proposal, which is to increase the economic use of the grid by allowing planning employees to integrate the consideration of economic alternatives.

50. To address this concern, the Commission proposes to limit the definition of integrated resource planning to instances in which the IRP process includes evaluation of third-party resources. The proposed limit is designed to balance the goal of facilitating least-cost resource procurement with the concern that the planning employees category

⁷² See, e.g., Cinergy Services, Inc., 111 FERC ¶ 61,512 (2005).

not be used to discriminate against non-affiliates. We wish to clarify, however, that such a limitation does not mean the Commission intends to supervise or otherwise prescribe the manner in which states consider third-party resources as part of their IRP processes or that the Commission intends a final integrated resource plan to necessarily include third-party resources. The states are in the best position to make those decisions as they are responsible for resource procurement for bundled retail load. Therefore, the Commission will not second-guess the manner in which states evaluate third-party resources; we only require that such resources be considered if a public utility seeks to use the planning employees category.⁷³

51. We seek comment on the foregoing restrictions placed on planning employees' activities. In their comments, commenters should address the balance the Commission is trying to achieve between providing planning employees with sufficient access to transmission information and to transmission function employees to conduct accurate and efficient integrated resource planning while at the same time ensuring that such access does not enlarge opportunities for planning employees to provide undue preferences to the transmission provider's marketing or energy affiliates. Thus, commenters who believe that the restrictions go too far should explain why, and, also, explain why the restrictions are unnecessary to prevent granting an undue preference. Likewise,

⁷³ This approach is consistent with the category being created below for competitive solicitations. We would permit competitive solicitation employees to have access to non-public transmission information and transmission function employees because, in those situations, the utility has allowed participation by third-party suppliers.

commenters who believe that the restrictions do not go far enough to prevent the granting of undue preferences should explain why and articulate how further restrictions can be fashioned while still providing planning employees with sufficient access to transmission information and to transmission function employees. Finally, commenters supporting the restrictions should explain the basis for their support. We urge commenters to be as specific as possible in their comments.

2. Competitive Solicitation Employees

52. In staff's outreach sessions, some public utilities also asserted that the standards of conduct hinder their ability to conduct efficient competitive solicitations, which are often conducted pursuant to an integrated resource plan. Some public utilities contended that the standards of conduct hinder their ability to evaluate the transmission impacts and costs of proposals responsive to competitive solicitations.

53. In raising this concern, some public utilities focused on the independent functioning requirement of the standards of conduct, because this requirement prohibits transmission function employees from working with bid evaluators to determine the transmission costs of bids responsive to a competitive solicitation. To make the evaluation of transmission costs more accurate, public utilities that conduct competitive solicitations seek to allow greater interaction between transmission function employees and those employees who conduct competitive solicitations. In staff's outreach, some public utilities contended that greater interaction would allow employees conducting competitive solicitations to engage in an iterative method for determining the "all-in"

costs of a bid or combination of bids, i.e., the “net effect of a portfolio.” For instance, two 100-MW projects evaluated together may cost less in transmission upgrades than the same two projects would cost if calculated separately because one may alleviate a constraint caused by the other. Through an iterative method, bid evaluators could, for example, submit a portfolio of bid options to transmission function employees, receive feedback on transmission costs related to the portfolio, refine the portfolio, and re-submit it to transmission function employees for further evaluation, and, if necessary, repeat these steps until a complete evaluation is achieved. In sum, some public utilities contended that, currently, they are unable to obtain an accurate picture of the true transmission costs of a bid and may not select the least-cost proposal.

54. The Commission proposes to add a new category of “competitive solicitation employees,” who would be permitted to direct, organize and execute certain “competitive solicitations.” Under this proposal, competitive solicitation employees could obtain non-public transmission information (but not non-public customer information) from the transmission provider to the extent necessary to evaluate bids or proposals responsive to a competitive solicitation.⁷⁴ The Commission does not believe that competitive solicitation employees have a need for non-public customer information. To the same extent, competitive solicitation employees could interact with transmission function employees.

⁷⁴ To the extent that transmission function employees disclose transmission information that is not related to competitive solicitations, the transmission provider must observe the posting requirements of 18 CFR 358.5(b)(3).

In order to allow competitive solicitation employees to interact with transmission function employees, competitive solicitation employees would be exempt from the independent functioning requirement.

55. To ensure that an undue preference is not given to marketing or energy affiliates, the Commission proposes several restrictions and limitations.⁷⁵ The term “competitive solicitations” would be defined as a solicitation by a public utility to obtain energy, capacity, or ancillary services to serve bundled retail load pursuant to an integrated resource plan. The definition would be limited to competitive solicitations that: (1) are for the purposes of meeting bundled retail load and (2) are made pursuant to a state-mandated integrated resource plan. The Commission intends the first limitation to ensure that competitive solicitation employees are acting for the benefit of bundled retail load customers and not obtaining energy, capacity, or ancillary services for the purpose of meeting a public utility’s other obligations. The Commission intends the second limitation to ensure that the public utility does not use competitive solicitation employees for any attempt to obtain energy, capacity or ancillary services. Thus, this limitation ensures that competitive solicitation employees are used only for relatively major procurements by virtue of their having been conducted as part of integrated resource planning. This limitation on competitive solicitations would also ensure state

⁷⁵ If a utility’s competitive solicitation results in the award of a contract to its affiliate, the Commission will review the resulting contract under the guidelines set forth in Allegheny Energy Supply Company, LLC, 108 FERC ¶ 61,082, at P 22 (2004).

involvement as integrated resource planning is defined as planning undertaken pursuant to state mandate.

56. The Commission seeks comment on the type of load and contracts that would fall within the definition of a competitive solicitation and, thereby, be eligible to be supplied through a competitive solicitation that benefits from non-public transmission information and access to transmission function employees and what, if any, other protections should be put in place to guard against undue preferences to marketing and energy affiliates. As noted above, for purposes of Order No. 888 and the Commission's enforcement practices, we have treated pre-1996, grandfathered wholesale requirements contracts similar to how we have treated bundled retail load. We seek comments on whether or not the Commission should continue this practice for competitive solicitations. Should load arising from POLR obligations or from wholesale requirements contracts, full or partial, be supplied through such a competitive solicitation? The Commission recognizes that supply obtained for bundled retail sales sometimes is used to make wholesale sales, for instance, when bundled retail load decreases. Does this make restricting competitive solicitations to bundled retail sales unworkable?

57. In order to protect against the potential for undue preferences, the Commission proposes further restrictions on competitive solicitation employees' activities similar to the restrictions on planning employees. Competitive solicitation employees would be subject to the "no-conduit rule," that is, they could not relay any non-public transmission

information received to any marketing or energy affiliate.⁷⁶ Competitive solicitation employees also would be restricted from participating in the sales or purchases of energy, capacity, ancillary services or transmission services, other than in competitive solicitations, to ensure that they do not use their access to non-public transmission information and to transmission function employees to benefit the public utility or its affiliates in transactions with other market participants. Competitive solicitation employees could not direct, organize, or participate in the development of a bid, or proposal submitted in a competitive solicitation or a benchmark used in a competitive solicitation. Further, analogous to the no-conduit rule, competitive solicitation employees could not provide any non-public bid or competitive solicitation information to marketing or energy affiliates. In other words, if the competitive solicitation involves bundled retail load and is the result of a state-mandated integrated resource plan, the competitive solicitation and the employees conducting it are not subject to all of the usual restrictions of the standards of conduct, although they would be subject to other restrictions outlined here.

58. The Commission seeks comment on its competitive solicitation employees proposal and the restrictions that should apply to their activities, including the potential benefit and harm to the market, specifically, whether competitive solicitation employees would need access to non-public customer information in addition to non-public

⁷⁶ Proposed 18 CFR 358.5(b)(9).

transmission information. The Commission would permit planning employees to serve as competitive solicitation employees and vice-versa. The Commission seeks comment on whether employees should be permitted to serve in both capacities. Because competitive solicitation employees would have access to non-public transmission information and to transmission function employees only for the purpose of conducting a competitive solicitation, the Commission expects that competitive solicitation employees would not need this access until after responses to a competitive solicitation are received. The Commission seeks comment on this restriction.

59. This proposed category of competitive solicitation employees may increase the opportunities to provide an undue preference that is not sufficiently offset by the proposed restrictions on the activities of competitive solicitation employees. Concerns about undue preferences are greater in the competitive solicitation process than in the IRP process, because an undue preference provided in a competitive solicitation can lead to a more concrete, nearer-term benefit, e.g., a contract, than a similar preference granted in the IRP process, which has a longer term focus and typically results in non-binding recommendations. Further, competitive solicitation employees may be evaluating third-party proposals in competition with proposals by affiliates or proposals by the public utility to build itself the resources required. Thus, it is important to ensure that competitive solicitation employees do not provide an undue preference, particularly through the use of non-public transmission information or access to transmission function employees, throughout the competitive solicitation process from design through contract

award.⁷⁷ Accordingly, the Commission seeks comments on whether its proposal strikes an appropriate balance between allowing access to transmission information and to transmission function employees while at the same time including appropriate restrictions to prevent undue preferences.

60. The Commission seeks comment on whether, instead of having separate categories for planning employees and for competitive solicitation employees, it should establish one category to include both sets of employees. States and utilities treat integrated resource planning and competitive solicitations differently in some respects; in other respects, the two are treated together. Commenters should explain whether they would use the same personnel for each category. Commenters should also address whether keeping the categories separate assists in preventing undue discrimination. Commenters advocating a single category for both planning and competitive solicitation employees should describe the permissible activities for such employees and set forth the restrictions that would apply to their activities.

3. Specific Proposals

61. In light of the discussion above, the Commission proposes the following regulatory changes. We propose the following revision to the definition of Transmission Function employee in § 358.3(j):

⁷⁷ This concern about undue preference is lessened in states that require an independent evaluator to play a role in a public utility's competitive solicitation.

(j) Transmission Function employee means an employee, contractor, consultant or agent of a Transmission Provider, other than a Planning Employee as defined in § 358.3(o), who conducts transmission system operations or reliability functions, including, but not limited to, those who are engaged in day-to-day duties and responsibilities for planning, directing, organizing or carrying out transmission-related operations.

We propose the following additions to the definitions in § 358.3:

(l) Integrated Resource Planning means a process to establish a plan, required by state law, regulation or other state mandate, for a public utility to meet its future bundled retail load obligations that evaluates a range of alternatives that includes consideration of third party resources.

(m) Competitive Solicitation means a solicitation by a public utility to obtain energy, capacity, or ancillary services for the purposes of meeting the public utility's bundled retail load obligations pursuant to an Integrated Resource Planning obligation.

(n) Competitive Solicitation Employee means an employee, contractor, consultant or agent of a public utility who directs, organizes, or executes the public utility's Competitive Solicitations.

(o) Planning Employee means an employee, contractor, consultant or agent of a public utility who directs, organizes or conducts the public utility's Integrated Resource Planning.

We propose the following additions to the Independent Functioning section, § 358.4:

(a) (7) A Transmission Function employee may interact with a Planning Employee for the purpose of engaging in Integrated Resource Planning. A Planning Employee, who receives non-public transmission information pursuant to § 358.5(b)(8) or who interacts with a Transmission Function employee, must not:

(i) Participate in sales of energy, capacity or ancillary services or in sales of transmission services, including directing, organizing, or otherwise preparing a bid, benchmark, or proposal by the public utility or by the public utility's Marketing or Energy Affiliates to supply energy, capacity or ancillary services;

(ii) Participate in purchases of energy, capacity or ancillary services or of purchases of transmission services other than in a Competitive Solicitation on behalf of its public utility Transmission Provider; or

(iii) Participate in non-planning transmission functions.

(a) (8) A Transmission Function employee may interact with a Competitive Solicitation Employee for the purpose of evaluating the transmission component of bids or proposals considered in a Competitive Solicitation. A Competitive Solicitation Employee, who receives non-public transmission information pursuant to § 358.5(b)(9) or who interacts with a Transmission Function employee, must not:

(i) Provide any non-public bid, proposal, or Competitive Solicitation information to the Marketing or Energy Affiliate employees;

(ii) Participate in sales of energy, capacity, ancillary services or in sales of transmission services, including directing, organizing, or otherwise preparing a bid, benchmark, or proposal by the public utility or by the public utility's Marketing or Energy Affiliates to supply energy, capacity or ancillary services; or

(iii) Participate in any purchases of energy, capacity or ancillary services or of transmission services other than a Competitive Solicitation on behalf of its public utility Transmission Provider.

We propose the following additions to the Non-Discrimination Requirements section in § 358.5(b):

(8) A Transmission Provider may share transmission information covered by §§ 358.5(a) and (b)(1) with Planning Employees to the extent those employees need that information to direct, organize or carry out Integrated Resource Planning, provided that such employees do not act as a conduit to share such information with any Marketing or Energy Affiliates.

(9) A Transmission Provider may share transmission information covered by §§ 358.5(a) and (b)(1) with Competitive Solicitation Employees to the extent those employees need that information to direct, organize, or execute Competitive Solicitations, provided that such employees do not act as a conduit to share such information with any Marketing or Energy Affiliates.

I. Changes to the Definition of Exempt Wholesale Generator

62. Currently, the standards of conduct define affiliate for an exempt wholesale generator (EWG) by referring to section 32a of Public Utility Holding Company Act of 1935 (PUHCA) and section 214 of the Federal Power Act (which in turn references,

section 2(a) of PUHCA).⁷⁸ With respect to the standards of conduct, a determination of affiliation for EWGs is based on whether one company controls five percent or more of its stock.⁷⁹ The Commission proposes changes to the definition of affiliate with respect to EWGs in light of the repeal of the PUHCA. Specifically, the Commission proposes to make conforming changes to the definition of EWG to delete the reference to PUHCA and direct the reader to 18 CFR 366.1, which contains a definition of EWG and a definition of affiliate that applies to an EWG.⁸⁰

63. Accordingly, the Commission proposes that § 358.3(b)(2) will read as follows:

For any exempt wholesale generator (as defined under § 366.1 of this chapter), an affiliate means the same as the definition of “affiliate” provided in § 366.1 of this chapter.

J. Revisions to Written Procedures

64. The Commission proposes several changes to the written procedures required of a transmission provider to delete outdated references, to clarify training certification, and to post the name of a transmission provider’s chief compliance officer.

⁷⁸ 18 CFR 358.3(b)(2).

⁷⁹ For non-EWG affiliates, a voting interest of 10 percent or more creates a rebuttable presumption of control or affiliation. 18 CFR 358.3(c).

⁸⁰ 18 CFR 366.1 implements the Public Utility Holding Company Act of 2005. (PUHCA 2005). The Energy Policy Act of 2005 (EPAAct 2005), Pub. L. No. 109-58, 119 Stat. 594 (2005), repealed PUHCA, 15 U.S.C. 79a et seq. (2000), and enacted the Public Utility Holding Company Act of 2005 (PUHCA 2005), EPAAct 2005 at 1261 et seq.

65. With emphasis added, § 358.4(e)(1) of the Commission's regulations reads:

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

With emphasis added, § 358.4(e)(3) of the Commission's regulations reads:

The Transmission Provider must post on the OASIS or Internet website, current written procedures implementing the standards of conduct in such detail as will enable customers and the Commission to determine that the Transmission Provider is in compliance with the requirements of this section by September 22, 2004 or within 30 days of becoming subject to the requirements of part 358.

The Commission proposes to delete § 358.4(e)(1) because the date for submitting a plan and schedule for implementing the standards of conduct has passed and the Commission does not need a new plan and schedule with respect to § 358.4(e)(3). The Commission proposes deleting "by September 22, 2004 or" because that date has passed and we are proposing to require in § 358.4(e)(3) that a transmission provider must comply with the standards of conduct within 30 days of becoming subject to the requirements of part 358.

66. Section 358(e)(5) of the Commission's regulations require training on the standards of conduct for certain employees of the transmission provider. Those employees are required to "sign a document or certify electronically that s/he has participated in the training." In order to ensure that such employees not only participate in, but, also, complete such training, the Commission proposes replacing the words "participated in" with the word "completed" so that the applicable sentence would read:

“The Transmission Provider must require each employee to sign a document or certify electronically signifying that s/he has completed the training.”⁸¹

67. Section 358.4(e)(6) requires transmission providers to designate a chief compliance officer who will be responsible for standards of conduct compliance. Recently, Commission staff has tried to identify the name of the chief compliance officers of several transmission providers, and noticed that some transmission providers do not publicly identify the name of the chief compliance officer. Therefore, the Commission proposes to add the following sentence to § 358.4(e)(6) as follows: “Transmission Providers must post the name of the Chief Compliance Officer and provide contact information on the OASIS or Internet Web site, as applicable.”

III. Information Collection Statement

68. The Office of Management and Budget (OMB) regulations require approval of certain information collection requirements imposed by agency rules.⁸² In this NOPR, the Commission proposes to reinstate the provisions remanded by the court in National Fuel.

69. Previously, the Commission submitted to OMB the information collection requirements arising from the standards of conduct adopted in Order No. 2004. OMB

⁸¹ Proposed 18 CFR 358.3(e)(5).

⁸² 5 CFR 1320.11.

approved those requirements.⁸³ The revisions to the standards of conduct proposed in this issuance do not impose any additional information collection burden on industry participants. In fact, by proposing that the standards of conduct will no longer govern the relationship between transmission providers and their energy affiliates, the information collection burden will likely decrease.

70. The Commission is submitting notification of the information collection requirements imposed in the NOPR to OMB for its review and approval under section 3507(d) of the Paperwork Reduction Act of 1995.⁸⁴ 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.

71. 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

⁸³ 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).

⁸⁴ 44 U.S.C. 3507(d).

OMB Control No: 1902- 0157 and 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 because of changes in transmission provider practices and in the energy market. The Commission proposes to revise the standards of conduct to be consistent with the recent court decisions and to make certain transmission provider practices more efficient and less costly.

72. These requirements conform to the Commission's plan for efficient information collection, communication, and management within 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.

73. Interested persons may obtain information on the reporting requirements by contacting: Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, [Attention: Michael Miller, Office of the Chief Information Officer], phone: (202) 502-8415, fax: (202) 208-2425, e-mail: Michael.miller@ferc.gov. Comments on the requirements of the proposed rule also may be sent to the Office of Information and

Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503

[Attention: Desk Officer for the Federal Energy Regulatory Commission].

IV. Environmental Analysis

74. 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.⁸⁵ The Commission has categorically excluded certain actions from these requirements as not having a significant effect on the human environment.⁸⁶ The action proposed here falls within the categorical exclusions provided in the Commission's regulations because this rule is clarifying and corrective and does not substantially change the effect of the regulations being amended.⁸⁷ Therefore, an environmental assessment is unnecessary and has not been prepared in this rulemaking.

V. Regulatory Flexibility Act

75. The Regulatory Flexibility Act of 1980 (RFA)⁸⁸ 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

⁸⁵ Regulations Implementing the National Environmental Policy Act, Order No. 486, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs. Preambles 1986-1990 ¶ 30,783 (1987).

⁸⁶ 18 CFR 380.4.

⁸⁷ 18 CFR 380.4(a)(2)(ii) and 380.4(a)(5).

⁸⁸ 5 U.S.C. 601-612.

definition of “small entity,”⁸⁹ the Commission certifies that this rule will not have a significant economic impact on a substantial number of small entities.

VI. Comment Procedures

76. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments must be filed on or before [insert date that is 45 days after date of publication in the **FEDERAL REGISTER**].

Reply comments must be filed on or before [insert date that is 65 days after date of publication in the **FEDERAL REGISTER**]. Comments and reply comments must refer to Docket No. RM07-1-000, and must include the commenter’s name, the organization he or she represents, if applicable, and his or her address.

77. Comments may be filed electronically via the eFiling link on the Commission’s website at <http://www.ferc.gov>. The Commission accepts most standard word processing formats, and commenters may attach additional files with supporting information in certain other file formats. Commenters filing electronically do not need to make a paper filing.

78. Commenters who are not able to file comments electronically must send an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street, N.E., Washington, D.C. 20426.

⁸⁹ See 5 U.S.C. 601(3).

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

VII. Document Availability

80. In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (<http://www.ferc.gov>) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, N.E., Room 2A, Washington D.C. 20426.

81. 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.

82. User assistance is available for eLibrary and the FERC's website during normal business hours from our Help line at (202)502-8222 or the Public Reference Room at (202) 502-8371 Press 0, TTY (202)502-8659. E-Mail the Public Reference Room at public.referenceroom@ferc.gov.

List of subjects in 18 CFR Part 358:

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

By direction of the Commission.

Magalie R. Salas,
Secretary.

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

Part 358 -- STANDARDS OF CONDUCT

Sec.

358.1 Applicability.

358.2 General principles.

358.3 Definitions.

358.4 Independent functioning.

358.5 Non-discrimination requirements.

Authority: 15 USC 717-717w, 3301-3432; 16 USC 791-825r, 2601-2645; 31 USC 9701; 42 USC 7101-7352.

§ 358.1 Applicability.

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

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

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

no access to transmission, customer or market information covered by § 358.5(b), it may request an exemption from this part.

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

(e) The Standards of Conduct in this part do not govern the relationship between a natural gas Transmission Provider as defined in § 358.3(a)(2) and its Energy Affiliates.

§ 358.2 General principles.

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

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

§ 358.3 Definitions.

(a) Transmission Provider means:

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

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

(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.

(b) Affiliate means:

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

(2) For any exempt wholesale generator (as defined under § 366.1 of this chapter), an affiliate means the same as the definition of “affiliate” provided in § 366.1 of this chapter.

(c) Control (including the terms "controlling," "controlled by," and "under common control with") as used in this part and § 250.16 of this chapter, includes, but is not limited to, the possession, directly or indirectly and whether acting alone or in conjunction with others, of the authority to direct or cause the direction of the management or policies of a company. A voting interest of 10 percent or more creates a rebuttable presumption of control.

(d) Energy Affiliate means an affiliate of a Transmission Provider that:

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

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

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

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

(5) An LDC division of an electric public utility Transmission Provider shall be considered the functional equivalent of an Energy Affiliate, unless it qualifies for the exemption in § 358.3(d)(6)(v).

(6) An Energy Affiliate does not include:

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

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

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

(iv) An affiliate that purchases natural gas or energy solely for its own consumption. “Solely for its own consumption” does not include the purchase of natural gas or energy for the subsequent generation of electricity.

(v) A State-regulated local distribution company that acquires interstate transmission capacity to purchase and resell gas only for on-system sales, and otherwise does not engage in the activities described in § 358.3(d)(1), (2), (3) or (4), except to the

limited extent necessary to support on-system sales and to engage in de minimis sales necessary to remain in balance under applicable pipeline tariff requirements.

(vi) A processor, gatherer, Hinshaw pipeline or an intrastate pipeline that makes incidental purchases or sales of de minimis volumes of natural gas to remain in balance under applicable pipeline tariff requirements and otherwise does not engage in the activities described in §§ 358.3(d)(1), (2), (3) or (4).

(e) Marketing, sales or brokering means a sale for resale of natural gas or electric energy in interstate commerce in U.S. energy or transmission markets. Marketing also includes managing or controlling transmission capacity of a third-party as an asset manager or agent.

(1) A sales and marketing employee or unit includes:

(i) An interstate natural gas pipeline's sales operating unit, to the extent provided in § 284.286 of this chapter, and

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

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

(3) Marketing means a sale of natural gas to any person or entity by a seller that is not an interstate pipeline, except where:

(i) The seller is selling gas solely from its own production;

(ii) The seller is selling gas solely from its own gathering or processing facilities;

or

(iii) The seller is an intrastate natural gas pipeline or a local distribution company making an on-system sale.

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

(g) Transmission Customer means any eligible customer, shipper or designated agent that can or does execute a transmission service agreement or can or does receive transmission service, including all persons who have pending requests for transmission service or for information regarding transmission.

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

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

(j) Transmission Function employee means an employee, contractor, consultant or agent of a Transmission Provider, other than a Planning Employee as defined in § 358.3(o), who conducts transmission system operations or reliability functions, including, but not limited to, those who are engaged in day-to-day duties and responsibilities for planning, directing, organizing or carrying out transmission-related operations.

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

(l) Integrated Resource Planning means a process to establish a plan, required by state law, regulation or other state mandate, for a public utility to meet its future bundled retail load obligations that evaluates a range of alternatives that includes consideration of third party resources.

(m) Competitive Solicitation means a solicitation by a public utility to obtain energy, capacity, or ancillary services for the purposes of meeting the public utility's bundled retail load obligations pursuant to an Integrated Resource Planning obligation.

(n) Competitive Solicitation Employee means an employee, contractor, consultant or agent of a public utility who directs, organizes, or executes the public utility's Competitive Solicitations.

(o) Planning Employee means an employee, contractor, consultant or agent of a public utility who directs, organizes or conducts the public utility's Integrated Resource Planning.

§ 358.4 Independent functioning.

(a) Separation of functions.

(1) Except in emergency circumstances affecting system reliability, the transmission function employees of the Transmission Provider must function independently of the Transmission Provider's Marketing or Energy Affiliates' employees.

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

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

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

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

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

(6) Transmission Providers are permitted to share risk management employees that are not engaged in Transmission Functions or sales or commodity functions with their Marketing and Energy Affiliates. This provision does not apply to natural gas transmission providers.

(7) A Transmission Function employee may interact with a Planning Employee for the purpose of engaging in Integrated Resource Planning. A Planning Employee, who receives non-public transmission information pursuant to § 358.5(b)(8) or who interacts with a Transmission Function employee, must not:

- (i) Participate in sales of energy, capacity or ancillary services or in sales of transmission services, including directing, organizing, or otherwise preparing a bid, benchmark, or proposal by the public utility or by the public utility’s

Marketing or Energy Affiliates to supply energy, capacity or ancillary services;

(ii) Participate in purchases of energy, capacity or ancillary services or of purchases of transmission services other than in a Competitive Solicitation on behalf of its public utility Transmission Provider; or

(iii) Participate in non-planning transmission functions.

(8) A Transmission Function employee may interact with a Competitive Solicitation Employee for the purpose of evaluating the transmission component of bids or proposals considered in a Competitive Solicitation. A Competitive Solicitation Employee, who receives non-public transmission information pursuant to § 358.5(b)(9) or who interacts with a Transmission Function employee, must not:

(i) Provide any non-public bid, proposal, or Competitive Solicitation information to the Marketing or Energy Affiliate employees;

(ii) Participate in sales of energy, capacity, ancillary services or in sales of transmission services, including directing, organizing, or otherwise preparing a bid, benchmark, or proposal by the public utility or by the public utility's Marketing or Energy Affiliates to supply energy, capacity or ancillary services; or

(iii) Participate in any purchases of energy, capacity or ancillary services or of transmission services other than a Competitive Solicitation on behalf of its public utility Transmission Provider.

(b) Identifying affiliates on the public Internet.

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

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

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

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

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

(iii) For all employees who are engaged in transmission functions for the Transmission Provider and marketing or sales functions or who are engaged in transmission functions for the Transmission Provider and are employed by any of the Energy Affiliates, the Transmission Provider must post the name of the business unit

within the marketing or sales unit or the Energy Affiliate, the organizational structure in which the employee is located, the employee's name, job title and job description in the marketing or sales unit or Energy Affiliate, and the employee's position within the chain of command of the Marketing or Energy Affiliate.

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

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

(vi) All OASIS or Internet Web site postings required by part 358 must comply, as applicable, with the requirements of § 37.6 or §§ 284.12(a) and (c)(3)(v) of this chapter.

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

date of the transfer. The information posted under this section must remain on the OASIS or Internet Web site, as applicable, for 90 days.

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

(e) Written procedures.

(1) [Reserved.]

(2) Each Transmission Provider must be in full compliance with the standards of conduct within 30 days of becoming subject to the Commission's jurisdiction.

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

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

(5) Transmission Providers shall train officers and directors as well as employees with access to transmission information or information concerning gas or electric purchases, sales or marketing functions. The Transmission Provider must require each

employee to sign a document or certify electronically signifying that s/he has completed the training.

(6) Transmission Providers are required to designate a Chief Compliance Officer who will be responsible for standards of conduct compliance. Transmission Providers must post the name of the Chief Compliance Officer and provide contact information on the OASIS or Internet Web site, as applicable.

§ 358.5 Non-discrimination requirements.

(a) Information access.

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

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

(b) Prohibited disclosure.

(1) An employee of the Transmission Provider may not disclose to its Marketing or Energy Affiliates any information concerning the transmission system of the Transmission Provider or the transmission system of another (including, but not limited to, information received from non-affiliates or information about available transmission capability, price, curtailments, storage, ancillary services, balancing, maintenance activity, capacity expansion plans, or similar information) through non-public communications conducted off the OASIS or Internet Web site, through access to information not posted on the OASIS or Internet Web site that is not contemporaneously available to the public, or through information on the OASIS or Internet Web site that is not at the same time publicly available.

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

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

(4) A non-affiliated transmission customer may voluntarily consent, in writing, to allow the Transmission Provider to share the non-affiliated customer's information with a Marketing or Energy Affiliate. If a non-affiliated customer authorizes the Transmission Provider to share its information with a Marketing or Energy Affiliate, the Transmission Provider must post notice on the OASIS or Internet 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.

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

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

(7) Neither a Transmission Provider nor an employee of a Transmission Provider is permitted to use anyone as a conduit for sharing information covered by the prohibitions of §§ 358.5(b)(1) and (2) with a Marketing or Energy Affiliate. A Transmission Provider may share information covered by §§ 358.5(b)(1) and (2) with employees permitted to be shared under §§ 358.4(a)(4), (5) and (6) provided that such

employees do not act as a conduit to share such information with any Marketing or Energy Affiliates.

(8) A Transmission Provider may share transmission information covered by §§ 358.5(a) and (b)(1) with Planning Employees to the extent those employees need that information to direct, organize or carry out Integrated Resource Planning, provided that such employees do not act as a conduit to share such information with any Marketing or Energy Affiliates.

(9) A Transmission Provider may share transmission information covered by §§ 358.5(a) and (b)(1) with Competitive Solicitation Employees to the extent those employees need that information to direct, organize, or execute Competitive Solicitations, provided that such employees do not act as a conduit to share such information with any Marketing or Energy Affiliates.

(c) Implementing tariffs.

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

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

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

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

(ii) Natural gas Transmission Providers must maintain a written log of waivers that the natural gas Transmission Provider grants with respect to tariff provisions that provider for such discretionary waivers and provide the log to any person requesting it within 24 hours of the request.

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

(d) Discounts.

Any offer of a discount for any transmission service made by the Transmission Provider must be posted on the OASIS or Internet Web site contemporaneous with the time that the offer is contractually binding. The posting must include: the name of the customer involved in the discount and whether it is an affiliate or whether an affiliate is involved in the transaction, the rate offered; the maximum rate; the time period for which

the discount would apply; the quantity of power or gas upon which the discount is based; the delivery points under the transaction; and any conditions or requirements applicable to the discount. The posting must remain on the OASIS or Internet Web site for 60 days from the date of posting.