

147 FERC ¶ 61,228  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;  
Philip D. Moeller, John R. Norris,  
and Tony Clark.

Communication of Operational Information Between      Docket No. RM13-17-001  
Natural Gas Pipelines and Transmission Operators

ORDER NO. 787-A

ORDER ON REHEARING

(Issued June 19, 2014)

1. In this Order on Rehearing, the Commission addresses pending requests to reconsider or clarify the Final Rule issued on November 15, 2013 in Order No. 787.<sup>1</sup> Order No. 787 amended the Commission's regulations to provide explicit authority to interstate natural gas pipelines and public utilities that own, operate, or control facilities used for the transmission of electric energy in interstate commerce to share non-public, operational information with each other for the purpose of promoting reliable service or operational planning on either the public utility's or pipeline's system. We deny rehearing.

**I. Background**

2. On November 15, 2013, the Commission issued Order No. 787, which revised the Commission's regulations to provide explicit authority to interstate natural gas pipelines and public utilities that own, operate, or control facilities used for the transmission of electric energy in interstate commerce to share non-public, operational information with each other for the purpose of promoting reliable service or operational planning on either the public utilities' or pipelines' system.<sup>2</sup> The Commission found that the revised regulations will help maintain the reliability of pipeline and public utility transmission

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<sup>1</sup> *Communication of Operational Information Between Natural Gas Pipelines and Transmission Operators*, Order No. 787, 78 Fed. Reg. 70163 (Nov. 22, 2013), FERC Stats. & Regs. ¶ 31,350 (cross-referenced at 145 FERC ¶ 61,134 (2013)).

<sup>2</sup> See 18 C.F.R. §§ 38.2 and 284.12(b)(4).

service by permitting transmission operators to share information with each other that they deem necessary to promote the reliability and integrity of their systems.<sup>3</sup> As a protection against the disclosure of non-public, operational information not covered by the Commission's Standards of Conduct,<sup>4</sup> Order No. 787 also adopted a No-Conduit Rule that prohibits subsequent disclosure of information received under the rule to a third party or the transmission operator's marketing function employees.

3. On December 16, 2013, requests for rehearing of Order No. 787 concerning two issues were filed. Enable Gas Transmission, LLC and Enable Mississippi River Transmission, LLC (collectively, Enable Pipelines) filed a request for rehearing of Order No. 787 related to the No-Conduit Rule and Natural Gas Supply Association (NGSA), Process Gas Consumers Group (PGC) and Northwest Industrial Gas Users (NWIGU) (collectively, NGSA *et al.*) together filed a request for clarification or, in the alternative, rehearing of Order No. 787 arguing that the Commission should hold a technical conference after an interim period to assess the effectiveness of the new communications standards in Order No. 787. The rehearing requests are discussed below.

## II. Discussion

### A. Request for Rehearing of Enable Pipelines

#### 1. Order No. 787

4. In Order No. 787, the Commission included additional protections to ensure that any non-public, operational information shared under the proposed regulations remain confidential and that information is shared among transmission operators in a manner that is consistent with the prohibition on undue discrimination. Sections 38.3(b) and 284.12(b)(4)(ii) adopt a No-Conduit Rule that prohibits all public utilities and pipelines, as well as their employees, contractors, consultants, or agents, from disclosing, or using anyone as a conduit for the disclosure of, non-public, operational information received under the rule to a third party. Sections 38.3(b) and 284.12(b)(4)(ii) similarly prohibit the disclosure of such non-public, operational information to the transmission operator's marketing function employees, as that term is defined in § 358.3 of the Commission's regulations. Order No. 787 held that the No-Conduit Rule applies to employees an interstate pipeline shares with affiliated gathering facilities or intrastate pipelines. But, Order No. 787 stated that interstate pipelines could seek a waiver of the No Conduit Rule,

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<sup>3</sup> In the Final Rule and in this order, the Commission refers to interstate natural gas pipelines and public utilities that own, operate, or control facilities used for the transmission of electric energy in interstate commerce collectively as "transmission operators."

<sup>4</sup> 18 C.F.R. pt. 358 (2013).

if the fact they share operational employees with local distribution companies (LDCs) or other affiliates makes compliance with the rule difficult.<sup>5</sup>

## 2. Request for Rehearing

5. Enable Pipelines raises on rehearing generally the same arguments it raised in its comments on the Commission's Notice of Proposed Rulemaking. Enable Pipelines state that they presently share employees with their intrastate and gathering affiliates. Enable Pipelines state that the No-Conduit Rule would make such employee sharing administratively burdensome and difficult to administer from a compliance perspective because any shared employee that would receive protected non-public, operational information under the rule would by definition be deemed to be a conduit of information to a non-jurisdictional entity.<sup>6</sup> Enable Pipelines state that the Commission provided no rational basis for creating this shared-employee issue and failed to adduce substantial record evidence that this shared-employee restriction is justified.

6. Enable Pipelines argue that instead of addressing the issue in Order No. 787, the Commission only remarked that a waiver will be available for employees who are shared with LDCs and other affiliates.<sup>7</sup> Enable Pipelines state that under the pre-Order No. 787 rules, such employees were already being exposed to sensitive non-public, operational information as a part of their regular activities without ill-effect to the industry or to the sources of the confidential information. Enable Pipelines state that information was appropriately protected by existing regulations. Enable Pipelines state that, if the Commission had met its obligations under Section 706 of the Administrative Procedure Act (APA), the Commission would have presented a logical examination of the evidence and arguments before it and explained the rationale and evidence behind the need for operational non-marketing function employees to be restricted from access to this information under the rule, including why existing rules were inadequate to protect the confidential information.<sup>8</sup> Without these showings, Enable Pipelines argue, the Commission has no reasonable basis for determining that the No-Conduit Rule is warranted. Enable Pipelines argue that it is entirely likely that the Commission's new, overly-broad No-Conduit Rule will impede rather than promote the Commission's policy goals of encouraging sharing of information helpful to system reliability.

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<sup>5</sup> Order No. 787, FERC Stats. & Regs. ¶ 31,350 at P 99.

<sup>6</sup> Enable Pipelines Rehearing Request at 3.

<sup>7</sup> On February 6, 2014, in Docket No. RP14-453-000, Enable Pipelines filed a request for a limited waiver of the No-Conduit Rule.

<sup>8</sup> Enable Pipelines Rehearing Request at 5 (citing 5 U.S.C. § 706 (2012)).

7. Enable Pipelines also argue that the Commission failed to engage in reasoned decision making when it chose to split non-public, operational information into two distinct, differently regulated classes: (a) regular, non-public operational information that it has not received from electric utilities, and therefore, not subject to these rules; and (b) this new category of confidential, highly protected, operational information received from electric utilities that is now subject to the Commission's heightened No-Conduit limitations under Order No. 787.<sup>9</sup> Enable Pipelines state that before Order No. 787, interstate pipelines received non-public, operational information from a variety of different sources and shared that information for reliability and operational planning purposes with upstream and downstream entities. Enable Pipelines argue that now, for no reason that has been clearly articulated and supported, the Commission has created a sub-category of information that cannot be a part of such system-wide planning due to the No-Conduit Rule. Enable Pipelines state that interstate pipelines already share non-public, operational information with interconnected non-jurisdictional third parties and affiliates with no ill effects, which the Commission even recognizes in Order No. 787 as being appropriate.<sup>10</sup>

8. Enable Pipelines state that the support for the Commission's implementation of a separate standard was solely that some commenters to the Notice of Proposed Rulemaking had theoretical, unsubstantiated concerns about possible abuse of the information. Enable Pipelines state that, as the D.C. Circuit Court of Appeals in *National Fuel* held, "[i]n the absence of factual evidence that satisfies Tenneco, FERC may try to support the [revised Standards of Conduct] by setting out its best case for relying solely on a theoretical threat of abuse."<sup>11</sup> There, Enable Pipelines state, the Court found that where the Commission relies solely on a theoretical threat "unsupported by a record of abuse" to justify "costly prophylactic rules," the Commission must at least explain why existing rules and procedures would not be effective to prevent the theoretical abuse.<sup>12</sup> Enable Pipelines state that Order No. 787 suffers from the same infirmity, which is that the Commission has neither developed nor considered sufficient record evidence to meet the Commission's burden or to reasonably draw the conclusion that the separate standard is necessary.

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<sup>9</sup> Enable Pipelines Rehearing Request at 6-7.

<sup>10</sup> *Id.* at 8 (citing Order No. 787, FERC Stats. & Regs. ¶ 31,350 at P 9)

<sup>11</sup> *Id.* (citing *National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, at 844 (referencing *Tenneco Gas v. FERC*, 969 F.2d 1187 (D.C. Cir. 1992))).

<sup>12</sup> *Id.*

9. Enable Pipelines also assert that the No-Conduit Rule creates new administrative and compliance burdens for interstate pipeline companies, which the Commission failed to address. Enable Pipelines state that the Commission neglected to adduce evidence or provide argument as to the balancing of the benefits of the new No-Conduit Rule with the actual costs of the implementation and maintenance by interstate pipeline companies. Enable Pipelines state that ignoring these highly relevant factors is not reasoned decision making and fails the substantial evidence test.<sup>13</sup>

10. Enable Pipelines again propose that the No-Conduit Rule be revised to allow interstate pipelines to share the non-public, operational information with third parties (other than marketing function employees) for the purpose of promoting reliable service and operational planning in order to allow, among other things, an interstate pipeline company to share the non-public, operational information with its own personnel who also play an operational role in their affiliated intrastate pipeline or gathering pipeline operations. Enable Pipelines state that the Commission provided no guidance as to why the suggested modifications are inadequate to serve the purpose behind the new No-Conduit Rule while also limiting its negative effects.

### **3. Commission Determination**

11. As discussed below, the Commission denies Enable Pipelines' request to revise the No-Conduit Rule to allow disclosures to third parties (other than marketing function employees) for the purpose of promoting reliable service and operational planning. The Commission continues to find that Enable Pipelines' concern regarding shared operating employees is better addressed through a waiver request than an overly broad exception to the No-Conduit Rule adopted in Order No. 787.

12. The Commission reaffirms its position that that the broad scope of non-public, operational information permitted to be shared under this Final Rule, and the potential competitive harm from its disclosure, justifies the No-Conduit Rule. The Commission intentionally made the scope of this information sharing very broad:

The Commission is intentionally permitting the communication of a broad range of non-public, operational information to provide flexibility to individual transmission operators, who have the most insight and knowledge of their

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<sup>13</sup> *Id.* at 10 (citing *Walter O. Boswell Memorial Hosp. v. Heckler*, 749 F.2d 788, 797 (D.C. Cir. 1984) (“Finally, an agency must consider ‘reasonably obvious alternative . . . rules and explain its reasons for rejecting alternatives in sufficient detail to permit judicial review.’”) (internal quotations and citations omitted)).

systems, to share that information which they deem necessary to promote reliable service on their system.<sup>14</sup>

13. The Commission's current Standards of Conduct do not apply to the sharing of information permitted under the Final Rule. The Standards of Conduct govern the preferential sharing of transmission function information from a transmission provider to its marketing function employee. "Transmission function" is defined as the planning, directing, organizing or carrying out of day-to-day transmission operations, including the granting and denying of transmission service requests,<sup>15</sup> and transmission function information is any information related to transmission functions.<sup>16</sup> However, the scope of information that may permissibly be shared under the Final Rule is not limited to "transmission function information" covered under the Standards of Conduct.<sup>17</sup> Rather, the scope of information that transmission operators may permissibly share under this rule is far broader than transmission function information. For example, confidential, customer-specific information about natural gas-fired generators, such as anticipated run times and gas purchases and scheduling decisions may be exchanged under the rule. Numerous parties raised concerns about the potential competitive effects of such disclosure,<sup>18</sup> and the Commission adopted the No-Conduit Rule to allay these legitimate concerns.

14. The general presumption of the Standards of Conduct is that the interstate pipeline must function on a non-discriminatory basis and that all pipeline transmission function information must be publicly disclosed.<sup>19</sup> As explained above, however, the information

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<sup>14</sup> Order No. 787, FERC Stats. & Regs. ¶ 31,350 at P 41.

<sup>15</sup> 18 C.F.R. § 358.3(h) (2013).

<sup>16</sup> 18 C.F.R. § 358.3(j) (2013).

<sup>17</sup> Order No. 787, 145 FERC ¶ 61,134 at P 97. The Commission also pointed out that the Standards of Conduct, and therefore, the No-Conduit Rule under the Standards of Conduct, do not apply to RTOs and ISOs. Further, the definition of "marketing function employee" in the Standards of Conduct is narrow and linked to the relationship between the transmission provider and its marketing function employee. As a result, various entities, including certain LDCs, intrastate pipelines, and gatherers will not have marketing function employees as that term is defined in the Standards of Conduct. *See, e.g., PJM Interconnection, L.L.C.*, 147 FERC ¶ 61,105 (2014).

<sup>18</sup> *See, e.g.,* Order No. 787, FERC Stats. & Regs. ¶ 31,350 at PP 16, 28 (summarizing comments).

<sup>19</sup> 18 C.F.R. §§ 358.4, 358.7 (2013).

provided by electric transmission operators to the interstate pipeline under the Final Rule goes beyond transmission function information that should be publicly disclosed, including confidential and competitively sensitive customer information. The provision of such information could provide third-parties, including pipeline affiliates, with competitive advantages over other participants in the natural gas and electricity markets. Enable Pipelines have not shown that provision of such information to third parties or their affiliates is necessary to achieve the goals of the rule, nor has it shown that it does not raise competitive concerns. As the Commission explained, the public disclosure of such information, as required by the Standards of Conduct with respect to transmission function information, is not a remedy that can be applied to much of the confidential information received from electric transmission operators.<sup>20</sup>

15. Under the Standards of Conduct, in the event interstate pipelines improperly disclose customer-specific information, the pipeline is required, at a minimum, to post the fact that the information was exchanged.<sup>21</sup> With respect to confidential electric generation information, Enable Pipelines have failed to show that mere posting of the fact of disclosure is sufficient to mitigate the potential harm of disclosure. Because the scope of permitted information under this rule is so much broader, and more competitively sensitive, than the disclosure of transmission function information, the Commission determined that more stringent requirements are necessary.

16. Nor has Enable Pipelines shown that their proposed limitation permitting disclosure only to non-marketing function employees of third-parties is adequate protection. In the case of regulated interstate pipelines, the Commission's regulations and enforcement process can help ensure that such information is not disclosed to marketing function or other employees that may obtain unfair competitive advantage from the information. In contrast, the Commission does not have jurisdiction over intrastate pipelines and LDCs and therefore cannot as effectively regulate disclosure of such competitively sensitive and confidential information.

17. Enable Pipelines contend that pipeline operators routinely exchange nomination and scheduling information with other pipeline operators and with non-jurisdictional upstream and downstream entities with no ill effects. They maintain that such exchanges justify disclosure to third parties. While the exchange of nomination information is a long-standing practice in the natural gas industry, such exchange is limited and is necessary for pipelines to confirm their schedules with interconnecting parties. The same

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<sup>20</sup> Order No. 787, 145 FERC ¶ 61,134 at P 125 (explaining that the information could not be publicly disclosed).

<sup>21</sup> 18 C.F.R. §358.7 (a)(2) (2013).

cannot be said for the broad scope of information that may be disclosed under this rule.<sup>22</sup> Enable Pipelines has not shown that allowing such disclosure to unregulated third-parties is necessary to maintain the on-going operations of its interstate pipeline, and given the competitive risks of such disclosure to unregulated parties, the Commission finds no basis for authorizing such blanket disclosure.

18. Enable Pipelines maintain on rehearing that the No-Conduit Rule creates a new compliance issue for pipeline companies that have operational personnel who are involved in operational planning for an interstate pipeline and affiliated gathering facilities or intrastate pipelines. In Order No. 787, the Commission did, however, recognize the potential need for operating employees shared between interstate pipelines and their affiliates to receive such information. The Commission found that the situations warranting such disclosure would depend on the individual circumstances of each case. Given the relatively few pipelines that are in this position, the Commission determined that, rather than attempting to craft a generic regulation, the best course would be to proceed on an individual case-by-case basis through waivers. We cannot find that the limited extra burden on a pipeline to seek a waiver to permit such sharing outweighs the benefits of being able to review the individual circumstances of such cases. For example, the Commission to date has received only three waivers requests, and in two separate orders issued contemporaneously with this order,<sup>23</sup> the Commission is granting partial waivers to Enable Pipelines as well as to National Fuel Gas Supply Corporation (NFGSC) and Empire Pipeline, Inc. (Empire) (collectively, National Fuel Pipelines). As demonstrated by these orders, we find that the waiver process is a reasonable means for Enable Pipelines, as well as other interstate natural gas pipelines, to address compliance issues involving shared employees resulting from Order No. 787.

**B. Request for Clarification or, in the Alternative, Rehearing of NGSA et al.**

19. On December 16, 2013, NGSA *et al.* filed a request for clarification or, in the alternative, rehearing of Order No. 787 arguing that the Commission should hold a technical conference after an interim period to assess the effectiveness of the new communications standards in Order No. 787. NGSA *et al.* state that they support the Commission's efforts to improve coordination between the gas and power sectors and agree that increased communication between gas and electric transmission operators, as a

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<sup>22</sup> Under the rule, the Commission does permit Enable Pipelines to exchange information about electric transmission or generator-specific information with other interstate pipelines.

<sup>23</sup> *Enable Gas Transmission, LLC and Enable Mississippi River Transmission, LLC*, 147 FERC ¶ 61,229 (2014); *National Fuel Gas Supply Corporation and Empire Pipeline, Inc.*, 147 FERC ¶ 61,214 (2014).

part of a larger effort to address a host of gas and electric coordination issues, is necessary.<sup>24</sup> But, they believe that the Commission, the two industry sectors, and all market participants would greatly benefit from an assessment of Order No. 787's effectiveness, as well as a review of the scope of information being shared pursuant to Order No. 787.<sup>25</sup> They state that the technical conference should take place after an interim period, such as one year from the date the Final Rule was issued.<sup>26</sup>

20. NGSA *et al.* state that, in NGSA's comments to the Notice of Proposed Rulemaking, NGSA proposed that the Commission should hold a technical conference after a period of one year to determine what information was shared under the new rule and how this shared information was used to promote reliable service or operational planning, but the Commission did not provide for this after-the-fact assessment or any post Order No. 787 implementation review.<sup>27</sup> NGSA *et al.* urge the Commission to reconsider this decision, stating that Order No. 787's relaxed restrictions on sharing otherwise non-public information remains a new and un-tested practice with which many market participants are not yet comfortable. They state that a technical conference would allow the Commission, pipelines, and electric transmission operators to report on the types of information being shared and either allay any concerns that Order No. 787 may subject market participants' commercially sensitive information to inappropriate disclosure or point out infirmities in the communication protocols that require modification.<sup>28</sup>

21. The Commission denies NGSA *et al.*'s request for clarification and rehearing. The Commission sees no need at this point to commit to a technical conference or any specific process for evaluating the regulations. As the Commission stated in the Final Rule, it expects market participants in both industries, as they experience the communications contemplated by rule, to keep the Commission informed about progress, issues, and areas of possible improvement.<sup>29</sup> Following recent cold weather events, multiple electric transmission operators apprised the Commission of their enhanced communications with pipeline transmission operators to maintain system reliability. For

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<sup>24</sup> NGSA *et al.* Rehearing Request at 3.

<sup>25</sup> *Id.* at 3.

<sup>26</sup> *Id.* at 4.

<sup>27</sup> *Id.* at 3-4 (citing Comments of the Natural Gas Supply Association, Docket No. RM13-17-000, at 9-11 (filed Aug. 26, 2013)).

<sup>28</sup> *Id.* at 5.

<sup>29</sup> Order No. 787, FERC Stats. & Regs. ¶ 31,350 at P 144.

example, PJM Interconnection, L.L.C. (PJM) informed the Commission about Order No. 787's effectiveness during the Polar Vortex, stating that Order No. 787 facilitated more detailed discussions with the interstate pipelines thereby allowing PJM to manage the bulk power grid reliably.<sup>30</sup> On April 1, 2014 the Commission also convened a public technical conference on Winter 2013-2014 Operations and Market Performance in RTOs and ISOs at which parties discussed communications during the cold weather events, as well as other experiences and lessons learned.<sup>31</sup> The Commission expects to continue to monitor the coordination of the electric and natural gas industries and will schedule conferences or other reports as it deems necessary. Accordingly, the Commission finds no need to specify any specific process at this time.

Commission Orders:

The requests for rehearing are denied as discussed in the order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>30</sup> See PJM, Response to FERC Data Request for January 2014 Weather Events (Jan. 10, 2014); FERC, Recent Weather Impacts on the Bulk Power System at 3 (Jan. 16, 2014). See also PJM, 147 FERC ¶ 61,105 at P 4.

<sup>31</sup> *Winter 2013-2014 Operations and Market Performance in Regional Transmission Organizations and Independent System Operators*, Docket No. AD14-8-000 (Feb. 21, 2014) (Notice of Technical Conference).