

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 358

(Docket No. RM07-6-000; Order No. 690

(Issued January 9, 2007)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Interim Rule

SUMMARY: This interim rule responds to the decision of the United States Court of Appeals for the District of Columbia vacating and remanding the standards of conduct rule, Order No. 2004, as it relates to interstate natural gas pipelines, in National Fuel Gas Supply Corporation v. FERC, 468 F.3d 831 (D.C. Cir. 2006). The court objected to the Federal Energy Regulatory Commission's (Commission's) expansion of the prior standards of conduct to include energy affiliates, and vacated the entire rule as it relates to natural gas pipelines. The interim rule repromulgates the standards of conduct that were not challenged before the court on an interim basis while the Commission considers how to respond to the court's decision on a permanent basis.

EFFECTIVE DATE: This rule will become effective January 9, 2007.

FOR FURTHER INFORMATION CONTACT:

Deme Anas
Office of Enforcement
Federal Energy Regulatory Commission
888 First Street, N.E.

Docket No. RM07-6-000

Washington, D.C. 20426

Telephone: (202) 502-8178

E-mail: demetra.anas@ferc.gov

Stuart Fischer

Office of Enforcement

Federal Energy Regulatory Commission

888 First Street, N.E.

Washington, D.C. 20426

Telephone: (202) 502-8517

E-mail: stuart.fischer@ferc.gov

SUPPLEMENTARY INFORMATION:

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Standards of Conduct for Transmission Providers

Docket No. RM07-6-000

INTERIM RULE

ORDER NO. 690

I. Introduction

1. The Federal Energy Regulatory Commission (Commission) is promulgating interim standards of conduct regulations that govern the relationship between natural gas transmission providers and their marketing affiliates to respond to the decision of the United States Court of Appeals for the District of Columbia concerning the Standards of Conduct for Transmission Providers under Order No. 2004.¹ In National Fuel Gas

¹ On November 25, 2003, the Commission added Part 358 to the Commission's 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 ¶ 31,155 (2003), order on reh'g, Order No. 2004-A, III FERC Stats. & Regs. ¶ 31,161 (2004), 107 FERC ¶ 61,032 (2004), order on reh'g, Order No. 2004-B, III FERC Stats. & Regs. ¶ 31,166 (2004), 108 FERC ¶ 61,118 (2004), order on reh'g, Order No. 2004-C, 109 FERC ¶ 61,325 (2004), order on reh'g, Order No. 2004-D, 110 FERC ¶ 61,320 (2005), vacated and remanded as it applies to natural gas pipelines, National Fuel Gas Supply Corporation v. FERC, 468 F.3d 831 (D.C. Cir. 2006).

Supply Corporation v. FERC (National Fuel),² the court found that the Commission did not support the standards of conduct's expansive definition of energy affiliates and vacated Order Nos. 2004, 2004-A, 2004-B, 2004-C and 2004-D (collectively referred to as Order No. 2004) 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 govern pipelines' relationships with numerous non-marketing affiliates, such as producers, gatherers, and local distribution companies (energy affiliates). In light of this finding, the court found moot the other issues raised on appeal.⁴

2. The purpose of this order is to repromulgate the standards of conduct not challenged in the National Fuel appeal in the interim while the Commission considers how to respond to the court's decision on a permanent basis. To that end the Commission plans to issue a Notice of Proposed Rulemaking (NOPR) in the very near future. The interim rule will thus help eliminate any uncertainty about how the standards of conduct apply to natural gas transmission providers while the Commission develops a final rule.

² National Fuel slip op. at 4 [published cite not yet available]

³ National Fuel, slip op. at 4. Order No. 2004 was not appealed as it applies to electric utility transmission providers.

⁴ National Fuel, slip op. at 4.

3. The Commission believes that this interim rule is consistent with the court's decision in National Fuel and meets the standards for an interim rule without notice and comment under the Administrative Procedure Act as set out in the court's opinion in Mid-Tex Electric Cooperative, Inc. v. FERC (Mid-Tex).⁵ In Mid-Tex, the court reviewed the Commission's interim rule regarding the construction work in progress (CWIP) accounts for electric utilities that had previously been vacated and remanded by the court.⁶ Despite objections to the interim CWIP rule, the court upheld the interim rule as consistent with the letter and spirit of its previous ruling.⁷ The court concluded that the Commission could reasonably infer that should it become necessary or proper to provide a regulation prior to its full reconsideration of the CWIP issue, it may do so if it addresses the issues raised by the court.⁸

4. The Mid-Tex court also concluded that the Commission had good cause to adopt an interim rule without prior notice and comment.⁹ The Administrative Procedure Act permits rulemaking without prior notice and comment when an agency "for good cause ... finds that notice and public procedure are impracticable, unnecessary, or contrary to

⁵ Mid-Tex Electric Cooperative, Inc. v. FERC, 822 F.2d 1123 (D.C. Cir. 1987).

⁶ Mid-Tex Electric Cooperative, Inc. v. FERC, 773 F.2d 327 (D.C. Cir. 1985).

⁷ Mid-Tex, at 1129-30.

⁸ Mid-Tex, at 1130.

⁹ Mid-Tex, at 1132.

the public interest.”¹⁰ In its order adopting the interim rule regarding CWIP, the

Commission emphasized three factors for foregoing prior notice and comment. First, the Commission stressed both the interim nature of the CWIP rule and the ongoing public process in formulating a permanent CWIP policy. Second, the Commission observed that the fundamental policy underlying the CWIP had been accepted by the court. Third, the Commission took notice that an interim rule was needed to avoid regulatory confusion.

5. Guided by the standards in Mid-Tex, the Commission has structured this interim rule in accordance with the court’s decision in National Fuel while the Commission conducts a public notice and comment process for promulgating a final rule. The Commission has adhered to both the letter and the spirit of the court's decision in National Fuel by fashioning an interim rule under which the standards of conduct do not apply to the relationship between natural gas transmission providers and energy affiliates, which is the aspect of the standards of conduct that the court found infirm.

6. The issuance of this interim rule is also consistent with the three factors articulated in Mid-Tex for issuing an interim rule without prior notice and comment under the Administrative Procedures Act. First, the Commission stresses that the instant interim rule is not intended to serve as a permanent rule and that it is commencing a rulemaking proceeding through the issuance in the very near future of a NOPR. Second, the interim rule follows both the letter and spirit of the court’s opinion in National Fuel because, for

¹⁰ 5 U.S.C. § 553(b)(3)(B) (2000).

natural gas pipelines, it eliminates the provisions of Order No. 2004 that were subject to appeal and instead adopts provisions originally promulgated in Order No. 497, which was upheld in relevant part by the court in Tenneco Gas v. FERC.¹¹ Third, the Commission needs to issue an interim rule to avoid regulatory confusion. When the Commission adopted Order No. 2004, it rescinded the standards of conduct promulgated by Order No. 497.¹² Because National Fuel vacated Order No. 2004 as applied to natural gas transmission providers, there are no existing regulations governing the relationship between natural gas transmission providers and their marketing affiliates. This interim rule repromulgates rules from Order No. 2004 that were not challenged on appeal. With respect to provisions that were challenged, as noted, the Commission is temporarily re-adopting the standards of conduct provisions promulgated under Order No. 497.

Otherwise, there would be no rules in place governing the relationship between natural gas pipelines and their affiliates --- a situation which the Commission believes would not

¹¹ Inquiry Into Alleged Anticompetitive Practices Related to Marketing Affiliates of Interstate Pipelines, Order No. 497, 53 Fed. Reg. 22,139 (1988), FERC Stats. & Regs., Regulations Preambles 1986-1990 ¶ 30,820 (1988); Order No. 497-A, order on reh'g, 54 Fed. Reg. 52,781 (1989), FERC Stats & Regs., Regulations Preambles 1986-1990 ¶ 30,868 (1989); Order No. 497-B, order extending sunset date, 55 Fed.Reg. 53,291 (1990), FERC Stats. & Regs., Regulations Preambles 1986-1990 ¶ 30,908 (1990); Order No. 497-C, order extending sunset date, 57 Fed. Reg. 9 (1992), FERC Stats. & Regs., Regulations Preambles 1991-1996 ¶ 30,934 (1991), reh'g denied, 57 Fed. Reg. 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).

¹² Order No. 2004 (in the description of the revisions to Title 18 of the Code of Federal Regulations).

be in the public interest as such rules have for almost two decades played an important role in the agency's program to ensure non-discriminatory access by pipeline customers to competitive wellhead markets.

7. Accordingly, in this interim rule, for natural gas transmission providers, the Commission modifies the regulations originally promulgated by Order No. 2004 consistent with the court's decision and issues appealed. The interim regulations will make clear that the standards of conduct apply to the relationship between natural gas transmission providers and marketing affiliates, and that the standards of conduct will not govern the relationship between natural gas transmission providers and their other energy affiliates. Because Order No. 2004 defined marketing differently than Order No. 497, the Commission is revising the definition of marketing consistent with Order No. 497.¹³

8. Although the court did not consider petitioners' appeals with respect to specific sections of part 358 as it vacated Order No. 2004 based on the lack of record support for the new definition of energy affiliate, the interim regulations will treat each of the sections challenged on appeal as if the court had held those sections infirm as well. Specifically, for natural gas transmission providers, the interim rule will: (1) omit

¹³ Since the standards of conduct will no longer govern the relationship between natural gas transmission providers and their energy affiliates, this addresses the issue concerning the scope of the energy affiliate exception for local distribution companies appealed by National Fuel Gas Distribution Corporation and National Fuel Gas Supply raised in National Fuel.

restrictions on shared risk management activities and employees¹⁴ and (2) revise the requirement to post all discretionary acts.¹⁵ Also raised on appeal were two issues discussed in the preamble of Order No. 2004, but not codified in regulatory text. Here, too, although the court did not consider these issues, the Commission will incorporate into this preamble modifications consistent with petitioners' appeals of Order No. 2004 as if the court had ruled in their favor. Specifically, the Commission will (1) allow natural gas transmission providers to treat lawyers as permissibly shared employees; and (2) not require newly certificated natural gas pipeline transmission providers to observe the standards of conduct until they commence transmission services.

9. In the very near future, the Commission will issue a NOPR, which will seek comments on adopting permanent changes to Part 358 consistent with National Fuel. As a result, the Commission expects that the provisions in the interim rule will remain in effect until we have completed the rulemaking process for a final rule for Standards of Conduct for Transmission Providers. The Commission further expects the process for adopting a final rule to proceed without delay.

¹⁴ 18 CFR 358.4(a)(6) (2006).

¹⁵ 18 CFR 385.5(c)(4) (2006).

II. Background

A. Order No. 2004

10. 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 1988,¹⁶ pursuant to the agency's statutory authority under sections 4 and 5 of the Natural Gas Act.¹⁷ In 1996, the Commission issued Order No. 889,¹⁸ which created standards of conduct regulations applicable to electric public utilities under sections 205 and 206 of the Federal Power Act.¹⁹ Both rules had the same goal: to prevent transmission providers from exercising their control over transmission to engage in undue discrimination or preference in favor of their marketing affiliates over non-affiliates. Both rules employed the same general approach: requiring employees engaged in transmission services to function independently from employees of its marketing affiliates and imposing prohibitions

¹⁶ See supra note 10.

¹⁷ 15 U.S.C. §§ 717c and 717d (2000). See also 18 CFR former part 161 (2003).

¹⁸ 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 1991-1996 ¶ 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), FERC Stats. & Regs., Regulations Preambles 1996-2000 ¶ 31,253 (Nov. 25, 1997).

¹⁹ 16 U.S.C. §§ 824d and 824e (2000). See also 18 CFR former section 37.4 (2003).

restricting transmission providers from sharing certain information with their marketing affiliates.

11. In Order No. 2004, the Commission revised the standards of conduct so that one set of standards of conduct applied uniformly to both natural gas pipelines and electric public utilities.²⁰ The Commission also expanded the coverage of the standards of conduct to govern the relationships between transmission providers and energy affiliates.

²¹ Previously, the standards of conduct governed the relationship between transmission providers and their marketing affiliates.²²

B. Matters Appealed

12. Five issues were appealed from Order No. 2004: (1) extension of the standards of conduct to cover the relationship between natural gas transmission providers and their energy affiliates under section 358.3(d); (2) the scope of the restrictions on sharing risk management employees between the natural gas transmission providers and their

²⁰ Order No. 2004 at P 8.

²¹ The Commission defined energy affiliates as any affiliate that is engaged or involved in transmission transactions; manages or controls pipeline capacity; buys, sells, trades or administers natural gas in domestic energy or transmission markets; and engages in financial transactions relating to the sale or transmission of natural gas in such markets. 18 CFR 358.3(d) (2006).

²² 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 (18 CFR 37.3(e)).

marketing/energy affiliates under section 358.4(a)(6); (3) the scope of the restrictions on sharing lawyers between natural gas transmission providers and their marketing/energy affiliates; (4) the scope of the requirement that natural gas transmission providers post all discretionary acts under section 358.5(c)(4); and (5) the timing as to when newly certificated pipelines become subject to the standards of conduct.

C. The Court's Decision

13. 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 the new definition of 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.²³ 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.

III. Discussion

A. Partially Repromulgating Part 358

14. Much of Order No. 2004 codified case-by-case exceptions that had evolved during the implementation of Order Nos. 497 and 889, which were beneficial to the natural gas

²³ National Fuel at 4.

transmission providers and not appealed. Some of the provisions under Order No. 2004 that were not challenged on appeal included: codifying exceptions to the independent functioning requirement;²⁴ revising information sharing prohibitions to reflect practical considerations²⁵ and emergency circumstances;²⁶ codifying a training requirement;²⁷ revising and imposing new posting requirements to improve transparency;²⁸ and requiring the transmission providers to designate a chief compliance officer.²⁹

15. This interim rule maintains one set of standards of conduct regulations for both the natural gas and electric utility industries. The Commission, however, is only making changes applicable to natural gas transmission providers consistent with National Fuel. Therefore, the interim rule makes inapplicable to natural gas transmission providers those portions of the standards of conduct that the court found unsupportable or that were challenged on appeal. However, it also repromulgates those sections that were not appealed and not found infirm.

²⁴ 18 CFR 358.4 (2006).

²⁵ 18 CFR 358.5(b)(6) and (8) (2006).

²⁶ 18 CFR 358.4(a)(2) (2006).

²⁷ 18 CFR 358.4(e)(5) (2006).

²⁸ 18 CFR 358.5(a) and (b) (2006).

²⁹ 18 CFR 358.4(e)(6) (2006).

16. In response to several informal inquiries, the Commission also clarifies that waivers or exemptions that the Commission issued under Order No. 2004 are not negatively impacted by the National Fuel decision.

B. Natural gas transmission providers and their energy affiliates

17. 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 energy affiliates, the interim rule adds a new provision stating that the standards of conduct do not govern the relationship between natural gas transmission providers and their energy affiliates. The effect of this change, along with the modification to the definition of marketing as discussed below, is that the standards of conduct for natural gas transmission providers will only govern the relationship between a transmission provider and its marketing affiliates, consistent with the prior standards of conduct before the adoption of Order No. 2004. New section 358.1(e) reads as follows:

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.

C. New definition of marketing affiliate

18. Order No. 2004 revised the definition of marketing affiliate previously codified by Order No. 497. As a result, the interim rule will promulgate regulations that mirror the exceptions to the definition of marketing that were found in Order No. 497.³⁰

Specifically, a new provision at section 358.3(1) provides as follows:

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.

D. Sharing of risk management employees

19. Prior to Order No. 2004, the standards of conduct were silent on whether a transmission provider could share risk management employees with its marketing affiliates. In reviewing the standards of conduct procedures submitted by Vector Pipeline, however, the Commission held that a natural gas pipeline could not share risk management employees if the functions included assessing the creditworthiness of a transmission customer.³¹ Subsequently, in Order No. 2004, the Commission reiterated that holding and permitted the sharing of risk management employees provided that they

³⁰ Former 18 CFR 161.2(c) (2003).

³¹ Vector Pipeline, L.P., 97 FERC ¶ 61,085 (2001).

were not “engaged in transmission functions or sales or commodity functions with their Marketing or Energy Affiliate.”³² INGAA appealed this issue.

20. As mentioned above, the court did not address the risk management exception in the independent functioning requirement. Still, because it was raised as an issue on appeal, the Commission believes that to be faithful to the court’s decision, section 358.4(a)(6) must be amended. Therefore, the Commission is adding, on an interim basis, a second sentence to that section as follows:

This provision does not apply to natural gas transmission providers.

E. Discretionary tariff provision

21. In Order No. 2004, the Commission required the transmission provider to maintain a log detailing the circumstances and manner in which it exercised discretion under any terms of its tariff and post it on its OASIS or internet website.³³ 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 section 161.3(k) promulgated under Order No. 497, required a pipeline to 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 section 358.5(c)(4) was much

³² Order No. 2004 at P 112. See also 18 CFR 358.4(a)(6) (2006).

³³ 18 CFR 358.5(c)(4) (2006).

broader than former section 161.3(k), arguing that there was a significant difference between granting waivers of tariff provisions that provide for such discretionary waivers (former section 161.3(k)) and exercising discretion under any terms of its tariff (section 358.5(c)(4)).

22. In response to the National Fuel decision, on an interim basis, the Commission is revising section 358.5(c)(4). First, we will make clear that 358.5(c)(4) only applies to electric public utility transmission providers and, second, we will adopt the language regarding discretionary waivers from Order No. 497 for natural gas transmission providers. Accordingly, we adopt the following language at section 358.5(c)(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 website 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 provide for such discretionary waivers and provide the log to any person requesting it within 24 hours of the request.

23. The Commission recognizes that many natural gas transmission providers have put in place procedures to post information regarding discretionary waivers on their Internet websites. Of course, this is an acceptable means of complying with the requirement in lieu of providing the log to any person requesting it within 24 hours of the request.

F. Sharing of lawyers

24. With respect to the sharing of lawyers, under the Order No. 497 standards of conduct, lawyers were treated as permissibly shared employees.³⁴ Order No. 2004 was silent as to the classification of lawyers. In Order No. 2004-A, the Commission clarified that a lawyer who participates in transmission policy decisions on behalf of a Transmission Provider would be considered a transmission function employee (and hence, not permissibly shared).³⁵ Additionally, the Commission explained that lawyers may provide legal or regulatory advice in their traditional roles without becoming transmission function employees,³⁶ but, an individual's title of "lawyer" did not automatically exempt him/her from the independent functioning requirement. The Commission stated that if lawyers participate in transmission policy decisions on behalf of transmission providers, the Commission considers that participation to be a transmission function and the lawyers to be transmission function employees.³⁷ Following requests for clarification, the Commission stated that lawyers may provide

³⁴ Order No. 497 at 31,142.

³⁵ Order No. 2004-A at P 157.

³⁶ Section 358.3(j) defines transmission function employee as an employee, contractor, consultant or agent of a transmission 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.

³⁷ Order No. 2004-A at P 157.

legal or regulatory advice in their traditional roles without becoming transmission function employees, but to the extent that lawyers conduct transmission functions or are involved in planning, directing or organizing transmission functions, the lawyer's status as a "lawyer" does not exempt him/her from also being transmission function employee.³⁸

25. This issue was appealed. In light of the court's decision, the Commission clarifies that participating in business decisions by rendering legal advice does not make a lawyer a transmission function employee. Since this issue was discussed in the preamble to Order No. 2004, there is no regulatory text to adopt or revise. However, this clarification is intended to provide direction to the natural gas industry that the Commission will treat lawyers as permissibly shared employees for natural gas transmission providers.

G. Timing of when a natural gas transmission provider becomes subject to the standards of conduct

26. 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.³⁹ In the preamble of Order No. 2004, the Commission stated that newly formed 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 considers

³⁸ Order No. 2004-B at P 74.

³⁹ Former 18 CFR 161.1 (2003).

transmission function activities. Since the timing of applicability of the standards of conduct was one of the items on appeal, the Commission will treat this issue as if the court had ruled against the Commission on this issue. As a result, the Commission will not require natural gas transmission providers to observe the standards of conduct until they commence transportation transactions with their marketing affiliates. Because this issue was discussed in the preamble to Order No. 2004, there is no regulatory text to adopt or revise. However, in the interim, the foregoing statement is intended to provide direction to the industry with respect to when the Commission will consider natural gas transmission provider subject to the standards of conduct.

IV. Information Collection Statement

27. The Office of Management and Budget (OMB) regulations require approval of certain information collection requirements imposed by agency rules.⁴⁰ Previously, the Commission submitted to OMB the information collection requirements arising from the standards of conduct adopted in Order No. 2004. OMB approved those requirements.⁴¹ This interim rule does not impose any additional information collection burden on industry participants.

⁴⁰ 5 CFR 1320.11 (2006).

⁴¹ 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).

28. The Commission is submitting notification of the information collection requirements imposed in the Interim Rule to OMB for its review and approval under section 3507(d) of the Paperwork Reduction Act of 1995.⁴² 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.

29. 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

Action: Proposed Collection

OMB Control No: 1902- 0157

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 in a non-discriminatory basis.

Internal Review: The Commission has reviewed the requirements pertaining to natural gas pipelines and determined the interim rule is necessary to avoid a regulatory gap.

⁴² 44 U.S.C. § 3507(d) (2000).

30. These requirements conform to the Commission's plan for efficient information collection, communication, and management within the natural gas and electric public 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.

31. 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].

V. Environmental Analysis

32. 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.⁴³ The Commission has categorically excluded certain actions from these requirements as not having a significant effect on the human

⁴³ Order No. 486, Regulations Implementing the National Environmental Policy Act, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs. Preambles 1986-1990 ¶ 30,783 (1987).

environment.⁴⁴ 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.⁴⁵

Therefore, an environmental assessment is unnecessary and has not been prepared in this rulemaking.

VI. Regulatory Flexibility Act

33. The Regulatory Flexibility Act of 1980⁴⁶ generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. Because most transmission providers do not fall within the definition of "small entity,"⁴⁷ the Commission certifies that this rule will not have a significant economic impact on a substantial number of small entities.

VII. Document Availability

34. 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

⁴⁴ 18 CFR 380.4 (2006).

⁴⁵ 18 CFR 380.4(a)(2)(ii) and 380.4(a)(5) (2006).

⁴⁶ 5 U.S.C. § 601-612 (2000).

⁴⁷ See 5 U.S.C. § 601(3) (2000).

hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, N.E., Room 2A, Washington D.C. 20426.

35. 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.

36. 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.

VIII. Effective Date and Congressional Notification

37. These regulations are effective on date of issuance. The Commission has determined, with the concurrence of the Administrator of the Office of Information and Regulatory Affairs of OMB, that this rule is not a “major rule” as defined in section 351 of the Small Business Regulatory Enforcement Fairness Act of 1996. The Commission will submit the interim rule to both houses of Congress and the General Accounting Office.⁴⁸

⁴⁸ 5 U.S.C. § 801(a)(1)(A) (2000).

Docket No. RM07-6-000

23

List of subjects in 18 CFR Part 358

Natural Gas, Reporting and recordkeeping requirements

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

In consideration of the foregoing, the Commission amends 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 U.S.C. 717–717w, 3301–3432; 16 U.S.C. 791–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

§ 358.1 Applicability.

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

(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 § 385.5(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 its Marketing or 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 that 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 Section 32(a) of the Public Utility Holding Company Act of 1935, as amended, the same as provided in section 214 of the Federal Power Act.

(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) A local distribution company 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 section 358.3(d)(1), (2), (3) or (4), except to

the limited extent necessary to support on-system sales and to engage in *de minimus* 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 minimus 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. Sales and marketing employee or unit includes:

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

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

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

(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 website* 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 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) *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.

§ 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 § 385.5(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.

(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 website.

(2) A Transmission Provider must post on its OASIS or Internet website, 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 website, 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 website 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 website, 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 website, 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) 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.

(2) Each Transmission Provider must be in full compliance with the Standards of Conduct by September 22, 2004.

(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 by September 22, 2004 or 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 shall require each employee to sign a document or certify electronically signifying that s/he has participated in the training.

(6) Transmission Providers are required to designate a Chief Compliance Officer who will be responsible for standards of conduct compliance.

§ 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 website, 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 website, 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 website 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 website, through access to information not posted on the OASIS or Internet Website that is not contemporaneously available to the public, or through information on the OASIS or Internet website 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 website, with employees of its Marketing or Energy Affiliates, except to the limited extent information is required to be posted on the OASIS or Internet website 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 website of that consent along with a statement that it did not provide any preferences, either operational or rate-related, in exchange for that voluntary consent.

(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 is permitted to share information necessary to maintain the operations of the transmission system with its 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 website 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 provide 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 website 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 website for 60 days from the date of posting.