

123 FERC ¶ 61,157  
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.

Obtaining Guidance on Regulatory Requirements                      Docket No. PL08-2-000

INTERPRETATIVE ORDER MODIFYING NO-ACTION LETTER PROCESS  
AND REVIEWING OTHER MECHANISMS FOR OBTAINING GUIDANCE

(Issued May 15, 2008)

1. This order is one of several steps the Commission is taking in response to the public input received at and following the November 16, 2007 Conference on Enforcement Policy (Conference) to assess our enforcement program in light of the passage of the Energy Policy Act of 2005 (EPAAct 2005).<sup>1</sup> In this Order, we address certain procedural and process matters raised in the comments. As requested by certain commenters, we expand the scope of the “no-action” letter (NAL) process through which entities subject to our authority may seek a determination on whether staff would recommend enforcement action against the requestor if particular transactions, practices or situations were pursued. We also review existing and new mechanisms available to those seeking guidance from staff and the Commission itself. By a separate order, we are revising the Enforcement Policy Statement, issued October 20, 2005.<sup>2</sup>

**I. Background**

2. EPAAct 2005 granted the Commission stronger civil penalty authority to prevent and prosecute violations of the Federal Power Act<sup>3</sup> (FPA), Natural Gas Act<sup>4</sup> (NGA), and

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<sup>1</sup> Pub. L. No. 109-58, 119 Stat. 594 (2005) (codified in scattered titles of the U.S.C.).

<sup>2</sup> *Enforcement of Statutes, Orders, Rules, and Regulations*, 113 FERC ¶ 61,068 (2005).

<sup>3</sup> 16 U.S.C. § 791a *et. seq.* (2000).

<sup>4</sup> 15 U.S.C. § 771 *et. seq.* (2000).

Natural Gas Policy Act of 1978<sup>5</sup> (NGPA) and the Commission's rules, regulations and orders thereunder. EAct 2005 increased the Commission's maximum civil penalty authority to \$1 million per day per violation.<sup>6</sup> This expanded civil penalty authority is in addition to the Commission's authority to order other remedies such as disgorgement of unjust profits and to condition, suspend, or revoke market-based rate authority, certificate authority, or blanket certificate authority. The new authority under EAct 2005, together with the Commission's existing authority, provides the Commission with tools to encourage compliance with its statutes, rules, orders, and regulations and allows the Commission to fashion the most appropriate and effective remedies and sanctions for each violation.

3. At the Conference, the Commission solicited questions and comments from the public and industry participants regarding its enforcement program following the passage of EAct 2005, particularly in light of the expanded civil penalty authority in Part II of the FPA, NGPA, and the NGA. Attendees made a number of suggestions regarding the Commission's enforcement program, including the suggestion that the Commission increase the opportunities for the public to obtain guidance and clarification on potential compliance issues.

4. Many commenters request that the Commission expand the NAL process beyond the narrow scope that exists today. Some also ask that NAL responses be provided more quickly, that more detailed analysis be provided in NAL responses, and that hypothetical or anonymous requests be considered. Other commenters request that the Commission create a help desk, separate from the Office of Enforcement, for market participants to contact for informal guidance. Commenters further request that Commission staff hold compliance workshops, prepare and publish on the Commission's website frequently asked questions (FAQs), and provide training and other outreach to assist in compliance efforts. Commenters ask for specific assurance that some measure of reliance could be placed on guidance provided through the help desk, FAQs, or staff-led trainings.

5. Commenters further request that the Commission clarify certain Commission policies so that it is easier for market participants to comply with applicable rules and regulations. Commenters ask several specific questions regarding Commission policies, such as limitations on asset management transactions in the gas industry and application of the Standards of Conduct<sup>7</sup> to particular situations. Other questions are more general,

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<sup>5</sup> 15 U.S.C. § 3301 *et. seq.* (2000).

<sup>6</sup> EAct 2005, §§ 1284(e), 314 (b)(1)(B) and 314 (b)(2), 119 Stat. 594 at 950 and 691.

<sup>7</sup> 18 C.F.R. Part 358 (2007).

such as the appropriate use of network service under the *pro forma* Open Access Transmission Tariff (OATT)<sup>8</sup> or permissible trading strategies under the Energy Market Manipulation Rules.<sup>9</sup>

6. Upon consideration of these comments, we have reevaluated the existing mechanisms for obtaining guidance from the Commission and its staff. In order to provide additional opportunities for entities subject to our authority to obtain guidance from staff regarding potential enforcement actions, we will expand the scope of the NAL process but leave in place the remaining requirements for NAL requests. We also commit to establishing a compliance help desk on the Commission's website to provide an additional mechanism for regulated companies, companies potentially subject to our jurisdiction, and affected entities to obtain more informal guidance from our staff. Finally, we direct staff to hold periodic workshops to allow the regulated community to discuss particular areas of concern regarding compliance with the statutes, rules, regulations, and tariffs administered by the Commission. Taken together, these reforms will assist the regulated community in understanding and complying with Commission policies and better enable staff to advise the Commission regarding areas of our jurisdiction in need of clarification.

## **II. Expansion of the NAL Process**

7. Through the NAL process, persons may obtain written advice as to whether staff would recommend that the Commission take no enforcement action with respect to specific proposed transactions, practices or situations.<sup>10</sup> Currently, the subject matter of NAL requests is limited to issues relating to the Standards of Conduct for transmission

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<sup>8</sup> See *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 Fed. Reg. 12,266 (Mar. 15, 2007), FERC Stats. & Regs. ¶ 31,241 (2007), *order on reh'g*, Order No. 890-A, 73 Fed. Reg. 2984 (Jan. 16, 2008), FERC Stats. & Regs. ¶ 31,261 (2007).

<sup>9</sup> *Prohibition of Energy Market Manipulation*, Order No. 670, 71 Fed. Reg. 4244 (Jan. 26, 2006), FERC Stats. & Regs. ¶ 31,202, *order denying reh'g*, 114 FERC ¶ 61,300 (2006) (codified at 18 C.F.R. Part 1c ).

<sup>10</sup> See *Interpretative Order Regarding No-Action Letter Process*, 113 FERC ¶ 61,174 (2005) (NAL Interpretative Order); *Interpretative Order Modifying No-Action Letter Process*, 117 FERC ¶ 61,069 (2006) (NAL Modification Order).

providers,<sup>11</sup> Affiliate Restrictions for electric sellers,<sup>12</sup> Code of Conduct for natural gas sellers,<sup>13</sup> and the Commission's Market Behavior Rules<sup>14</sup> and Energy Market Manipulation Rules.<sup>15</sup> In order to provide the public with additional opportunities to obtain written advice from Commission staff regarding potential enforcement actions, we will now expand the scope of issues for which NAL requests may be submitted to include any issue that falls within the Commission's jurisdiction, except for those issues arising under Part I of the FPA, sections 215 and 216 of the FPA, sections 3, 7, and 15 of the NGA, and section 311 of the NGPA.

8. We decline to include issues related to the licensing of hydroelectric projects, certification of natural gas pipelines, and operation of LNG terminals in the NAL process because independent, successful programs have already been implemented to address compliance matters in these areas. For example, the Commission's Office of Energy Projects has developed a thorough and specific compliance program pursuant to which

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<sup>11</sup> See *supra* note 7.

<sup>12</sup> 18 C.F.R. § 35.39 (promulgated in *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity, and Ancillary Services by Public Utilities*, Order No. 697, 72 Fed Reg. 39,904 (July 20, 2007), FERC Stats. & Regs. ¶ 31,252 (2007) (Order No. 697), *clarified by*, 121 FERC ¶ 61,260 (2007) *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 (2008)).

<sup>13</sup> 18 C.F.R. §§ 284.288, 284.403 (2007).

<sup>14</sup> The Market Behavior Rules applicable to electric wholesale transactions were promulgated in *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003), *reh'g denied*, 107 FERC ¶ 61,175 (2004), *revised by*, 114 FERC ¶ 61,165 (2006), later codified in *Conditions for Public Utility Market-Based Rate Authorization Holders*, Order No. 674, 71 Fed. Reg. 9695 (Feb. 27, 2006), FERC Stats. & Regs. ¶ 31,208 (2006), and subsequently renumbered in Order No. 697. The Market Behavior Rules applicable to natural gas wholesale transactions were promulgated in *Amendments to Blanket Certificates*, Order No. 644, 68 Fed. Reg. 66323 (Nov. 26, 2003), FERC Stats. & Regs. ¶ 31,153 (2003), *reh'g denied*, 107 FERC ¶ 61,174 (2004), *aff'd*, *Colo. Office of Consumer Counsel v. FERC*, 490 F.3d 954 (D.C. Cir. 2007), and were revised in *Amendments to Codes of Conduct for Unbundled Sales Service and for Person's Holding Blanket Marketing Certificates*, Order No. 673, 71 Fed. Reg. 9709 (Feb. 27, 2006), FERC Stats. & Regs. ¶ 31,207 (2006).

<sup>15</sup> See *supra* note 9.

staff routinely provides guidance to licensees.<sup>16</sup> Inspection programs have been implemented to ensure routine and consistent interaction with LNG terminal operators and pipeline developers, providing oversight to and reporting mechanisms for that area of Commission responsibility. Inspections of natural gas pipelines are also conducted during and after construction, which include feedback and remedial actions prior to hand off to the Department of Transportation for on-going safety oversight during operation. Given such compliance programs, expansion of the NAL process to include issues related to the licensing of hydroelectric projects, certification of pipelines, and the authorization of LNG terminals would be duplicative and, therefore, unnecessary.

9. We also decline to include issues related to the enforcement of reliability standards in the NAL process at this time. The Regional Entities and the North American Electric Reliability Corporation (NERC) have initial responsibility for investigating and fixing responsibility for a violation of an approved reliability standard.<sup>17</sup> When guidance is needed, requests for formal interpretations may be submitted to NERC, which must submit any interpretations it approves to the Commission for review. These procedures have only recently been implemented and expanding the NAL process to include matters under section 215 of the FPA could undermine their development. The Commission will consider the inclusion of reliability matters in the NAL process in the future as necessary.

10. In the past, the Commission has allowed NAL requests to be withdrawn, which generally occurred when the requesting party developed a belief that staff was inclined to issue a negative response to the request. The Commission considered it appropriate to allow companies to withdraw their NAL request in order to encourage companies to seek guidance regarding their transactions and practices.<sup>18</sup> Upon further consideration, we believe that both positive and negative responses to NAL requests can offer useful guidance to the industry and that allowing the withdrawal of requests may impair the usefulness of the NAL process, particularly in light of its newly expanded scope. We therefore will no longer permit the withdrawal of non-confidential NAL requests

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<sup>16</sup> A detailed overview of the compliance program is outlined in the Compliance Handbook distributed and updated by the Division of Hydropower Administration and Compliance. [http://www.ferc.gov/industries/hydropower/gen-info/handbooks/compliance\\_handbook.pdf](http://www.ferc.gov/industries/hydropower/gen-info/handbooks/compliance_handbook.pdf) (last accessed on February 29, 2008).

<sup>17</sup> See *North American Electric Reliability Corp.*, 116 FERC ¶ 61,062, *order on reh'g and compliance*, 117 FERC ¶ 61,126 (2006).

<sup>18</sup> See NAL Modification Order at P 9.

submitted after the date of this order.<sup>19</sup> Companies that do not wish to submit NAL requests that cannot later be withdrawn may obtain informal, verbal guidance from staff through one of the other guidance mechanisms described below.

11. We decline to adopt the remaining recommendations suggested by commenters, such as mandating a particular response time or allowing hypothetical or anonymous requests.<sup>20</sup> All of the remaining requirements for an NAL request therefore remain unchanged. NAL requests may not be submitted anonymously and must relate to a specific, actual transaction, practice or situation in which the applicant is or may be involved. The applicant must explain the specific details of the transaction, practice or situation, including identifying to the extent possible the persons involved, the purpose of the matter, the requestor's role in the matter, and the regulatory issues posed. NAL requests will not be accepted for hypothetical situations, nor may NAL requests relate to transactions or activities that are completed and pre-date the particular request. NAL requests will be treated as non-public until the date on which the General Counsel and Director of the Office of Enforcement, or their designees, issue a response to the request, or for an additional specified period of time not to exceed 120 days.

12. We also emphasize that, due to their non-binding nature, requests for NAL responses should not be used as a substitute for a complaint or other litigation between counterparties to a contract. Similarly, counterparties should not use the NAL process to seek Commission staff's advice regarding their relative positions with respect to compliance with the terms of a jurisdictional agreement. A NAL request is appropriate only for a person seeking advice as to whether staff would recommend that the Commission take action against it for violation of one of the statutes we administer, a Commission rule, regulation or order, or a Commission-approved tariff.

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<sup>19</sup> In unusual cases a requester may seek non-public treatment of its request for a no-action letter and a staff response, at least to the extent that the request and response describe the proposed matter or matters that are under review, for a specified period of time not in excess of 120 days from the date of any response. If our staff agrees with the period of non-public treatment the requester seeks, the Commission will not make the request and the response public until the expiration of the time period sought by the requester. If staff disagrees with the non-public period sought by the requester, it will so notify the requester, who may then withdraw the request within 30 days of the date of the staff notice. *See* NAL Interpretative Order at P 15-16.

<sup>20</sup> Although we decline to mandate a particular response time, we expect that in most circumstances staff will act on NAL requests within 60 days after the filing of, or amendment to, a request.

13. Finally, we note that the Commission does not currently charge a fee for applicants to file an NAL request as it does with other requests for guidance from the Commission.<sup>21</sup> We do not, here, propose to charge a fee for filing requests for NAL responses. We will continue to reevaluate the need to charge applicants for NAL requests based on the number of requests received and the complexity of issues involved in the requests for NAL responses.

### **III. Mechanisms for Obtaining Commission and Staff Guidance**

14. The NAL process is only one of the mechanisms available to those seeking to obtain guidance regarding compliance with Commission statutes, rules, regulations or orders or Commission-approved tariffs. The most formal, and most binding, form of guidance is provided through Commission orders, issued in response to pleadings subject to public review and comment. The least formal, and least binding, form of guidance is provided through the Enforcement Hotline (Hotline) and meetings and discussions with individual members of Commission staff. In between these two extremes are NAL responses, legal opinions issued by the Office of the General Counsel, and interpretative letters issued by the Chief Accountant. While not binding on the Commission, these advisory materials provide confirmation of staff positions that reflect various levels of staff consensus.

15. The choice of which option to pursue when seeking guidance will be influenced by a variety of considerations, including the subject matter of the request, the relative urgency of the request, the amount of reliance the person desires to place on the guidance received, and the level of confidentiality needed. As a general matter, more definitive guidance is the product of more time consuming and less confidential processes. To assist the public in its consideration of which guidance mechanism is best suited to its needs, we review below the various options that are available and the relative level of reliance that can be placed on each. Those in need of guidance from the Commission can weigh the benefits and limitations of each option in order to determine which is most appropriate for a particular circumstance.

16. Many industry and consumer representatives are already familiar with those members of staff to be contacted regarding particular areas of our jurisdiction. For those less familiar with Commission staff, we are implementing a compliance help desk on our website to provide a mechanism to submit questions regarding compliance with the statutes, rules, regulations and tariffs we administer. The compliance help desk will allow individuals to indicate the area of our jurisdiction to which a question relates so that it can be forwarded internally to the appropriate staff member for response. The

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<sup>21</sup> See 18 C.F.R. Part 381 (2007).

compliance help desk will be easily accessible from the homepage of our website,<sup>22</sup> which will provide further details regarding the type of inquiries for which the compliance help desk is appropriate. Through this website feature, persons or companies that are or may be subject to the Commission's jurisdiction, or otherwise affected by jurisdictional activities, will be able to easily reach the appropriate member of our staff when compliance questions arise.

17. We reiterate, however, that the informal advice given by staff is never binding on the Commission. The Commission's regulations make clear that "[o]pinions expressed by the staff do not represent the official views of the Commission, but are designed to aid the public and facilitate the accomplishment of the Commission's functions."<sup>23</sup> The official views of the Commission must be stated through its public orders, agreed to by a majority of voting Commissioners based on a complete review of the record. Nonetheless, the Commission recognizes that good faith and reasonable reliance on staff guidance may be a mitigating factor when considering penalties for violations of a statute, rule, regulation, order or tariff. Similarly, acting in contravention of informal staff guidance may be an aggravating factor when considering what, if any, civil penalty is appropriate for a violation. We further address the issue of mitigating and aggravating factors for civil penalty assessments in the accompanying Revised Policy Statement on Enforcement.

18. We encourage the public to continue to reach out to staff when in need of advice by using one of the various mechanisms discussed below. Members of our staff are experts in their particular area of responsibility and are well acquainted with the statutes, regulations, rules and orders administered by the Commission. Those in need of guidance can therefore often find valuable information from staff. To the extent more formal, binding guidance from the Commission is needed, a petition for declaratory order should be considered.

**A. Petition for Declaratory Order**

19. Any person seeking to terminate a controversy or remove uncertainty regarding a matter within the Commission's jurisdiction may file a request for a declaratory order under Rule 207(a)(2) of the Commission's rules of practice and procedure.<sup>24</sup> The

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<sup>22</sup> The Commission will issue a notice in this docket indicating the specific link to the compliance help desk when it is operational.

<sup>23</sup> 18 C.F.R. § 388.104(a) (2007).

<sup>24</sup> 18 C.F.R. §385.207(a)(2) (2007). There is a filing fee associated with a petition for declaratory order, although certain entities are exempt from the filing fee. *See* 18 C.F.R. § 381.302 (2007). In the context of a particular proceeding, parties also may

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declaratory order process can be very useful to persons seeking reliable, definitive guidance from the Commission. Recent declaratory orders have addressed such issues as the extent of the Commission's jurisdiction over a natural gas gatherer,<sup>25</sup> permissible actions under section 305(a) of the FPA,<sup>26</sup> and triggering events to make an entity a "public utility" under the Public Utility Holding Company Act of 2005.<sup>27</sup> As with other formal Commission actions, a declaratory order represents a binding statement of policy that provides direction to the public and our staff regarding the statutes we administer and the implementation and enforcement of our orders, rules and regulations. A declaratory order is therefore the most reliable form of guidance available from the Commission.

20. Essential to the declaratory order process, however, is the ability of interested persons to comment on the issues raised. Petitions for declaratory order are therefore subject to the public comment process, ensuring that interested persons have the opportunity to provide input regarding the subject matter of the petition. Because of the public and formal nature of the declaratory order process, there is an unavoidable delay between the receipt of a petition and issuance of an order. Although there is no statutory time frame to respond to a request for a declaratory order, the Commission attempts to respond to all such requests in a timely manner. The amount of time needed to consider each petition will vary depending on the complexity of issues raised. To the extent that a petitioner or party needs action by a certain date, any request for such action should be explained in the petition.

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submit requests for clarifications of a prior Commission order in the docket. If the requested clarification reveals a need to reform rather than merely clarify a particular rule or regulation, the Commission may initiate further proceedings to propose such reforms, as it did recently in response to a request for clarification of the rules governing the release of firm capacity by shippers on interstate natural gas pipelines. *See, e.g., Pacific Gas & Elec. Co, et al.*, 118 FERC 61,005 (2007); *Promotion of a More Efficient Capacity Release Market*, Notice of Proposed Rulemaking, 72 Fed. Reg. 65,916 (Nov. 26, 2007), FERC Stats. & Regs. ¶ 32,625 (2007) (Capacity Release NOPR). Requests for clarification are not subject to a filing fee.

<sup>25</sup> *Quicksilver Resources, Inc.*, 122 FERC ¶ 61,115 (2008).

<sup>26</sup> *Entergy Gulf States, Inc. ex rel. Entergy Gulf States Louisiana, L.L.C.*, 122 FERC ¶ 61,075 (2008).

<sup>27</sup> *Babcock & Brown Holdings, Inc.*, 121 FERC ¶ 61,304 (2007).

## B. NAL Requests

21. Through the NAL process, persons may obtain written advice as to whether staff would recommend that the Commission take no enforcement action with respect to specific existing or proposed transactions, practices or situations.<sup>28</sup> NAL responses thus provide increased certainty regarding staff's view on whether a particular transaction, practice or situation would be subject to agency enforcement action. As a result, the NAL process is an effective tool for entities subject to our authority to reduce the risk of failing to comply with the statutes we administer, the orders, rules or regulations thereunder, or Commission-approved tariffs.

22. As discussed above, NAL requests are only appropriate for certain subject matters. They must relate to a situation in which the requesting party is or may be involved and not involve hypothetical circumstances or completed transactions. Past NAL responses have addressed, under then-applicable policies, issues such as the ability of certain employees to provide non-public transmission information on a non-discriminatory basis,<sup>29</sup> the use of shared employees by a transmission provider's generation function and transmission function,<sup>30</sup> and classification of service-providing affiliates under the Standards of Conduct.<sup>31</sup> Expansion of the scope of the NAL process will allow the public to obtain similar guidance on a broader range of issues.

23. Although NAL responses are not binding on the Commission, they are signed by representatives of the Office of the General Counsel and the Office of Enforcement and thus reflect the consensus view of those offices. Where appropriate, members of the Office of Energy Market Regulation also are consulted when preparing an NAL response and, therefore, their views are often reflected. Until a response is issued, NAL requests are treated as non-public. Applicants can request that staff continue to treat both NAL

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<sup>28</sup> See NAL Interpretative Order at P 6.

<sup>29</sup> *E.ON U.S. LLC*, Docket No. NL08-1-000 (Nov. 29, 2007).

<sup>30</sup> *Entergy Corp.*, Docket No. NL07-4-000 (Feb. 9, 2007); *Bonneville Power Administration*, Docket No. NL07-5-000 (Feb. 9, 2007).

<sup>31</sup> *Sabine Pipe Line LLC*, Docket No. NL07-1-000 (Nov. 17, 2006); *Chandeleur Pipe Line Company*, Docket No. NL07-2-000 (Nov. 17, 2006).

requests and responses as non-public for an additional period of 120 days after a response is issued. Once an NAL response is public, it is posted in the Commission's eLibrary system in a searchable format.<sup>32</sup>

### C. General Counsel Opinion Letters

24. Another avenue available to the public when seeking guidance from Commission staff is to request an opinion letter from the General Counsel.<sup>33</sup> General Counsel opinion letters can be used to provide guidance regarding the interpretation of any statute or implementing regulation under the Commission's jurisdiction, such as the Commission's jurisdiction over a particular entity, issue or transaction. Past opinion letters have addressed such issues as how two separate but related license applications will be treated,<sup>34</sup> questions of Commission jurisdiction over natural gas pipelines and electric energy sales,<sup>35</sup> and whether certain sales would be subject to price mitigation and must-offer obligations.<sup>36</sup>

25. Because they involve legal questions, opinion letters can sometimes be issued without involvement from other offices within the Commission. However, typically other offices are consulted as appropriate depending on the subject matter presented. Although the process for obtaining a General Counsel opinion letter is less complicated,

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<sup>32</sup> NAL responses are posted in "NL" dockets and may be searched in the eLibrary system by date or requesting party. A link to all NAL responses is available on the Commission's website at <http://www.ferc.gov/legal/no-action-letters.asp>.

<sup>33</sup> 18 C.F.R. § 388.104(c) (2007). There is a filing fee associated with a General Counsel opinion letter except for requests relating solely to matters under Part I of the Federal Power Act. *See* 18 C.F.R. § 381.305 (2007).

<sup>34</sup> *Xcel Energy Services, Inc.*, (August 8, 2005) (unpublished General Counsel Opinion Letter).

<sup>35</sup> *City of Duluth Public Works & Utilities*, (June 7, 2002) (unpublished General Counsel Opinion Letter); *Southern California Edison Co. v. Lynch, et al.*, (February 12, 2001) (unpublished General Counsel Opinion Letter).

<sup>36</sup> *Ex rel. City of Los Angeles*, Docket No. EL00-95-012 (May 25, 2001).

the views expressed are only those of the General Counsel and are not binding on the Commission. Absent confidentiality concerns, opinion letters will be released to the public through postings on the Commission's eLibrary system.<sup>37</sup>

#### **D. Accounting Interpretations**

26. The Commission's Uniform Systems of Accounts provide that in order to maintain uniformity of accounting, regulated entities must submit questions of doubtful interpretations to the Commission for consideration and decision. The Commission and its Chief Accountant provide guidance to, and respond to inquiries from, regulated entities on the implementation of standards issued by the Financial Accounting Standards Board and existing or emerging industry-wide or entity specific accounting issues within the context of the Uniform Systems of Accounts. Guidance letters are publicly available on the Commission's website.<sup>38</sup> Past guidance letters have addressed such issues as accounting for uncertainty in income taxes,<sup>39</sup> accounting for the funded status of defined benefit postretirement plans,<sup>40</sup> and the appropriate accounting treatment for earnings on use-restricted debt funds used for construction.<sup>41</sup>

27. The advice provided in guidance letters issued by the Chief Accountant represent the views of the Commission's accounting staff and serve as controlling accounting guidance for regulated entities unless or until superseded by rehearing or other

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<sup>37</sup> Although General Counsel opinion letters often are not issued in a specific docket, they can be found by selecting "Interpretation and Advisory Opinion" in the Document Type field in eLibrary and searching all issuances within the relevant time period.

<sup>38</sup> Accounting guidance letters are issued as either Accounting Interpretations (AI dockets) or Accounting Releases and are available on the Commission's website at <http://www.ferc.gov/legal/acct-matts.asp>. Accounting Releases are also published in the Federal Energy Guidelines.

<sup>39</sup> *Accounting and Financial Reporting for Uncertainty in Income Taxes*, Docket AI07-2-000 (May 25, 2007) (unpublished letter order).

<sup>40</sup> *Commission Accounting and Reporting Guidance to Recognize the Funded Status of Defined Benefit Postretirement Plans*, Docket AI07-1-000 (Mar. 29, 2007) (unpublished letter order).

<sup>41</sup> *Massachusetts Water Resources Authority*, Docket No. AI95-2-000 (Aug. 11, 1995) (unpublished letter order); *Release AR-13*, FERC Stats. & Regs. ¶ 40,013 (May 1, 1983).

Commission action. However, neither guidance letters issued by the Chief Accountant nor informal advice provided through discussions with the Chief Accountant are binding on the Commission and are not controlling precedent for ratemaking purposes.

**E. Enforcement Hotline**

28. The Hotline is operated by staff of the Office of Enforcement and provides informal guidance to the public on all areas within the Commission's jurisdiction, provided they do not involve matters before the Commission in docketed proceedings.<sup>42</sup> The Hotline is available to attempt to informally resolve disputes that fall within the Commission's jurisdiction. In addition, the Hotline serves as a conduit for the public and industry to inform Enforcement staff of potential violations of Commission statutes, rules, regulations, and orders. For example, the Hotline has been used to report allegations of market manipulation, an abuse of an affiliate relationship, or a violation of a tariff. Through its responses to Hotline inquiries, Enforcement staff provides information to the general public and guidance to the energy industry regarding the application of the Commission's statutes, rules, regulations, and orders.

29. In responding to a Hotline call, the Enforcement staff will research the legal issues raised by the inquiry and will likely consult with the staff of other Commission offices who have expertise in the subject matter of the inquiry. Although Enforcement staff consults with other Commission staff prior to responding to an inquiry, the opinions provided through the Hotline are informal and are not binding on the Commission or the General Counsel.<sup>43</sup> If the caller requests Enforcement staff's assistance to resolve a dispute, staff will contact the companies involved in the dispute and attempt to facilitate a resolution that avoids litigation. All calls to the Hotline may be made anonymously,<sup>44</sup> and all information and documents obtained through a Hotline inquiry, and any response provided, are treated as non-public by the Commission and its staff consistent with the provisions of section 1b.9 of the Commission's regulations.<sup>45</sup>

**F. Meetings, Compliance Help Desk Inquiries, and Other Informal Contacts**

30. Members of Commission staff routinely answer questions and offer advice regarding matters within the Commission's jurisdiction to aid the public and facilitate the

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<sup>42</sup> 18 C.F.R. § 1b.21 (2007).

<sup>43</sup> 18 C.F.R. § 1b.21(a) (2007).

<sup>44</sup> 18 C.F.R. § 1b.21(d) (2007).

<sup>45</sup> 18 C.F.R. § 1b.21(c) (2007) citing 18 C.F.R. § 1b.9 (2007).

accomplishment of the Commission's functions.<sup>46</sup> The Commission provides on its website specific contact information for subject matter experts within many areas of the Commission's jurisdiction. To find the appropriate point of contact, simply navigate to the Industry Activities section of our homepage for the relevant industry and select the particular area of interest.<sup>47</sup> Alternatively, navigate to the compliance help desk portal from the 'Help' section of our website to submit questions regarding particular areas of compliance.

31. If helpful in a particular circumstance, staff also can arrange meetings with representatives from various Commission offices to provide feedback or input on issues of concern.<sup>48</sup> Staff members often have developed significant expertise in their subject area and can help identify relevant issues and precedent to address, as well as areas in which precedent is less clear. For example, staff regularly participates in pre-filing meetings with persons that anticipate initiating a proceeding at the Commission, as well as consumer representatives and staff from other regulatory agencies. Such meetings can involve any area of the Commission's jurisdiction, such as rate matters or project licenses and representatives from multiple offices at the Commission may be in attendance. Pre-filing meetings thus educate staff regarding matters of interest to the public and allow an opportunity for staff to express concerns they may have with an anticipated proposal or position. While the information and advice provided in pre-filing meetings is not binding on the Commission, candid discussions regarding relevant Commission policies often result in filings that are more focused and consistent with Commission policy, which benefits the public generally.

32. Staff also regularly participates in meetings regarding pending rulemakings. Because the *ex parte* restrictions applicable to adjudications do not apply to our

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<sup>46</sup> See 18 C.F.R. § 388.104(a) (2007) ("The Commission staff provides informal advice and assistance to the general public and to prospective applicants for licenses, certificates, and other Commission authorizations . . .").

<sup>47</sup> For example, the Industry Activities for the electric industry can be found at <http://www.ferc.gov/industries/electric/indus-act.asp>. Links to particular subject matters are provided, each with information regarding the Commission's activities in the area and contact information for staff. Similar webpages are available for other industries, accessible by navigating to the Industries link on the Commission's homepage. We also note that every notice of proposed rulemaking and final rule issued by the Commission lists at least one specific staff member who is available for questions on that particular order or rule.

<sup>48</sup> Staff is not permitted to comment, off-the-record, on ongoing, contested proceedings. See 18 C.F.R. § 385.2201 (2007).

rulemaking proceedings, staff is available to meet with interested persons and answer questions that they may have regarding the issues pending in such rulemakings. Candid discussions with staff can assist the Commission through refinement of the issues and the development of improved comments to be submitted in such rulemakings.

33. The most frequent form of staff advice is provided during individual conversations with staff members. Many questions regarding Commission rules and regulations can often be answered through a quick phone call with a member of staff. Staff can answer informal questions about any issue that falls under the Commission's enabling statutes and regulations, such as what information an applicant is required to file with the Commission under a particular regulation, possible solutions to a potential problem prior to initiation of a proceeding before the Commission, and informal clarification on a Commission rule or order. While it is important to recognize that such guidance is only the opinion of one staff person, that opinion is often informed by years of experience within the particular subject area and within the Commission itself. Implementation of the compliance help desk will help facilitate the public's access to this body of experience.

34. It must be emphasized, however, that guidance given informally by staff is the most informal form of advice available and will not benefit from the deliberative process used to produce NAL responses, opinion letters, and accounting interpretations. Because of these limitations, however, informal advice often can be given more quickly and can be maintained confidentially at the request of the inquiring party. To ensure maximum availability and efficient use of staff resources, inquirers represented by legal counsel are expected to research issues initially before seeking staff's guidance.

#### **IV. Guidance on the Application of Regulations and Orders**

35. At the Conference, several commenters expressed concern that the Commission's rules and regulations are often ambiguous and can be difficult to comply with properly. To address these concerns, the Commission invited post-Conference comments identifying the particular rules and regulations in need of clarification. Many of the topics identified in the subsequent comments are already being addressed in on-going proceedings and, therefore, we decline to address them here.

36. For example, some commenters ask specific questions regarding restrictions on asset management transactions in the gas industry and the application of the Standards of Conduct in the electric industry. These issues are presently pending before the Commission in rulemaking proceedings in Docket Nos. RM08-1-000<sup>49</sup> and RM07-1-

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<sup>49</sup>Capacity Release NOPR, *supra* note 23.

000,<sup>50</sup> respectively, and are best addressed in those proceedings. Other commenters ask more general questions regarding the operation of the market-based rate program and the requirements of the *pro forma* OATT. These questions involve matters that have been the subject of extended comment in the proceedings leading to issuance of Order Nos. 697 and 890 last year.<sup>51</sup> Those orders address a host of issues related to the market-based rate program and the provision of service under the *pro forma* OATT and continue to be subject to rehearing and clarification in future orders.

37. We are sensitive, however, to requests for greater clarity in our rules. We therefore direct staff to hold periodic workshops with the regulated community to discuss areas of concern regarding compliance.<sup>52</sup> Through these workshops, the regulated community can help staff identify areas in which additional clarity is needed and staff can provide advice regarding compliance pending further action by the Commission. In the absence of a contested, ongoing proceeding,<sup>53</sup> industry participants also can continue to contact staff directly through one of the mechanisms described above or bring the matter to the Commission's attention through a request for declaratory order.

38. In order for the Commission or staff to be responsive, however, requests for clarification must be precisely stated within the context of the particular Commission policies. This applies equally to matters raised in a declaratory order and in a compliance workshop. Claims of general ambiguity without reference to a particular transaction or

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<sup>50</sup> *Standards of Conduct for Transmission Providers*, Notice of Proposed Rulemaking, 73 FR 16228 (Mar. 27, 2008), FERC Stats. & Regs. ¶ 32,630 (2008), *see also Standards of Conduct for Transmission Providers*, Order No. 690, 72 FR 2427 (Jan. 19, 2007), FERC Stats. & Regs. ¶ 31,237 (Jan. 9, 2007), *order on clarification*, Order No. 690-A, 72 FR 14235 (Mar. 27, 2007), FERC Stats. & Regs. ¶ 31,243 (2007).

<sup>51</sup> *See* Order No. 697, *supra* note 12; *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 Fed. Reg. 12,266 (Mar. 15, 2007), FERC Stats. & Regs. ¶ 31,241 (2007), *order on reh'g*, Order No. 890-A, 73 Fed. Reg. 2984 (Jan. 16, 2008), FERC Stats & Regs. ¶ 31,261 (2007).

<sup>52</sup> Compliance workshops will be listed on the Calendar of Events on our website. Members of the public interested in receiving notices of upcoming workshops may subscribe to the Technical Conferences Feed using the RSS feature on our website. *See* <http://www.ferc.gov/help/rss.asp>.

<sup>53</sup> 18 C.F.R. § 385.2201 (2007).

situation are not helpful to the development of clear and unambiguous rules and regulations. Commission staff will utilize such industry feedback to develop recommendations for the Commission regarding potential future action to clarify our regulations.<sup>54</sup>

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>54</sup> Staff may also use information gathered in these workshops to update FAQs posted on the Commission's website. We interpret commenter requests to develop and post FAQs to be a request to expand the existing FAQs already posted on the Industries section of our website. Whether it would be appropriate or helpful for staff to post additional FAQs regarding a particular issue is best addressed in the workshop regarding that compliance matter.