20020425-3001 Received by FERC OSEC 04/25/2002 in Docket#: RM01-10-000

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Standards of Conduct for Transmission Providers Docket No. RM01-10-000

NOTICE OF STAFF CONFERENCE

(April 25, 2002)

Take notice that on May 21, 2002, the Federal Energy Regulatory Commission staff will hold a public conference to discuss the proposed revisions to the gas and electric standards of conduct governing transmission providers and their energy affiliates issued in this docket on September 27, 2001. 1/ To focus the discussion at the conference, a staff analysis of the comments received to date is attached to this notice. The conference will begin at 9:30 a.m. at the Commission's offices, 888 First Street N.E., Washington, D.C. in the Commission's Meeting Room. All interested persons are invited to attend.

To reflect the changing structure of the energy industry, in this docket the Commission proposed to adopt one set of standards of conduct to govern the relationships between regulated gas and electric transmission providers and all their energy affiliates, broadening the definition of an energy affiliate covered by the standards of conduct, from the more narrow definition in the existing regulations found in parts 37 and 161. This proposal is intended to eliminate the potential for a transmission provider's market power over transportation to be transferred to its affiliated energy businesses because the existing rules do not cover all affiliate relationships.

The Commission received comments to the NOPR from 154 interested participants from all segments of the natural gas and electric industries, trade associations, and state and federal regulatory agencies. In light of these comments, in the attached analysis of the comments, the Commission staff suggests some possible changes in the proposals in the NOPR, specifically, changes to the proposed definition of an "energy affiliate." The purpose of the public conference is to discuss the issues outlined in the attached staff paper.

1/ Standards of Conduct for Transmission Providers, 66 FR 50919 (Sep.27, 2001), IV FERC Stats. & Regs. Regulations Preambles ¶ 32,555 (Sep.27, 2001).

The conference will be organized in a town meeting, or technical conference, format to allow discussion of specific drafting options for the regulatory text. Attendees who want to propose alternatives to the regulatory text in the attached staff paper should come prepared to share specific proposed language. Also, the participation of people familiar with the business operations of the transmission providers and their energy affiliates is particularly invited. Participants are encouraged to offer assessments of the quantitative impacts of the proposed rule and the benefits to be obtained by the proposed rule. The order of the discussion at the conference will follow the organization of the attached staff paper: the definition of an energy affiliate, application of the rules to the bundled sales function for retail native load, the independent functioning requirement, information disclosure rules, and the posting of specified information.

The Capitol Connection patrons in the Washington, D.C. area will receive notices regarding the broadcast of the conference. It also will be available, for a fee, live over the Internet, via C-Band Satellite, and via telephone conferencing. Persons interested in receiving the broadcast, or who need further information, should contact David Reininger or Julia Morelli at the Capitol Connection (703-993-3100) as soon as possible or visit the Capitol Connection web site at http://www.capitolconnection.gmu.edu and click on "FERC."

In addition, National Narrowcast Network's Hearing-On-The-Line service covers all FERC meetings live by telephone so that interested persons can listen at their desks, from their homes, or from any phone, without special equipment. Billing is based on time on-line. Call (202) 966-2211 for further details.

Questions about the conference should be directed to:

Demetra Anas
Office of General Counsel
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426
202-208-0178.
Demetra.Anas@ferc.gov

Linwood A. Watson, Jr.
Deputy Secretary

Staff Analysis of the Major Issues Raised in the Comments

In this rulemaking, the Commission proposed to adapt existing regulations to reflect the evolving energy market by consolidating the standards of conduct and applying them uniformly to all regulated transmission providers (natural gas pipelines and transmitting public utilities). *Standards of Conduct for Transmission Providers*. 2/ The NOPR also broadened the definition of an energy affiliate from the more narrow definition in the existing regulations. 3/ In this paper, staff provides its analysis of the major issues raised by the commenters in response to the NOPR. Further analysis will be necessary to evaluate the implications of the D.C. Circuit Court's recent decision in Dominion Resources Inc. v. FERC. 4/

I. BACKGROUND

The standards of conduct are one method used by the Commission to limit the ability of the transmission provider, a natural monopoly, to extend its market power over transmission to other energy markets by giving its affiliates unduly preferential treatment. Currently, the standards of conduct require that: (1) a transmission provider's transmission function operates independently from its marketing and sales functions; and (2) a transmission provider must treat all transmission customers, affiliated and unaffiliated, on a non-discriminatory basis.

2/ Standards of Conduct for Transmission Providers, 66 FR 50919 (Oct. 5, 2001), IV FERC Stats. & Regs. Regulations Preambles ¶ 32,555 (Sep. 27, 2001).

3/ The gas standards of conduct are codified at Part 161 of the Commission's regulations, 18 CFR Part 161 (2001), and the electric standards of conduct are codified at Part 37 of the Commission's regulations, 18 CFR Part 37 (2001).

4/ Dominion Resources, Inc. And Consolidated Natural Gas Co., 89 FERC ¶ 61,1652 (1999), order on compliance filing, 91 FERC ¶ 61,140 (2000), order denying reh'g, 93 FERC ¶ 61,214 (2000), vacated and remanded (D.C. Circuit No. 01-1169, Slip Op. Issued April 19, 2002).

In the NOPR, the Commission proposed to update its standards of conduct to reflect the current realities of the natural gas and electric industries. When the gas standards of conduct were first adopted, in the 1980's, the Commission was responding to concerns that pipelines had created marketing affiliates, and as a result, pipelines were giving their marketing affiliates preferential treatment. See Order No. 497 et. seq. 5/ More recently, the Commission promulgated the electric standards of conduct in Order No. 889 6/ simultaneously with Order No. 888, which required electric transmission providers to offer open access transmission service.

With the move toward open access transmission service for both the gas and electric industries, the energy market structure is vastly different now than it was 15 or even 5 years ago. The standards of conduct have, for the most part, remained unchanged, while the energy market structures have changed significantly.

As new types of market participants, both affiliated and unaffiliated, grow and change, more entities compete for access to transmission service. Moreover, with the

---

5/ Order No. 497, 53 FR 22139 (June 14, 1988), FERC Stats. & Regs. 1986-1990 ¶ 30,820 (1988); Order No. 497-A, order on reh'g, 54 FR 52781 (Dec. 22, 1989), FERC Stats. & Regs. 1986-1990 ¶ 30,868 (1989); Order No. 497-B, order extending sunset date, 55 FR 53291 (Dec. 28, 1990), FERC Stats. & Regs. 1986-1990 ¶ 30,908 (1990); Order No. 497-C, order extending sunset date, 57 FR 9 (Jan. 2, 1992), FERC Stats. & Regs. 1991-1996 ¶ 30,934 (1991), reh'g denied, 57 FR 5815 (Feb.18, 1992), 58 FERC ¶ 61,139 (1992); Tenneco Gas v. FERC (affirmed in part and remanded in part), 969 F.2d 1187 (D.C. Cir. 1992); Order No. 497-D, order on remand and extending sunset date, 57 FR 58978 (Dec. 14, 1992), FERC Stats. & Regs. 1991-1996 ¶ 30,958 (Dec. 4, 1992); Order No. 497-E, order on reh'g and extending sunset date, 59 FR 243 (Jan. 4, 1994), FERC Stats. & Regs. 1991-1996 ¶ 30,987 (Dec. 23, 1993); Order No. 497-F, order denying reh'g and granting clarification, 59 FR 15336 (Apr. 1, 1994), 66 FERC ¶ 61,347 (Mar. 24, 1994); and Order No. 497-G, order extending sunset date, 59 FR 32884 (June 27, 1994), FERC Stats. & Regs. 1991-1996 ¶ 30,996 (June 17, 1994).

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

changes in the size and scope of transmission providers resulting from mergers, the transmission providers and their affiliates are engaged in both gas and electric transactions. As customers of transmission companies compete for access to the transmission service, a transmission provider's market power over transmission could be transferred to its affiliated energy businesses because the existing rules do not cover all affiliate relationships.

Therefore, the NOPR proposed to combine the standards of conduct so that the regulations address the evolution in the gas and electric industries, including the convergence of many gas and electric companies. The NOPR also proposed that the standards of conduct would govern the relationship between the transmission provider and its energy affiliates, broadening the definition of energy affiliate to reflect the changes in competitive markets. Under the proposed definition of energy affiliates, the transmission provider would be required to treat its bundled sales function for retail native load as an energy affiliate. The proposed definition of energy affiliates would also eliminate the exemption in the current standards of conduct for producers, gatherers, processors and local distribution companies (LDCs) that only engage in on-system sales. Finally, the NOPR proposed that any offer of a discount for any transmission service made by the transmission provider must be announced to all potential customers solely by posting on the OASIS or Internet. This was to ensure that all parties have equal and timely access to discount information in the fast-paced marketplace.

In response to the NOPR, the Commission received 154 sets of comments, plus one reply comment, from natural gas pipelines, electric utilities, LDCs, producers, gatherers, marketers, industrials, end users, munis, coops, ISOs, trade associations, one city, and state and federal agencies. This paper provides staff's preliminary views on the most significant issues.

Some of the NOPR's initiatives were generally supported by the commenters. Specifically, the proposal to develop a single set of standards of conduct was endorsed by companies involved in the converging energy industry because they currently operate under both the electric and gas standards of conduct. In addition, commenters supported the proposals to exempt a Commission-approved RTO from the standards of conduct, and to permit a transmission owner that participates in an RTO but does not control or operate its transmission facilities to request an exemption from the standards of conduct.

The NOPR also solicited comments on specific additional policy suggestions, such as structural remedies, capacity limits, revising capacity allocation methods, disgorgement of opportunity cost and prohibiting profit sharing mechanisms. For the most part, the commenters, which were predominantly from the gas industry on these

policy suggestions, argued that there was no evidence that justified the need for implementing, on a generic basis, the additional policy suggestions suggested in the NOPR. Very few commenters supported any of the measures. These measures are not discussed in this paper.

However, some of the comments raised significant substantive issues, which are discussed herein.

II. DISCUSSION

This paper discusses substantive issues that generated the most comments. The scope of the proposed rule yielded the greatest volume of comments. Therefore, the first two sections highlight the issues relating to: (1) the definition of energy affiliate, and (2) whether to treat the bundled sales function for retail native load as a marketing function. The third section addresses issues related to the requirement for the transmission function to operate independently. The fourth section highlights the current policy differences on information disclosure under the gas and electric standards of conduct compared to the NOPR's proposals. The fifth section addresses commenters' concerns relating to the requirement to post organizational charts and job descriptions on the Internet or OASIS. Finally, the last section discusses the proposed requirement to post discount information at the time a discount is offered.

A. Issues Concerning the Definition of An Energy Affiliate

The current standards of conduct only govern the relationship between the regulated transmission provider and its marketing affiliate and/or wholesale merchant function. The NOPR proposed to govern the relationship between the transmission provider and all of its energy affiliates to eliminate the loophole in the current regulations that does not prohibit a transmission provider from giving other affiliates an undue preference or preferential access to information. Therefore, the NOPR defined the term energy affiliate broadly as,

> any entity affiliated with a transmission provider that engages in or is involved in transmission transactions or manages or controls transmission capacity or buys, sells, trades or administers natural gas or electric energy or engages in financial transactions relating to the sale or transmission of natural gas or electric energy.

Proposed Section 358.3(d). Under this definition, the NOPR proposed to govern the relationship between the transmission provider and affiliated producers, gatherers, LDCs

and processors. This definition generated a lot of comments from virtually all industry groups arguing that the definition of energy affiliates was overly broad, suggesting that some narrowing of the definition would be appropriate.

Since the standards of conduct seek to prohibit undue preferences and thereby the transfer of market power from the transmission provider to its affiliates, the term "energy affiliate" must require the transmission business to operate independently from more of its energy affiliates than are covered by the existing rules. A narrow definition of energy affiliates would allow the transmission function to continue to share employees and information with some of its energy affiliates who could then receive an unfair advantage in the competitive marketplace. On the other hand, too broad a definition of "energy affiliate" would limit some of the efficiencies to be gained from vertical integration. The issue to be decided by the Commission is whether the costs associated with requiring the independent functioning of the transmission provider from a broad range of affiliates exceed the costs associated with potential anticompetitive behavior.

1. Clarifying the Definition of Energy Affiliate

Affiliates not engaged or involved in transmission transactions: Thirteen entities, including Ad Hoc Marketer, INGAA and mostly natural gas pipelines, oppose the proposed definition of energy affiliates because it does not require the energy affiliate to be engaged or involved in transmission transactions on the transmission provider's system. These commenters urge the definition of energy affiliates to be narrowed to only apply to affiliates that are involved in transportation on affiliated transmission providers' systems.

Staff disagrees with the commenters. Although an affiliate may not be directly involved in transmission transactions, the energy commodity market is closely linked to the activities in the transmission market. The transmission market and commodity markets are so interconnected that a transmission provider does have the ability to operate its transmission system in a manner as to give a trading affiliate an undue preference or to provide the trading affiliate with unduly preferential information. For example, a transmission constraint directly impacts the value of the commodity being transported and preferential access to information about such a constraint could provide a significant benefit to an affiliate engaged in trading of the commodity, even if the trader is not using the affiliated transmission provider. This is of particular importance in the electric power market because electric power cannot be practicably stored in large amounts. In these circumstances, Staff is concerned that the transmission provider could extend its market power over transmission to the other businesses or could operate its transmission system to unduly benefit an affiliate. Therefore, the definition of energy

affiliates should not be revised to require the affiliate to be engaged or involved in a transmission transaction.

Trading and financial affiliates: Several commenters, including Ad Hoc Marketers, INGAA, one natural gas pipeline and four electric transmission providers oppose or request clarification on defining energy affiliates to include entities that trade power or are engaged in financial transactions. Entities involved in the trading of power or in financial transactions related to the sale, purchase or transmission of power are an integral part of the energy commodity and transmission markets. As discussed above, the transmission market and commodity markets are so interconnected that a transmission provider has the ability to operate its transmission system in a manner so as to give a trading affiliate an undue preference or to provide the trading affiliate with unduly preferential information. In these circumstances, Staff is concerned that the transmission provider could extend its market power over transmission to the trading of energy commodities or financial transactions involving energy commodities. Therefore, trading and financial affiliates should be included in the definition of energy affiliates, to the extent that they are engaged in transactions in the energy commodity or transmission market.

Pipeline affiliates: Twenty-seven entities, the majority of which came from the gas pipeline industry, pointed out that the definition of energy affiliate would appear to require transmission providers to treat affiliated transmission providers as energy affiliates. Many argue that such a broad definition of energy affiliate would restrict the joint operations of jurisdictional transmission facilities and would mandate unnecessary duplication of jointly operated facilities. INGAA and others point out that governing the relationship between affiliated transmission providers would be inconsistent with recent Commission policy. They cite the Commission's orders that required Dominion Transmission, Inc. to apply the gas standards of conduct to its energy affiliates as a merger condition. There, the Commission specifically excluded affiliated transmission providers from the definition of energy affiliates because they are already subject to the non-discrimination provisions of the standards of conduct. 7/

7/ Dominion Resources, Inc. and Consolidated Natural Gas Co., 89 FERC ¶ 61,162 (1999), order on compliance filing, 91 FERC ¶ 61,140 (2000), order denying reh'g, 93 FERC ¶ 61,214 (2000), vacated and remanded, (D.C. Cir. No. 01-1169 Slip. Opinion issued on April 19, 2002). Even though the Commission required Dominion to apply the standards of conduct to its energy affiliates, it did not go so far as to require Dominion to apply the standards of conduct to its affiliated

(continued...)

Staff agrees that jurisdictional pipelines coordinating transactions with affiliated pipelines or holding upstream or downstream capacity on other pipelines is not a concern Similarly, coordination of transmission activities or sharing of information between affiliated electric transmission providers is not a concern. Nor does it appear that communications between regulated gas transmission providers and regulated electric transmission providers would be a problem. This is because the transmission activities of gas pipelines and electric transmission providers are adequately regulated under the open access rules. Moreover, the focus of the standards of conduct are to prevent transmission market power from extending to other products or services, so the transmission provider to transmission provider communications should not undermine the purpose of the rule. Since this was not the intent of the NOPR, the definition of energy affiliates should be clarified to exclude affiliated transmission providers.

Holding or service companies: Several commenters, including INGAA, Dominion, EEI and Williams, argue that the definition of energy affiliates could be construed to include service or holding companies because the definition includes affiliates that engage in financial transactions related to the transmission of natural gas or electricity. The commenters argue that this could limit the ability of senior officers and directors of the holding or service companies to exercise their fiduciary duties for their subsidiaries.

Holding and service companies typically are not participants in the energy or transmission market and would not be considered energy affiliates. As discussed above, only affiliates engaged in financial transactions that are involved in or engaged in the energy commodity or transmission markets will be considered an energy affiliate. Therefore, the final rule should clarify that the definition of energy affiliate does not include holding or service companies that do not engage in or are involved in transmission transactions in U.S. energy markets. This would avoid the problem highlighted in the comments of potentially prohibiting legitimate communications between the transmission company and the holding or service company.

Although, there may be situations where information from the transmission company could flow to an energy affiliate through a holding or service company, the purposes of the NOPR can be achieved by prohibiting the holding or service companies from acting as conduits for sharing information between the transmission provider and

---

7/ (...continued)
transmission providers.

other energy affiliates. Therefore, the final rule should include a provision prohibiting any affiliate from acting as a conduit for sharing information with an energy affiliate. This proposed regulatory revision should be reflected in the prohibited disclosure provisions of section 358.5(b), which are discussed later in this document.

Foreign affiliates: Thirteen commenters, including INGAA, six natural gas pipelines, five electric transmission providers and Shell objected to the definition of energy affiliates to the extent that it includes foreign affiliates. They are concerned that transmission providers will be required to treat affiliates in Europe, South America and the Caribbean as energy affiliates. Staff sees no reason to be concerned about the possibility that a transmission provider will extend its market power by giving foreign affiliates an undue preference, where the foreign affiliates do not participate in the energy markets in the United States. Therefore, the final rule should clarify that definition of energy affiliates excludes foreign affiliates that do not participate in the U.S. energy markets. However, a transmission provider should treat a foreign affiliate that participates in U.S. energy markets, by either buying, selling or trading natural gas or electric energy, as an energy affiliate.

In addition, where a foreign affiliate has an ownership interest in a jurisdictional transmission provider that affiliate is, by virtue of its ownership interests, participating in the U.S. energy markets. For example, a joint venture U.S. pipeline transmission provider would have to treat its Canadian affiliates that buy, sell or trade natural gas or electric energy or engage in or are involved in transmission transactions in U.S. energy markets as an energy affiliate.

Affiliates buying power for themselves: Several commenters, including Dominion, Calpine, and KN, argued that the Commission needs to clarify the definition of energy affiliates because including the terms "buy," "sell," or "administer" could be construed to include affiliated entities that are purchasing power for their own consumption, for example, a communications affiliate that is purchasing power to heat its office building. Under the NOPR, if an affiliate is simply "buying" power for its own consumption and not using the affiliated transmission provider for transmission, the transmission provider would be required to post the organizational charts and job descriptions for the energy affiliates, which the commenters argue, would be burdensome. Although these purchases can have an impact on the energy markets, nonetheless, there is little potential for competitive harm if the definition of energy affiliates is clarified to exclude any affiliate of the transmission provider that is solely purchasing power or natural gas for its own consumption and is not using an affiliated transmission provider for transmission.

Proposed regulatory text: The proposed revisions to section 358.3(d) would read as follows:

> (d)(i) 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.
>
> (ii) The definition of energy affiliate excludes (1) other affiliated regulated transmission providers; and (2) holding or service companies that do not engage in or are involved in transmission transactions in U.S. energy markets.

2. Should the Definition of Energy Affiliate include Producers, Gatherers and LDCs?

Under the proposed definition of energy affiliates, transmission providers would be required to apply the standards of conduct to their relationships with their affiliated producers, gatherers, intrastate pipelines, processors and LDCs. The NOPR proposed to eliminate the exemption of Order No. 497, which permitted the natural gas pipelines to share employees and information between its interstate transmission business and its affiliated producers, gatherers and LDCs. 8/

Ten entities, consisting mostly of producers and unaffiliated gas marketers, supported the proposed definition of energy affiliate, focusing on LDCs. They asserted that: (1) conditions have changed since Order No. 497 was promulgated and LDCs compete more vigorously for access to transmission service because they no longer provide service under state approved cost-of-service regulation; (2) the current exemption is a loophole that permits the LDC to get preferential access to information, which harms competition; and (3) the LDC exemption permits pipelines to circumvent the standards of conduct by using the LDC as a conduit for sharing information where they are solely engaged in on-system sales.

8/ 18 C.F.R. § 161.2(c) (2001).

Four states, Indiana, Pennsylvania, Utah and Wyoming, and the City of New Orleans opposed applying the standards of conduct to a transmission providers' relationship with its affiliated LDC because section 1 of the NGA makes production, gathering, distribution and intrastate transportation subject to regulation by the states.

Thirty-four commenters, primarily natural gas pipelines and affiliated marketers, opposed applying the standards of conduct to a transmission provider's relationship with its affiliated LDCs. They argued that: (1) there is no evidence or market analysis to support eliminating the exemption granted under Order No. 497; (2) to require such separation would cause unnecessary duplication of employees and gas control facilities, resulting in additional costs to the consumers; (3) the Commission does not have jurisdiction over producers, gatherers or LDCs; and (4) limits on communications with LDCs would impair reliability, and the "emergency" exception is insufficient.

The argument that the Commission cannot govern the relationship between the transmission provider and energy affiliates that are subject to state regulation is misdirected. The Commission has ample authority to ensure that the interstate pipeline treats all customers, affiliated and unaffiliated, on a non-discriminatory basis by regulating the conduct of the pipeline. 9/ The NOPR did not, in any way, propose to regulate the affiliates' conduct. The real issue is not whether the Commission has the legal authority to require pipelines to function independently of state regulated affiliates. The issue is whether it is the correct policy to adopt.

In determining whether to adopt this policy, the Commission has to balance the costs to the transmission provider and its affiliated producers associated with separating shared functions against the benefit to competition and the elimination of discriminatory behavior. As noted by many of the commenters, there will be costs, and for some transmission companies that have fully integrated transmission and distribution functions, those costs could be considerable. On the other hand, the affiliate relationship between the transmission provider and its affiliated LDC gives the transmission provider the financial incentive to share information with the affiliated LDC, and the loophole in the current regulations permits it to do so. As a result, the affiliated LDC has an unfair advantage over unaffiliated sellers. Elimination of the loophole in the current regulations

---

9/ See Section 4 of the Natural Gas Act, which states that with respect to the sale or transportation of natural gas, no natural gas company shall make or grant an undue preference or subject any person to an undue preference or disadvantage or maintain any unreasonable difference in rates, charges, service or facilities. 15 U.S.C. § 717c (2000).

would level the playing field for all sellers and shippers, ensuring a competitive marketplace. Therefore, the definition of energy affiliates in the final rule should require a transmission provider to treat affiliated LDCs as energy affiliates.

Staff also recommends that the definition of energy affiliate include producers, gatherers and processors. Whether a producer or gatherer is making an on-system sale or an off-system sale, it is still competing for access to the interstate transmission system. Nothing in the language of the NGA distinguishes between transmission used for on-system sales versus off-system sales. The Commission's focus is to ensure comparability of service. To retain a loophole that permits the transmission provider to share employees with its energy affiliates or give its producers or gatherers preferential information is inconsistent with the Commission's goal of non-discriminatory interstate transmission service.

With respect to producers, gatherers, and processors, the commenters voiced practical concerns about how the proposed standards of conduct would impact communications amongst these entities and with their affiliated transmission providers. INGAA seemed to assume that the NOPR proposed to restrict communications between producers, gatherers, and processors. This is not the case. The NOPR does not propose to restrict communications among producers, gatherers and processors. However, the NOPR was silent on what types of day-to-day communications would be permitted between the transmission providers and their affiliated producers, gatherers and processors. As discussed later, affiliates should be able to share certain operational information crucial to the reliable operation of the transmission system. This would alleviate many of the commenters' concerns about how the transmission provider will be able to do business with its affiliated gatherers, producers and processors.

Several parties voiced concern about the shared functions and employees on the upstream and downstream systems, particularly for off-shore facilities which are constructed and operated as integrated systems. The approach under the existing regulations has been to evaluate particular circumstances for each transmission provider's system, and where appropriate, permit the sharing of certain field-type personnel where there is little potential to give an affiliate an undue preference or to harm the competitive market. 10/ However, the Commission has had considerable experience in determining

---

10/ Order No. 497-F at 62,157 and Tennessee Gas Pipeline Company, 55 FERC ¶ 61,285 (1990).

which types of field-type personnel could be shared, and could provide additional guidance in the final rule or on a case-by-case basis in implementing the final rule.

B. Should the Definition of Marketing, Sales or Brokering Include the Bundled Sales Function for Retail Native Load

In proposed section 358.3(e), the definition of "marketing, sales or brokering" includes an electric transmission provider's sales unit, including those employees that engage in wholesale merchant sales or bundled retail sales. As a result, a transmission provider would have to separate its interstate transmission function from its bundled sales
function. 11/ This would eliminate the exemption of Order No. 889, which permitted the electric transmission provider to use the same employees for its interstate transmission business and its bundled retail sales and distribution business.

Fourteen commenters, including the Cooperatives, Calpine, ELCON, EPSA, NEMA, Transmission Access Policy Group and Transmission Group, four state agencies and the FTC supported the NOPR's proposal to include retail function employees within the definition of energy affiliate. They argued that the Commission can assert jurisdiction over the organizational structure of the jurisdictional public utility and the dissemination of information acquired through the operation of jurisdictional assets. Generally, they argue that: (1) the Commission must ensure that transmission service is not unduly discriminatory; (2) bundled retail sales represent a large percentage of utilities' sales and the utilities have little incentive to promote comparability, to improve OASIS or to provide equal quality service; and (3) the distinction between wholesale and retail is artificial and the conditions in the retail market impact the wholesale market. Several commenters, including Dynegy, argue that discriminatory behavior that harms competition is taking place. For example, Dynegy contends that some utilities block ATC across valuable interconnections in the name of service to native load, which has the effect of blocking other purchases within the utility's system. Commenters also assert that when a utility's merchant function reserves access to a valuable import path, purportedly for native load, only to simultaneously export the utility's own generation from the same control area in amounts equal to or greater than the imports this results in an undue preference. The FTC strongly endorses eliminating the native load exemption

---

11/ Section 284.286 of the Commission's regulations, 18 C.F.R. § 284.286 (2001) currently requires an interstate pipeline to separate its interstate transmission function from its unbundled sales service, essentially treating the pipeline's sales business as the equivalent of an affiliated marketing company.

from the current regulations, contending that the retail merchant function should not have preferential access to information or to the interstate transmission grid.

Thirty-six commenters, including EEI, NASUCA, NARUC, many electric transmission companies and ten state agencies, opposed treating retail function employees as a marketing function. For the most part, they contend that: (1) the Commission is exceeding its statutory authority under section 201 of the FPA, which gives states regulatory authority over facilities used in distribution, intrastate commerce or retail consumption (state preemption); (2) separation of employees engaged in the bundled sales function for retail native load from interstate transmission employees would cause expensive duplication of staff and facilities, without any countervailing competitive benefit (estimates of the one-time costs range from $75,000 - $1,000,000); (3) the transmission provider may not be able to maintain reliability and would have difficulty in coordinating generation dispatch; and (4) there are no competitive concerns because retail service is state mandated. NASUCA argues that structural separation may not be necessary to accomplish the Commission's goal that all market participants should have access to the same information. NASUCA proposes the required posting of any information relating to transmission prices or availability provided to retail sales employees by transmission employees should accomplish the Commission's goal without requiring the expense of requiring a separation of functions.

Several commenters, APPA, Duke, Bowater and Oklahoma Gas and Electric, proposed that transmission providers treat employees engaged in a bundled sales function for retail native load as energy affiliates only where they do business in states that have enacted retail competition. They argue that in states where there are no competitors seeking transmission access to serve retail customers, there can be no harm to the customer. North Carolina Utilities Commission argues that in states where there is no retail competition, such as North Carolina, the NOPR will not have the effect of promoting competition because there is none. However, a piece-meal rule, that excludes transmission providers in states that have not enacted retail competition would be difficult to implement because many transmission providers and their retail merchant operate in multiple states.

The NOPR's proposal is consistent with the Supreme Court's recent decision concerning Order No. 888. 12/ The Supreme Court held that the plain language of section 201(b) of the Federal Power Act gives the Commission jurisdiction over

---

12/ New York et al. v. FERC et al., 70 U.S.L.W. 4151, 4166; 122 S.Ct. 1012; 2001 U.S. Lexis 1380 (March 5, 2002).

wholesale sales of electric energy and transmission in interstate commerce. The Court further stated that no statutory language limits the Commission's transmission jurisdiction to the wholesale market. The NOPR proposed rules for transmission within the Commission's jurisdiction and did not assert jurisdiction over the bundled sales function. The Commission's focus and the proposed regulations relate to the jurisdictional interstate transmission provider and how it operates its interstate transmission system. Requiring the transmission provider to treat its bundled retail sales business as an energy affiliate is a critical step to full comparability.

The question facing the Commission is whether the cost of separating the retail sales function from the transmission function outweighs the benefit of eliminating the potential anticompetitive effects of a transmission owner's native load preference.

Staff has observed that many transmission providers have already structured their corporate organization so that the retail sales unit is a part of the wholesale merchant function. For those companies, there would be no cost to comply. However, for the transmission providers that currently share transmission function employees with employees engaged in bundled retail sales, there will be a cost of separating those employees and functions. These transmission providers, that typically use the shared employees for customer service, load forecasting and scheduling purposes, argue that they would incur significant costs to separate the transmission function from the retail sales function with no commensurate benefit.

As Duke recognized, the magnitude of these increased costs depends, in part, on how the separation is implemented and whether certain specific functions, like administrative or support functions, and certain information, like specific transaction or reliability information, can be shared between the transmission function and the retail sales function. Therefore, many electric transmission providers articulated the types of costs associated with separating the retail sales function from the transmission function, for example, hiring additional employees, leasing additional space, purchasing additional computers, software, increased administrative and legal costs. Only a few provided details quantifying the costs associated with separating the retail sales function, presumably because of the uncertainty whether the Commission would continue to permit the sharing of some support or administrative employees. As discussed below, under the current gas and electric standards of conduct, the Commission has permitted transmission providers to share non-transmission functions, such as administrative, accounting, human resources, with their marketing affiliates or merchant functions. This paper recommends

that the Commission continue to permit the sharing of non-transmission functions between the transmission business and its energy affiliates under the proposed regulations.

On the other hand, when a transmission provider shares employees and information with its retail sales function, there is an inherent incentive for the transmission provider to favor its native load. As a result, the native load is shielded from external competition and the market is not competitive. EPSA highlights the potential $32 billion benefit of a well-functioning competitive market (citing a Department of Energy 1999 study.) More recently, the FTC studied competition and consumer protection, focused on retail competition, and found that effective wholesale and retail competition will mutually reinforce each other, thus combining to bring benefits to customers. 13/ By requiring the transmission provider to give all transmission customers, wholesale or retail, affiliated or unaffiliated, the same access to transmission information, the Commission is fulfilling its obligation to ensure non-discriminatory transmission service. Moreover, requiring the transmission provider to treat its retail sales function as a marketing affiliate would level the playing field for all transmission customers, and would promote a competitive marketplace.

C. The Independent Functioning Requirement

The NOPR, like the current gas and electric standards of conduct, proposes to require the transmission business to function independently. Although the current standards of conduct require the transmission business to function independently of marketing or wholesale merchant functions, the proposed standards of conduct require the transmission business to function independently of any energy affiliates.

Costs of compliance: Gas pipelines and electric transmission utilities were almost unanimous in their opposition to the proposed broad definition of energy affiliates because they construed it to include affiliated businesses or components of their business that the Commission probably did not intended to sweep into the definition of an energy affiliate, such as affiliated transmission providers, holding companies, service companies and foreign affiliates. As a result, they argued that the costs associated with requiring the transmission function to operate independently of the other energy affiliates ranged from $75,000 to $200,000,000, depending on the size of the transmission provider.

13/ FTC Staff Report: Competition and Consumer Protection Perspectives on Electric Power Regulatory Reform, Focus on Retail Competition (Sep 2001) http://www.ftc.gov/reports/index.

It appears that the commenters' projected costs of imposing the independent functioning requirement reflect the "worst-case scenario," that is, if the Commission were to require a complete separation of affiliated transmission providers, holding companies and other energy affiliates, such as electric retail sales, LDCs etc., as well as prohibiting the sharing of certain non-operating functions.

If the Commission narrows the definition of the term energy affiliate as discussed earlier, then the implementation costs would not be as large as those suggested by the commenters. Therefore, the majority of cost estimates submitted by the comments do not provide a useful basis for assessing the costs of expanding the independent functioning requirement to the transmission provider's relationship with a broader group of affiliates. However, some companies did break down specific costs associated with establishing separate computer and telephone systems and a separate office building for an affiliated LDC. For example, National Fuel, which is a pipeline whose operations are wholly integrated with its LDC, states it would cost $10.7 million in the first year to duplicate these facilities.

Sharing of non-transmission functions: Forty-six commenters, including gas pipelines, electric transmission providers, AGA, EEI, INGAA, NGSA and Industrials, were very concerned because the NOPR was silent on whether the Commission would implement the independent functioning requirement consistent with the case law that has developed under the current standards of conduct.

Historically, the Commission has recognized that different transmission providers are faced with different practical circumstances in reviewing the appropriate degree of separation between the transmission function and the marketing affiliate or wholesale merchant function. Under the current gas and electric current standards of conduct, the Commission has permitted the transmission function to share with its marketing affiliate or wholesale merchant function non-operating officers or directors, and personnel performing various non-operating functions. 14/ The Commission's approach has been

---

14/ The Commission's current policy is that non-operating functions include those not engaged in day-to-day marketing, sales, transportation or other gas-related operations, including clerical and secretarial staff, general office accounting staff and some field personnel. In Order No 497-F, the Commission stated that field personnel, such as those who perform manual work (dig trenches) or purely technical duties (operate and maintain the pipeline's equipment) would not be considered operating employees.

to balance its regulatory goals with the practicalities of operating a transmission system, large or small.

For large gas and electric transmission providers, the Commission has permitted the sharing of various non-transmission functions such as legal, accounting, human resources, travel and information technology. 15/ By permitting such sharing of non-operating employees, the Commission has allowed the transmission provider to realize the benefits of cost savings through integration where the shared employees do not have duties or responsibilities relating to transmission and could not give a marketing affiliate an undue preference. In these circumstances, the sharing of transmission business employees with marketing affiliate employees was not considered to be likely to be harmful to shippers, consumers or competition in the transmission market. The Commission has also recognized that under normal circumstances, highly placed employees, such as officers or directors, are not involved in day-to-day duties and responsibilities, and can be shared between a transmission provider and its marketing affiliate so long as these individuals comply with the information disclosure prohibitions. 16/

For small gas transmission providers, the Commission looked, on a case-by-case basis, at the size of companies, the number of employees and level of interest in transportation on the pipeline, and, where appropriate, determined that companies had separated to the maximum extent practicable even if they did share transmission employees with their marketing affiliates. 17/ The Commission did not conduct comparable reviews of how small electric transmission providers implemented the independent functioning requirement of the electric standards of conduct because the

---

15/ Under Standard G, 18 C.F.R. § 161.3(g) (2001), to the maximum extent practicable a pipeline's operating employees and the operating employees of its marketing affiliate must function independently of each other. In Order No. 497-E, the Commission defined operating employees as, in part, those that are engaged in the day-to-day duties and responsibility for planning, directing, organizing or carrying out gas-related operations, including gas transportation, gas sales or gas marketing activities. Order No. 497-E at 30,996.

16/ Order No. 497-E at 30,996.

17/ See e.g., Ringwood Gathering Co., 55 FERC ¶ 61,300 (1991) and Caprock Pipeline Company, et al., 58 FERC ¶ 61,141 (1992).

Commission exempted many of the small electric transmission providers from the electric standards of conduct. 18/

The independent functioning requirement is a central component of the standards of conduct, limiting the ability of the transmission provider to use its market power to preferentially benefit an energy affiliate. Nonetheless, it is necessary to recognize the practicalities of operating a transmission system, and therefore staff recommends that the Commission continue to permit the sharing of non-transmission functions between the transmission business and its energy affiliates under the proposed regulations.

D. Information Disclosure Requirements/Prohibitions

The standards of conduct prohibitions on information disclosure are intended to prevent a transmission provider from granting its energy affiliate an undue preference over non-affiliates by sharing confidential or transmission information. The existing gas and electric standards of conduct concerning the permissible flow of information between affiliates are quite different, so as a result the positions of the commenters with respect to the NOPR's proposals depended on the industry upon which they were focused.

1. Current Policy Differences on Information Disclosure under the Gas and Electric Standards of Conduct

Under the current gas standards of conduct, when a natural gas pipeline company shares transportation information with its marketing affiliate, the pipeline must contemporaneously share that information with non-affiliates. 19/ This requirement is designed to prevent a transmission provider from giving its marketing affiliate undue

---

18/ Black Creek Hydro, Inc., 77 FERC ¶ 61,232 (1996).

19/ Standard F, 18 C.F.R. § 161.3(f) (2001), states that to the extent a pipeline provides to a marketing affiliate information related to transportation of natural gas, it must provide that information contemporaneously to all potential shippers, affiliated and non-affiliated on its system.

preferences over its unaffiliated customers through the exchange of insider transmission information.

In addition, the current gas standards of conduct prohibit a pipeline from sharing with its marketing affiliate any information the pipeline receives from a nonaffiliated shipper or potential nonaffiliated shipper (this is considered confidential information). 20/ The gas industry commonly refers to this as the "automatic imputation rule" because the Commission's policy is that when an employee that performs functions for the pipeline and its marketing affiliate receives confidential shipper information, the information is automatically divulged or imputed to the marketing affiliate since the employee is also working for the marketing affiliate. In Tenneco, the Court of Appeals endorsed this approach when it found that the relevant question is not whether a shared employee who receives critical information will disclose it to the affiliate, but whether that shared employee will in fact receive such information in the first place, or alternatively, how the pipeline intends to keep information supplied by nonaffiliated shippers from reaching a shared employee. 21/

Over the past 15 years, several natural gas pipelines have urged the Commission to adopt different approaches; (1) apply the "automatic imputation rule" only to shared **operating** employees; and (2) adopt a "no-conduit rule." 22/ However, the Commission has consistently applied the "automatic imputation rule" to all shared employees, whether they perform operating and non-operating functions, and specifically rejected a "no-conduit rule" 23/

20/ Standard E, 18 C.F.R. § 161.3(e) (2001), states that a pipeline may not disclose to its marketing affiliate any information the pipeline receives from a nonaffiliated shipper or potential nonaffiliated shipper.

21/ Tenneco Gas v. FERC (affirmed in part and remanded in part), 969 F.2d 1187 (D.C. Cir. 1992).

22/ Under a "no-conduit rule," a shared non-operating employee could receive confidential information as long as the shared employee did not act as a conduit for sharing the information with the marketing affiliate or wholesale merchant function.

23/ See Order No. 497-E and F, and Amoco Production Co. and Amoco Energy Trading Co. v. Natural Gas Pipeline Company of America, 83 FERC ¶ 61,197 at 61,849 (1998).

In contrast, under the current electric standards of conduct, which contain much broader information disclosure prohibitions, the Commission has permitted shared non-operating employees to receive confidential shipper information as long as the shared employee did not act as a conduit for sharing the information with wholesale merchant function employees. 24/ In implementing Order No. 889, the Commission justified the different rule because the electric standards of conduct provide a stricter separation of functions requirement than the pipeline standards. 25/ When the Commission reviewed the standards of conduct for electric transmission providers, the Commission adopted the "no-conduit" rule, rather than applying the "automatic imputation rule." 26/

The NOPR proposed to prohibit the transmission provider from disclosing transmission information about transmission system operations, or information acquired from non-affiliated customers, to their marketing and sales employees and the energy affiliates' employees through non-public communications. The NOPR, however, was silent on how the information prohibitions would be applied to shared employees, that is, whether the Commission would adopt the "automatic imputation rule" from the gas standards of conduct or the "no-conduit rule" from the electric standards of conduct. Many commenters, from both the gas and electric industry, request, without much explanation, that the Commission codify the “no-conduit rule” and apply to it all transmission providers.

24/ Under the gas standards of conduct, the contemporaneous disclosure requirement only applies to transportation information, while under the electric standards of conduct, the contemporaneous disclosure requirements apply to transmission and market information and prohibit off-OASIS communications. See 18 C.F.R. § § 37.4(4) and 161.3(f) (2001).

25/ Under the gas standards of conduct, to the maximum extent practicable, a pipeline's operating employees and the operating employees must function independent of each other. See 18 C.F.R. § 161.3(g) (2001). In contrast, the employees of the electric transmission provider engaged in transmission system operations must function independently of the employees engaged in wholesale merchant functions, except for emergency circumstances affecting system reliability . See 18 C.F.R. § 37.4(a)(1) (2001). The key difference being the flexibility under the term "maximum extent practicable," which permits, in certain situations, the sharing of operating employees.

26/ Allegheny Power Service Corp., et. al., 84 FERC ¶ 61,316 at 62,425 (1998).

Under the proposed regulations, staff expects transmission providers would continue to share non-operating employees, including officers and directors with their energy affiliates. In the past, the Commission's focus has been how to keep the information supplied by non-affiliated shippers from reaching the shared non-operating employees. Some non-operating functions, for example, Human Resources or Travel, clearly have little or no access to transmission-related or market information and application of the information disclosure prohibitions has little practical impact on those operations. However, where shared employees have regular access to transmission-related information, such as billing or accounting, and provide services to both the transmission provider and its energy affiliates, Staff is concerned that there is an opportunity for transmission information to be used for other functions.

The issue is, once the shared employee learns confidential shipper information, can he or she use that information to give an energy affiliate an undue preference? Under the no-conduit rule, the shared non-operating employee could receive the information, but would be prohibited from sharing the information with an energy affiliate. Applying the no-conduit rule might allow transmission providers to share more non-operating employees with its energy affiliates without violating the information disclosure prohibitions.

On the other hand, the automatic imputation rule recognizes the reality that an individual cannot segment his or her brain, and once an individual learns information, he or she is likely to utilize it. The automatic imputation rule is a clearer standard and easier to implement because it eliminates the opportunity for improperly sharing information. Staff would recommend that the Commission adopt the automatic imputation rule under the proposed regulations.

2. Sharing of Operational/Reliability Information

Many commenters from virtually all segments of the gas and electric industry argue that the separation of functions and the information disclosure prohibitions required by the NOPR will prohibit a transmission provider from communicating crucial operational information with its retail sales function, generation function, producer, gatherer or LDC. They argue that prohibiting certain of these communications will endanger the reliability of both the gas and electric transmission systems. Several commenters argue that the Commission should adopt the approach taken when implementing Order No. 889, where the Commission permitted transmission providers to share certain types of operational information with its generation function and wholesale merchant function.

Staff recommends that transmission providers and their energy affiliates be permitted to share crucial operational information necessary to maintain the reliability of the transmission system. One option for resolving this concern would be to promulgate rules governing the specific types of information that a transmission provider could share with its energy affiliates.

3. Exceptions under the Current Gas Standards of Conduct

Under current policy, a transmission provider is not required to contemporaneously disclose to all shippers information relating to a marketing affiliate's specific request for transportation service. The NOPR did not specifically address this issue. Similarly, in numerous cases implementing the existing gas standards of conduct, the Commission has permitted a non-affiliate to voluntarily consent, in writing, to allow the gas pipeline to share the non-affiliate's information with the marketing affiliate. 27/ The NOPR did not specifically address this policy. Virtually every segment of the gas industry requested clarification whether the Commission would continue the "specific-transaction exception" and the voluntary disclosure provision.

In several cases implementing the existing gas standards of conduct, the Commission permitted transportation function employees to buy and sell gas for operational reasons, including to balance fuel usage, for storage operations, to effectuate cashouts and deplete or replenish line pack. 28/ Several gas pipelines, as well as INGAA, note that the NOPR does not appear to retain the historical exclusion for such activities and urge the Commission to retain this exception.

These exceptions, which impact practical operations of the transmission system, are important and merit retention. Therefore, these exclusions should be continued in the proposed regulations.

Proposed regulatory text: The revision to proposed section 358.5(b) would add three new sections, sections 358.5(b)(3), 358.5(b)(5) and (6), and renumber section 358.5(b)(3) to 358.5(b)(4) as follows:

> (3) An employee of a transmission provider and a transmission provider cannot use any affiliate or employee of an affiliate as a conduit for

---

27/ See e.g., Southern Natural Gas Company, 70 FERC ¶ 61,348 (1995).

28/ See e.g., East Tennessee Natural Gas Co., 63 FERC ¶ 61,578, order on rehearing 64 FERC ¶ 61,159 (1993).

sharing information with an energy affiliate that is prohibited by sections 358.5(b)(1) and (2).

(4) If an employee of the transmission provider discloses information in a manner contrary to the requirements of sections 358.5(b)(1) and (2), the transmission provider must immediately post such information on the OASIS or Internet website.

(5) A nonaffiliated transmission customer may voluntarily consent, in writing, to allow the transmission provider to share the non-affiliate transmission customer's transmission information with an energy affiliate.

(6) A transmission provider is not required to contemporaneously disclose to all transmission customers or potential transmission customers information relating to an energy affiliate's specific request for transmission service.

E. Posting Organizational Charts and Job Descriptions

Currently, natural gas pipelines and electric utilities are required to post various organizational charts and job descriptions. The gas pipelines are required to make changes to the postings within three business days of a change. The Commission has never addressed the frequency of changes to be made under the electric standards of conduct. Commenters from the gas and electric industry urge the Commission to reconsider this requirement. Although they are already complying with this requirement with respect to their marketing affiliates, they argue that there would be significantly more information to post if the Commission adopts a broad definition of the term energy affiliate. Several urge that the information be updated 10-30 days from the date of the change, rather than the three days proposed by the NOPR. Commenters also argue that it may be difficult to post all changes within three business days given the complexity of some mergers or buy-outs.

Staff disagrees with the commenters position that there would be significantly more information to post with the broader definition of the term energy affiliate. Under the NOPR, there are only two changes, which might cause a minimal additional burden: (1) the transmission provider would have to identify all of its energy affiliates on the organizational charts in order to provide a clear picture of the transmission provider's relative position in the corporate structure of the parent company; and (2) a transmission provider would have to provide additional information concerning any employees it shares with its energy affiliates. Most companies already maintain organizational charts

and structural information, so there should be little additional burden to post this. With respect to posting information for employees the transmission provider shares with its energy affiliate, such posting should be minimal because the standards of conduct require the transmission provider to function independently of its energy affiliates.

Regarding the ability to update employee information, Staff has observed that some companies link their employee or human resource databases to the posted organizational charts and job descriptions, such that an automatic download or update takes place each day. Therefore, requiring the changes to be posted within three days would appear reasonable. However, the commenters' arguments, that it may be difficult to post all changes within three business days given the complexity of some mergers or buy-outs, is also a reasonable one. That does not, however, justify a delay of 10 to 30 business days. In balancing the minimal burden associated with updating day-to-day employee information with the efforts that would be needed to post completely new organizational charts resulting from complex changes, such as the sale, purchase or merger of a company, it would be reasonable to require the information to be updated within seven business days from the date of the change.

F. Posting Discounts at Time of Offer

The NOPR proposed to require any offer of a discount for any transmission service made by the transmission provider to be announced to all potential customers solely by posting on the OASIS or Internet. Although this language is consistent with the electric standards of conduct, it represents a change from the current gas standards of conduct, which require discount information to be posted within 24 hours of the time gas first flows under a discounted transaction. The NOPR stated that posting discounts on the Internet is a simple, quicker way of communicating discount information to all potential customers and reflects the Commission's desire is to ensure that all potential customers have equal and timely access to discount information in the fast-paced marketplace.

Commenters from the electric industry were largely silent on this issue because they are already operating under these requirements.

A few commenters, APGA, Amoco/BP, CPUC and Reliant, offered unqualified support of this requirement. Twenty-six commenters, primarily from the gas industry, INGAA, Ad Hoc Marketers, NGSA, EPSA, and Industrials, strongly opposed posting discounts at the time of the offer. The commenters point out that discounting is fundamentally different between the gas and electric industry. In the gas industry, pipelines face a competitive transportation market, where discounting, pipeline-to-

pipeline competition and alternative fuel sources are frequent. They argue that this proposal would put a damper on discounting and the posting requirement is inconsistent with selective discounting for the gas industry. Many expressed concern about the vagueness of the word “offer” and offered various definitions or variations for when the information should be posted. Several commenters, AGA, Dominion, Industrials and NISOURCE, recommended that discounts be posted after they are executed.

The final rule will need to balance the importance of equal and timely access to discount information with the possibility that a new discount requirement might put such a damper on discounting, that transmission capacity would remain unsold or put an interstate pipeline at a competitive disadvantage vis-a-vis non-jurisdictional competition, e.g., intrastate pipelines. Staff agrees that the term "offer" can be interpreted in a variety of ways, and recommends that the final rule provide additional clarification on the timing of the posting in the final rule. However, the current requirement, under section 161.3(h)(2), to post information within 24 hours of gas flow is too late to afford an unaffiliated competitor the opportunity to negotiate a comparable deal in today's fast-paced marketplace. In balancing those competing concerns, Staff recommends that the final rule require the transmission provider to post the discount at the conclusion of negotiations, when the discount offer is binding.

Proposed regulatory text: The proposed revisions to section 358.5(d) would read as follows:

> (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 contemporaneously 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 scheduled to be moved; 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.

List of Commenters

AEC Storage and HUB Service INC.
Alabama Electric Cooperative, Inc.
Alabama Municipal Electric Authority (AMEA)

Alcoa Power Generating Inc.
Allegheny Power - Monongahela Power Company, The Potomac Edison Company and The West Penn Power Company
Alliance Pipeline L.P.
American Electric Power System
American Forest & Paper Association
American Gas Association (AGA)
American Public Gas Association (APGA)
American Public Power Association (APPA)
Amoco Production Company and BP Energy Company (Amoco/BP)
Arkansas Public Service Commission
Atlanta Gas Light Company, Virginia Natural gas, Inc. and Chattanooga Company
Atmos Energy Corporation
Avista Corporation (Avista)
Bangor Hydro - Electric
Basin Electric Power Cooperative
Bonneville Power Administration (BPA)
Bowater Inc. (Bowater)
California Dairy Coalition
Calpine Corporation (Calpine)
Canadian Association of Petroleum Producers and the Alberta Department of Energy
Carolina Power & Light Company and Florida Power Corporation
Cinergy Services, Inc. (Cinergy)
City Council of the City New Orleans, Louisiana
CMS Energy Corporation (CMS)
Colorado Spring Utilities (CSU)
Connexus Energy
Conectiv
The Cooperatives - The Alabama Electric Cooperative, The Arkansas Electric Cooperative Corporation and The Seminole Electric Cooperative
Dairyland Power Cooperative
Discovery Producer Services LLC and Discovery and Discovery Gas Transmission LLC
Dominion Resources, Inc. (Dominion)
DTE Energy Company
Duke Energy Corporation (Duke Energy)
Dynegy Inc. (Dynegy)
East Texas Electric Cooperative, Inc. and Wolverine Power Supply Cooperative, Inc.
Edison Electric Institute (EEI)
Electric Power Supply Association (EPSA)
Electricity Consumers Resource

El Paso Corporation
El Paso Energy Partners, LP
Empire District Electric Company
Enbridge Inc.
Energy East Companies and Rochester Gas & Electric
Entergy Services, Inc. (Entergy)
Equitable Resources, Inc.
Exelon Corporation
Federal Trade Commission (FTC)
Fertilizer Institute
First Electric Cooperative Corporation
Florida Pubic Service Commission
Green Mountain Power Corporation
Gulf South Pipeline Company, LP
Gulfstream Natural Gas System, L.L.C.
Idaho Public Utilities
Independent Oil & Gas Association of West Virginia (IOGA)
Illinois Commerce Commission
Interstate Natural Gas Association of America (INGAA)
Independent Petroleum Association of America and Cooperating Association (IPAA)
The Industrials - The Process Gas Consumers Group, The American Forest & Paper Association, The American Iron and Steel Institute, The Georgia Industrial Group, The Industrial Gas Users of Florida, The Florida Industrial Gas Users, and United States Gypsum Company.
Industrial Coalitions on Standards of Conducts for Transmission Providers
Keyspan Corporation
Kinder Morgan Pipelines
LG& E Energy Corp.
The Long Island Lighting Company (filed one day out of time)
Maritimes & Northeast Pipeline, L.L.C.
Maryland Public Service Commission
Member System
Midwest Independent Transmission System
MIGC, Inc,.
Minnesota Department of Commerce
Mississippi Public Service Commission
Mirant
Montana - Dakota Utilities Co.
Montana Power Company
National Association of State Utility Consumer Advocate

National Energy Marketer Association (NEMA)
National Propane Gas Association
National Fuel Gas Distribution Corporation
National Grid USA
National Rural Electric Cooperative Association
Natural Gas Supply Association (NGSA)
New Power Company
New York Power Authority (NYPA)
New York Independent System Operator, Inc.
Nevada Independent Energy Coalition
Niagara Mohawk Power Corporation
NICOR Gas
Nisource Inc.
North Carolina Utilities Commission
Northeast Utilities Service Company
Northeast Independent Transmission Company Proponents
Northwest Natural Gas Company
Oktex Pipeline Company
Oklahoma Corporation Commission
Oklahoma Gas & Electric Company
Orlando Utilities Commission
Pancanadian Energy Services Inc.
Piedmont Natural Gas Co.
Pinnacle West Companies
Portland Natural Gas Transmission System
PPL Companies
Process Gas Consumer Group
Proliance Energy, LLC
Public Utilities Commission of the State of California "CPUC"
Public Service Company
PSEG Companies
Public Utilities Commission of Ohio & Michigan
Puget Sound Energy
Questar Market Resource, INC.
Questar Pipeline Company, Questar Gas Company, and The Questar Regulated Services Company
Reliant Resources, Inc.
Rural Utilities Service, United States Department of Agriculture

SCANA Companies - South Carolina Electric & Gas Company, Public Service Company, of North Carolina, South Carolina Pipeline Corporation, SCG Pipeline Inc., SCANA Energy Marketing, INC. and SCANA Services, Inc..
Sempra Energy
Shell Offshore Inc.
Shell Gas Transmission, LLC
Southern California Edison Company
Southern Company Services, Inc.
Southwest Transmission Cooperative, Inc. ("SWTC")
Southwest Gas Corporation
Superior Natural Gas Corporation and Walter Oil & Gas Corporation
TECO Energy, Inc.
Transmission Access Policy Study Group ("TAPS")
Transmission Group - Northern Natural Gas Company, Transwestern Pipeline Company, Florida Gas Transmission Company, Northern Border Pipeline Company, Midwestern Gas Transmission Company, and Portland General Electric.
Unaffiliated Marketers - The Midwest United Energy LLC, The Wasatch Energy, LLC and The Public Alliance for Community Energy.
USG Pipeline Company, B-R Pipeline Company , and The United States Gypsum Company
Utah Associated Municipal Power System
Utah Division of Public Utilities
Utilicorp United Inc.
Vector Pipeline L.P.
Vermont Department of Public Service
Washington Gas Light Company and Hampshire Storage Company
Washington Utilities and Transportation Commission
Wells Rural Electric Company
The Williams Companies

Williston Basin Interstate Pipeline Company
Wisconsin Electric Power Company and Wisconsin Gas Company
Wisconsin Public Service Corporation and The Upper Peninsula Power Company