

(Release No. 33-8400) relating to the addition of new Form 8-K disclosure requirements and acceleration of the filing date for that form, which was the subject of FR Doc. 04-6332, is corrected as follows.

Note: These corrections to Form S-2 (17 CFR 239.12), Form S-3 (17 CFR 239.13), Form 8-K (17 CFR 249.308), Form 10-Q (17 CFR 249.308a), Form 10-QSB (17 CFR 249.308b) and Form 10-K (17 CFR 249.310) do not appear in the Code of Federal Regulations.

1. On page 15618, first column, eleventh line, revise the reference "Section 12" to read "Section 13".

2. On page 15618, second column, fifth line of paragraph I.A.3.(a) under *General Instructions*, revise the reference "Section 12" to read "Section 13".

3. On page 15619, first column, second line of the second checkbox, revise the reference to "14a-12(b)" to read "14a-12".

4. On page 15619, first column, third line of the second checkbox, revise the reference to "(17 CFR 240.14a-12(b))" to read "(17 CFR 240.14a-12)".

5. On page 15619, first column, add the following checkbox above the *General Instructions*.

Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))"

6. On page 15620, second column, fourth line of paragraph (a) under Item 1.03 Bankruptcy or Receivership, revise the reference "Bankruptcy Act" to read "U.S. Bankruptcy Code".

7. On page 15620, third column, revise paragraph (e) under Item 2.01 Completion of Acquisition or Disposition of Assets to read as follows:

"(e) if the transaction being reported is an acquisition and if a material relationship exists between the registrant or any of its affiliates and the source(s) of the funds used in the acquisition, the identity of the source(s) of the funds unless all or any part of the consideration used is a loan made in the ordinary course of business by a bank as defined by Section 3(a)(6) of the Act, in which case the identity of such bank may be omitted provided the registrant:"

8. On page 15625, third column, redesignate paragraphs (a)(5)(1) and (a)(5)(2) of Item 5.01 as paragraphs (a)(5)(i) and (a)(5)(ii).

9. On page 15627, first column, fifth line of paragraph (c) of Item 5.05, revise the word "five" to read "four".

10. On page 15628, first column, revise amendatory instruction 20.f. to read:

"f. Revising Item 5(a);"

11. On page 15628, first column, first line under "Item 5. Other Information," designate the paragraph as paragraph (a).

12. On page 15628, in the second column, revise amendatory instruction 21.f. to read:

"f. Revising Item 5(a);"

13. On page 15628, second column, first line under "Item 5. Other Information," designate the paragraph as paragraph (a).

14. On page 15628, third column, eighth through eleventh lines in paragraph (a) under "*Item 5. Market for Registrant's Common Equity and Related Stockholder Matters*," remove the phrase "other than unregistered sales made in reliance on Regulation S (17 CFR 230.901 through 230.905)".

By the Commission.

Dated: August 4, 2004.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 04-18118 Filed 8-9-04; 8:45 am]

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 358

[Docket Number RM01-10-002; Order No. 2004-B]

Standards of Conduct for Transmission Providers

Issued August 2, 2004.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final Rule; Order on Rehearing of Order No. 2004-A.

SUMMARY: The Federal Energy Regulatory Commission (Commission) generally reaffirms its determinations in Order Nos. 2004 and 2004-A and grants rehearing and clarifies certain provisions. Order No. 2004 requires all natural gas and public utility Transmission Providers to comply with Standards of Conduct that govern the relationship between the natural gas and public utility Transmission Providers and all of their Energy Affiliates.

In this order, the Commission addresses the requests for rehearing and/or clarification of Order No. 2004-A. The Commission grants rehearing, in part, denies rehearing, in part, and provides clarification of Order No. 2004-A.

EFFECTIVE DATE: Revisions in this order on rehearing will be effective September 9, 2004.

FOR FURTHER INFORMATION CONTACT:

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Before Commissioners: Pat Wood, III, Chairman; Nora Mead Brownell, Joseph T. Kelliher, and Suede G. Kelly.

1. On November 25, 2003, the Federal Energy Regulatory Commission issued a Final Rule adopting Standards of Conduct for Transmission Providers (Order No. 2004 or Final Rule)¹ which added Part 358 and revised Parts 37 and 161 of the Commission's regulations. The Commission adopted Standards of Conduct that apply uniformly to interstate natural gas pipelines and public utilities (jointly referred to as Transmission Providers) that were

¹ Standards of Conduct for Transmission Providers, 68 FR 69134 (Dec. 11, 2003), III FERC Stats. & Regs. ¶ 31,155 (Nov. 25, 2003).

subject to the former gas Standards of Conduct in Part 161 of the Commission's regulations or the former electric Standards of Conduct in Part 37 of the Commission's regulations.² Under Order No. 2004, the Standards of Conduct govern the relationships between Transmission Providers and all of their Marketing and Energy Affiliates. On April 16, 2004, the Commission affirmed the legal and policy conclusions on which Order No. 2004 was based, granted and denied rehearing and offered clarification in Order No. 2004-A.³

2. In this order, the Commission addresses the requests for rehearing and/or clarification of Order No. 2004-A. As discussed below, the Commission grants rehearing, in part, denies rehearing, in part, and provides clarification of Order No. 2004 and 2004-A.

3. Chief among the clarifications are that (1) Local distribution companies (LDCs) may release or acquire capacity in the capacity release market without becoming Energy Affiliates; (2) the Energy Affiliate exemption for LDCs extends to LDCs serving state-regulated load at cost-based rates that acquire interstate transmission capacity to purchase and resell gas only for on-system sales; (3) an LDC division of an electric public utility Transmission Provider will not be treated as an Energy Affiliate if it qualifies for the LDC exemption under § 358.3(d)(6)(v); (4) LDCs that otherwise qualify for the LDC exemption under § 358.3(d)(6)(v) do not change their status by responding to emergencies; however, each emergency activity shall be posted; (5) natural gas processors do not become Energy Affiliates by virtue of purchasing and transporting gas on affiliated Transmission Providers for plant thermal reduction purposes; (6) processors, gatherers, intrastate pipelines and Hinshaw pipelines may purchase gas for operational purposes and make de minimus sales as required to remain in balance without becoming Energy Affiliates; (7) service companies that do not engage in any activities described in §§ 358.3(d)(1), (2), (3) or (4) on their own behalf and whose employees assigned, dedicated or working on behalf of a particular entity are subject to the Standards of Conduct as if they were directly employed by that entity are not Energy Affiliates; (8) an affiliate that purchases natural gas

solely for its own consumption is not an Energy Affiliate by virtue of those purchases; (9) § 358.4(a)(5) does not prohibit senior officers who are Transmission Function Employees from receiving transmission-related information; (10) Transmission Providers need not post the identity of shared physical field infrastructure, such as substations, that do not house any employees; (11) posted logs of discretionary waivers need not disclose customer names; (12) all officers of the Transmission Provider as well its employees with access to transmission information or information concerning gas or electric purchases, sales or marketing must be trained concerning the requirements of the Standards of Conduct; (13) Transmission Providers need not post notice of or transcribe scoping meetings for purposes of the Standards of Conduct; and (14) a Transmission Provider that has a division that operates as a functional unit is not required to maintain separate books and records for that unit.

I. Background

4. The Commission provided a detailed background of this proceeding in Order Nos. 2004 and 2004-A, which it will not repeat here.

5. Thirty-five petitioners requested rehearing and/or clarification of Order No. 2004-A.⁴

6. On May 10, 2004, in Houston, Texas, the Commission hosted a Technical Conference to provide additional informal guidance on implementing the Standards of Conduct. Approximately 230 individuals participated in the conference, which was also audiocast. As a result of the conference, industry groups have been working to bring together Chief Compliance Officers in a collaborative fashion.

II. Need for the Rule

Order Nos. 2004 and 2004-A

7. The Final Rule and the Order on Rehearing identified a number of changes in the energy, natural gas, power and transmission markets that supported the need for enhancing the Standards of Conduct, including, but not limited to, open-access transmission, unbundling, changing commodity markets, increased mergers, convergence of gas and electric industries, asset management, electronic commodity trading and an increase in the number of power marketers or entities with market-based rate authority.

Requests for Rehearing and/or Clarification and Commission Conclusions

8. El Paso and INGAA request rehearing and repeat the arguments they previously made that the Standards of Conduct requirements in Order No. 2004 (and 2004-A) are overbroad and unsupported by substantial evidence. NGSa and Sempra filed comments stating that they support most aspects of the Standards of Conduct.

9. For the reasons discussed in Order Nos. 2004 and 2004-A, the Commission denies the requests for rehearing. As the Commission previously stated, the Final Rule is needed to address the Commission's statutory mandate to prevent unduly discriminatory transmission service under sections 4 and 5 of the Natural Gas Act (NGA) and sections 205 and 206 of the Federal Power Act (FPA). Order Nos. 2004 and 2004-A are needed to guide the behavior of Transmission Providers towards all of their affiliates who compete with non-affiliates for access to transmission capacity and compete in the wholesale commodity markets.

10. Entergy, Kinder Morgan, Southern and Xcel have requested that the Commission postpone the date for Transmission Providers to comply with the requirements Order No. 2004. The Commission is deferring the implementation date by three weeks and Transmission Providers are required to comply with the Standards of Conduct by September 22, 2004.

III. Analysis of Requests for Rehearing and/or Clarification

A. Definition of a Transmission Provider

Order Nos. 2004 and 2004-A

11. Section 358.3(a) defines a Transmission Provider as: "(1) Any public utility that owns, operates or controls facilities used for the transmission of electric energy in interstate commerce; or (2) Any interstate natural gas pipeline that transports gas for others pursuant to subpart A of part 157 or subparts B or G of part 284 of this chapter."

Requests for Rehearing and/or Clarification and Commission Conclusions

12. NASUCA repeats its previous request for rehearing arguing that the Commission should classify Hinshaw⁵

² The gas standards of conduct were codified at part 161 of the Commission's regulations, 18 CFR part 161 (2003), and the electric standards of conduct were codified at 18 CFR 37.4 (2003).

³ 69 FR 23562 (Apr. 29, 2004), III FERC Stats. & Regs. ¶ 31,161 (Apr. 16, 2004).

⁴ A list of petitioners that requested rehearing and/or clarification is included in Appendix A.

⁵ Hinshaw pipelines are exempt from Commission regulation under the NGA, but they may have limited jurisdiction certificates to provide interstate transportation services like an intrastate pipeline under the Natural Gas Policy Act of 1978. See Order No. 63, FERC Stats. & Regs., Regulations Preambles 1977-1981 ¶ 30,118 (1980).

or intrastate pipelines as Transmission Providers under the Standards of Conduct. NASUCA argues that section 311 of the Natural Gas Policy Act of 1978 (NGPA)⁶ authorizes the Commission to condition the certificates that authorize Hinshaw and intrastate pipelines to engage in transmission transactions. NASUCA claims that intrastate pipelines have the same incentives to transfer market power to their Energy Affiliates as do other Transmission Providers. NASUCA argues that requiring the independent functioning of employees would limit the opportunities for intrastate pipelines to give preferential treatment to marketing affiliates that compete with non-affiliated shippers on intrastate pipelines. NASUCA claims that discriminatory intrastate transactions have the potential to distort wholesale markets and may fall between the cracks of federal and state regulation.

13. For the reasons discussed in Order No. 2004-A (at P 36), the Commission denies NASUCA's request for rehearing and will not classify intrastate and Hinshaw pipelines as Transmission Providers under the Standards of Conduct. The Commission encourages shippers who are treated in a discriminatory fashion by an intrastate or Hinshaw pipeline that is providing service under section 311 of the NGPA to contact the Enforcement Hotline or file a complaint with the Commission.

14. AGA, National Fuel—Distribution and Questar-Gas argue that LDCs should not be considered Transmission Providers as a result of transporting interstate natural gas under Order No. 63 Certificates. The Commission agrees and stated as much in Order No. 2004-A.⁷ To the extent an LDC is also a Hinshaw pipeline with Order No. 63 certificate authorization, it is not an Energy Affiliate unless it engages in Energy Affiliate activities beyond those allowed pursuant to § 358.3(d)(6)(v).

B. Definition of an Energy Affiliate

Order Nos. 2004 and 2004-A

15. The Final Rule defined Energy Affiliate in § 358.3(d) as an affiliate that:

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

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

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

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

(5) An LDC division of an electric public utility Transmission Provider shall be considered the functional equivalent of an Energy Affiliate.

(6) An Energy Affiliate does not include:

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

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

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

(iv) An affiliate that purchases natural gas or energy solely for its own consumption and does not use an affiliated Transmission Provider for transmission of natural gas or energy; or

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

(4), except to the limited extent necessary to support on-system customer sales and to engage in *de minimus* sales necessary to remain in balance under applicable pipeline tariff requirements.

i. Scope of the LDC Exemption

Requests for Rehearing and Clarification and Commission Conclusions

16. Several petitioners repeat previous requests for an outright exemption for LDCs and all their activities. For the reasons discussed in Order No. 2004-A, the Commission denies this request.

17. AGA, Cinergy, Duke, Questar-Gas, Gulf South and National Fuel—Distribution seek rehearing and reconsideration of the Commission's decision to exempt from Energy Affiliate status only those LDCs that do not participate in wholesale market functions such as hedging. Some petitioners argue that the Commission should allow LDCs to participate in

financial markets and to hedge to support on-system sales. Petitioners argue that hedging and capacity release are essential functions that allow LDCs to control costs and ensure reliability. Petitioners argue that capacity release, like *de minimus* sales, allows LDCs to balance their upstream transmission capacity commitments throughout the year and minimize costs to retail ratepayers. In addition, some petitioners argue that the *de minimus* exception for balancing sales is too vague.

18. The Commission is retaining the current version of the rule with some clarification. Specifically, an LDC would not be able to engage in financial or futures transactions or hedging without becoming an Energy Affiliate. As stated in Order Nos. 2004 and 2004-A, the Commission is concerned that transmission information could be valuable in the financial and futures markets and could be unduly preferential to an Energy Affiliate. Although several petitioners urge the Commission to narrow the definition of Energy Affiliate to permit LDCs to participate in futures markets or hedging to the extent necessary to support on-system sales, it is virtually impossible to distinguish between financial or futures transactions in a speculative market versus those needed to support on-system sales.

19. With respect to LDCs' participation in the capacity release market, the Commission did not intend to restrict the capacity release market and clarifies that LDCs may release or acquire capacity in the capacity release market without becoming Energy Affiliates. KM Pipelines requested rehearing of the Commission's statement in Order No. 2004-A, that its affiliated LDC makes off-system sales and therefore falls squarely within the definition of Energy Affiliate. (Order No. 2004-A at P 105.) KM Pipelines argue that its affiliated LDC, KMI, only makes purchases or sales of gas that are "necessary to support on-system customer sales" and does not make "off-system sales."

20. KM Pipeline's request for rehearing on this issue has identified to the Commission an error in the regulatory text of § 358.3(d)(6)(v) of the Commission's regulations, which references both "on-system customers" and "on-system customer sales." The Commission will revise the regulatory text at § 358.3(d)(6)(v) so that the term "on-system sales" is consistently used. We intend this correction to limit the LDC exemption to LDCs serving state-regulated load at cost-based rates, and not LDCs competing in competitive retail markets.

⁶ 15 U.S.C. 3371 (2000).

⁷ Order No. 2004-A at P 72 (special purpose exchange authorizations and section 7(f) service area determinations do not make an LDC a Transmission Provider or an Energy Affiliate) and Order No. 2004-A at P 93 (an LDC's status as a Hinshaw pipeline does not invalidate an otherwise appropriate exemption from the term Energy Affiliate).

21. With respect to KM Pipelines's specific request, although the Commission erroneously labeled KMI's activities as "off-system," the Commission finds that KMI nonetheless may not qualify for the LDC exemption. The Commission is concerned that an LDC which also acts as a competitive retail service provider in a state-approved retail access program could use preferential access to interstate transmission system to frustrate other competitive merchants seeking to serve the same customers. Affiliated retail merchant functions will compete against other non-affiliated retail merchants for upstream pipeline capacity, storage services, and the best gas purchase alternatives available in the wholesale energy market. Also, a competitive retail merchant has a strong profit motive in this line of its business.⁸ While the Commission supports retail competition under state approved programs, the Commission must also ensure fair and non-discriminatory access to interstate transmission and storage services to all who participate in competitive retail markets.

ii. Treatment of LDC Divisions

Order on Rehearing

22. In Order No. 2004-A, the Commission stated that an LDC division of an electric Transmission Provider would be treated as an Energy Affiliate.⁹

Requests for Rehearing and Clarification and Commission Conclusions

23. AEP and EEI request rehearing arguing that the Commission has shown no potential for affiliate abuse relating to the sharing of employees, facilities, or information between an LDC division and its affiliated electric Transmission Provider. Because an LDC division that makes only on-system sales and does not participate in other Energy Affiliate activities is not defined as an Energy Affiliate, this question only pertains to LDC divisions that are making off-system sales or participating in Energy Affiliate activities. The Commission will revise the regulatory text to reflect the Commission's intent that an LDC division would not be treated as an Energy Affiliate to the extent that it

⁸ Unlike a traditional LDC serving bundled franchised public utility load in a state prescribed service territory at state-approved rates, a retail service provider selling in a competitive retail market is authorized by the state to compete at prices established by the market not by regulators. Any reductions in costs will typically accrue as profits to the retail merchant, while increases in costs may result in losses.

⁹ See Order No. 2004-A at P 68; see also 18 CFR 358.3(d)(5).

qualifies for the LDC exemption at § 358.3(d)(6)(v).

24. With respect to LDCs that are Energy Affiliates, the Commission denies rehearing. If an LDC division provides natural gas to an electric generator in exchange for power and then sells the power, the LDC division would unduly benefit from preferential access to electric transmission information and competitors would be unduly disadvantaged. Application of the Standards of Conduct ensures that the affiliated LDC has no more information than unaffiliated competitors.

25. Entergy, Cinergy and National Grid request the Commission to clarify that both gas and electric LDCs qualify for an exemption from the definition of Energy Affiliate in § 385.3(d)(6)(v). They note that the Commission's revision to § 358.3(d)(6)(v) focuses on LDCs that are natural gas distributors and does not reference electric LDCs. They argue, however, that elsewhere in Order No. 2004-A, the Commission implied that LDC includes both natural gas and electric retail operations. They argue that provided a Transmission Provider's marketing and sales unit is treated as an Energy Affiliate, the Transmission Provider's bundled electric retail distribution function should not be treated as an Energy Affiliate. Therefore, they request the Commission to revise § 358.3(d)(6)(v) to reflect that a state-regulated LDC that acquires interstate transmission capacity to purchase and resell gas or electricity only for on-system customers is not an Energy Affiliate.

26. The Commission denies these requests for rehearing. This is one instance where the Commission's Standards of Conduct Rules were modified to reflect differences in the gas and electric industries. Gas LDCs make *de minimus* sales and purchases of gas to maintain line pack and keep their systems in balance. Electric LDCs do not make sales to stay in balance but instead they purchase ancillary services from the Transmission Provider or adjust generation. Electric utilities, therefore, do not need a *de minimus* exception for balancing.

iii. Emergency LDC Activities

Requests for Rehearing and Clarification and Commission Conclusions

27. AGA asks the Commission to exempt LDCs' responses to emergency situations. AGA argues that LDCs should not become Energy Affiliates in the event they make off-system sales, or take other actions in the wholesale market place in response to

emergencies. The Commission clarifies that LDCs do not change their status under the LDC exemption by responding to emergencies. The LDC should inform its affiliated Transmission Provider of the emergency and the Transmission Provider is directed to comply with the requirements of § 358.4(a)(2) and post on the OASIS or Internet Web site, as applicable, each emergency activity of the LDC, within 24 hours of such emergency.

iv. Gatherers and Processors

Order Nos. 2004 and 2004-A

28. In Order No. 2004-A at P 97, the Commission clarified that gatherers and processors affiliated with interstate pipelines are not Energy Affiliates in certain circumstances. Further, the Commission ruled that if a gatherer or processor merely provides a gathering or processing service and only purchases natural gas to supply operational needs (such as compression fuel), and does not engage in other transmission-related activities, then it is not an Energy Affiliate. The Commission explained that when gatherers and processors engage only in gathering and processing, they provide services to wholesale market participants but do not compete with them. Order No. 2004-A further held that an affiliate may use an affiliated Transmission Provider to transport power or gas for its own consumption without becoming an Energy Affiliate as defined in the rule. See Order No. 2004-A at P 118.

Requests for Rehearing and/or Clarification and Commission Conclusions

29. El Paso requests that the Commission confirm that to the extent a processor purchases gas for plant thermal reduction (PTR) purposes, it is doing so to supply its operational needs and is not an Energy Affiliate. El Paso further requests that the Commission clarify that the transportation of gas for PTR purposes is not an activity that would make a processor an Energy Affiliate. The Commission grants this requested clarification.

30. CenterPoint, Duke Energy, El Paso and INGAA argue that it is arbitrary and capricious for the Commission to recognize that gatherers and processors affiliated with interstate transmission providers may purchase gas for operational purposes, but not to acknowledge that such entities also may engage in sales of gas for similar reasons. The Commission will grant clarification that processors and gatherers may purchase gas for

operational purposes and make *de minimus* sales as required from time to time to remain in balance without becoming Energy Affiliates. The regulatory text will be modified to reflect this (*see* discussion of § 358.3(d)(6)(vi) *infra*).

31. CenterPoint also argues that gatherers and processors should be exempt from the definition of Energy Affiliate if they buy and sell gas from their own facilities and act as nominating/scheduling agents. CenterPoint argues that the ability to buy gas at the wellhead and resell it is a critical aspect of the gathering business model because the gatherer knows that a specific volume of gas will be gathered at a particular point and is better able to ensure maximum utilization of its investment in pipeline gathering facilities. CenterPoint claims that such certainty improves the affiliated gatherer's ability to plan and implement expansion of its gathering system.

32. The Commission denied rehearing on this point in Order No. 2004–A, and CenterPoint offers no basis for the Commission to reconsider its determination there.¹⁰ To the extent a gatherer aggregates supply produced by others and resells that gas to the wholesale market, the gatherer is clearly acting as a marketer, and the Transmission Provider must treat it as such. To the extent CenterPoint wishes to continue to pursue its business model as a field aggregator it is not prohibited from doing so, but it must comply with the separation required of Transmission Providers and their Energy Affiliates.

v. Producers

Order Nos. 2004 and 2004–A

33. In the Final Rule and the Order on Rehearing, the Commission concluded that producers that perform Energy Affiliate activities as described in § 358.3(d) are not exempt from the definition of Energy Affiliate.

Requests for Rehearing and/or Clarification and Commission Conclusions

34. Shell Offshore and Shell Gas disagree with the Commission's decision not to include a producer exemption in the new Part 358 Standards of Conduct. For the reasons stated in Order No. 2004–A, rehearing is denied.¹¹

35. Shell Offshore argues that because two Commissioners voted to grant rehearing of Order No. 2004 and include a producer exemption there was no

majority for the Energy Affiliate definition in § 358.3(d). Shell Offshore argues that defining a producer that performs Energy Affiliate functions as an Energy Affiliate under the rule contravenes the requirement in the Department of Energy Authorization Act that Commission actions must be approved by a majority vote of the Commission. Shell Offshore requests a stay of Order No. 2004 until a valid rehearing order is issued.

36. The Commission denies Shell Offshore's request for stay. Shell Offshore states that two Commissioners voted to include a producer exemption. This is incorrect. Commissioner Brownell, in her dissent in part, stated that she would have retained the existing exemption under Order No. 497 for affiliated producers. Commissioner Kelliher, in his dissent in part, would have, among other things, expanded the scope of the LDC exemption and granted an exemption for Part 157 pipelines. He did not, however, state that he would have granted an exemption for affiliated producers. Nonetheless, the decision to define producers (as well as gatherers, processors, intrastate pipelines and Hinshaw pipelines) that perform Energy Affiliate functions as Energy Affiliates was originally made in Order No. 2004 with a 2–1 majority vote of the Commission. As there was no majority to exempt producers from the definition of Energy Affiliate on rehearing in Order No. 2004–A, producers have no blanket exemption from the definition of Energy Affiliates.

37. Shell Offshore and Shell Gas disagree with the Commission's decision not to include a producer exemption in the new Part 358 Standards of Conduct. Shell Offshore argues that there is no evidence to support the Commission's decision to expand the Standards of Conduct to cover "traditionally exempt entities such as producers shipping solely their own production." Shell Offshore argues that the two *Gas Daily* articles cited in Order No. 2004–A were published after the issuance of Order No. 2004, were not in the record of this proceeding, were not available for public comment, are not relevant to the elimination of the producer exemption, and have been misinterpreted by the Commission in reaching its conclusions. Shell Offshore argues that, at best, the articles stand for the proposition that producers hold pipeline capacity only to fill the void left from the collapse of the marketers.

38. The Commission denies rehearing of a blanket exemption for producers shipping solely their own production. We do not accept Shell Offshore's argument that the Commission should

categorically exempt a producer when it is shipping solely its own production over the affiliated pipeline. Such a scenario does not eliminate the possibility of the producer being in a position to take undue advantage of preferential access to transmission system information.¹²

As the Commission stated in Order No. 2004:

Producers that are selling energy are competing with other non-affiliated shippers for access to the pipelines' transmission systems. Whether a producer is selling gas from its own production or from the production of another, it is competing with non-affiliates for access to the pipeline's transportation system.¹³

Producers, as first sellers of natural gas, are always in a position to potentially benefit from preferential access to transmission system information.¹⁴ While producers can and sometimes do conduct business in ways that minimize that potential, such as when a producer sells all of its gas under firm fixed-price, long-term contracts at the wellhead, such strategic decisions are choices that producers may change at will.

39. The Commission's use of the *Gas Daily* articles in Order No. 2004–A was neither inappropriate nor misplaced. The articles merely illustrate the point that producers have a significant presence in the wholesale commodity marketplace.¹⁵ Producers sell significant quantities of natural gas at points downstream of the producing fields, and preferential access to transmission system information would unduly

¹² For example, if the producer received information about a curtailment of capacity on the affiliated pipeline before non-affiliated shippers, it would be in a position to make mid-day nominations on the affiliated pipeline to remedy the situation before other non-affiliated shippers became aware of the situation. Such an event, if it resulted in the allocation of the remaining capacity at the only alternative delivery point on the system to the affiliated producer, would leave no capacity available to other shippers. This would allow the affiliated producer to continue to deliver its gas while non-affiliated producers would be shut in. The fact that the affiliated producer flows only its own production over the affiliated pipeline does not alleviate the Commission's concern about such an undue preference taking place.

¹³ Order No. 2004 at P 71.

¹⁴ For example, knowledge of damage to a neighboring pipeline might allow a producer to demand a higher price for its uncommitted gas.

¹⁵ See also "Top N. American Marketers, *Gas Daily's Quarterly Look at Marketer rankings*," *Gas Daily*, September 5, 2002 (BP, Conoco, Chevron Texaco and Exxon Mobil among the top 15 marketers in 2002 and 2001); "Top Players Shift in Latest Marketer Rankings," *Gas Daily*, August 17, 2001 (BP number two for second quarter 2001 with 12.3 Bcf/d in trading); "Top 30 Gas Marketers," *Inside FERC's Gas Market Report*, June 25, 1999 (Coral, Conoco, BP/Amoco, and Texaco among top 19 marketers in 1998).

¹⁰ Order No. 2004–A, PP 77–83.

¹¹ Order No. 2004–A at PP 84–87.

prefer their wholesale merchant function activities whether they are first sales or sales for resale.

40. While the Commission will deny rehearing, there may be circumstances where an individual interstate natural gas pipeline with an affiliated producer can demonstrate that the Commission's general concerns do not apply in a particular case. The Commission will consider requests for exemptions or waiver of the Standards of Conduct on a case-by-case basis.

vi. Intrastate and Hinshaw Pipelines Order Nos. 2004 and 2004-A

41. In the Order on Rehearing, the Commission clarified that intrastate and Hinshaw pipelines affiliated with interstate pipelines are not Energy Affiliates in certain circumstances. The Commission stated that to the extent Hinshaw pipelines are state-regulated LDCs, make no off-system sales and do not engage in any of the activities described in § 358.3(d), they are not Energy Affiliates. However, the Commission also stated that if a Hinshaw pipeline makes off-system sales or participates in Energy Affiliate activities, it is an Energy Affiliate. See Order No. 2004-A at P 93. If an intrastate pipeline makes sales of natural gas, holds transmission capacity or engages in Energy Affiliate activities, it is an Energy Affiliate. See Order No. 2004-A at P 94.

Requests for Rehearing and/or Clarification and Commission Conclusions

42. Duke Energy, El Paso and INGAA request rehearing and urge the Commission to permit intrastate and non-LDC Hinshaw pipelines to make purchases and sales for operational reasons without triggering Energy Affiliate status. INGAA and El Paso argue that forcing only affiliates to rely exclusively on cash-out mechanisms to balance places them at a distinct disadvantage compared to any other company that must balance.

43. The Commission grants rehearing on this point. We agree with INGAA and El Paso that intrastate and Hinshaw pipelines should be permitted to make *de minimus* sales and purchases of natural gas to keep their systems in balance without becoming Energy Affiliates on account of that balancing. The Commission will codify in a new section (§ 358.3(d)(6)(vi)) as follows: A producer, gatherer, Hinshaw pipeline or an intrastate pipeline that makes incidental purchases or sales of *de minimus* volumes of natural gas to remain in balance under applicable

pipeline tariff requirements and otherwise does not engage in the activities described in §§ 358.3(d)(1), (2), (3) or (4).

44. Duke Energy adds that intrastate and non-LDC Hinshaws should also be permitted to hedge financial risk without triggering Energy Affiliate status. The Commission denies rehearing. Duke Energy's request that intrastate and Hinshaw pipelines be permitted to hedge financial risk is denied because hedging financial risk is a commodity function. There is no reason that entities performing that commodity function should have preferential access to transmission information.

vii. Service Companies Order Nos. 2004 and 2004-A

45. In Order Nos. 2004 and 2004-A, the Commission stated that service companies that do not engage in energy or natural gas commodity markets and are not involved in transmission transactions in U.S. markets are not Energy Affiliates. See Order No. 2004 at PP 52-58 and Order No. 2004-A at PP 108-115. The Commission also stated that if a Transmission Provider utilizes a service corporation or other subsidiary as a mechanism for employment, all employees assigned, dedicated or working on behalf of a particular entity, such as a Transmission Provider or Energy Affiliate, are subject to the Standards of Conduct as if they were directly employed by the Transmission Provider or Energy Affiliate. See Order No. 2004-A at P 110. However, in Order No. 2004-A, the Commission also noted that agency agreements can be used to aggregate control over transmission capacity and clarified that a service company may act as agent for its affiliated Transmission Provider, Marketing or Energy Affiliate without becoming an Energy Affiliate so long as the service company is involved in only non-energy-related activities. The Commission also stated that if the service company/agent is involved in energy-related activities, it is an Energy Affiliate. See Order No. 2004-A at P 115.

Requests for Rehearing and Clarification and Commission Conclusions

46. EEI, INGAA, AEP, Cinergy, Entergy, Southern and Xcel argue that service companies should not become Energy Affiliates simply by acting as agents for energy-related activities. EEI claims that many service companies would have to be split in to two separate service companies and urges the Commission to allow employees to

function separately within the service company by observing the Standards of Conduct. AEP argues that service companies are not Energy Affiliates unless the service companies are also entering into energy-related contracts on their own behalf. AEP also suggests that another alternative would be to prohibit the service company from entering into energy-related agreements on behalf of both the Transmission Provider and its Marketing/Energy Affiliates. Cinergy argues that the Commission has not provided any support for prohibiting an SEC-approved service company from acting as agent for its affiliates with respect to energy-related activities. Several petitioners urge the Commission to state that service companies are not Energy Affiliates provided they maintain the separation of functions requirements when acting on behalf of a Transmission Provider or Energy Affiliate. Southern argues that the Public Utility Holding Company Act of 1935 (PUHCA) requires service companies to act on behalf of all their affiliates.

47. The Commission grants clarification, in part. Petitioners raise a valid point that the language in P 115 swallows the exception described in Order No. 2004 and the previous paragraphs in Order No. 2004-A. In addition, although Order No. 2004-A expressed some concern about service company employees acting as agents for energy-related transactions, such service company employees will be subject to the Standards of Conduct, and the Commission will treat them as if they were directly employed by the Transmission Provider or Marketing/Energy Affiliate. Accordingly, the Commission adopts petitioners' requests and excludes service companies from the definition of Energy Affiliate unless they are engaging on their own behalf in any energy-related transactions covered under §§ 358.3(d)(1), (2), (3) or (4) and on the condition that the service company employees assigned, dedicated or working on behalf of a particular entity are subject to the Standards of Conduct as if they were directly employed by that entity.

viii. Parent Companies

Order Nos. 2004 and 2004-A

48. Section 358.3(d)(6)(iii) excludes from the definition of Energy Affiliate, a holding, parent or service company that does not engage in energy or natural gas commodity markets or is not involved in transmission transactions in U.S. energy markets. In Order No. 2004-

A,¹⁶ the Commission noted in response to a question from Kinder Morgan Pipelines that it would consider individual requests if a parent company/LDC can demonstrate an acceptable level of independent functioning by an LDC division.

Requests for Rehearing and/or Clarification and Commission Conclusions

49. Kinder Morgan Pipelines request clarification that its parent company will not lose the exemption from Energy Affiliate status afforded by § 358.3(d)(6)(iii) due to the fact that its parent company is an LDC which participates in wholesale energy and capacity markets to serve on-system load, as long as its LDC operations also qualify for the exemption afforded in § 358.3(d)(6)(v). Kinder Morgan Pipelines argue that the Commission erroneously concluded that its LDC function made off-system sales in concluding that Kinder Morgan Pipelines' parent company did not qualify for the parent company exemption.¹⁷ Kinder Morgan Pipelines argue that its parent company/LDC does not make off-system sales, and therefore should qualify for the exemption afforded LDCs.

50. The Commission clarifies that a parent or holding company will not lose the exemption from Energy Affiliate status provided by § 358.3(d)(6)(iii) if it is also an LDC, as long as the LDC qualifies for the LDC exemption provided by § 358.3(d)(6)(v). However, as noted in our earlier discussion, Kinder Morgan Pipelines' LDC operations, to the extent they include service to competitive retail markets, at market-based prices would not qualify for the LDC exemption of § 358.3(d)(6)(v).

ix. Affiliates Buying Power for Themselves

Order Nos. 2004 and 2004-A

51. Section 358.3(d)(6)(iv) excludes from the definition of Energy Affiliate, "an affiliate that purchases natural gas or energy solely for its own consumption and does not use an affiliated Transmission Provider for transmission of that natural gas or energy." In Order No. 2004-A, the Commission clarified that an affiliate buying gas or power for its own consumption "may use an affiliated Transmission Provider," and cautioned that "the Transmission Provider must treat the affiliate as an Energy Affiliate unless the gas or power is for its own

consumption." See Order No. 2004-A at P 118.

Requests for Rehearing and/or Clarification and Commission Conclusions

52. To reflect the Commission's intent, INGAA requests that the Commission revise the regulatory text of § 358.3(d)(6)(iv) to delete the words "and does not use an affiliated Transmission Provider for transmission of that natural gas or energy." The Commission agrees that the regulatory text at § 358.3(d)(6)(iv) needs to be revised to reflect the Commission's clarifications in Order No. 2004-A. However, the specific change suggested would not fully reflect the Commission's intent because it is overly broad. Accordingly, the Commission will revise § 358.3(d)(6)(iv) to read as follows:

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

C. Independent Functioning

53. One of the most significant elements of the Standards of Conduct is the requirement that Transmission Providers function independently of their Marketing and Energy Affiliates. The independent functioning of the Transmission Provider limits its ability to give its Marketing and Energy Affiliates unduly preferential service or access to information. Therefore, § 358.4(a)(1) requires the transmission function employees of the Transmission Provider to function independently of the Transmission Provider's Marketing or Energy Affiliates' employees.¹⁸ In Order Nos. 2004 and 2004-A, the Commission codified certain exceptions that permit a Transmission Provider to share certain categories of employees with its Marketing or Energy Affiliate. Specifically, a Transmission Provider may share with its Marketing and/or Energy Affiliates: (1) Support employees and field and maintenance employees;¹⁹ (2) senior officers and directors who are not Transmission Function Employees;²⁰ and (3) risk management employees that are not engaged in Transmission Functions of sales or commodity functions.²¹ However, the Commission has also stated that although certain categories of

¹⁸ Section 358.4(a)(2) provides an exception to this requirement in the event of emergency circumstances that affect system reliability.

¹⁹ See 18 CFR 358.4(a)(4).

²⁰ See 18 CFR 358.4(a)(5).

²¹ See 18 CFR 358.4(a)(6).

employees are permitted to be shared, the Commission will look to employees' actual functions and duties to determine whether the Transmission Provider is appropriately applying this exemption to particular employees. See Order No. 2004-A at P 131.

i. Sharing of Senior Officers and Directors

Order Nos. 2004 and 2004-A

54. In Order No. 2004, the Commission stated that it would allow senior officers and directors who do not engage in transmission functions, or have day-to-day duties and responsibilities for planning, directing, organizing or carrying out transmission-related operations, to maintain such positions with the Transmission Provider and its Marketing or Energy Affiliates. The Commission, however, cautioned that shared executives may not serve as conduits for sharing transmission, customer or market information with a Marketing or Energy Affiliate.

55. In Order No. 2004-A, the Commission codified the exemption for senior officers and directors in the regulatory text.²² In addition, the Commission revised the regulatory text in § 358.4(a)(5) to better reflect that the Commission did not intend to restrict corporate governance functions.²³

Requests for Rehearing and/or Clarification and Commission Conclusions

56. AGA, INGAA, LPPC, NiSource, Southern and Xcel requested clarification regarding the sharing of senior officers and directors. Southern claims that it is still unclear regarding which officers and directors can be shared. NiSource argues that Transmission Providers should be permitted to share senior officers and directors serving policy roles that do not involve day-to-day transmission operations with their Energy Affiliates and make it clear that such senior officers and directors may communicate with their counterparts employed by the Energy Affiliates. AGA queries whether a senior officer or director who approves a limited number of transactions or

²² The Commission had included the language for the regulatory text in the preamble of Order No. 2004, but inadvertently omitted it from the regulatory text for codification.

²³ Section 358.4(a)(5) of the Commission's regulations provides that "A Transmission Provider may share transmission information covered by §§ 358.5(a) and (b) with its senior officers and directors provided that they do not (1) participate in directing, organizing or executing transmission system operations or marketing functions; or (2) act as a conduit to share such information with a Marketing or Energy Affiliate."

¹⁶ See Order No. 2004-A at P 105.

¹⁷ KM Pipelines cite to Order No. 2004-A, P 105.

investments or who is involved in corporate planning (capacity expansion), as opposed to day-to-day planning for transmission is a Transmission Function Employee. LPPC seeks clarification that senior officers and directors may, upon occasion, review and execute transmission function or energy affiliate transactions when such transactions exceed the delegated authority for middle management to approve.

57. Permitting the sharing of high-level officers and directors is a balance between the Commission's requirement to have a Transmission Provider function independently of its Marketing/Energy Affiliates and the need for the company to have officers and directors who are accountable, can exercise their fiduciary responsibilities and can engage in corporate governance functions. High-level officers and directors have significantly different roles and responsibilities at various Transmission Providers. To the extent that senior officers or directors conduct transmission functions or are involved in planning, directing or organizing transmission functions, the officers' or directors' status does not automatically exempt them from also being a Transmission Function Employee.

58. INGAA requests clarification and regulatory text revisions that § 358.3(a)(5) does not prohibit senior officers of the pipeline who are Transmission Function Employees from receiving transmission-related information. The Commission so clarifies, and will clarify the regulatory text to indicate that § 358.3(a)(5) pertains to shared senior officers and directors.

ii. Sharing of Field and Maintenance Personnel

Order Nos. 2004 and 2004-A

59. Section 358.4(a)(4) codifies the Commission's historical policy of allowing Transmission Providers to share field and maintenance personnel with their Marketing and Energy Affiliates. In Order No. 2004-A, the Commission clarified that shared field and maintenance employees include field supervisors who do not take part in advance planning for facility closures or are involved in shutting down facilities based on economic reasons. The Commission also clarified that the field and maintenance employees' exception applies to technicians, mechanics and their immediate supervisors who are responsible for electric transmission activities. See Order No. 2004-A at PP 145 and 146.

Requests for Rehearing and Clarification and Commission Conclusions

60. Shell Offshore questions whether it is permissible to share second-level supervisors, some of whom are located onshore, that "control" a gas pipeline's operations such as shutting in production on a platform.

61. Without reviewing the specific job descriptions for Shell Offshore's second-level supervisors, the Commission cannot generically state whether these individuals are permissibly shared field and maintenance personnel. The field and maintenance personnel exception was developed to allow the sharing of employees who would not be in a position to give undue preferences to Energy Affiliates either by sharing information or through physical control of facilities.

62. Shell Offshore may request that the Commission address its specific configuration in an individual filing in which it describes in detail the duties and functions of affected employees.

iii. Risk Management Employees

Order Nos. 2004 and 2004-A

63. Order No. 2004 prohibits the sharing of risk management employees who are operating employees of either Transmission Providers or their Marketing or Energy Affiliates.²⁴ The Final Rule also prohibits risk management employees from being conduits for improperly sharing information because they are in a position to use transmission, customer and market information to give Marketing and Energy Affiliates undue advantages. In Order No. 2004-A, the Commission codified an exception in § 358.4(a)(6) that permits Transmission Providers to share risk management employees that are not engaged in transmission functions or sales or commodity functions with their Marketing and Energy Affiliates. The Commission also stated that it is permissible for the risk management function to: (1) Manage corporate-wide business risk exposure of the corporation and/or its affiliates; (2) evaluate business risk exposure for third parties on an aggregate basis; (3) manage overall corporate investment for the entire corporation; (4) approve expansion projects; and (5) establish spending, trading and capital authorities for each business unit. See Order No. 2004-A at P 153. However, the Commission stated that the risk management function is not permitted to assess creditworthiness of a particular customer under a pipeline's tariff. *Id.*

²⁴ Order No. 2004 at P 112.

This is consistent with the Commission's previously articulated policy, in which the Commission held that the "act of deciding whether a potential shipper can become an actual shipper by satisfying the creditworthiness requirements under [a pipeline's] tariff is a transportation function."²⁵ Finally, in Order No. 2004-A, the Commission emphasized that the risk management function cannot be used to share information with Marketing or Energy Affiliates that the Transmission Provider is prohibited from sharing under § 358.5(a). The limitations on shared risk management functions or employees are intended to prevent unduly discriminatory behavior in favor of a Marketing or Energy Affiliate. See Order No. 2004-A at P 154.

Requests for Rehearing and/or Clarification and Commission Conclusions

64. Duke Energy, EEI and INGAA request additional clarification and/or rehearing regarding the employees engaged in risk management functions for Transmission Providers and their Marketing/Energy Affiliates.

65. EEI claims that the Commission should permit the sharing of certain critical functions, such as risk management, because such employees must be knowledgeable and have intimate knowledge of their companies, the customers and the various issues affecting transmission service and retail/wholesale energy sales. Duke Energy expressed concern because Commission Staff stated at the May 10, 2004, Technical Conference that under the Standards of Conduct, risk management employees would be prohibited from engaging in certain activities or receiving certain information. Duke Energy requests clarification that the Standards of Conduct will not restrict the essential functions of corporate risk management.

66. INGAA claims that for a corporate risk management group to be able to function, it must be able to understand, and obtain information from all business units concerning their business and their business strategies. INGAA is concerned that the Commission allows the risk management group to evaluate risk, but will not allow the risk management group to take action on the risks because such action would make the risk management employees operating employees of an Energy Affiliate. INGAA also requests clarification whether the risk

²⁵ See Vector Pipeline, L.P., 97 FERC ¶ 61,085 (2001).

management personnel would be allowed to direct action (subject to a no conduit rule) to minimize risk.

67. INGAA also requests clarification that the corporate risk management unit is permitted to receive creditworthiness information from the pipeline, evaluate and communicate the results of that creditworthiness analysis to the pipeline. In INGAA's view, the corporate risk management unit could communicate to an Energy Affiliate that a particular company had exceeded its corporate-wide credit limit or that the customer's credit rating had been downgraded, but could not inform the Energy Affiliate that the particular company had not paid its pipeline transportation fees or had acquired significant amounts of additional pipeline capacity.

68. The Commission is denying the requests for clarification. Sharing of risk management functions is permitted to allow companies to assess corporate-wide risk. It is not intended to allow the shared risk management employees to serve as operators of Transmission Providers or Marketing/Energy Affiliates. Therefore, shared risk management employees should not direct Transmission Providers' or Marketing/Energy Affiliates' responses to the risks they identify. A shared risk management employee cannot decide whether a transmission customer receives service, sets prices, or sets other rates, terms or conditions of transmission service, such as a specific amount of collateral a non-creditworthy shipper must post before receiving service. A shared risk management employee may: (1) Manage corporate-wide business risk exposure of the corporation and/or its affiliates; (2) evaluate business risk exposure for third parties on an aggregate basis; (3) manage overall corporate investment for the entire corporation; (4) approve expansion projects; and (5) establish spending, trading and capital authorities for each business unit.²⁶

69. Furthermore, the Commission is troubled by the implication, as suggested by INGAA, that in the absence of specific tariff authority a Transmission Provider might use communications from a corporate-level risk management group as a reason to deny service to particular customers. A Transmission Provider's creditworthiness process must be described in its tariff so that the Commission may determine whether

any use of corporate-wide credit review and screening processes are just and reasonable and not unduly discriminatory.

iv. Lawyers as Transmission Function Employees

Order Nos. 2004 and 2004-A

70. INGAA and others requested clarification of Order No. 2004 regarding the classification of lawyers as Transmission Function Employees. In Order No. 2004-A, the Commission stated that "if lawyers participate in transmission policy decisions on behalf of a Transmission Provider, the Commission considers that activity as a Transmission Function and the lawyer is a Transmission Function Employee. For example, a lawyer who participates in a decision on whether the Transmission Provider should seek a contract with a customer is acting as a Transmission Function Employee. If, however, the lawyer is asked to implement the Transmission Provider's business decision and negotiate a contract with that customer, the lawyer would not be a Transmission Function Employee." See Order No. 2004-A at P 157.

Requests for Rehearing and/or Clarification and Commission Conclusions

71. EEI, Entergy, INGAA and Sempra request rehearing and/or additional clarification on when lawyers become Transmission Function Employees. Specifically, EEI requests that the Commission clarify that lawyers acting in their traditional and fiduciary role of providing advice to their clients can continue to be shared employees and be housed in shared services legal departments. Entergy repeats some of its previous rehearing requests and seeks further guidance on the Commission's clarification on when lawyers become Transmission Function Employees. Specifically, Entergy points out that lawyers are often called upon by individuals involved in business decisions to provide legal opinions regarding regulatory requirements and the impact of those requirements on business decisions. Entergy seeks clarification that the provision of legal advice to a business person does not constitute a Transmission Function or Energy Affiliate activity, and does not render the employee as improperly shared between the Transmission Provider and Marketing or Energy Affiliate. Entergy also seeks clarification whether Order Nos. 2004 and 2004-A mandate separate legal departments, physical separation of lawyers within

such departments, or lack of physical access by Energy Affiliate employees to legal department offices or floors where there are lawyers who meet the definition of Transmission Function Employee.

72. INGAA requests the Commission to clarify that a Transmission Provider's lawyer's participation in a Transmission Provider's business decisions is for the exclusive or predominant purpose of rendering legal or regulatory advice, and that such lawyers are not treated as Transmission Function Employees. INGAA argues that a lawyer whose participation is limited solely or predominantly to rendering legal or regulatory advice should not be considered a Transmission Function employee because s/he is not "conducting" transmission system operations or planning, directing or organizing transmission-related operations. INGAA claims the court affirmed the Commission's previous determination that lawyers could be shared by stating that "professionals such as attorneys and accountants are regularly entrusted with information which they must hold confidential from other clients, the public and even other personnel in their own firms or companies."²⁷ Finally, INGAA identifies cases, in the context of attorney-client privilege, which distinguishes the lawyer's traditional role as a legal advisor in business decisions.

73. Sempra expresses concern whether shared services lawyers and other shared services personnel who help develop and advocate policy in public forums are deemed Transmission Function Employees for purposes of the Standards of Conduct. Sempra queries whether the lawyer who drafts pleadings, provides legal and regulatory advice relating to public policy positions but does not have transmission information can be shared. Sempra also queries whether shared services lawyers who advise Transmission Function Employees on legal and regulatory requirements associated with business operations should be deemed Transmission Function Employees. If a lawyer performs some Transmission functions, is s/he dedicated to that function and can no longer be shared.

74. The Commission clarifies that lawyers may provide legal or regulatory advice in their traditional roles without becoming Transmission Function Employees. However, to the extent that they conduct transmission functions, or

²⁶ Also, INGAA is correct that the Standards of Conduct prohibit a risk management employee from disclosing to an Energy Affiliate that a transmission customer has not paid its transmission bills.

²⁷ INGAA cites *Tenneco v. FERC*, 969 F.2d 1187 at 1207-8 (D.C. Cir. 1992).

are involved in planning, directing or organizing transmission functions, the lawyers' status as "lawyers" does not exempt them from also being Transmission Function Employees. If a lawyer performs some Transmission Functions, then s/he is dedicated to that function, and cannot be shared with the Marketing or Energy Affiliate. Lawyers who help develop and advocate policy in public forums are not necessarily Transmission Function Employees. Such advocacy may fall within the lawyers' traditional role of publicly representing their clients' positions.

75. In many instances, lawyers have a significant amount of access to the Transmission Providers' transmission, customer and marketing information. Lawyers, like other employees or agents, are prohibited from being conduits for improperly sharing information between a Transmission Provider and its Marketing or Energy Affiliates. See 18 CFR 358.5(b)(7). Lawyers, like other Transmission Provider employees are expected to restrict access to transmission, customer or market information using appropriate measures, such as locked file rooms/drawers and password protection for computer files. Securing the Transmission Providers' information will limit the ability of Marketing/Energy Affiliate employees to improperly obtain access to information while visiting the legal department offices or floors where lawyers work. The Commission is not mandating separate legal departments or physical separation of lawyers within a legal department, although either of those measures might simplify compliance. A Transmission Provider's organizational chart should reflect any sharing of lawyers. Shared office space should also be identified as required by § 358.4(b)(2).

D. Information To Be Posted on the Internet or OASIS

i. Posting Organizational Charts

Order Nos. 2004 and 2004-A

76. Section 358.4(b) requires all Transmission Providers to post information, including organizational charts and job descriptions, with respect to Marketing and Energy Affiliates on their OASIS or Internet websites. The Transmission Provider is also required to update the organizational charts and job descriptions within seven business days of a change. In Order No. 2004-A, the Commission explained that the purpose of posting organizational charts and job descriptions is to provide a mechanism for the Commission and market participants to determine whether the Transmission Provider is

functioning independently of its Marketing and Energy Affiliates.

Requests for Rehearing and/or Clarification and Commission Conclusions

77. On rehearing, NiSource argues that the Commission should: (1) Make clear that Transmission Providers need only post information identifying the particular support units (non-Transmission Function Employees) that are shared with their Energy Affiliates; (2) clarify that Transmission Providers are not required to post full organizational charts for their service companies or shared support units; and (3) not require that Transmission Providers post organizational charts for non-affiliated companies that may provide certain non-transmission related services to the Transmission Provider.

78. As the Commission stated in Order No. 2004-A (at P 163), the Transmission Provider must post an organizational chart that identifies the parent corporation with the relative position in the corporate structure of the Transmission Provider, Marketing and Energy Affiliates. The Transmission Provider is not required to post detailed organizational charts for the shared non-Transmission Function support units, but these units must be identified as shared in the organizational chart that identifies the corporate structure of the Transmission Provider and its relative position to the parent company and other Marketing/Energy Affiliates.

79. Similarly, the Transmission Provider must include the service company in the organizational chart that identifies the corporate structure. With respect to whether a detailed organizational chart is also required for a service company, the answer depends on the functions that the service company is performing. If the service company is performing transmission functions, additional detail is required. As the Commission stated in Order No. 2004-A at P 163, there may be instances where a corporation should post both functional and structural organizational charts to accurately reflect its operations. NiSource may seek specific guidance from the Commission on the information to include in its organizational chart postings with respect to service companies.

80. With respect to NiSource's last request, the Commission clarifies that Transmission Providers are not required to post organizational charts regarding non-affiliated companies that may provide non-transmission functions for the Transmission Provider.

81. Section 358.4(b)(3)(iii) provides that, for all employees who are engaged in transmission functions for the Transmission Provider and marketing or sales functions or who are engaged in transmission functions for the Transmission Provider and are employed by any of the Energy Affiliates, the Transmission Provider must post the name of the business unit within the marketing or sales unit or the Energy Affiliate, the organizational structure in which the employee is located, the employee's name, job title and job description in the marketing or sales unit or Energy Affiliate, and the employee's position within the chain of command of the Marketing or Energy Affiliate.

82. On rehearing, INGAA argues that as written, § 358.4(b)(3)(iii), which requires the posting of all shared employees engaged in transmission functions, appears to contradict the independent functioning requirement in § 358.4(a) by suggesting that employees engaged in transmission functions for the Transmission Provider can be employees of an Energy Affiliate. INGAA, therefore, requests the Commission to reword § 358.4(b)(3)(iii) to avoid contradicting § 358.4(a), or if the Commission so intended, to clarify under what non-emergency circumstances an Energy Affiliate employee may perform transmission functions for the Transmission Provider. The Commission denies the request for clarification. Section 358.4(b)(3)(iii) is intended to identify the shared employees of Transmission Providers which have received exemptions of the independent functioning requirements of the Standards of Conduct.²⁸

ii. Posting of Merger Information

Order Nos. 2004 and 2004-A

83. Section 358.4(b)(v) requires the Transmission Provider to post on the OASIS or Internet website the name(s) and address(es) of potential merger partner(s) as affiliates within seven days after the potential merger is announced.

Requests for Clarification and Commission Conclusions

84. INGAA and Enbridge urge the Commission to clarify that the seven-day posting requirement is only triggered by a public announcement, when, and to the extent, such an announcement is required by other applicable law, such as the securities laws administered by the Securities and Exchange Commission (SEC). They argue that the Commission should

²⁸ See Bear Creek Storage Company, 108 FERC ¶ 61,011 (2004).

clarify that Order No. 2004–A does not impose any new, independent obligation to publicly announce a proposed merger.

85. As noted by INGAA, mergers are customarily subject to various contingencies that must be satisfied prior to consummation. The Commission clarifies that it is not imposing a new, independent obligation to publicly announce a proposed merger in advance of applicable SEC requirements. However, once a public announcement has been made, the Transmission Provider must post the name(s) and address(es) of potential merger partner(s) and related Energy Affiliates on the OASIS or internet Web site.

iii. Transfer of Employees

Order Nos. 2004 and 2004–A

86. Section 358.4(c) requires a Transmission Provider to post notices of employee transfers on the OASIS or Internet Web site. In Order No. 2004–A, the Commission clarified that the requirement is intended to capture the transfers between a Transmission Provider on the one hand and its Marketing or Energy Affiliates on the other.

Requests for Rehearing and/or Clarification and Commission Conclusions

87. NiSource requests clarification whether the Commission is requiring the posting of transfers between Energy and Marketing Affiliates. The Commission clarifies that it is not requiring the posting of transfers between Energy and Marketing Affiliates. The posting requirement applies only to transfers involving both a Transmission Provider and an Energy or Marketing Affiliate.

iv. Posting of Shared Facilities

Order Nos. 2004 and 2004–A

88. Section 358.4(b)(2) requires Transmission Providers to post the facilities shared with Marketing or Energy Affiliates.

Requests for Clarification and Commission Conclusions

89. Allegheny, AEP and NiSource request clarification on the information that needs to be posted with respect to shared facilities. ITC and NiSource assert that Transmission Providers should not be required to post all field facilities that are shared by a Transmission Provider and Marketing/ Energy Affiliate. Similarly, Allegheny seeks clarification as to what shared facilities need to be identified. It claims

that if a Transmission Provider has spun off generation to an affiliate, shared facilities would include every substation where such generation interconnects with the Transmission Provider. Allegheny and ITC request that the Commission clarify that the types of facilities that are required to be posted are office buildings and computer systems, and not physical infrastructure (such as substations or other transmission equipment that do not house transmission personnel).

90. The Commission grants the requests for clarification. Transmission Providers need not post notice of shared physical field infrastructure such as substations or other transmission equipment that is not housed with any employees.

v. Posting of Discretionary Waivers

Order Nos. 2004 and 2004–A

91. As proposed in the NOPR and codified in the Final Rule, § 358.5(c)(4) requires a Transmission Provider to maintain a written log, available for Commission audit, detailing the circumstances and manner in which it exercised its discretion under any terms of its tariff. The information contained in the log is to be posted on the OASIS or internet Web site within 24 hours of when a Transmission Provider exercises its discretion under any terms of the tariff. This requirement superseded former Standard K from the gas Standards of Conduct,²⁹ but used language identical to the former electric Standards of Conduct at 18 CFR 37.4(b)(5)(iii). There were no timely requests for rehearing of this provision following issuance of Order No. 2004 and this provision was not referenced in Order No. 2004–A.

Requests for Clarification and Commission Conclusions

92. Questar Pipeline claims, as a procedural matter, that the requirement to post exercises of discretion was a “new” burden that was not disclosed in the rulemaking proceeding or to the Office of Management and Budget. The Commission rejects Questar Pipeline’s argument as incorrect. The Commission included the proposed regulatory text for § 358.5(c)(4) in the NOPR and in the regulatory text of Order No. 2004. See NOPR, FERC Stats. & Regs., Proposed Regulations 1999–2003 ¶ 32,555 at 34,096 and in proposed regulatory text and Final Rule at P 162 and in

²⁹ Under former 18 CFR 161.3(k)(2003), the Commission required a pipeline to maintain a written log of waivers that the pipeline grants with respect to tariff provisions that provide for such discretionary waivers and provide the log to any person requesting it within 24 hours of the request.

regulatory text. Moreover, Questar Pipeline’s request is untimely because all requests for rehearing of the Final Rule were due within 30 days of its issuance (by December 29, 2003). See section 19a of the NGA, 15 U.S.C. 717r (2000) and section 313 of the FPA, 16 U.S.C. 8251(a) (2000).

93. AGA, Duke Energy, El Paso, INGAA and Questar Pipeline each sought additional clarifications on implementation of the requirement to post exercises of discretion. INGAA and Duke Energy are concerned that the Order No. 2004 requirement is much broader than the former Standards of Conduct and would apply to any number of Gas Tariff provisions which use discretionary terms such as “may,” “may in its discretion,” and “may use its best efforts.” Petitioners are concerned that it could be a burden if a pipeline has to post every discretionary action and might result in the pipelines reducing service flexibility. El Paso argues that the Commission should clarify that the discretionary posting requirement only applies where the pipeline exercises such discretion with regard to a shipper requirement under its FERC Gas Tariff.

94. INGAA requests that the waiver log posting not apply to the following discretionary activities: (1) Operational activities; (2) when the service itself has a discretionary component; or (3) when posting is already mandated by regulation or tariff provision.

95. INGAA also argues that with respect to some tariff provisions, for example those involving interruptible service, discretion is an inherent part of the service. INGAA notes that for some exercises of discretion, the Commission has already required or approved posting obligations, e.g., curtailment of interruptible services, discounts or issuance of operational flow orders.

96. AGA, INGAA, and Questar Pipeline request clarification that the posting requirement does not apply where a pipeline exercises flexibility, the pipeline’s tariff specifies the flexibility that is available and all parties are on notice (through the tariff) that the flexibility is available. For example, correction of an invoice due to a mutual mistake of fact or additional nomination opportunities if the pipeline can accommodate such requests on a best efforts basis. AGA is concerned that this requirement will present a disincentive for pipelines to provide valued flexibility to any customer.

97. Finally, Questar Pipeline urges that the Commission not require the posting of discretionary waivers where the posting might reveal customers’ identity or sensitive business

information. For example, if a pipeline makes a negative determination of a customer's credit, is the pipeline required to post on its website a log detailing the circumstances and manner in which it determined to deny credit or require collateral. Questar Pipeline is concerned about the impact that such a posting might have on a customer's dealings with other creditors.

98. The Commission clarifies that when a posting is already mandated by the tariff or other requirement, such as operational flow orders, available capacity or curtailments, the requirement to post exercises of discretion will not trigger a duplicate posting requirement.³⁰ Also, in response to Questar Pipeline, a posting need not reveal confidential customer information or sensitive business information. Rather, a Transmission Provider shall post information regarding the date of its action and the type of discretion it exercised (*e.g.*, a creditworthiness determination) without revealing the name of the customer.

99. INGAA's request not to post waivers logs with respect to pipeline operations, such as determinations of available capacity, has merit. The Commission's regulations at § 284.13 already require the posting of capacity information. But, INGAA's request not to post waiver logs with respect to services that have discretionary components is too broad. The purpose of this rule, which is to allow non-affiliates to determine whether they have been treated in a non-discriminatory manner, would not be achieved under INGAA's service proposal. The way in which a pipeline exercises its discretion in providing services is valuable information in assessing its compliance with the non-discrimination requirements of the NGA. As El Paso acknowledges, exercises of discretion with respect to shipper requirements should be posted.

E. Training

Order Nos. 2004 and 2004-A

100. Section 358.4(e)(5) requires a Transmission Provider to train all of its employees and sign an affidavit certifying that they have been trained regarding the Standards of Conduct. In Order No. 2004-A, the Commission revised the regulatory text to state that electronic certification is an acceptable substitute for an affidavit to permit Transmission Providers to use computer-based training.

101. In Order No. 2004-A, the Commission stated that one of the goals of training a broad group of employees is to ensure that employees with access to information about transmission, energy, power, gas or marketing functions understand the restrictions on sharing information and the prohibition on acting as a conduit for sharing information. Therefore, the Commission clarified that for employees without access to information about transmission, energy or natural gas functions training would not be required.

Requests for Rehearing and/or Clarification and Commission Conclusions

102. Questions at the May 10th Technical Conference and petitions for clarification reveal that some Transmission Providers are still unclear about which employees must be trained. *See* requests of CenterPoint, EEI, El Paso, INGAA, NiSource, Texas Gas and Xcel. Petitioners urge the Commission to acknowledge that employees without access to information regarding transmission, energy or gas functions need not be trained and that only employees with access to transmission information or information about gas or electric purchases or sales or marketing must be trained. The Commission so clarifies, and as discussed below, will revise the regulatory text accordingly. In addition, the Commission denies EEI's suggestion that the decision to train Marketing or Energy Affiliate employees or other Transmission Provider employees should be left to the discretion of the Transmission Provider.

103. The Commission clarifies that all officers and directors of the Transmission Provider, as well as its employee with access to transmission information or information concerning gas or electric purchases, sales or marketing functions must be trained. For those employees without access to transmission information or information concerning gas or electric purchases, sales or marketing functions, however, training will not be required.

104. CenterPoint urges the Commission to clarify that the Transmission Provider is obliged to distribute Standards of Conduct material to the employees of the Transmission Provider and Marketing and Energy Affiliates, but is not obliged to train the employees of the Marketing or Energy Affiliates. At PP 181 and 184 of Order No. 2004-A, the Commission stated that Transmission Providers are not required to train employees of their Marketing or Energy Affiliates, but must distribute the Standards of Conduct to

those employees with access transmission information or information regarding gas or electric purchases or sales or marketing either in paper copy or electronically. Marketing and Energy Affiliates should train their employees to ensure that they understand and observe the Standards of Conduct requirements.

105. INGAA, Texas Gas, Westar and Xcel note that the regulatory text is inconsistent with the preamble language in Order No. 2004-A because the regulatory text requires the training of all employees, yet the discussion in Order No. 2004-A stated that training was not required for all employees.

106. Finally, EEI, Texas Gas and Xcel ask the Commission to delete the "affidavit" requirement and, as was discussed at the May 10th Technical Conference, require adequate documentation in a reasonable form, such as electronic certification or sign in sheets.

107. The Commission will grant the requests and revise the regulatory text of § 358.4(e)(5) as follows:

Transmission Providers shall train officers and directors as well as employees with access to transmission information or information concerning gas or electric purchases, sales or marketing functions. The Transmission Provider shall require each employee to sign a document or certify electronically signifying that s/he has participated in the training.

F. Information Access and Disclosure Prohibitions

Order Nos. 2004 and 2004-A

108. Generally, §§ 358.5(a) and (b) prevent a Transmission Provider from giving its Marketing or Energy Affiliate unduly preferential access to transmission, customer or marketing information. The Commission has also established several specific exemptions from the information disclosure prohibitions that permit a Transmission Provider to communicate with its Marketing or Energy Affiliate, including: (1) Information relating to specific transactions (transaction specific exemption);³¹ and (2) crucial operating information (crucial operating information exemption).³²

i. No Conduit Rule

109. In Order No. 2004-A, the Commission added additional regulatory text in § 358.4(a)(5) to provide that "A Transmission Provider may share transmission information * * * with its senior officers and

³⁰ See Part II(G) for the discussion concerning posting of discounts.

³¹ 18 CFR 358.5(b)(5).

³² 18 CFR 358.5(b)(8).

directors provided that they do not (1) participate in directing, organizing or executing transmission system operations or marketing functions; or (2) act as a conduit to share such information with a Marketing or Energy Affiliate.” The Commission also revised § 358.5(b)(7) to provide that “A Transmission Provider may share information * * * with employees permitted to be shared under §§ 358.4(a)(4), (5) and (6) provided that such employees do not act as a conduit to share such information with any Marketing or Energy Affiliates.”

Requests for Rehearing and/or Clarification and Commission Conclusions

110. On rehearing, Entergy argues that these revisions may reinstate an “automatic imputation rule,³³ because shared employees receiving the information will themselves be employees of Marketing or Energy Affiliates. Entergy seeks clarification that the Commission means what it said and the regulatory revisions in §§ 358.4(a)(5) and 358.4(b)(7) result in a No Conduit Rule without the overlay of the automatic imputation rule.

111. The Commission clarifies that the additional regulatory text added in §§ 358.4(a)(5) and 358.5(b)(7) was not intended to impose the automatic imputation rule on the No Conduit Rule. As provided in § 358.5(b)(7), neither a Transmission Provider nor an employee of a Transmission Provider is permitted to use anyone as a conduit for sharing information covered by the prohibitions of § 358.5(b)(1) and (2) with a Marketing or Energy Affiliate. As the Commission stated in Order No. 2004–A, notwithstanding the prohibitions of §§ 358.5(b)(1) and (2), the Commission intends to allow a Transmission Provider to share information with employees that permissibly may be shared so that they can engage in certain functions, *e.g.*, corporate governance, risk management, or certain “support-type” services. The additional regulatory text was intended to reflect that the No Conduit Rule also will apply to such shared employees.

ii. Operating Information Exemption Order Nos. 2004 and 2004–A

112. Order No. 2004 permitted a Transmission Provider to share crucial operating information with its Energy Affiliates to maintain the reliability of

the transmission system. In Order No. 2004–A, the Commission clarified that “crucial” operating information is that information necessary to operate and maintain the transmission system on a day-to-day basis; it does not include transmission or marketing information that would give a Transmission Provider’s Marketing or Energy Affiliate undue preference over a Transmission Provider’s nonaffiliated customers in the energy marketplace. The Commission revised the regulatory text at § 358.5(b)(8) eliminating the term “crucial” and providing that a Transmission Provider is permitted to share information necessary to maintain the operations of the transmission system with its Energy Affiliates.

Requests for Rehearing and/or Clarification and Commission Conclusions

113. Shell Offshore requests the Commission to clarify the relationship between the “crucial operating information exemption in § 358.5(b) and the “No Conduit Rule.” Specifically Shell Offshore requests the Commission to clarify that, in the “crucial operating information exemption,” the “No Conduit Rule” applies only to the employees of the Transmission Provider and not to the employees of an Energy Affiliate. Shell Offshore argues that applying the “No Conduit Rule” to the crucial operating information exemption is unnecessary and unworkable because the information that is to be shared is the information necessary to operate and maintain the transmission system on a day-to-day basis and it does not include transmission or marketing information that would give a Transmission Provider’s Marketing or Energy Affiliate undue preference over a Transmission Provider’s non-affiliated customers in the Energy marketplace. Shell Offshore argues that, since the crucial operating information will not give the Energy Affiliate an undue preference, there is no reason to make the communication of this information subject to the No Conduit Rule.

114. The Commission’s clarification of operating information makes clear that information necessary to operate a transmission system on a day-to-day basis may be shared with an Energy Affiliate. However, Energy Affiliate Employees who receive such transmission information are, by definition, employees engaged in the physical operations of the Energy Affiliate. These operational employees may not share with other Energy Affiliate employees (serve as a conduit of) the transmission information the operational employees receive.

115. INGAA and Duke Energy request the Commission to clarify that the sharing of operational information under § 358.5(b)(8) will not violate the functional separation requirement codified in § 358.4. They are concerned that § 358.4, without referencing § 358.5(b)(8), contains an exception that applies only “in emergency circumstances affecting system reliability.” Therefore, they seek clarification that the functional separation requirement of § 358.4 does not limit the sharing of operational information permissible under § 358.5(b)(8).

116. The Commission clarifies that sharing of information necessary to maintain the operations of the transmission system under § 358.5(b)(8) does not compromise the independent functioning required in § 358.4.

iii. Transaction Specific Exemption and Scoping Meetings Order Nos. 2004 and 2004–A

117. In the Final Rule, the Commission codified a “transaction specific exemption” in § 358.5(b)(5). Under the exemption, Transmission Providers do not have to contemporaneously disclose information covered by § 358.5(b)(1) if the communication between the Transmission Provider and its Marketing or Energy Affiliates relates solely to the Marketing or Energy Affiliate’s specific request for transmission service.

118. Order No. 2004–A required that when a Transmission Provider and an Energy Affiliate participate in scoping meetings or discussions about capacity expansion or new development (scoping meetings), the Transmission Provider must: (1) Post an advance notice to the public on its OASIS or Internet website of its intent to conduct a meeting with its Energy Affiliate; (2) transcribe the meeting in its entirety; and (3) retain the transcript of the scoping meeting for three years and make it available to the Commission upon request.³⁴ Order No. 2004–A stated, further, that a Transmission Provider cannot provide advance information to a Marketing or Energy Affiliate regarding a general expansion project because that would not be transaction-specific and such information would give the Marketing or Energy Affiliate an undue competitive advantage.

³⁴ These conditions are consistent with similar requirements provided in Order No. 2003–A.

³³ Under an “automatic imputation rule,” any transmission information given to an employee shared by the Transmission Provider and its Marketing or Energy Affiliate would be deemed to have been given to the Marketing or energy Affiliate.

Requests for Rehearing and Clarification and Commission Conclusions

119. AGA and INGAA argue that the requirement to post notice of and transcribe scoping meetings is an unjust, unreasonable and undue burden on the Energy Affiliate to its disadvantage vis-à-vis non-affiliated customers. They argue that the requirement to notice and transcribe these meetings will chill a Transmission Provider's willingness to engage in any facility-related discussions with its Energy Affiliates although the Transmission Provider would have no such disincentive in regard to similar discussions with non-affiliated customers or potential customers. Others, such as ATC, BP, CenterPoint, Duke Energy, EEI, El Paso, Large Public Power Counsel, NiSource, Questar Pipeline and Southern make similar arguments that the advance notice and transcription safeguards for scoping meetings are burdensome and should be removed or clarified. They contend that the safeguards ignore the differences between electric utilities and natural gas pipelines such as the difference in the type of requests for information and the differences in the way energy projects are developed.

120. BP illustrates these differences by pointing out that electric scoping meetings take place after a service request is submitted and the queue/priority has been established, while gas scoping meetings take place before a shipper requests transmission and before the pipeline's open season. BP also notes that electric scoping meetings are part of a structured interconnection process that requires the Transmission Provider to provide detailed transmission data after a request for transmission has been made. On the other hand, BP notes that, due to the cost of exploring for natural gas, a producer often will hold preliminary, informal discussions with a pipeline regarding the producer's plans to develop a region very early in a development project process. According to BP, these preliminary, informal discussions enable a pipeline to assess whether it is possible to build the infrastructure necessary to support a project. BP contends that a pipeline's open season provision, which allows all interested parties to seek capacity on the pipeline, is a current non-discriminatory safeguard that will protect other potential pipeline shippers. At a minimum, BP requests that discussions held prior to submission of a written request should not be subject to the rules regarding scoping meetings.

121. The Commission is granting petitioners' requests for rehearing. The Standards of Conduct will not require Transmission Providers to post notice of or transcribe scoping meetings.³⁵ The Commission is persuaded that the requirement to post notice of and transcribe scoping meetings could have a chilling effect on natural gas infrastructure development.

iv. Information Sharing for Jointly-Owned Transmission Providers

122. In Order No. 2004-A, the Commission explained that Transmission Providers may share information with affiliated Transmission Providers (an affiliated Transmission Provider is not considered an Energy Affiliate) and may share operating information consistent with § 358.3(b)(8).

Requests for Rehearing/Clarification and Commission Conclusions

123. On rehearing, Duke Energy and INGAA argue that the provisions referenced by the Commission in Order No. 2004-A do not address their concern, which is that the Standards of Conduct will preclude a jointly-owned pipeline from providing information to an owner that also may be an Energy Affiliate. According to Duke and INGAA, Order No. 2004-A does not address circumstances where one or more of the owners of a pipeline happens to be an Energy Affiliate, but not a Transmission Provider. They request the Commission to clarify that a joint owner of a Transmission Provider can receive non-public transmission system information for corporate governance and investment management purposes, subject to the no-conduit rule, even if the joint owner is an Energy Affiliate as long as the employees receiving such information are not involved in "energy affiliate" activities listed in § 358.3(d) and are subject to the no-conduit rule.

124. Duke and INGAA explain that, typically, joint owners of pipelines create management committees whose function is to oversee the operations of the pipeline. They assert that management committees that typically govern jointly-owned Transmission Providers are the functional equivalent of a company's board of directors and thus, an employee of an Energy Affiliate who serves on the management committee of a jointly-owned Transmission Provider is the functional equivalent of a non-operating officer or

director shared by the Transmission Provider and its Energy Affiliate. According to them, the Standards of Conduct as clarified in Order No. 2004-A could be interpreted to prohibit communication of non-public transmission information necessary to manage and operate the jointly-owned pipeline asset.

125. Duke and INGAA concede, however, that restrictions on how transmission information is provided to an Energy Affiliate owner are appropriate. They agree that no Energy Affiliate employee that is engaged in "energy affiliate" activities identified in § 358.3(d) should receive the Transmission Provider's information, and that recipients of non-public transmission information should be subject to the no-conduit rule. They state that this approach of allowing such communications, subject to appropriate restrictions, is consistent with § 358.4(a)(5), which permits Transmission Providers to share senior officers and directors who are not transmission function employees with Energy Affiliates and allows those senior officers and directors to receive non-public information (subject to a no-conduit rule) as long as they do not participate in the directing, organizing or executing transmission system operations or marketing functions.

126. The Commission clarifies that employees of an Energy Affiliate owner of a jointly-owned Transmission Provider may receive non-public transmission information (subject to a no-conduit rule) that is necessary for corporate governance and investment management purposes as long as the employees who receive the transmission information do not engage in the activities listed in § 358.3(d)(1), (2), (3), or (4).

G. Discounts

Order Nos. 2004 and 2004-A

127. Section 358.5(d) requires a Transmission Provider to post on its OASIS or Internet website, any offer of a discount at the conclusion of negotiations, "contemporaneous with the time that the offer is contractually binding." In Order No. 2004-A, the Commission clarified that the time the offer is contractually binding means the time that both parties are bound to the contract.

Requests for Rehearing and/or Clarification and Commission Conclusions

128. El Paso, INGAA and Texas Gas seek additional clarification regarding the posting of discounts. Petitioners ask

³⁵ This, however, does not exempt electric Transmission Providers from complying with the requirements of Order No. 2003.

the Commission to modify § 358.5(d) to apply only to discounts to Marketing and Energy Affiliates (and not all discounts) and to make the timing of discount posting consistent with the requirements of Order No. 637. Texas Gas queries whether the Commission intended to apply the discount requirements to all discounts (affiliated and non-affiliated) or only to affiliated discounts, with non-affiliated discounts continuing to be reported under Order No. 637's discount posting requirements at § 284.13(b) of the Commission's regulations.

129. The requests for clarification are denied. Under the former gas Standards of Conduct, Transmission Providers were required to post only discounts to affiliates. See former § 161.3(h) of the Commission's regulations. However, under the former electric Standards of Conduct, Transmission Providers were required to post discounts to all transmission customers. See former §§ 37.6(c)(3) and(d)(2) of the Commission's regulations. Under Order No. 2004 and 2004-A, the Commission adopted the broader posting requirements of the electric Standards of Conduct and required that Transmission Providers post all discounts to improve communication of discount information and improve transparency.

130. Some petitioners from the gas industry argue that this will result in duplicative posting of discount information because rates are also posted in the Transactional Reports required under § 284.13(b) of the Commission's regulations. The Transactional Reports and the Discount Posting information serve different purposes, however. The discount information is easily accessible and quickly identifies which transactions are discounted so that shippers can quickly assess whether they are similarly situated and entitled to a "comparable discount." However, the Transactional Data posts information concerning all transmission transactions and identifies current rates, but do not specifically flag discounts. Many times, Transmission Providers do not execute or revise long-term interruptible transmission agreements and these discounts have not been posted. Therefore, the Discount Posting information better alerts non-affiliated shippers to possible undue discrimination.

131. Section 358.5(d) requires that a discount posting include, among other things, the quantity of power or gas scheduled to be moved. INGAA urges the Commission to revise the requirement to post the quantity of gas scheduled to be moved, and instead to

require the Transmission Provider to post the firm maximum daily contract quantity or, for interruptible transportation, the gas entitled under one's contract. The Commission denies INGAA's request to use the contract quantity or the quantity of gas the shipper is entitled to transport because the quantity of gas the shipper is entitled to transport may be significantly different than the amount of gas that the discount was based on.

H. Separate Books and Records

Order Nos. 2004 and 2004-A

132. Section 358.3(b)(1) requires a Transmission Provider to maintain separate books and records from those of its Marketing and Energy Affiliates.

Requests for Rehearing and Clarification and Commission Conclusions

133. National Grid and Entergy note that in Order No. 2004-A, the Commission clarified that an affiliate includes a division that operates as a functional unit. See § 358.3(b)(1). Although National Grid is supportive of the Commission's change, it seeks clarification whether a Transmission Provider with company divisions must also maintain separate books, records and financial reports for the divisions. National Grid notes that in § 358.4(d), the Commission stated that internal business units and divisions should be treated as Energy Affiliates. National Grid argues that requiring every business unit within a corporation to maintain separate reports, books and records would be the accounting equivalent of corporate restructuring and would impose a significant burden.

134. The Commission grants the request for clarification. In the former gas Standards of Conduct in Part 161, the Commission did not require divisions to comply with the requirement of maintaining separate books and records. A Transmission Provider with a company division that operates as a functional unit is not required to maintain separate books and records to comply with the Standards of Conduct.³⁶

I. Applicability of the Standards of Conduct to Newly Formed Transmission Providers

Order on Rehearing

135. In Order No. 2004-A, the Commission stated that new

³⁶ However, this does not mean that Transmission Providers are authorized to change their accounting practices to maintain joint books and records. To the extent Transmission Providers are required to keep separate books and records for other purposes, this rule does not modify those requirements.

Transmission Providers should take appropriate steps to comply with the Standards of Conduct as soon as practicable and clarified that the Standards of Conduct apply to all Transmission Providers, including those which have not yet begun operations.

Requests for Rehearing and Clarification and Commission Conclusions

136. Entrega and INGAA argue that the Commission has no jurisdiction to impose the Standards of Conduct on new pipelines that are not yet natural gas companies. They argue that a new interstate pipeline project should not become subject to the Standards of Conduct until it is granted and accepts a certificate of public convenience and becomes subject to the Commission's Natural Gas Act jurisdiction. INGAA argues that as a matter of policy, the Commission should not add to the regulatory burdens of developing new infrastructure.

137. The Commission grants clarification. A new pipeline will have a reasonable time (30 days) after it accepts its certificate or otherwise becomes subject to the Commission's jurisdiction (whichever comes first) to come into compliance with the Standards of Conduct.³⁷ Most pipeline development is undertaken by existing natural gas companies and the Standards of Conduct would apply to the parent company in full. Claims of affiliate preference or abuse can also be addressed in a new pipeline's certificate proceeding.

IV. Document Availability

138. In addition to publishing the full text of this document in the **Federal Register**, the Commission also provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's home page <http://www.ferc.gov> and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5 p.m. Eastern time) at 888 First Street, NE., Room 2A, Washington, DC 20426.

139. From the Commission's home page on the internet, this information is available in the eLibrary. The full text of this document is available on eLibrary in PDF and Word format for viewing, printing, and/or downloading. To access this document in eLibrary,

³⁷ When applying Order No. 497, the Commission gave pipelines 30 days from the date of the first transportation transaction with a marketing affiliate to comply with the Standards of Conduct. See e.g., *Garden Banks Pipeline, LLC*, 99 FERC ¶ 61,066 (1999); *TransColorado Gas Transmission Company*, 78 FERC ¶ 61,249 (1997); *Nautilus Pipeline Company, LLC*, 88 FERC ¶ 61,088 (1999).

type the docket number excluding the last three digits of this document in the docket number field.

140. User assistance is available for eLibrary and the Commission's Web site during normal business hours from FERC Online Support by phone at (866) 208-3676 (toll free) or for TTY, contact (202) 502-8659, or by e-mail at FERCOnlineSupport@ferc.gov.

V. Effective Date

141. This revisions in this order on rehearing will be effective September 9, 2004.

List of Subjects in 18 CFR Part 358

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

By the Commission, Commissioners Brownell and Kelliher dissenting in part with separate statements attached.

Magalie R. Salas,
Secretary.

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

PART 358—STANDARDS OF CONDUCT

1. The authority citation for part 358 continues to read as follows:

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

- 1. In § 358.3:
(a) paragraph (d)(5) is revised,
(b) paragraph (d)(6)(iv) is revised,
(c) in paragraph (d)(6)(v), the terms "on-system customers" and "on-system customer sales" are removed and the words "on-system sales" are added in their place, and
(d) paragraph (d)(6)(vi) is added, to read as follows:

§ 358.3 Definitions.

- (d)
(5) An LDC division of an electric public utility Transmission Provider shall be considered the functional equivalent of an Energy Affiliate, unless it qualifies for the exemption in § 358.3(d)(6)(v).
(6)
(iv) An affiliate that purchases natural gas or energy solely for its own consumption. "Solely for its own consumption" does not include the purchase of natural gas or energy for the subsequent generation of electricity.
(vi) A producer, gatherer, Hinshaw pipeline or an intrastate pipeline that

makes incidental purchases or sales of de minimus volumes of natural gas to remain in balance under applicable pipeline tariff requirements and otherwise does not engage in the activities described in §§ 358.3(d)(1), (2), (3) or (4).

* * * * *

- 2. In § 358.4:
(a) in paragraph (a)(5), the word "shared" is inserted between the words "its" and "senior" in the second sentence, and
(b) in paragraphs (e)(2) and (e)(3), the words "September 1, 2004" are removed and the words "September 22, 2004" are inserted in their place.
(c) paragraph (e)(5) is revised to read as follows:

§ 358.4 Independent functioning.

- (e) Written procedures.
(5) Transmission Providers shall train officers and directors as well as employees with access to transmission information or information concerning gas or electric purchases, sales or marketing functions. The Transmission Provider shall require each employee to sign a document or certify electronically signifying that s/he has participated in the training.

Appendix A

This Appendix A will not be published in the Code of Federal Regulations.

List of Petitioners Requesting Rehearing or Clarification or Submitting Comments

- Allegheny Energy, Inc. (Allegheny)
American Electric Power Service Corp. (AEP)
American Gas Association (AGA)
American Public Gas Association (APGA)
American Transmission Company, LLC
BP America Production and BP Energy Company (BP)
CenterPoint Energy Gas Transmission Company (CenterPoint)
Cinergy Services, Inc. (Cinergy)
Duke Energy Corporation (Duke Energy)
Edison Electric Institute (EEI)
El Paso Corporation (El Paso)
Enbridge Offshore Pipelines (Enbridge)
Entergy Services, Inc. (Entergy)
Entrega Gas Pipeline Inc. (Entrega)
Gulf South Pipeline, Company, L.P. (Gulf South)
Interstate Natural Gas Association of America (INGAA)
Kinder Morgan Interstate Pipelines (Kinder Morgan Pipelines)
Large Public Power Counsel (LPPC)
National Association of State Utility Consumer Advocates (NASUCA)
National Fuel Gas Distribution Corporation (National Fuel—Distribution)
National Grid USA (National Grid)
National Rural Electric Cooperative Association (NRECA)
Natural Gas Supply Association (NGSA)

- NiSource, Inc. (NiSource)
Questar Pipeline Co. (Questar Pipeline)
Questar Gas Co. (Questar-Gas)
Saltville Gas Storage Co., LLC (Saltville)
Sempra Energy (Sempra)
Shell Gas Transmission, LLC (Shell Gas)
Shell Offshore, Inc. (Shell Offshore)
Southern Company Services, Inc. (Southern)
Texas Gas Transmission Co. (Texas Gas)
Westar Energy, Inc. (Westar)
Williston Basin Interstate Pipeline Company (Williston Basin)
XCEL Energy Services, Inc. (Xcel)

Nora Mead BROWNELL, Commissioner, dissenting in part.

1. For the reasons set forth in my dissent in part to Order No. 2004, Standards of Conduct for Transmission Providers, 68 FR 69134 (Dec 11, 2003), III FERC Stats. & Regs. ¶ 31,155 (Nov. 25, 2003), I would have retained the existing exemptions under Order No. 497 for affiliated producers.

Nora Mead Brownell,
Kelliher, Commissioner, dissenting in part.

For the reasons set forth in my dissent in part on the Order on Rehearing, Order No. 2004-A, Standards of Conduct for Transmission Providers, I believe the Standards of Conduct rule is fundamentally flawed. That flaw is the lack of record evidence supporting expanding the scope of the rule beyond Marketing Affiliates.

Accepting nonetheless that new Standards of Conduct are being adopted, I would further limit application of the rule. With respect to this order, I agree with the clarifications provided by the Commission, which may make the Standards of Conduct rule more workable.

Joseph T. Kelliher,
Commissioner.

[FR Doc. 04-18091 Filed 8-9-04; 8:45 am]

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 388

[Docket Nos. RM02-4-002, PL02-1-002, RM03-6-001; Order No. 649]

Critical Energy Infrastructure Information

Issued August 3, 2004.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is issuing this final rule amending its regulations for gaining access to critical energy infrastructure information (CEII). These changes are being made based on comments filed in response to the February 13, 2004 notice seeking public comment on the effectiveness of the Commission's CEII rules. The final rule