CHANGES TO THE PRO FORMA LGIP AND LGIA—Continued

Article 5.14	Delete the first two sentences of this article and replace them with the following sentence: "Transmission Provider or Transmission Owner and Interconnection Customer shall cooperate with each other in good faith in obtaining all permits, licenses, and authorizations that are necessary to accomplish the interconnection in compliance with Applicable Laws and Regulations."
Article 5.17.7	In the second paragraph, before the last sentence, add this new sentence: "The settlement amount shall be calculated on a fully grossed-up basis to cover any related cost consequences of the current tax liability."
Article 5.17.8(ii)	Add the word "interest" to the beginning of this subsection, revising it to read: "(ii) interest on any amount paid * * * Reference to 18 CFR 35.19a(a)(2)(ii) should be changed to 18 CFR 35.19a(a)(2)(iii).
Article 11.4.1	In the second paragraph of this article, replace "(2) declare in writing that Transmission Provider or Affected System Operator will continue to provide payments to Interconnection Customer pursuant to this subparagraph until all amounts advanced for Network Upgrades have been repaid." with "(2) declare in writing that Transmission Provider or Affected System Operator will continue to provide payments to Interconnection Customer on a dollar-for-dollar basis for the non-usage sensitive portion of transmission charges, or develop an alternative schedule that is mutually agreeable and provides for the return of all amounts advanced for Network Upgrades not previously repaid; however, full reimbursement shall not extend beyond twenty (20) years from the Commercial Operation Date." Add the following sentence to the last paragraph of this article: "Before any such reimbursement can occur, the Interconnection Customer, or the entity that ultimately constructs the Generating Facility, if different, is responsible for identifying the entity to which reimbursement must be made." Reference to 18 CFR 35.19a(a)(2)(ii) should be changed to 18 CFR 35.19a(a)(2)(iii).
Article 18.1	Capitalize each reference to "Indemnifying Party."
Article 18.3.5	Revise the second sentence to read "* * * thirty (30) Calendar Days advance written notice * * *"
Article 18.3.6	In the first sentence, change "polices" to "policies."
Article 19.1	In the second sentence, change "party's" to "Party's."
Article 22.1.10	Revise the last sentence to read: "Requests from a state regulatory body conducting a confidential investigation shall be treated in a similar manner if consistent with the applicable state rules and regulations."
Article 28.1.2	In the first sentence, change "party" to "Party."

Nora Mead BROWNELL, Commissioner dissenting in part:

On rehearing of Order No. 2003, the Commission made three critical revisions to the procedures by which Interconnection Customers obtain cost recovery for their up-front funding of Network Upgrades. Specifically, the Commission eliminated the following key protections afforded to Interconnection Customers: (1) The ability to apply credits to transmission service taken from sources other than the specific interconnecting generating facility; (2) the ability to obtain full reimbursement within five years; and (3) the ability to obtain reimbursement for upgrades made to adjacent transmission systems (so-called "Affected Systems") on which the Interconnection Customer does not take transmission service. I am now convinced that the Commission erred in making these revisions, and that today's order, by making the minor modification of requiring full reimbursement after twenty years, does not go far enough to correct that error.

In Order No. 2003–A, the Commission's primary justification for modifying the cost recovery provisions was that the changes were necessary to ensure that Interconnection Customers make efficient decisions on where to site their generating facilities. Rehearing petitioners make a convincing argument that there is no reason to believe that these modifications will have any appreciable effect on siting decisions, which are driven by state and local siting regulations and fuel accessibility needs. Instead of attempting to rebut this argument or develop a substitute rationale, the majority simply treats petitioners' argument as an admission that Network Upgrade costs are small and, therefore, concludes that Interconnection Customers have no basis to complain about bearing those costs. However, the relative size of Network Upgrade costs compared to other siting costs is irrelevant to whether it is fair to put Interconnection Customers at substantial risk of never obtaining full reimbursement for upgrades that benefit all customers.

The Commission has been quite explicit that up-front payment of Network Upgrades costs by an Interconnection Customer is simply a "financing mechanism that is designed to facilitate the efficient construction of Network Upgrades," and is "not a rate for interconnection or transmission service." [1] As the Commission explained in Order No. 2003–A, "the Transmission Provider's right to charge for transmission service at the higher of an embedded cost rate, or an incremental rate designed to recover the cost of the Network Upgrades, provides the Transmission Provider with a cost recovery mechanism that ensures that native load and other transmission customers will not subsidize service to the Interconnection Customer." [2] The primary purpose of having the Interconnection Customer finance the Network Upgrades was to alleviate any delay that might result if the Transmission Provider were forced to secure funding.[3]

The issue, then, is whether we have exposed the Interconnection Customer to undue risk in its role as financier of Network Upgrades that benefit the system as a whole. I believe that we have. Therefore, I would grant rehearing and return to the cost recovery policies we announced in Order No. 2003.

Nora Mead Brownell

[FR Doc. 05–15 Filed 1–3–05; 8:45 am]

BILLING CODE 6717–01–P

[1] Standardization of Generator Interconnection Agreements and Procedures, Order No. 2003–A, Order on Rehearing, 69 FR 15932 (Mar. 26, 2004), FERC Stats. & Regs. ¶ 31,160 at P 612 (2004).

[2] *Id.* at P 613.

[3] *See, e.g., id.*

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 358

[Docket Number RM01–10–003; Order No. 2004–C]

Standards of Conduct for Transmission Providers

Issued December 21, 2004.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final rule; order on rehearing of order no. 2004–B.

SUMMARY: The Federal Energy Regulatory Commission (Commission) generally reaffirms its determinations in Order Nos. 2004, 2004–A and 2004–B and grants rehearing and clarifies certain provisions. Order Nos. 2004 *et seq.* require 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–B. The Commission grants rehearing, in part, denies rehearing, in part, and provides clarification of Order No. 2004–B.

EFFECTIVE DATE: Revisions in this order on rehearing will be effective February 3, 2005.

FOR FURTHER INFORMATION CONTACT: Demetra Anas, Office of Market Oversight and Investigations, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8178.

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

Order on Rehearing and Clarification

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 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] On August 2, 2004, the Commission issued Order No. 2004–B, in which it addressed the requests for rehearing and/or clarification of Order No. 2004–A.[4]

2. Seventeen petitioners requested rehearing or clarification of Order No. 2004–B. As discussed below, the Commission grants rehearing, in part, denies rehearing, in part, and provides additional clarification. Chief among the resolutions are: (1) Granting rehearing by allowing local distribution companies (LDCs) to participate in hedging related to on-system sales and still qualify for exemption from Energy Affiliate status; (2) denying rehearing regarding exemptions for electric local distribution companies; (3) clarifying the duties of Transmission Function Employees; (4) providing additional clarification and granting partial rehearing regarding information to be posted on the Internet or OASIS; (5) denying rehearing regarding the timing of the applicability of the Standards of Conduct to newly formed Transmission Providers; (6) and making miscellaneous corrections to the regulatory text.

A. Definition of an Energy Affiliate

Order No. 2004, et seq.

3. The Standards of Conduct, as revised in Order Nos. 2004–A and 2004–B, defines 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, unless it qualifies for the exemption in § 358.3(d)(6)(v).

(6) An Energy Affiliate does not include:

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

(ii) An affiliated Transmission Provider or an interconnected foreign affiliated natural gas pipeline that is engaged in natural gas transmission activities 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;

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

(v) A State-regulated local distribution company that acquires interstate transmission capacity to purchase and resell gas only for on-system customers, and otherwise does not engage in the activities described in section 358.3(d)(1), (2), (3) or (4), except to the limited extent necessary to support on-system customer sales and to engage in de minimis sales necessary to remaining in balance under applicable pipeline tariff requirements.

(vi) A producer, gatherer, Hinshaw pipeline or an intrastate pipeline that makes incidental purchases or sales of de minimis 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).

i. Scope of the LDC Exemption

Order No. 2004–B

4. In Order No. 2004–B, the Commission stated that an LDC would not be able to engage in financial or futures transactions or hedging without becoming an Energy Affiliate. The Commission expressed concern that the LDC's access to transmission information could be unduly preferential for the LDC when participating in such financial transactions. The Commission also stated that it is virtually impossible to distinguish between financial or futures transactions in a speculative market from those needed to support on-system sales.[5]

Requests for Rehearing and/or Clarification and Commission Conclusions

5. AGA seeks clarification that an LDC that does not make off-system sales except for purposes of balancing may engage in any of the activities described in §§ 358.3(d)(1), (2), (3), or (4), including hedging activities undertaken in conjunction with gas-acquisition activities to support its retail sales, without becoming an Energy Affiliate. Specifically, AGA seeks clarification that an LDC that engages in off-system sales only for balancing can engage in certain types of specific "hedging" transactions such as gas storage, contracts for the future delivery of natural gas, futures contracts for natural gas, and financial instruments to stabilize or mitigate the volatility of gas prices, without becoming an energy affiliate.

6. The Duke Pipelines, OkTex, National Fuel, the New York PSC, Southwest Gas, and the Utah PSC and the Wyoming PSC also request rehearing of the Commission's decision to exempt from Energy Affiliate status only those LDCs that do not participate in wholesale market transactions such as hedging, even when such wholesale market transactions are entered into by the LDC only for the purposes of supporting on-system sales.

7. National Fuel, AGA and PSC New York argue that excluding LDCs that engage in hedging from the exemption

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

[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] 69 FR 48371 (Aug. 10, 2004), III FERC Stats. & Regs. ¶ 31,166 (Aug. 2, 2004).

[5] *See* Order No. 2004–B at P 18.

from Energy Affiliate status is inconsistent with the text of §§ 358.3(d)(4) and (d)(6)(v).

8. Several petitioners also argue that, contrary to the Commission's statements in Order No. 2004–B, it is possible to distinguish between hedging and speculative financial derivative transactions. National Fuel and AGA argue that the Commission's own accounting regulations currently provide methods for distinguishing between hedging and speculation, and request clarification that exempt LDCs may utilize gas derivatives in support of on-system sales when such transactions are properly classified either as ''normal purchases and sales scope exception'' per part 201, General Instruction 23(A), or as non-speculative derivatives as properly recorded in Balance Sheet Accounts 176 or 245 per part 201, General Instructions 23(D) and (E). National Fuel goes on to say that it and other New York LDCs are required by the New York PSC to comply with the Commission's Uniform System of Accounts and, as publicly traded companies, are also subject to the Financial Accounting Standards Board (FASB) Standard Nos. 133 and 138 which impose accounting standards for the accounting of derivatives. National Fuel states that an LDC entering into a financial transaction to hedge price risk related to physical purchases for on-system sales is required to concurrently designate and document the hedge, the hedged item and the specific risk being hedged, in order to take advantage of ''fair value'' or ''cash flow'' accounting. National Fuel argues that these requirements would provide an adequate accounting basis to allow hedging to be distinguished from speculation.

9. Petitioners point out that the limitations on hedging for exempt LDCs are inconsistent with various existing and proposed local regulations or policies that require or encourage LDCs to reduce price volatility for their on-system customers by various methods including hedging. OkTex argues that the existence of locally approved and monitored gas cost stabilization programs demonstrates the lack of reasoned basis for the conclusion that it is impossible to distinguish between speculative and nonspeculative transactions.

10. National Fuel argues that affiliated pipelines relying on the LDC exemption would have to limit their purchases to the spot market which might result in increased costs to ratepayers. It also argues that the Commission's concerns regarding improper access to transmission information by LDCs is misplaced in the context of transactions that support on-system sales. National Fuel argues that an LDC with information that could potentially be of benefit would have greater profit potential if it entered a speculative transaction, rather than if it entered into a hedge transaction to limit price risk for on-system sales customers. It also argues that the authorities having jurisdiction over LDCs retail sales require that any benefit derived from entering into such transactions must accrue to the retail ratepayer, with no benefits to the company's shareholders.

11. Duke Pipelines and OkTex request clarification that hedging programs would not jeopardize an LDC's exemption so long as the programs are reviewed on a case-by-case basis by regulators and found to be non-speculative. Utah PSC and Wyoming PSC similarly argue that exempt LDCs should be allowed to implement price stabilization programs which utilize hedging so long as such programs are approved and monitored by state commissions and are for the exclusive benefit of retail customers.

12. The Commission clarifies, as requested by National Fuel and others, that ''normal purchases and sales,'' as those terms are generally used for accounting purposes, are not considered to be financial, futures, or hedging transactions under the Standards of Conduct. Furthermore, the Commission grants rehearing and will allow exempt LDCs to participate in financial transactions necessary for price risk management solely for the benefit of on-system retail customers. Petitioners have raised persuasive arguments that hedging is an important and generally used tool needed to provide economical retail sales service under state regulatory mandates. Further, petitioners have convinced us that current accounting standards make clear distinctions between hedging and speculation so as to create an audit trail should the need arise to investigate allegations of affiliate abuse in this area.[6] However, we wish to be clear that we intend to allow exempt LDCs to use hedging only to manage price risks attributable to serving their on-system, state-regulated bundled retail load. If an LDC engages in financial transactions on a speculative basis for stockholder profit rather than financial transactions to protect bundled retail ratepayers, the LDC will no longer be an exempt Energy Affiliate.

13. Southwest Gas seeks clarification that an LDC exempt from Energy Affiliate status may engage in wholesale sales transactions so long as the transmission capacity acquired by the LDC occurs on unaffiliated interstate pipelines or on affiliated ''conduit'' pipelines that transport under part 157 certificates.

14. The Commission is denying Southwest Gas's request for clarification. If an affiliated LDC participates in any wholesale transactions, the affiliated LDC does not qualify for the Energy Affiliate exemption under § 358.3(d)(6)(v).[7] As the Commission stated in Order No. 2004–A, the purpose is to place all wholesale market participants, affiliated and non-affiliated, on an equal footing. LDC affiliates engaging in wholesale sales transactions compete with non-affiliates for transmission.

ii. Treatment of Gas LDCs

Order No. 2004, et seq.

15. Under § 358.3(d)(6)(v), a Local Distribution Company must be regulated by a state to qualify for exemption from status as an Energy Affiliate.

Requests for Rehearing and/or Clarification and Commission Conclusions

16. Duke Pipelines request clarification that Canadian LDCs regulated at the provincial level and not engaged in off-system sales may also qualify for exemption under § 358.3(d)(6)(v), consistent with the Commission's treatment of other foreign entities and state-regulated LDCs.[8] The Commission is granting the Duke Pipelines' request for clarification. The Commission will treat LDCs that are regulated by Canadian provincial authorities as if they are state-regulated. As a result, if provincially-regulated Canadian LDCs meet the requirements of § 358.3(d)(6)(v) they will not be treated as Energy Affiliates if they do not participate in U.S. commodity and transmission markets. However, as the

[6] Should the Commission need to examine the books and records of a Transmission Provider's LDC to ensure compliance with the Standards of Conduct, those records should be made available upon the Commission's request. To the extent that records are found to be deficient, or not readily available, the affiliated Transmission Provider shall treat the subject LDC as an Energy Affiliate that is ineligible for exemption pursuant to § 358.3(d)(6)(v).

[7] The Commission notes that on September 20, 2004, in Docket No. TS04–222–000, the Commission granted Southwest Gas a partial waiver of the Standards of Conduct vis-à-vis its affiliated LDC. *See Alcoa Power Generating Inc.*, 108 FERC ¶ 61,243 at P 202–203 (Alcoa).

[8] In Order No. 2004–A, the Commission determined that a foreign affiliated Transmission Provider, that is regulated by the state, province or national regulatory board of the foreign country in which its facilities are located will not be treated as an Energy Affiliate. *See* Order No. 2004–A at P 97.

Commission stated in Order No. 2004–A, a Canadian Energy Affiliate that does business in the U.S. commodity and transmission markets should not be afforded undue preferences or services. *See* Order No. 2004–A at P 97.

17. Entergy seeks clarification that LDCs regulated by local governmental bodies which regulate the rates, terms and conditions for retail electric and natural gas service, may also qualify for the LDC exemption. Entergy states that an LDC regulated by the City of New Orleans, which regulates the rates, terms and conditions for retail electric and natural gas service in New Orleans, should also be exempt from status as an Energy Affiliate as if it were a state-regulated LDC. The Commission is denying Entergy's request for clarification. Entergy's request reflects a very limited, if not unique, circumstance. Entergy has not shown that other entities are subject to local rather than state regulation or that its regulatory situation warrants a generic exemption. The Commission will not create a generic exemption for LDCs subject to local regulation. Entergy, however, may file a request for an individual waiver based on its individual circumstances.

iii. Treatment of Electric LDCs or LDC Divisions

Order No. 2004–B

18. In Order No. 2004–B, the Commission rejected requests to clarify that electric LDCs may qualify for the exemption from the definition of Energy Affiliate in § 358.3(d)(6)(v). *See* Order No. 2004–B at P 26.

Requests for Rehearing and/or Clarification and Commission Conclusions

19. Entergy, National Grid, and EEI repeat their request for clarification that the LDC exemption from Energy Affiliate status apply to electric LDCs as well as gas LDCs, arguing that the Commission's previous denial of such clarification in Order 2004–B was based on an inaccurate understanding of the concerns raised. They argue that the Commission in Order No. 2004–B addressed the question of whether exempt electric LDCs could make de minimis off-system sales, while the petitioners were concerned with the broader question of whether electric LDCs were included in the LDC exemption from Energy Affiliate status. Petitioners argue that the first clause of the LDC exemption in § 358.3(d)(6)(v) assumes that an LDC buys or sells gas, and thus could be inferred to mean that the exemption applies only to gas LDCs. Petitioners recommend establishing a separate exemption statement for electric and gas LDCs, and endorse EEI's proposed language. Under EEI's proposal, § 358.3(d)(6)(v) would be clarified to refer only to gas, and a new section would be added to create an exemption from the Energy affiliate status as follows: ''A state-regulated electric local distribution company or division that 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 sales.'' National Grid argues that adoption of EEI's proposed regulatory language clarifying the exemptions for gas and electric LDCs in § 358.3(d)(6) would ensure that employees who do not engage in Energy Affiliate activities, such as employees serving distribution functions, are not required to be treated as Energy Affiliate employees or separated from transmission system information.

20. EEI states that the Commission may want to explain that the new regulatory language it has proposed for § 358.3(d)(6) does not alter the treatment of bundled or unbundled retail sales as expressed in prior orders.

21. National Grid also argues that the since Commission does not require the independent functioning of distribution division employees from transmission function employees when they are all part of the same company, it would be illogical to require independent functioning of an electric distribution division when the distribution function is contained in a corporate entity separated from the affiliated Transmission Provider.

22. Calpine submitted an answer to Entergy and EEI's request for new regulatory language in § 358.3(d)(6). Calpine argues that Entergy and EEI are repeating a request for a stand-alone exemption from the definition of Energy Affiliate for LDCs that the Commission already rejected as unnecessary in Order No. 2004–B. Calpine also argues that EEI's proposed text is too broad, and could be interpreted to permit retail sales function employees of an LDC to purchase capacity and power in wholesale energy markets, in competition with non-affiliates, without regard to the Standards of Conduct, so long as such transactions were deemed ''necessary to support on-system sales.''

23. Entergy and EEI submitted an answer to Calpine's answer, in which they argue that Calpine has seriously misinterpreted what Entergy and EEI intended in their requests for clarification. The regulatory text EEI proposes, they argue, simply makes explicit the fact that electric LDCs that do not make off-system sales can qualify for the LDC exemption from Energy Affiliate status.

Commission Disposition

24. We will deny petitioners' requests for rehearing and grant in part the requests for clarification of the exemption from the definition of Energy Affiliate. The Commission will not adopt petitioners' proposed language for an exemption for electric LDCs. The Commission clarifies that an electric distribution division or company that performs only distribution wires functions may be shared with the transmission function of a Transmission Provider (wires-to-wires services). But, if the distribution function includes retail sales functions, a retail sales function employee cannot engage in any wholesale sales, such as selling excess generation to a non-retail customer without triggering Energy Affiliate status. It is not appropriate for an entity that participates in the wholesale market to obtain an undue preference when competing with non-affiliates for transmission capacity. See Order No. 2004 at P 78.[9]

25. The effect of this ruling is not overly broad. Many electric distribution divisions or companies are not Energy Affiliates because they do not engage in nor are involved with the following activities in U.S. energy or transmission markets: transmission transactions; manage or control transmission capacity; buy, sell, trade, or administer electric energy; or engage in financial transactions relating to the sale or transmission of electric energy. As we have stated, electric distribution divisions or companies (unlike gas LDCs) do not make purchases or sales of electricity to remain in balance. Therefore, a separate electric distribution division or company exemption is unnecessary. However, the

[9] *See also,* Order No. 889–A, 81 FERC ¶ 61,253 at 62,174 (1997) (A * * * public utility has no choice pursuant to Order Nos. 888 and 888–A but to separate its wholesale power marketing function (including power purchase transactions made by the marketing function on behalf of wholesale native load) from the transmission operations function. This means that those persons in the company that are involved in wholesale power purchases as well as wholesale sales cannot interact with the transmission personnel other than through the OASIS. Thus, to the extent they are making purchases on behalf of wholesale as well as bundled retail native load as part of a single purchase, they will have to abide by the separation of function requirement * * * [S]uch a purchase is not divisible. Additionally, it is conceivable that there could be a separate retail marketing function for native load and a separate wholesale marketing function for native load * * * [I]n such cases, it would clearly be inappropriate for the retail staff to share transmission information with the wholesale marketing staff.).

Commission will consider case-specific requests for exemption.[10]

B. Definition of a Transmission Function Employee

Order No. 2004, *et seq.*

26. Section 358.3(j) defines a Transmission Function Employee as an employee, contractor, consultant or agent of a Transmission Provider who conducts transmission system operations or reliability functions, including, but not limited to, those who are engaged in day-to-day duties and responsibilities for planning, directing, organizing or carrying out transmission-related operations. Order No. 2004–A clarified, and Order No. 2004–B reiterated, that the Commission looks at the actual duties and responsibilities of employees in determining whether individuals are Transmission Function Employees.[11]

Requests for Rehearing and/or Clarification and Commission Conclusions

27. EEI and AGA seek additional clarification of the term Transmission Function Employee following the Commission's issuance of Alcoa Power Generating, Inc., 108 FERC ¶ 61,243 (2004).[12] Petitioners are concerned that Commission's wording of *Alcoa* could be read to suggest that all transmission rate design and transmission tariff administration duties are deemed transmission functions. EEI and AGA seek clarification with regard to the applicability of the designation of Transmission Function Employee to rate design and transmission tariff administration employees. With regard to rate design employees, EEI and AGA request clarification that, to the extent that employees who do not engage in other Transmission Functions, may engage in traditional accounting and regulatory cost-of-service support activities for designing transmission rates without becoming Transmission Function Employees. EEI and AGA claim that for many of their members, rate design duties are not assigned to a dedicated staff, but rather spread over a large number of employees with other shared roles.

28. With regard to tariff administration employees, EEI and AGA request clarification that the Commission did not intend to make a blanket determination that all such employees were Transmission Function Employees, but rather that the status of each such employee should be determined by his or her job description. EEI and AGA urge the Commission to clarify that an employee who performs billing or administrative support should not be deemed a Transmission Function Employee even if the employee is located in the ''tariff administration'' department. EEI and AGA claim that these employees are ''back-office support employees'' and do not offer transmission service, execute service agreements, negotiate terms or service or approve service, and should qualify for the support exemption under § 358.4(a)(4).[13]

29. With respect to rate-design employees, petitioners offer few details about the specific duties of employees who engage in accounting and regulatory cost-of-service support roles. Rate design is an integral element of the transmission function. As discussed in the *Alcoa* order, activities such as designing rates, administering tariffs (which establish rates for services as well as the terms and conditions of service for the transmission of electricity or transportation of natural gas, including operating conditions), and calculating gas cost adjustment charges are transmission functions that involve the planning and carrying-out of transmission-related operations. See *Alcoa* at P 169. Petitioners urge the Commission to consider Ameren Services Co., in which the Commission permitted the sharing of rate design functions and found that none of the rate design individuals described by a particular company directed, organized or executed transmission/reliability or wholesale merchant functions.[14] Petitioners urge the Commission to continue to review these issues on a case-by-case basis rather than make a blanket determination that all rate design employees are Transmission Function Employees.

30. The Commission grants the requested clarification, and reiterates our prior commitment to consider the actual duties and responsibilities of employees in determining whether they are Transmission Function Employees. However, to provide additional guidance to Transmission Providers, we also clarify that there are certain rate design functions that will be considered Transmission Functions because rates are an integral part of transmission service.

31. With regard to tariff administration employees, the Commission clarifies that it did not make a blanket determination that all tariff administration employees are automatically deemed Transmission Function Employees. As previously stated, the Commission will look at the actual duties and responsibilities of employees in determining whether they are Transmission Function Employees. However, an employee that is involved in certain tariff-related activities, such as determining whether discretion may be granted under the tariff or applying tariff provisions, is a Transmission Function Employee.

C. Independent Functioning—Treatment of Electricity Provider of Last Resort Service (POLR)

Order No. 2004–B

32. Order 2004–A explained, in response to a request for clarification from Cinergy, that the Commission was not prepared to adopt a proposed rule change and amendment to the definition of ''marketing, sales or brokering'' to accord POLR service the same treatment, on a generic basis, as the Commission had accorded bundled retail sales, but that it would entertain case-by-case requests for exemption of a POLR service based on the relevant facts and circumstances.[15]

Requests for Rehearing and/or Clarification and Commission Conclusions

33. Cinergy is concerned that Order Nos. 2000, 2000–A and 2000–B could be interpreted to classify the retail account representatives of its affiliates, Cincinnati Gas & Electric Company (CG&E) and Union Light, Heat & Power Company (ULH&P), as sales and marketing employees or Energy Affiliate employees subject to the independent functioning and information sharing restrictions, even though CG&E provides only POLR gas and electric services in Ohio, and ULH&P provides only bundled gas and electric services in greater Cincinnati's Northern Kentucky communities (where competitive retail gas and electric markets have not been adopted).

34. Cinergy requests that the Commission find that the activities of the account representatives do not fall within the definition of sales and marketing employees at § 358.3(e). But, if they should be classified as sales and

[10] We note that National Grid has requested a case-specific exemption in Docket No. TS04–46–000, which will be addressed separately by the Commission.

[11] *See* Order No. 2004–A at P 131 and Order No. 2004–B at P 53.

[12] In *Alcoa,* the Commission addressed several requests for exemption from the Standards of Conduct.

[13] Under 18 CFR 358.4(a)(4), Transmission Providers are permitted to share support employees and field and maintenance employees with their Marketing and Energy Affiliates.

[14] 87 FERC ¶ 61,145 at 61,598 (1999).

[15] Order No. 2004–A at P 127.

marketing employees or Energy Affiliate employees, Cinergy requests an exemption from the independent functioning and information sharing restrictions for their account representatives because, Cinergy argues, in their limited roles, they cannot cause any harmful effects to the retail or wholesale competitive marketplace.

35. As the Commission explained in Order No. 2004–A, the question of the status of shared employees in the context of a state retail access program or as a provider of last resort is best decided on a case-specific basis. To the extent Cinergy seeks clarification of that policy, Cinergy's request is denied. Further, we are not prepared to grant any of Cinergy's requests at this time. While Cinergy has committed to ensuring that the account representatives will not act as conduits for passing transmission system information to its sales and marketing personnel or to any Energy Affiliate, Cinergy also seeks an exemption for these employees from the information sharing and independent functioning requirements. This request for exemption appears to be inconsistent with its no-conduit commitment. We need more explanation as to how the no-conduit commitment will work in practice in combination with the apparent need for an information sharing and independent functioning exemption if the Commission were to classify the retail account representatives as sales and marketing employees or Energy Affiliate employees.

36. Accordingly, we direct the Secretary to redocket Cinergy's request in the next available TS Docket, and we direct Cinergy to explain its implementation of the no-conduit rule in the context of its account representatives. The Commission will process this filing subsequently as a request for waiver or exemption specific to Cinergy's unique circumstances.

D. Information To Be Posted on the Internet or OASIS

i. Discretionary Waivers

Order No. 2004, et seq.

37. In Order No. 2004, the Commission stated that a Transmission Provider must 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 Commission further required that the Transmission Provider post the information in this log on the OASIS or Internet Web site within 24 hours of when the Transmission Provider exercises its discretion under any terms of the tariff. See § 358.5(c)(4) of the Commission's regulations.

Requests for Rehearing and/or Clarification and Commission Conclusions

38. INGAA seeks clarification that when discretion is exercised under a Transmission Provider's tariff, the details contained in the written log must be posted online on the following business day, as opposed to within 24 hours, consistent with § 385.2007. INGAA argues, for example, that if the act of discretion occurs on a Friday afternoon, the Transmission Provider could post the information on Monday. INGAA submits that requiring the posting within 24 hours would require Transmission Providers to hire additional staff to be available on non-business days to review and post discretionary waivers that is not justified since shippers and potential shippers would not likely be reviewing the postings on non-business days.

39. The Commission denies INGAA's request. Under INGAA's scenario, the Transmission Provider could wait until 5 p.m. on Monday to post the information concerning its act of discretion that took place on Friday. This is insufficient notice. If a Transmission Provider exercises discretion by waiving a nomination/scheduling deadline or gas quality provision, and the Transmission Provider posts the information on the next business day rather than within 24 hours, the shipper or potential shipper may not learn of the discretionary act until it is too late to benefit from the posting. Gas control centers operate 24 hours a day, seven days a week and daily changes occur, even on the weekends and holidays. The goal of the requirement is to ensure that if a Transmission Provider exercises discretion, all shippers or potential shippers have timely access to information concerning that discretion so that, if appropriate, they can, on a non-discriminatory basis, obtain comparable service.

ii. Discounts

Order No. 2004, et seq.

40. Under § 358.5(d), any offer of a discount for any transmission service made by the Transmission Provider must be posted on the OASIS or Internet Web site contemporaneously with the time that the offer is contractually binding. One of the elements of the discount posting includes the requirement to identify the quantity of power or gas scheduled to be moved.[16] Following Order No. 2004–A, INGAA requested clarification and urges the Commission to require the posting of the firm maximum daily contract quantity or, for interruptible transportation, the quantity of gas to which the shipper is entitled, instead of requiring the quantity ''scheduled.'' INGAA explained that while the parties agree on the quantity of the shipper's entitlement at the time they enter into the contract, they typically do not know what quantities will actually be nominated and scheduled until later when service begins under the contract. The Commission denied INGAA's request in Order No. 2004–B. See Order No. 2004–B at P 131.

Requests for Rehearing and/or Clarification and Commission Conclusions

41. INGAA repeats its request for clarification that Internet postings of transmission service provided at a discount should refer to the quantity of gas that the shipper is entitled to take under the contract, rather than the quantity of gas that is actually scheduled. INGAA argues that the Commission, in denying its previous request for clarification of Order No. 2004–A, misunderstood the problem INGAA was identifying, which is that the quantities that the contracts reference are the maximum quantities that the contracts permit to be scheduled, and that the actual amounts scheduled may be less than the contract amount. INGAA argues that the requested clarification that Transmission Providers must post the contract quantities on the Internet instead of the scheduled quantities will ''provide other shippers with timely, pertinent discount contract quantity information to determine whether they are entitled to ''comparable discount'' as similarly situated shippers.''

42. The Commission recognizes that the Transmission Provider may not know, at the time the offer is contractually binding, the actual quantity that will later be ''scheduled.'' However, the Commission disagrees with INGAA's claim that the discount contract applies to the maximum quantity that the shipper is entitled to nominate and have scheduled at that discounted rate. Discount procedures vary significantly among pipelines and for different types of service on the same pipeline. Contrary to INGAA's assertion,

[16] Using the quantity of gas scheduled to be moved as an element of the discount posting requirement is consistent with the former gas standards of conduct at former 18 CFR 161.3(h)(2).

the maximum daily contract amount does not always reflect the volume on which the discount was based. For example, under umbrella-type interruptible transportation agreements, short-term discounts are often negotiated for less than the MDQ identified in the IT transportation agreement, and posting the MDQ would provide misleading information about the discount.

43. The goal of the discount requirement is to post pertinent information so a similarly situated shipper can determine if it is entitled to a comparable discount. There may be instances in which the MDQ is the appropriate information to post vis-à-vis volume, but there are also instances in which the amount scheduled more accurately reflects the information used by the Transmission Provider as a basis for granting a discount. With that in mind, the Commission clarifies that the volume reported for the discount postings should be the volume identified in the discount request or relied upon as part of the consideration upon which a specific discount is granted. A Transmission Provider must identify whether it is posting the volumetric information based on the MDQ or scheduled volume. The Commission will modify the following portion of the regulatory text at § 358.5(d) by deleting the phrase ''the quantity of power or gas scheduled to be moved,'' and replacing it with the phrase ''the quantity of power or gas upon which the discount is based.''

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

Order No. 2004–B

44. In Order No. 2004–B, the Commission established that a new pipeline will have a reasonable time (30 days) after it accepts its certificate of public convenience or otherwise becomes subject to the Commission's jurisdiction (whichever comes first) to come into compliance with the Standards of Conduct.[17]

Requests for Rehearing and/or Clarification and Commission Conclusions

45. Tractebel and AES seek clarification that companies which have obtained certificates allowing them to construct pipelines, but which have not yet begun transporting natural gas for others, are not yet natural gas companies, and therefore the Standards of Conduct do not apply to them. Tractebel points to section 2(6) of the Natural Gas Act and the Commission's interpretation of that section in Millennium Pipeline Co., 100 FERC ¶ 61,277 at P 121 and 124, where the Commission found that Millennium Pipeline Co. had not completed construction of its pipeline and therefore was not yet a natural gas company. Tractebel further argues that a pre-operational pipeline is not a Transmission Provider as that term is defined in § 358.3(2) because it has not yet begun providing transportation service. Similarly, AES requests clarification that it need not comply with the separation of functions requirement until it has ''transmission function employees,'' as defined in § 358.3(j), and until it commences ''transmission,'' as defined in § 358.3(f). AES also requests clarification that in the pre-service stage of development, it need not comply with the posting, training or separation of function requirements contained in Standards of Conduct. Tractebel and AES both point to the Commission's statement in Order No. 2004–A at P 237 that ''some aspects of the Standards of Conduct may have no meaningful applicability until the company has been staffed and begins to perform transmission functions, such as soliciting business, or negotiating contracts.''

46. As noted by Petitioners, the Commission previously stated that some of the Standards of Conduct requirements may not apply until the Transmission Provider has been staffed and begins to perform transmission functions. However, when a Transmission Provider begins soliciting business or negotiating, it is engaging in transmission functions and is subject to the Standards of Conduct requirements. The Commission's goal is to ensure that the newly formed pipeline will provide non-discriminatory treatment and limit its ability to unduly favor its Marketing or Energy Affiliates. If the Commission defers applying the Standards of Conduct, a newly formed pipeline might share employees or information with its Marketing or Energy Affiliates giving those affiliates the ability to obtain preferential service or treatment.

F. Exemptions

Order No. 2004, *et seq.*

47. In Order No. 2004, the Commission established that Transmission Providers that did not previously obtain an exemption may request an exemption under § 358.1(d) from all or some of the requirements of Part 358.[18]

Requests for Rehearing and/or Clarification and Commission Conclusions

48. NGSA seeks clarification that §§ 358.5(c) and (d) generally should not be waived absent extraordinary circumstances justifying such a waiver.[19] NGSA argues that these provisions are generally applicable standards of conduct that prevent unduly discriminatory behavior, and that waiver of such provisions for gas Transmission Providers that do not have Energy Affiliates inadvertently eliminates important protections that should apply to all pipeline operations regardless of whether any Energy Affiliate relationships exist. Specifically, NGSA argues that the complete exemption from the Standards of Conduct granted to Texas Gas Transmission Company (Texas Gas) may lead to the unduly discriminatory treatment of shippers on Texas Gas's system, and that Texas Gas should only be granted a waiver from those Standards of Conduct that apply specifically to affiliate relationships.[20]

49. In response, Texas Gas argues that the Commission's finding is consistent with the Commission's policy under the former Part 161 Standards of Conduct in which a Transmission Provider was not subject to the Standards of Conduct if it had no Marketing Affiliates.[21] Moreover, Texas Gas argues that it is still bound to provide service that is not unduly discriminatory under the requirements of sections 4 and 5 of the Natural Gas Act (NGA). The Commission denies NGSA's request. As Texas Gas states, the Commission's determination was limited to a single Transmission Provider with unique circumstances. If Texas Gas obtains a Marketing or Energy Affiliate, it must comply with the Standards of Conduct requirements of Order No. 2004 within 30 days of obtaining or creating a Marketing or Energy Affiliate. Finally, as noted above, Texas Gas is bound by the provisions of sections 4 and 5 of the

[17] Order No. 2004–B at P 137.

[18] *See* Order No. 2004 at P 28.

[19] Sections 358.5(c) and (d) contain provisions requiring the Transmission Provider to implement tariffs on a non-discriminatory manner and to post discounts.

[20] On September 20, 2004, in Docket No. TS04–253–000, the Commission determined that Texas Gas Transmission Company (Texas Gas) was not subject to Order No. 2004 because Texas Gas does not have any Marketing or Energy Affiliates. See Alcoa at P 108. NGSA's petition was filed in the instant docket, as well as in the TS04–253 docket, with a request for an untimely intervention, which Texas Gas opposed.

[21] See Discovery Gas Transmission LLC, 103 FERC ¶ 61,301 at 62,170 (2003).

NGA to provide non-discriminatory service and the non-discriminatory provisions of the Standards of Conduct regarding the implementation of tariffs should serve as a guideline for Texas Gas's behavior in complying with sections 4 and 5 of the NGA.

G. Miscellaneous Corrections

50. The Commission is also making some miscellaneous corrections to typographical errors in the regulatory text. Specifically, Entergy has pointed out that § 358.4(b)(3)(vi) contains a reference to § 37.3 which Entergy believes should be § 37.6. The Commission agrees, and § 358.4(b)(3)(vi) is being corrected to reference § 37.6. Also, § 358.3(d)(6)(vi) is revised to remove ''producer'' and replace it with ''processor'' to reflect the Commission's intent of this provision as described in paragraph 30 of Order No. 2004–B.

By the Commission.

Linda Mitry,

Deputy Secretary.

■ In consideration of the foregoing, the Commission amends 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.

§ 358.3 [Amended]

■ 2. In § 358.3(d)(6)(vi) the word ''producer'' is removed and the word ''processor'' is inserted in its place.

§ 358.4 [Amended]

■ 3. In § 358.4(b)(3)(vi) the word ''§ 37.3'' is removed and the word ''§ 37.6'' is inserted in its place.

§ 358.5 [Amended]

■ 4. In § 358.5(d), the words ''the quantity of power or gas scheduled to be moved'' are removed and the words ''the quantity of power or gas upon which the discount is based,'' are inserted in their place.

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

Appendix A

List of Petitioners Requesting Rehearing or Clarification or submitting Comments

American Gas Association (AGA)
AES Ocean Express LLC (AES)
Algonquin Gas Transmission, LLC; jointly with East Tennessee Natural Gas, LLC; Egan Hub Storage, LLC; Gulfstream Natural Gas System, L.L.C.; Maritimes & Northeast Pipeline, L.L.C.; and Texas Eastern Transmission, LP (collectively, Duke Pipelines)
Calpine Corporation (Calpine)
Cinergy Services, Inc. (Cinergy)
Edison Electric Institute (EEI)
Entergy Services, Inc. (Entergy)
Interstate Natural Gas Association of America (INGAA)
National Fuel Gas Supply Corporation jointly with National Fuel Gas Distribution Corporation (collectively, National Fuel)
National Grid USA (National Grid)
Natural Gas Supply Association (NGSA)
OkTex Pipeline Company (OkTex)
Public Service Commission of the State of New York (PSC New York)
Southwest Gas Corporation (Southwest Gas)
Tractebel Calypso Pipeline, LLC (Tractebel)
Utah Public Service Commission (Utah PSC)
Wyoming Public Service Commission (Wyoming PSC)

[FR Doc. 05–16 Filed 1–3–05; 8:45 am]

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Parts 1304, 1306, and 1310

[Docket No. DEA–234F]

RIN 1117–AA71

Recordkeeping and Reporting Requirements for Drug Products Containing Gamma-Hydroxybutyric Acid (GHB)

AGENCY: Drug Enforcement Administration (DEA), Justice.

ACTION: Final rule.

SUMMARY: DEA is amending its regulations to require additional recordkeeping and reporting requirements for drug products containing gamma-hydroxybutyric acid (GHB) for which an application has been approved under the Federal Food, Drug, and Cosmetic Act. DEA makes these changes under section 4 of the ''Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000.'' These additional requirements are necessary to protect against the diversion of GHB for illicit purposes.

EFFECTIVE DATE: February 3, 2005.

FOR FURTHER INFORMATION CONTACT: Patricia M. Good, Chief, Liaison and Policy Section, Office of Diversion Control, Drug Enforcement Administration, Washington, DC 20537. Telephone (202) 307–7297.

SUPPLEMENTARY INFORMATION:

Controlled Substances and Listed Chemicals

Controlled substances are drugs that have a potential for abuse and addiction; these include opiates, stimulants, depressants, hallucinogens, anabolic steroids, and substances that are immediate precursors to these controlled substances. Controlled substances are listed in 21 CFR part 1308. The substances are divided into five schedules. Schedule I substances are drugs for which there is a high potential for abuse, no currently accepted medical treatment in use in the United States, and lack accepted safety for use under medical supervision. Schedule II–V substances have accepted medical uses, but have a potential for abuse and may lead to physical and psychological dependence. Such drugs are subject to varying levels of control. Chemicals that can be used to manufacture controlled substances are regulated as either List I chemicals (important to the manufacture) or List II chemicals (used in the manufacture) of controlled substances.

Background

Gamma-Hydroxybutyric acid (GHB) is a central nervous system depressant drug. In recent years, the abuse of GHB has increased substantially. GHB is abused for its euphoric and purported hallucinogenic effects, as well as for its alleged role as an agent to stimulate muscle growth. GHB can produce drowsiness, dizziness, nausea, visual disturbances, unconsciousness, seizures, severe respiratory depression, coma, and death.

GHB can be produced in clandestine laboratories using a relatively simple synthesis with readily available and inexpensive source materials. Gamma-Butyrolactone (GBL), a List I chemical, is an industrial chemical that is used in the illicit manufacture of GHB. GBL and 1,4-butanediol, another industrial chemical, are also abused for their GHB-like effects. Due to their structural and pharmacological similarities to GHB, GBL and 1,4-butanediol are considered controlled substance analogues as defined by 21 U.S.C. 802(32). Manufactured GHB usually results in a clear solution that can be disguised by adding food coloring, flavorings, or storing it in different kinds of bottles and containers.

The listed chemical GBL has many industrial applications, and has not been scheduled at this time to prevent an undue regulatory burden to legitimate commerce in this substance. Because GBL is a controlled substance analogue, individuals who manufacture or distribute or possess with intent to manufacture or distribute this chemical intending it for human consumption may be prosecuted under provisions of the Controlled Substances Act. This is