

market or derivatives transaction execution facility, any commodity option authorized under section 4c of the Act, or any leverage transaction authorized under section 19 of the Act; or (ii) to whom, for compensation or profit, and as part of a regular business, the commodity trading advisor issues or promulgates analyses or reports concerning any of the activities referred to in paragraph (bb)(2)(i) of this section. The term "client" includes, without limitation, any subscriber of a commodity trading advisor.

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Issued in Washington, DC, on February 21, 2006 by the Commission.

Jean A. Webb,

Secretary of the Commission.

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## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

#### 18 CFR Part 358

[Docket No. RM01-10-005]

#### Interpretive Order Relating to the Standards of Conduct

Issued February 16, 2006.

**AGENCY:** Federal Energy Regulatory Commission, DOE.

**ACTION:** Interpretive order.

**SUMMARY:** The Federal Energy Regulatory Commission (Commission) is issuing this Order to clarify that Transmission Providers may communicate with affiliated nuclear power plants regarding certain matters related to the safety and reliability of the transmission system on the nuclear power plants, in order to comply with requirements of the Nuclear Regulatory Commission.

**DATES:** The interpretive order will become effective February 24, 2006. Comments are due March 20, 2006. Reply comments are due April 19, 2006.

**FOR FURTHER INFORMATION CONTACT:** Demetra Anas, Office of the Market Oversight and Investigations, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502-8178, [Demetra.Anas@ferc.gov](mailto:Demetra.Anas@ferc.gov).

**SUPPLEMENTARY INFORMATION:** Before Commissioners: Joseph T. Kelliher, Chairman; Nora Mead Brownell, and Suedeen G. Kelly.

Standards of Conduct for Transmission Providers.

1. The Federal Energy Regulatory Commission (Commission) clarifies that sections 358.5(a) and (b) of the Commission's regulations, 18 CFR 358.5(a) and (b) (2005), do not prohibit a Transmission Provider and its affiliated nuclear power plant from engaging in necessary communications related to the safety and reliability of the transmission system or the nuclear power plant, including information relating to the loss of or potential loss of transmission lines that provide off-site power to the nuclear power plant regardless of ownership of those lines. The Commission is issuing this Interpretive Order to clarify that Transmission Providers may communicate with affiliated and non-affiliated nuclear power plants to enable the nuclear power plants to comply with the requirements of the Nuclear Regulatory Commission (NRC) as described in the NRC's February 1, 2006 Generic Letter 2006-002, Grid Reliability and the Impact on Plant Risk and the Operability of Offsite Power (Generic Letter).<sup>1</sup>

#### I. Background

2. On November 25, 2003, the Commission issued a Final Rule adopting Standards of Conduct for Transmission Providers (Order No. 2004).<sup>2</sup> Under Order No. 2004, the Standards of Conduct govern the relationships between Transmission Providers<sup>3</sup> and all of their Marketing Affiliates<sup>4</sup> and Energy Affiliates.<sup>5</sup> The

<sup>1</sup> Nuclear Regulatory Commission's Generic Letter 2006-002, Grid Reliability and the Impact on Plant Risk and the Operability of Offsite Power. February 1, 2006. OMB Control No.: 3150-0011.

<sup>2</sup> *Standards of Conduct for Transmission Providers*, Order No. 2004, FERC Stats. & Regs., Regulations Preambles ¶ 31,155 (2003), *order on reh'g*, Order No. 2004-A, III FERC Stats. & Regs. ¶ 31,161 (2004), 107 FERC ¶ 61,032 (2004), *order on reh'g*, Order No. 2004-B, III FERC Stats. & Regs. ¶ 31,166 (2004), 108 FERC ¶ 61,118 (2004), *order on reh'g*, Order No. 2004-C, 109 FERC ¶ 61,325 (2004), *order on reh'g*, Order No. 2004-D, 110 FERC ¶ 61,320 (2005), *appeal docketed sub nom., National Gas Fuel Supply Corporation v. FERC*, No. 04-1183 (D.C. Cir. June 9, 2004).

<sup>3</sup> A Transmission Provider means: (1) Any public utility that owns, operates or controls facilities used for the transmission of electric energy in interstate commerce; or (2) Any interstate natural gas pipeline that transports gas for others pursuant to subpart A of part 157 or subparts B or G of part 284 of this chapter. A Transmission Provider does not include a natural gas storage provider authorized to charge market-based rates that is not interconnected with the jurisdictional facilities of any affiliated interstate natural gas pipeline, has no exclusive franchise area, no captive ratepayers and no market power. 18 CFR 358.3(a) (2005).

<sup>4</sup> A Marketing Affiliate means an affiliate as that term is defined in section 358.3(b) or a unit that engages in marketing, sales or brokering activities as those terms are defined at section 358.3(e). 18 CFR 358.3(k) (2005).

<sup>5</sup> An Energy Affiliate means an affiliate of a Transmission Provider that:

Standards of Conduct also contain various information sharing prohibitions to help ensure that Transmission Providers do not use their access to information about transmission to unfairly benefit their own or their affiliates' sales to the detriment of competitive markets. Absent one of the exceptions articulated in section 358.5, if a Transmission Provider discloses transmission information to its Marketing or Energy Affiliate, the Transmission Provider is required to immediately post that information on its OASIS or Internet Web site.<sup>6</sup>

3. On January 9, 2006, at the request of the NRC, FERC Staff participated in a public meeting/workshop of the NRC regarding its then-proposed Generic Letter concerning Grid Reliability and the Operability of Offsite Power. During that discussion, participants expressed concern that the Commission's Standards of Conduct appear to restrict communications between Transmission Providers and their affiliated nuclear power plants, which are Energy Affiliates, thereby limiting the ability of the nuclear power plants to comply with all the requirements of the NRC. The participants also expressed concern that the information sharing prohibitions of the Standards of Conduct would prevent the nuclear power plants from answering all the questions posed in the NRC's draft Generic Letter.

4. The NRC's Generic Letter information request focuses on four areas: (1) Use of protocols, communications and coordination procedures between the nuclear power plant and the transmission system operators (TSO), independent system operator (ISO) or reliability coordinator/authority (RC), including the use of real-time contingency analysis or other programs to monitor the operability of

(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). 18 CFR 358.3(d) (2005). Affiliates that are not Energy Affiliates are described at 18 CFR 358.3(d)(6)(i)-(vi) (2005).

<sup>6</sup> The information sharing prohibitions of the Standards of Conduct are found at 18 CFR 358.5(a) and (b).

offsite power systems; (2) describing procedures and the sharing of information between the NPP and the TSO/ISO/RC regarding real time contingency analysis to assist the NPP in monitoring grid considerations in maintenance risk assessments; (3) communications and procedures between the NPP and the TSO/ISO/RC regarding offsite power restoration procedures; and (4) losses of offsite power caused by grid failures at a frequency equal to or greater than once in 20 site-years. The February 1, 2006, Generic Letter asks nuclear power plant owners/operators to submit to the NRC a variety of information, within 60 days of its issuance, so that the NRC can determine if the nuclear power plants are complying with its regulations. Based on its inspection information and risk insights following the August 14, 2003 blackout, the NRC staff expressed concern that several issues associated with assurance of grid reliability may impact public health and safety and/or compliance with applicable regulations.<sup>7</sup> Accordingly, through the questions posed in the Generic Letter, the NRC is trying to identify the types of communications, protocols and procedures, both formal and informal, that are in place between the TSO, ISO or RC and nuclear power plants to ensure that off-site power is available in the event of a significant power outage, such as the one that occurred on August 14, 2003.

## II. Discussion

5. At the January 9, 2006 workshop, representatives of the nuclear power plants raised the concern that the Standards of Conduct prevent Transmission Providers from communicating with the nuclear power plants limiting their ability to comply with the NRC's requirements articulated in the Generic Letter. The Standards of Conduct are not intended to impede necessary communications related to safety or reliability between operators of transmission systems and nuclear power plant generators. The Commission recognizes the NRC's stringent requirements on nuclear power plants as part of the nuclear power plants' operating licenses to satisfy NRC standards for offsite and onsite electric power systems. See 10 CFR Part 50, Appendix A, Design Criterion 17 (2005).

6. During the Standards of Conduct rulemaking proceeding, the Commission adopted an exception to the information

sharing prohibitions to permit the types of communications necessary for the nuclear power plants to comply with the requirements of NRC's Generic Letter. Specifically, the Commission permits a Transmission Provider to share with its Energy Affiliates information necessary to maintain the operations of the transmission system. 18 CFR 358.5(b)(8) (2005). This information is defined as information necessary to operate and maintain the transmission system on a day-to-day basis as well as information relating to maintenance of interconnected facilities and operational data relating to interconnection points, but does not include transmission or marketing information that would give a Transmission Provider's Marketing or Energy Affiliates undue preference over a Transmission Provider's non-affiliated customers in the energy marketplace. See Order No. 2004-A at P 203. Thus, communications between nuclear power plants and Transmission Providers as required by NRC's Generic Letter are permitted without violating the information disclosure prohibitions or triggering a posting requirement under the Standards of Conduct.<sup>8</sup> Of course, nuclear power plant operators are prohibited from being a conduit for sharing transmission or customer information with other employees of the Marketing or Energy Affiliates. 18 CFR 358.5(b)(7) (2005).

7. In this Interpretive Order, the Commission also recognizes that, in addition to permitting communications necessary to operate and maintain the transmission system, the Transmission Provider and its interconnected nuclear power plant must engage in certain limited communications to operate and maintain the operations of the interconnection and the safety and reliability of the nuclear power plant. The Commission clarifies that such communications may include: (1) communications between the transmission control center and the nuclear power plant control room regarding switching, output, transformer availability; opening or closing breakers and other operational parameters

<sup>8</sup> During the rulemaking proceeding, one commenter expressed concern that nuclear power plant operators belonging to an Energy Affiliate of the Transmission Provider would be prohibited from receiving information they need to satisfy certain requirements of the NRC's regulations. The commenter also pointed out that station blackout rules require that nuclear stations have real-time information on grid disturbances and duration of power unavailability under 10 CFR 50.63. In Order No. 2004, the Commission ruled that in such situations the Transmission Provider would be permitted to share this type of information with its Energy Affiliates. See Order No. 2004 at P 144 and Order No. 2004-A at 206.

necessary to maintain the safety and reliability of the transmission system and the nuclear power plant; (2) information necessary to coordinate switching and maintenance at the interconnected nuclear power plants; and (3) information on grid disturbances and the duration of power unavailability in order for the nuclear power plant to plan for off-site power in the event of a grid-related loss of power or station blackout, as required by the NRC. Although such communications are permitted, as noted earlier, the nuclear power plant operators are prohibited from being a conduit for sharing this information with employees of other Marketing or Energy Affiliates. 18 CFR 358.5(b)(7) (2005). For example, a nuclear power plant operator may communicate to an employee of the Marketing Affiliate that output from the nuclear power plant is not available, but cannot disclose that the plant output is not available because there is an outage at a certain location on the transmission system. (unless that information is already publicly available.)

8. In addition to this exception for nuclear power plants' operations and reliability, Transmission Providers can communicate any information to nuclear power plants if that information is also simultaneously posted on an OASIS. Many Transmission Providers already post much of the information that might be needed by nuclear power plants on their respective OASIS sites. Part 37 of the Commission's regulations require Transmission Providers to post on their OASIS information regarding: transmission service schedules (18 CFR 37.6(f)); constrained posted paths (18 CFR 37.6(b)(3)(1)); and curtailments or interruptions (18 CFR 37.6(e)(3)) so that all transmission customers have the information at the same time.

9. Finally, under emergency conditions, the Commission created an exception that permits a Transmission Provider to take whatever steps are necessary to keep a system in operation. 18 CFR 358.4(2) (2005). For example during such emergency situations, such as the 2003 Blackout or Hurricanes Katrina and Rita, a Transmission Provider is permitted to engage in any type of communications and to share any employees needed to keep the system in operation. Subsequently, the Transmission Provider is required to report to the Commission each emergency that resulted in any deviation from the Standards of Conduct. 18 CFR 358.4(2) (2005).

## III. Comment Procedures

10. No public notice or comment on this Interpretive Order is necessary

<sup>7</sup> Nuclear Regulatory Commission's Generic Letter 2006-003, Grid Reliability and the Impact on Plant Risk and the Operability of Offsite Power. February 1, 2006.

pursuant to section 4(b)(A) of the Administrative Procedure Act, 5 U.S.C. 533(b)(A) (2000), which exempts from such notice or comment "interpretive rules, general statements of policy or rules of agency organization, procedure or practice." However, the Commission herein invites all interested persons to submit written comments on this Interpretive Order. The Commission invites interested persons to submit comments on the matters and issues proposed in this Interpretive Order, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due March 20, 2006. Reply comments are due April 19, 2006. Comments and reply comments must refer to Docket No. RM01-10-005, and must include the commenters' names, the organizations they represent, if applicable, and their address in their comments. Comments and reply comments may be filed either in electronic or paper format.

11. Comments and reply comments may be filed electronically via the eFiling link on the Commission's Web site at <http://www.ferc.gov>. The Commission accepts most standard word processing formats and commenters may attach additional files with supporting information in certain other file formats. Commenters filing electronically do not need to make paper filings. Commenters that are not able to file comments and reply comments electronically must send an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE., Washington, DC 20426.

12. All comments and reply comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments and reply comments on other commenters.

#### IV. Document Availability

13. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through 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.

14. From the Commission's Home Page on the Internet, this information is

available in the Commission's document management system, eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

15. User assistance is available for eLibrary and the Commission's Web site during normal business hours. For assistance, please contact FERC Online Support at 1-866-208-3676 (toll free) or (202) 502-8222 (e-mail at [FERCOnlineSupport@FERC.gov](mailto:FERCOnlineSupport@FERC.gov)), or the Public Reference Room at (202) 502-8371, TTY (202) 502-8659 (e-mail at [public.referenceroom@ferc.gov](mailto:public.referenceroom@ferc.gov)).

By the Commission.

**Magalie R. Salas,**

*Secretary.*

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

#### 21 CFR Part 73

[Docket No. 2001C-0486] (formerly Docket No. 01C-0486)

#### Listing of Color Additives Exempt From Certification; Tomato Lycopene Extract and Tomato Lycopene Concentrate

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final rule; response to objections; removal of stay.

**SUMMARY:** The Food and Drug Administration (FDA) is responding to two objections that it received on the final rule that amended the color additive regulations authorizing the use of tomato lycopene extract and tomato lycopene concentrate as color additives in foods. After reviewing the objections to the final rule, the agency has concluded that the objections do not raise issues of material fact that justify a hearing or otherwise provide a basis for modifying the amendment to the regulation. FDA is also establishing a new effective date for this color additive regulation, which was stayed by the filing of proper objections.

**DATES:** The final rule that published in the **Federal Register** of July 26, 2005 (70 FR 43043), with an effective date of August 26, 2005, was stayed by the filing of objections as provided for under section 701(e)(2) of the Federal

Food, Drug, and Cosmetic Act (21 U.S.C. 371(e)(2)) as of August 25, 2005. This final rule is newly effective as of February 24, 2006.

**FOR FURTHER INFORMATION CONTACT:** James C. Wallwork, Center for Food Safety and Applied Nutrition (HFS-265), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 301-436-1303.

#### SUPPLEMENTARY INFORMATION:

##### I. Introduction

FDA published a notice in the **Federal Register** on October 30, 2001 (66 FR 54773), announcing the filing of a color additive petition (CAP 1C0273) by LycoRed Natural Products Industries to amend the color additive regulations in part 73 (21 CFR part 73) to provide for the safe use of tomato lycopene extract to color foods generally. The petition included information on two forms of tomato lycopene (extract and concentrate) that differ primarily in concentration. In the **Federal Register** of July 26, 2005 (70 FR 43043), the agency issued a final rule providing for the safe use of tomato lycopene extract and tomato lycopene concentrate as color additives in foods. The preamble to the final rule advised that objections to the final rule and requests for a hearing were due within 30 days of the publication date (i.e., by August 25, 2005) and that the rule would be effective on August 26, 2005, except that any provisions may be stayed by the filing of proper objections.

##### II. Objections and Requests for a Hearing

Sections 701(e)(2) and 721(d) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 371(e)(2) and 379e(d)) collectively provide that, within 30 days after publication of an order relating to a color additive regulation, any person adversely affected by such an order may file objections, specifying with particularity the provisions of the order "deemed objectionable, stating reasonable grounds therefore, and requesting a public hearing based upon such objections."

Objections and requests for a hearing are governed by part 12 (21 CFR part 12) of FDA's regulations. Under § 12.22(a), each objection must meet the following conditions: (1) Must be submitted on or before the 30th day after the date of publication of the final rule; (2) must be separately numbered; (3) must specify with particularity the provision of the regulation or proposed order objected to; (4) must specifically state the provision of the regulation or proposed