

11. The current standards of conduct do not address the sharing of confidential shipper information and transportation information with all Energy Affiliates. For example, if an interstate natural gas pipeline informs its affiliated asset manager about a proposed pipeline expansion or upcoming curtailment, the current standards of conduct do not require it to make that information available to non-affiliates, unless the asset manager is a Marketing Affiliate. Nor do the current standards address whether an electric Transmission Provider can share with its generator affiliates information about generation projects planned by competitors. Sharing of information between Transmission Providers and Energy Affiliates undermines and frustrates the efforts of "independent" businesses to buy, sell, build, grow, and provide competitive alternatives in markets where there are concerns about market power. Although Transmission Providers' unduly preferential behavior towards their Energy Affiliates may not violate the current standards of conduct, we believe it violates the general statutory prohibitions against undue discrimination and undue preferences in the provision of interstate transmission services.

12. Many commenters argue generally that the rule is unnecessary. They maintain that there have been relatively few cases of anti-competitive behavior. Some commenters urged the Commission to maintain the status quo. Many public utility Transmission Providers and interstate natural gas pipeline Transmission Providers argue that there is no need for a general rule, and individual instances of abuse can be considered and resolved by the Commission in case-by-case investigations or in individual Commission proceedings.

13. Some commenters supported the Commission's proposal to develop uniform standards of conduct. For example, the American Antitrust Institute said that Transmission Providers have the ability and incentive to adversely affect electricity or gas prices by frustrating or precluding a rival's access to electric transmission or gas transportation. In addition, those companies involved in the converging energy industry support the Commission's initiative because they currently operate under both the electric and gas standards of conduct. Some commenters urge the Commission to

adopt stricter prohibitions, such as structural remedies or capacity limits. NASUCA says that the lack of complaints is a "Catch-22." NASUCA states that the reason there have been very few complaints regarding other affiliates is that anti-competitive transactions involving these transactions do not violate the current standards of conduct.

14. Having carefully considered all the comments, the Commission is convinced of the need for a general rule to establish standards of conduct governing relationships between Transmission Providers and their Energy Affiliates. With the creation of the Office of Market Oversight and Investigations (OMOI), the Commission is seeing the results of a more active enforcement program investigating unduly discriminatory practices. Recently, the Enforcement Division of OMOI has uncovered affiliate abuse activity that reveals that some Transmission Providers are giving their affiliates undue preferences and violating the standards of conduct.¹⁶ In addition, several audits of public utilities, conducted by the Division of Regulatory Audits, Office of the Executive Director, revealed violations of the standards of conduct. Specifically, Public Service Company of New Mexico (PNM) failed to comply with the independent functioning requirement.¹⁷ In addition, wholesale merchant function employees had access to computer terminals that allowed them to access transmission system information on the EMS (Energy Management System). More recently, an audit of Ameren Corporation revealed, among other things, that Ameren's transmission employees had engaged in non-public, off-OASIS communications with wholesale merchant function employees and other customers.¹⁸

15. Transmission Providers continue to have economic incentives to show undue preferences toward their Energy Affiliates. The Commission is adopting new rules to close loopholes in existing

rules and to give Transmission Providers specific guidance on how to eliminate undue discrimination and undue preferences in the provision of interstate transmission services, consistent with the directions of the NGA and FPA. The Commission believes that the revised standards of conduct will ensure that Transmission Providers function independently of all their Energy Affiliates. Such separation is vital if the Commission is to 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.

IV. Section-by-Section Analysis of Final Rule

A. Applicability—§ 358.1

16. The NOPR proposed that the standards of conduct would apply to all Transmission Providers, as discussed in the section below. The NOPR also stated that the standards of conduct would not apply to Commission-approved Regional Transmission Organizations (RTOs) that comply with the requirements of Order No. 2000.¹⁹ However, RTOs would be subject to the posting requirements in §§ 37.5 and 37.6 of the Commission's regulations, 18 CFR 37.5 and 37.6 (2003). Finally, the NOPR provided that a public utility transmission owner that participates in a Commission-approved RTO and does not operate or control its transmission facilities may request an exemption from the standards of conduct. Following a review of the comments, and as discussed in more detail below, the Commission is adopting this section with modifications, as follows:

§ 358.1 Applicability.

(a) This part applies to 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.

(b) This part applies to any public utility that owns, operates, or controls transmission facilities used for the transmission of electric energy in interstate commerce.

(c) This part does not apply to a Transmission Provider that is a Commission-approved Regional Transmission Organization (RTO) or Independent System Operator (ISO). If a public utility transmission owner participates in a Commission-approved RTO or ISO and does

¹⁶ See e.g., Transcontinental Gas Pipe Line Corp., 102 FERC ¶ 61,302 (2003) (*Transco*); National Fuel Gas Supply Corp., 103 FERC ¶ 61,192 (2003); Idaho Power Corp., 103 FERC ¶ 61,182 (2003) (*Idaho Power*); and Cleco Corp., 104 FERC ¶ 61,125 (2003) (*Cleco*).

¹⁷ April 25, 2000 Letter from John Delaware, Deputy Director and Chief Accountant, to Public Service Company of New Mexico in Docket No. FA99-9-000.

¹⁸ For example, merchant function employees called transmission function employees to request the most up-to-date, non-firm ATC information to save time in submitting requests for transmission service via OASIS. See September 27, 2002 Letter from John Delaware, Deputy Executive Director and Chief Accountant to Ameren Corporation in Docket Nos. FA01-5-000, FA01-6-000 and FA01-7-000.

¹⁹ Regional Transmission Organizations, Order No. 2000, 65 FR 809 (Jan. 6, 2000), FERC Stats. & Regs., Regulation Preambles July 1999–December 2000 ¶ 31,089 (Dec. 20, 1999), *order on reh'g*, Order No. 2000-A, 65 FR 12088 (Mar. 8, 2000), FERC Stats. & Regs., Regulation Preambles 1996–2000 ¶ 31,092 (Feb. 25, 2000), *petitions for review pending sub nom.*, Public Utility District No. 1 of Snohomish County, *Washington v. FERC* (D.C. Cir., Apr. 24, 2000 (Nos. 00-1174, et al.)).

data shows that marketing affiliates hold about 16 percent of the affiliated pipelines' firm capacity and non-marketing affiliates hold an additional 42 percent of the affiliated pipelines' firm capacity.