

exemptions and partial waivers under Order No. 889 or Order No. 497. However, an exemption may be revoked if, after an investigation or audit, the Commission determines that the entity no longer qualifies for the exemption or the entity has abused the exemption.

28. In addition, Transmission Providers that did not previously obtain an exemption may request an exemption from all or some of the requirements of Part 358. RUS and NRECA requested clarification that generation and transmission cooperatives and their distribution cooperatives will not be subject to the Final Rule. The Commission clarifies that it will treat generation and transmission cooperatives consistent with the policies established under Order No. 888.²³

iv. Delay of Applicability

29. Alliance urges the Commission to allow Transmission Providers to delay implementing the Final Rule while the Commission reviews a Transmission Provider's request for an exemption or waiver from the standards of conduct. This is inconsistent with Commission policy to implement rules after reasonable notice; however, apart from the information filing required in § 358.5(e)(1), the Commission is giving Transmission Providers until June 1, 2004 to implement the requirements of the Final Rule. This implementation date should afford Transmission Providers time to fashion requests for waivers or exemptions.

B. General Principles—§ 358.2

30. The NOPR proposed the following general principles for the standards of conduct: (1) A Transmission Providers' employees engaged in transmission system operations must function independently from the Transmission Providers' sales or marketing employees and from any employees of their Energy Affiliates,²⁴ and (2) a Transmission Provider must treat all transmission customers, affiliated and non-affiliated, on a non-discriminatory basis, and cannot operate its transmission system to benefit preferentially an Energy Affiliate or Marketing Affiliate.

31. No comments were received on this section. Therefore, the Commission is adopting these principles as proposed in the NOPR. These principles are based on Section 4 of the NGA and Section 205 of the FPA, which prohibit a natural gas company or a public utility,

respectively, from making or granting an undue preference with respect to transportation/transmission or sale subject to the Commission's jurisdiction.

C. Definitions—§ 358.3

32. As proposed in the NOPR, § 358.3 combines and revises the definitions that were previously contained in §§ 37.3 and 161.2 of the Commission's regulations, and adds, as appropriate, definitions for new terms. The Commission is modifying and adopting the definitions proposed in the NOPR, as discussed below.

i. Definition of a Transmission Provider

33. The NOPR defined a Transmission Provider as:

(1) any public utility that owns, operates or controls facilities used for transmission of electric energy in interstate commerce; or (2) any interstate natural gas pipeline that transports gas for others pursuant to subpart A or Part 157 or subparts B or G of Part 284.

34. The Major Issues Analysis did not address the definition of Transmission Provider. The Commission has reviewed the commenters' recommendations, but, as discussed in more detail below, is adopting the definition of Transmission Provider as proposed.

35. The American Forest and Paper Association (AFPA) urged the Commission to clarify that the definition of a Transmission Provider only includes "any public utility that owns, operates or controls transmission facilities used for the transmission of electric energy in interstate commerce and is subject to the open access requirements of Order No. 888." It requested the Commission to clarify that Transmission Providers do not include industrials that own some discrete transmission facilities used solely for the purpose of interconnecting with the electrical grid. Along the same lines, the Industrials requested clarification that the definition of Transmission Provider will not apply to industrials with self-generation. The Industrials were concerned that the definition would include wholesale sellers such as power marketers and merchant generators with market-based-rate authority and qualifying facilities (QF) because these entities self provide ancillary services or that selling ancillary services would be considered providing "transmission service." Industrials claimed that any generator directly interconnected with an investor-owned transmission system would be deemed a Transmission Provider under the proposed definition. Finally, the Industrials were concerned that owning an interconnect could be interpreted as ownership of a

transmission facility. Similarly, Calpine argued that independent generators connected to jurisdictional transmission facilities that do not own transmission facilities, must be excluded from the definition of Transmission Provider.

36. The revision proposed by AFPA is unnecessary. Consistent with our implementation of Order No 888, Industrials that merely interconnect with the interstate transmission grid and sell power would not be a Transmission Provider as used in the Final Rule. Nor is self-generation considered transmission in interstate commerce.

ii. Definition of an Energy Affiliate

37. The NOPR's proposed definition of Energy Affiliate yielded the greatest volume of comments. The NOPR defined the term Energy Affiliate broadly, as:

an affiliate of a Transmission Provider that (1) engages in or is involved in transmission transactions; or (2) manages or controls transmission capacity of a Transmission Provider; or (3) buys, sells, trades or administers natural gas or electric energy; or (4) engages in financial transactions relating to the sale or transmission of natural gas or electric energy.

38. Since the Standards of Conduct seek to prohibit undue preferences and thereby the transfer of market power from the Transmission Provider to its affiliates, the term Energy Affiliate must cover more than the marketers and merchants covered by the existing rules. A narrow definition of Energy Affiliates will not specifically prohibit the transmission function from sharing employees and information with some of its Energy Affiliates who could then receive an unfair advantage in the competitive marketplace. On the other hand, too broad a definition of Energy Affiliate will limit some of the efficiencies gained from certain corporate structures. This language is also intended to cover affiliates that are indirectly involved in transportation, such as asset managers or agents.

39. The definition in the NOPR proposed to govern the relationship between the Transmission Provider, and, among others, affiliated producers, gatherers, local distribution companies (LDCs) and processors. Virtually all of the industry groups argued that the definition of Energy Affiliates is overly broad, and suggested that some narrowing of the definition would be appropriate.

40. In response to numerous comments, the Major Issues Analysis recommended various changes to the definition of Energy Affiliate and provided draft regulatory text. Follow-up comments recommended further

²³ Order No. 888—A at 30,666.

²⁴ As noted earlier, when the Commission references employees, it includes contractors, consultants or agents.