

with non-affiliates for access to the pipeline's transportation system. We conclude that providing a producer, gatherer or processor with preferential access to the pipeline's transmission system or information concerning the pipeline's system is inconsistent with NGA Section 4's prohibition against undue preferences or discrimination in the provision of interstate transportation services; accordingly, this Final Rule will prevent such conduct.

8. Intrastate and Hinshaw Pipelines

72. Although the NOPR did not specifically address intrastate or Hinshaw pipelines,³⁴ the definition of Energy Affiliate proposed in the NOPR would include intrastate and Hinshaw pipelines. Several commenters, including the Association of Texas Intrastate Natural Gas Pipelines, SCE&G and CMS, opposed including intrastate and Hinshaw pipelines in the definition of Energy Affiliate and urged the Commission to retain the current exemption at § 161.2(c)(3) of the Commission's regulations, 18 CFR 161.2(c)(3) (2003), that permits intrastate pipelines to make on-system sales without triggering the standards of conduct. The arguments raised mirror those raised with respect to producers, gatherers or processors, which currently enjoy the same exemption. The Commission's definition of Energy Affiliate in the Final Rule will include intrastate and Hinshaw pipelines. Providing an intrastate pipeline or Hinshaw pipeline preferential access to a transmission system or information concerning a transmission system would be inconsistent with NGA Section 4's prohibitions against undue preferences or discrimination in the provision of interstate transportation service.

iii. Definition of Marketing, Sales or Brokering

73. The NOPR proposed to define marketing, sales or brokering as:

A sale for resale of natural gas or electric energy in interstate commerce. Sales and marketing employee or unit includes: (1) Any pipeline's sales operating unit, to the extent provided in § 284.286 of this chapter, and (2) an electric transmission provider's sales unit, including those employees that engage in wholesale merchant sales or bundled retail sales.³⁵

³⁴ Hinshaw pipelines are exempt from Commission regulation under the NGA, but they may have limited jurisdiction certificates to provide interstate transportation services like an intrastate pipeline under the Natural Gas Policy Act.

³⁵ The term bundled retail sales employees, means those employees of the public utility Transmission Provider or its affiliates who market or sell the bundled electric energy product

74. The NOPR proposed that "marketing" would include a public utility Transmission Provider's sales unit, including all employees that engage in wholesale merchant sales or bundled retail sales functions.³⁶ This would eliminate the exemption of Order No. 889, which permitted a public utility Transmission Provider to use the same employees for its interstate transmission business and its bundled retail sales business.

75. Fourteen commenters, including the FTC, Cooperatives, Calpine, ELCON, EPSA, NEMA, Transmission Access Policy Group, Transmission Group, several state commissions, and AAI supported the NOPR's proposal to treat retail function employees as marketing affiliate employees. They argued that the Commission can assert jurisdiction over the organizational structure of the jurisdictional public utility and the dissemination of information acquired through the operation of jurisdictional assets. In addition, they argued that: (1) The Commission must ensure that transmission service is not unduly discriminatory; (2) the bundled retail sales represent a large percentage of utilities' sales, and the utilities have little incentive to promote comparability, to improve OASIS or to provide equal quality service; and (3) the distinction between wholesale and retail is artificial and the conditions in the retail market impact the wholesale market.

76. However, thirty-six commenters, including EEI, NASUCA, NARUC, many public utility Transmission Providers, several cooperatives and ten state commissions, opposed treating retail function employees as Marketing Affiliate employees. Many commenters questioned the need to change the standards of conduct for public utility Transmission Providers when the current rules appear to be adequate.³⁷ For the most part, they contend that: (1) The Commission is exceeding its statutory authority under Section 201 of the FPA, which gives states regulatory authority over facilities used in local distribution, intrastate commerce or retail consumption; (2) there are no competitive concerns because retail

(including generation, transmission, and distribution) delivered to the transmission provider's firm and non-firm retail customers.

³⁶ Section 284.286 of the Commission's regulations currently requires an interstate natural gas pipeline to separate its interstate transmission function from its unbundled sales service, essentially treating the pipeline's sales business as the equivalent of an affiliated marketing company. See 18 CFR 284.286 (2003).

³⁷ The Commission does not have detailed data on the amount of transmission used for retail electric service.

service is state regulated; (3) the Transmission Provider may not be able to maintain reliability and would have difficulty in coordinating generation dispatch; (4) some Transmission Providers could not fulfill their state-mandated obligations to be providers of last resort; (5) the Transmission Provider would not be able to engage in integrated resource planning; and (6) separating employees engaged in the bundled sales function for retail load from interstate transmission employees would cause expensive duplication of staff and facilities, without any countervailing competitive benefit.³⁸

77. The Major Issues Analysis recommended retaining the proposal in the NOPR. Many commenters submitted follow-up comments opposing the Staff's recommendation. In contrast with some commenters' statements, there have been several recent examples of affiliate abuse in the electric industry. In 2002, Idaho Power favored its wholesale merchant function and marketing affiliate by accepting their representations that certain non-firm transmission requests were necessary to serve native load, when in fact they were not.³⁹ More recently, the Commission approved a settlement with Cleco Corp. for its 1999–2002 violations of the standards of conduct, including, among other things, sharing of a trading floor by employees engaged in wholesale merchant functions and in retail sales functions.⁴⁰

78. The Commission has ample authority to regulate the behavior of the public utility that owns, operates or controls transmission in interstate commerce and its relationship with any Energy Affiliates. Nevertheless, the Final Rule will retain the exemption of Order No. 889, which permits a public utility Transmission Provider to use the same employees for its interstate transmission business and its bundled retail sales business. However, as stated in Order No. 888–A, "if unbundled retail transmission in interstate commerce occurs voluntarily by a public utility or as a result of a state retail access program, the Commission has exclusive jurisdiction over the rates, terms and conditions of such transmission."⁴¹ The standards of conduct will apply to merchant employees who are engaged in sales or purchase of power that will be resold at retail pursuant to state retail wheeling

³⁸ A discussion of the commenters' concerns regarding additional costs is included in the Independent Functioning discussion, below.

³⁹ 103 FERC ¶ 61,182 (2003).

⁴⁰ 104 FERC ¶ 61,125 (2003).

⁴¹ FERC Stats. & Regs., Regulation Preambles January 1991–June 1996 ¶ 31,036 at 51,781.