

transmission function and the retail sales function.

116. The Final Rule will not be as costly as anticipated by the commenters because the Final Rule excludes certain categories of affiliates, such as LDCs making only on-system sales, from the definition of Energy Affiliate, does not include solely bundled retail sales employees in the definition of Marketing Affiliate, allows the sharing of certain support and field personnel, and adopts the no-conduit rule as well as other exceptions to the informational disclosure prohibitions. The level of separation of functions required by the Final Rule is needed to ensure that Transmission Providers do not use their access to information about transmission to the detriment of customers or competitors. EPSCA states that the long-term benefits could amount to several billion dollars.

117. The Commission disagrees with commenters' arguments that there is no harm to the market under the current level of sharing between Transmission Providers and their Energy Affiliates. There is harm to the market. For example, unduly preferential behavior in favor of a marketing affiliate harmed the retail customers of Idaho in the amount of \$5.8 million until the Commission required a refund as a condition of a settlement.⁶⁰ Similarly, the retail customers of Louisiana were harmed approximately \$2.1 million until the Commission required a refund as a condition of settlement.⁶¹ Although there was no specific quantification of harm caused by the unduly preferential behavior described in the *Transco* settlement, it was of sufficient magnitude that the Commission required the marketing affiliate to exit the market, and Transco paid a record civil penalty of \$20 million.

ix. Conclusion

118. The independent functioning requirement is a central component of the standards of conduct which limits the ability of the Transmission Provider to use its market power to preferentially benefit an Energy Affiliate. Nonetheless, it is necessary to recognize the practicalities of operating a transmission system, and, therefore, the Commission will continue to permit the sharing of certain non-transmission function employees between the Transmission Provider and its Marketing and Energy Affiliates in the Final Rule.

119. However, in an investigation of Transco, the Commission learned that

there are instances in which a shared information technology function provided a marketing affiliate an undue preference.⁶² Specifically, a shared IT employee designed a software program for the marketing affiliate that gave the marketing affiliate access to the pipeline's mainframe databases and used the pipeline's modeling information to optimize the marketing affiliate's nominations on the pipeline's transmission system. In these circumstances, the IT employees were no longer "support" employees, and gave the marketing affiliate unduly preferential access to valuable transmission information.

120. Similarly, if lawyers are participating in directing, organizing or executing transmission system operations or reliability functions or direct the policy of the Transmission Provider, they are not "support staff," rather they are transmission function operating employees who are subject to the standards of conduct. The exemption of "support employees" is not a mechanism to circumvent the prohibition on providing a Marketing or Energy Affiliate an undue preference relating to transmission or preferential access to transmission information.

121. Although the majority of "support employees" are genuinely performing supporting functions, some have or receive access to transmission or customer information. Therefore, the Final Rule will require Transmission Providers to train all of the "support" employees in the standards of conduct and prohibit them from acting as conduits for sharing information with marketing or Energy Affiliates. In addition, Transmission Providers with shared support employees will be subject to greater audit scrutiny.

E. Identification of Affiliates on Internet

122. Section 358.4(b) requires all Transmission Providers to post information with respect to their marketing and sales employees and energy affiliates on their OASIS or Internet Web sites, as applicable. Gas pipelines already post this information with respect to their marketing affiliates under § 161.3(l). Although the current regulations do not require public utility Transmission Providers to post the names and addresses of their marketing affiliates on the OASIS, the Commission did require the posting of organizational charts and job descriptions when it reviewed the electric Transmission Providers' implementation of the

standards of conduct.⁶³ The Major Issues Analysis recommended that the Commission revise some of the posting requirements consistent with some of the commenters' suggestions. Commenters have submitted follow-up comments, which make additional arguments and suggestions. The Final rule requires:

(1) A Transmission Provider must post the names and addresses of its sales and marketing units and Energy Affiliates on its OASIS or Internet Web site.

(2) A Transmission Provider must post on its OASIS or Internet Web site, as applicable, a complete list of the facilities shared by the Transmission Provider and its marketing or sales units or any Energy Affiliates, including the types of facilities shared and their addresses.

(3) A Transmission Provider must post comprehensive organizational charts showing:

(i) The organizational structure of the parent corporation with the relative position in the corporate structure of the Transmission Provider, marketing and sales units and any Energy Affiliates;

(ii) For the Transmission Provider, the business units, job titles and descriptions, and chain of command for all positions, including officers and directors, with the exception of clerical, maintenance, and field positions. The job titles and descriptions must include the employee's title, the employee's duties, whether the employee is involved in transmission or sales, and the name of the supervisory employees who manage non-clerical employees involved in transmission or sales.

(iii) For all employees who are engaged in transmission functions for the Transmission Provider and marketing or sales functions or who are engaged in transmission functions for the Transmission Provider and are employed by any of the Energy Affiliates, the Transmission Provider must post the name of the business unit within the marketing or sales unit or the energy affiliate, the organizational structure in which the employee is located, the employee's name, job title and job description in the marketing or sales unit or energy affiliate, and the employee's position within the chain of command of the marketing or sales unit or energy affiliate.

(iv) The Transmission Provider must update the information on its OASIS or Internet website, as applicable, required by §§ 358.4(1), (2) and (3) within seven business days of any change, posting the date on which the information was updated.

(v) The Transmission Provider must post information concerning potential merger partners as affiliates within seven days after the merger is announced.

(vi) All OASIS or Internet website postings required by Part 358 must comply, as applicable, with the requirements of § 37.3 or §§ 284.12(a) and (c)(3)(v) of this chapter.

⁶⁰ Idaho Power Co., IDACORP Energy, L.P., and IDACORP, Inc., 103 FERC ¶ 61,182 (2003).

⁶¹ *Cleco*, 104 FERC ¶ 61,125 (2003).

⁶² *Transco*, 102 FERC ¶ 61,302 (2003).

⁶³ American Electric Power Service Corporation, 81 FERC ¶ 61,332 (1997), *order on reh'g*, 82 FERC ¶ 61,131 (1998); *order on reh'g*, 83 FERC ¶ 61,357 (1998).