

H. Non-Discrimination Requirements—§ 358.5

142. The principle underlying these requirements is that the Transmission Provider is prohibited from giving the employees of its Marketing or Energy Affiliates any undue preferential treatment. The proposed standards specify the ways in which a Transmission Provider must ensure equal treatment and equal access to information.

i. Information Access and Disclosure Prohibitions

143. The NOPR proposed information access and disclosure prohibitions that tracked the requirements of §§ 161.3(e) and (f) and 37.4(b)(3) and (4) from the gas and electric standards of conduct. The proposed prohibitions prevent a Transmission Provider from giving its Marketing or Energy Affiliates undue preferences over their unaffiliated customers through the exchange of “insider” information. The existing gas and electric standards of conduct concerning the permissible flow of information between affiliates are not consistent with each other, so as a result, the positions of the commenters varied. As discussed below, proposed § 358.5(a) and (b) generated a large volume of comments. Few commenters identified substantive concerns with the specific language of the proposed regulations; rather, they focused on what was not discussed in the NOPR, implementation of the information disclosure prohibitions. The Major Issues Analysis made a variety of recommendations and provided draft regulatory text. Virtually all of the follow-up comments addressed the information requirements. As discussed in more detail below, the Commission is revising the information requirements and, as recommended by commenters, codifying several exceptions. The Final Rule requires:

(a) Information access.

(1) The Transmission Provider must ensure that any employee of the Transmission Provider engaged in marketing or sales or any employee of any Energy Affiliate may only have access to that information available to the Transmission Provider's transmission customers (*i.e.*, the information posted on the OASIS or Internet website, as applicable), and must not have access to any information about the Transmission Provider's transmission system that is not available to all users of an OASIS or Internet website, as applicable.

(2) The Transmission Provider must ensure that any employee of the Transmission Provider engaged in marketing or sales or any employee of any Energy Affiliate is prohibited from obtaining information about the Transmission Provider's transmission

system (including, but not limited to, information about available transmission capability, price, curtailments, storage, ancillary services, balancing, maintenance activity, capacity expansion plans or similar information) through access to information not posted on the OASIS or Internet website or that is not otherwise also available to the general public without restriction.

(b) Prohibited disclosure.

(1) An employee of the Transmission Provider may not disclose to its marketing or sales employees, or to employees of the Transmission Provider's Energy Affiliates any information concerning the transmission system of the Transmission Provider or the transmission system of another (including, but not limited to, information received from non-affiliates or information about available transmission capability, price, curtailments, storage, ancillary services, balancing, maintenance activity, capacity expansion plans, or similar information) through non-public communications conducted off the OASIS or Internet website, through access to information not posted on the OASIS or Internet Website that is not contemporaneously available to the public, or through information on the OASIS or Internet website that is not at the same time publicly available.

(2) A Transmission Provider may not share any information, acquired from nonaffiliated transmission customers or potential nonaffiliated transmission customers, or developed in the course of responding to requests for transmission or ancillary service on the OASIS or Internet website, with employees of its Marketing or Energy Affiliates, except to the limited extent information is required to be posted on the OASIS or Internet website in response to a request for transmission service or ancillary services.

(3) If an employee of the Transmission Provider discloses information in a manner contrary to the requirements § 358.5(b)(1) and (2), the Transmission Provider must immediately post such information on the OASIS or Internet website.

(4) A non-affiliated transmission customer may voluntarily consent, in writing, to allow the Transmission Provider to share the non-affiliated customer's information with a Marketing or Energy Affiliate.

(5) A Transmission Provider is not required to contemporaneously disclose to all transmission customers or potential transmission customers information covered by § 358.5(b)(1) if it relates solely to a Marketing or Energy Affiliate's specific request for transmission service.

(6) A Transmission Provider may share generation information necessary to perform generation dispatch with its Marketing and Energy Affiliate that does not include specific information about individual third party transmission transactions or potential transmission arrangements.

(7) Neither a Transmission Provider nor an employee of a Transmission Provider is permitted to use anyone as a conduit for sharing information covered by the prohibitions of § 358.5(b)(1) and (2) with a Marketing or Energy Affiliate.

(8) A Transmission Provider is permitted to share crucial operating information with its

Energy Affiliates to maintain the reliability of the transmission system.

A. “No Conduit” or “Automatic Imputation”

144. *Current Policies:* Under the current gas standards of conduct, when an interstate natural gas pipeline company shares transportation information with its marketing affiliate, the pipeline must contemporaneously share that information with non-affiliates.⁶⁷ This requirement is designed to prevent a Transmission Provider from giving its marketing affiliate undue preferences over its unaffiliated customers through the exchange of transmission information. In addition, the current gas standards of conduct prohibit a pipeline from sharing with its marketing affiliate any information the pipeline receives from a nonaffiliated shipper or potential nonaffiliated shipper (this is considered confidential customer information).⁶⁸ The gas industry commonly refers to this as the “automatic imputation rule” because the Commission's policy is that when an employee who performs functions for the pipeline and its marketing affiliate receives confidential shipper information, the information is automatically divulged or imputed to the marketing affiliate. In *Tenneco*, the Court of Appeals endorsed this approach when it found that the relevant question is not whether a shared employee who receives critical information will disclose it to the affiliate, but whether that shared employee will in fact receive such information in the first place, or alternatively, how the pipeline intends to keep information supplied by nonaffiliated shippers from reaching a shared employee.⁶⁹

145. Over the past 15 years, several interstate natural gas pipelines have urged the Commission to adopt different approaches; (1) apply the “automatic imputation rule” only to shared operating employees; and (2) adopt a “no-conduit rule.”⁷⁰ Up until now,

⁶⁷ Standard F states that to the extent a pipeline provides to a marketing affiliate information related to transportation of natural gas, it must provide that information contemporaneously to all potential shippers, affiliated and non-affiliated on its system. See 18 CFR 161.3(f) (2003).

⁶⁸ Standard E states that a pipeline may not disclose to its marketing affiliate any information the pipeline receives from a nonaffiliated shipper or potential nonaffiliated shipper. See 18 CFR 161.3(e) (2003).

⁶⁹ *Tenneco Gas v. FERC*, 969 F.2d 1187 (D.C. Cir. 1992) (*affirmed in part and remanded in part*).

⁷⁰ Under a “no-conduit rule,” a shared non-operating employee could receive confidential information as long as the shared employee did not act as a conduit for actively sharing the information