

Commission has rejected the “no-conduit rule” for the gas industry.⁷¹

146. In contrast, under the current electric standards of conduct, which contain broader information disclosure prohibitions, the Commission has permitted shared non-operating employees to receive confidential shipper information as long as the shared employee did not act as a conduit for sharing the information with wholesale merchant function employees.⁷² In implementing Order No. 889, the Commission justified the different rule because the electric standards of conduct provide a stricter separation of functions requirement than the pipeline standards.⁷³ When the Commission reviewed the standards of conduct for public utility Transmission Providers, the Commission adopted the “no-conduit” rule, rather than applying the “automatic imputation rule.”⁷⁴

147. The NOPR was silent on how the information prohibitions would be applied to shared employees, that is, whether the Commission would adopt the “automatic imputation rule” from the gas standards of conduct or the “no-conduit rule” from the electric standards of conduct. In their Initial Comments, many commenters from both the gas and electric industries, requested, without much explanation, that the Commission codify the “no-conduit rule” and apply to it all Transmission Providers. The Major Issues Analysis proposed to apply the automatic imputation rule. After much discussion at the May 21st Conference, the Commission received more than 100 supplemental comments on this issue.

with the marketing affiliate or wholesale merchant function.

⁷¹ See Order Nos. 497-E and F; *Amoco Production Co. and Amoco Energy Trading Co. v. Natural Gas Pipeline Company of America*, 83 FERC ¶ 61,197 at 61,849 (1998).

⁷² Under the gas standards of conduct, the contemporaneous disclosure requirement only applies to transportation information, while under the electric standards of conduct, the contemporaneous disclosure requirement applies to transmission and market information and prohibits off-OASIS communications. See 18 CFR 37.4(4) and 161.3(f) (2003).

⁷³ Under the gas standards of conduct, to the maximum extent practicable, a pipeline’s operating employees and the operating employees must function independent of each other. See 18 CFR 161.3(g) (2003). In contrast, the employees of the electric Transmission Provider engaged in transmission system operations must function independently of the employees engaged in wholesale merchant functions, except for emergency circumstances affecting system reliability. See 18 CFR 37.4(a)(1) (2003). The key difference is the flexibility under the term “maximum extent practicable,” which permits, in certain situations, the sharing of operating employees.

⁷⁴ *Allegheny Power Service Corp., et al.*, 84 FERC ¶ 61,316 at 62,425 (1998).

Almost every segment of the industry and all major industry trade associations that opposed the automatic imputation rule argued that it could force the break-up of service companies and that the limitations on the sharing of information would restrict a director, officer or senior manager’s ability to engage in corporate governance functions. Of the states that commented, Connecticut favored the automatic imputation rule, while Alabama, Indiana, Nebraska, and Ohio favored the no-conduit rule.

148. A few commenters supported the “automatic-imputation” proposal. NASUCA stated that the no-conduit rule fails to recognize the reality that a person who gains access to important information is likely to act upon that information. Rather than advocate a particular position with respect to these options, the Industrials merely stated that officers and directors should be allowed to discharge their duties. Sempra raised a valid point—the potential for harm is great when the Commission permits the sharing of operating employees, but the danger is low when the shared employees are engaged in “support-type” services, while the potential for cost savings by permitting the sharing of “support-type” services is significant.

149. One significant event that occurred after the NOPR was the passage of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley Act), which requires corporate officers to engage in informed oversight and requires CEOs to personally vouch for the veracity, timeliness and fairness of their companies’ public disclosures.⁷⁵ In addition, there is significant industry-wide concern that the automatic imputation rule would limit the information a director, officer or senior manager could receive, effectively restricting his or her ability to engage in the corporate governance function under the Sarbanes-Oxley Act.⁷⁶

150. After carefully considering the comments, the Final Rule will adopt the “no-conduit rule.” As a result, interstate natural gas Transmission Providers,

⁷⁵ Effective August 29, 2002, the Securities and Exchange Commission adopted a Final Rule that requires the principal executive and financial officers each to certify the financial and other information submitted in quarterly and annual reports to the SEC. See Ownership Reports and Trading by Officers, Directors and Principal Security Holders, Final Rule and Request for Comments, 67 FR 56461 (Sept. 3, 2002).

⁷⁶ In July 2003, Commission staff met with representatives of the Securities and Exchange Commission (SEC) to get a better understanding how the SEC implements the Sarbanes-Oxley Act, and how the Commission’s proposed information disclosure prohibitions would affect compliance with the Sarbanes-Oxley Act.

which have been operating under the stricter “automatic imputation rule” since 1987, will now be covered by the more flexible “no conduit rule.” This rule will prohibit employees of a Transmission Provider from using any affiliate or employee of an affiliate as a conduit for sharing information that is prohibited by § 358.5(b)(1) and (2).

B. Sharing of Operational Information

151. Many commenters from virtually all segments of the gas industry argued that the separation of functions and the information disclosure prohibitions required by the NOPR will prohibit a Transmission Provider from communicating crucial operational information with its affiliated producers, gatherers or LDCs. They argued that prohibiting certain of these communications will endanger the reliability of the gas transmission systems. NGSA proposed that employees who are responsible solely for the physical operations of their structure (infrastructure operators) be permitted to share operational information because those infrastructure operators are not involved in other functions. Several commenters argued that the Commission should adopt the approach taken when implementing Order No. 889, where the Commission permitted Transmission Providers to share certain types of operational information with its generation function and wholesale merchant function. The Major Issues Analysis recommended that Transmission Providers and their Energy Affiliates be permitted to share crucial operational information necessary to maintain the reliability of the transmission system.

152. In supplemental comments, many commenters, including Alliance, BP America, EEI, Duke, First Energy, INGAA, National Grid, and Williston Basin supported the Staff’s proposal. NiSource expressed concern that the exception may be too narrow because certain day-to-day information is needed on both sides of the meter to ensure that a gas pipeline meets its service obligations, regardless of whether the interconnected party is an affiliate. Several commenters encouraged the Commission to create a list of permissible communications. However, the AdHoc Marketers, Cinergy and Shell Offshore discouraged the Commission from creating a “laundry list” of permissible communications because it would be inadequate and incomplete and create regulatory uncertainty.

153. The Commission is declining to create a list of permissible communications. However,