

Transmission Providers are encouraged to contact the Hotline for guidance regarding permissible communications. Although the Commission will permit Transmission Providers and their Energy Affiliates to share crucial operational information necessary to maintain the reliability of the transmission system, we caution that this is not to be a mechanism to circumvent the rules.

C. Generation Dispatch

154. Many commenters argued that the separation of functions and the information disclosure prohibitions suggested by the NOPR would prohibit a Transmission Provider from communicating crucial operational information with its affiliated retail sales function. They argue that prohibiting certain of these communications will endanger the reliability of the electric transmission systems. Several commenters argue 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.⁷⁷ Cinergy and PGE urge the Commission to codify the case-specific exemption that permits Transmission Providers to share with generation dispatch employees information necessary to perform such dispatch, provided that such information does not include specific information about individual third-party transmission arrangements.⁷⁸ Although the Commission is not providing a list of types of communications, we will codify the exception that permits the sharing of generation-related information. For example, the Marketing and Energy Affiliates may have access to information such as area control error, regulation rates, but not the specific load of third party transmission customers. Likewise, wholesale merchant function employees or employees of the Energy Affiliates may not have access to information that would enable them to determine, directly or indirectly, the interchange schedules of third party customers, consistent with Commission precedent.⁷⁹

155. Exelon notes that nuclear plant operators belonging to an Energy Affiliate of a Transmission Provider would be prohibited from receiving information they need to satisfy certain requirements of the Nuclear Regulatory Commission's regulations. For example, station blackout rules require that nuclear stations have real-time information on grid disturbances and the duration of power unavailability under 10 CFR 50.63 (2003). The Transmission Provider would be permitted to share this type of information with its Energy Affiliate under this exception.

D. Voluntary Consent

156. Although the NOPR did not discuss whether a non-affiliate could voluntarily consent, in writing, to allow a Transmission Provider to share the non-affiliate's information with the marketing affiliate, numerous commenters suggested that the Commission codify this exception.⁸⁰ The Major Issues Analysis concurred with the commenters' suggestions and provided draft regulatory text to codify this policy. Carolina Power & Light, Duke Energy, EEI and Florida Power Corp., among others, supported the Staff's recommendation. However, in follow-up comments, several commenters, including Indicated Shippers, BP America, BP Energy, Exxon-Mobil, and Occidental Energy Marketing urged the Commission not to adopt the voluntary consent provision. They argue that it is anti-competitive because even if a shipper agreed to disclose the information, the consent may not truly be voluntary because the Transmission Provider could be exercising market power.

157. The Commission is adopting this voluntary consent exception, which impacts practical operations of the transmission system, and is incorporated into the regulatory text of the Final Rule. Any shipper may file a formal complaint or approach the Enforcement Hotline on a confidential basis if a Transmission Provider is abusing this exception. Transmission Providers are required to preserve all written consents, and any amendments, transfers or withdrawals of them.

E. Transaction Specific Exemption

158. Under current policy regarding the gas standards of conduct, an interstate natural gas pipeline is not required to contemporaneously disclose to all shippers information relating to a

marketing affiliate's specific request for transportation service.

159. In contrast, current § 37.4(b)(3) and (4) of the Commission's regulations, 18 CFR 37.4(b)(3) and (4) (2003), prohibit the disclosure of any transmission information to wholesale merchant employees by off-OASIS communications. Order No. 889 did clarify that this does not foreclose customers, including wholesale merchant employees, from obtaining information about the status of particular transactions.⁸¹ However, the Transmission Provider must provide the same types of information with the same level of detail to all customers presenting similar requests.

160. The NOPR did not specifically address this issue.

161. Virtually every segment of the gas industry requested clarification whether the Commission would continue the "specific-transaction exception." The Major Issues Analysis recommended that the Commission codify this policy and provided draft regulatory text for comment. All the follow-up comments from the gas industry, as well as Cinergy, EEI and Exelon supported the Major Issues Analysis and draft regulatory text. This exception, which impacts practical operations of the transmission system merits retention, and the regulatory text has been revised accordingly.

ii. Implementing Tariffs

162. Proposed § 358.5(c) combines §§ 161.3(a), (b), (c), (d) and (k) and § 37.4(b)(5), under which Transmission Providers are required to treat all customers in a fair and impartial manner. For example, Transmission Providers must apply tariff provisions in a manner that treats all transmission customers in a non-discriminatory manner. Transmission Providers would be prohibited from giving their marketing and sales employees and Energy Affiliates' employees preferential treatment, such as more flexible service. There were no comments on this proposed section in response to the NOPR, and the Final Rule adopts the language as originally proposed.

I. Discounts

163. The NOPR proposed that § 358.5(d) would combine the requirements of §§ 161.3(h) and 37.6(c)(3). The NOPR stated that proposed § 358.5(d) is consistent with the way electric Transmission Providers currently treat discounts—any offer of a

⁷⁷ See, e.g., American Electric Power Service Corp., *et al.*, 81 FERC ¶ 61,332 (1997); Allegheny Power Service Corporation, *et al.*, 81 FERC ¶ 61,339 (1997); Allegheny Power Service Corporation, *et al.*, 84 FERC ¶ 61,131 (1998).

⁷⁸ See, e.g., Indianapolis Power and Light Co., 90 FERC ¶ 61,174 (2000).

⁷⁹ APS, 84 FERC ¶ 61,131 (1998).

⁸⁰ See, e.g., Southern Natural Gas Company, 70 FERC ¶ 61,348 (1995).

⁸¹ FERC Stats. & Regs., Regulation Preambles 1991–1996 ¶ 31,035 at 31,597.