

discount for any transmission service made by the Transmission Provider must be announced to all potential customers solely by posting on the OASIS. The NOPR did not propose to change the OASIS requirements currently codified at § 37.6(c)(3).

164. Proposed § 358.5(d) would change current discounting requirements for natural gas pipelines, however. Currently, § 161.3(h)(1), states that if a pipeline offers a discount to its marketing affiliate, the pipeline must make a comparable discount contemporaneously available to all similarly situated non-affiliated shippers. However, under current § 161.3(h)(2), the pipeline is required to post relevant information (name of affiliate, maximum rate, discounted rate, delivery points, quantity of gas and conditions) on its Internet website within 24 hours of the time at which gas first flows under a discounted transaction. The NOPR also solicited comments on whether it would be necessary to continue posting discount information for gas transactions under proposed § 358.5(d) when rate information is required to be posted under §§ 284.13(b)(1) and (2) of the Commission's regulations.<sup>82</sup>

165. Commenters from the electric industry were largely silent on this issue.

166. A few commenters, APGA, Amoco/BP, CPUC and Reliant, offered unqualified support for the requirement to offer all discounts by posting on OASIS or Internet websites. In addition, the Ohio Commission, Michigan Commission, and Oklahoma Commission stated that advance knowledge of discounts enables affiliates to profit from "insider trading." Twenty-six commenters, primarily from the natural gas industry, INGAA, Ad Hoc Marketers, NGSA, EPSA, and Industrials, strongly opposed posting discounts at the time of the offer. The commenters point out that discounting is fundamentally different between the gas and electric industries. In the gas industry, pipelines face pipeline-to-pipeline competition and competition from alternative fuel sources. They argue that the posting requirement is inconsistent with selective discounting for the gas industry and that this proposal would discourage discounting. Many expressed

concern about the vagueness of the word "offer" and offered various definitions or proposals for when the information should be posted. Several commenters, AGA, Dominion, Industrials and NiSource, recommended that discounts be posted after they are executed.

167. The Major Issues Analysis recommended that the Final Rule require the transmission provider to post a discount at the conclusion of negotiations, "when the discount offer is contractually binding." The majority of follow-up comments supported the Major Issues Analysis recommendation. However, the Transmission Group is concerned that the discount posting requirements will discourage shippers from making early commitments to pipeline projects, *e.g.*, precedent agreements.

168. The Final Rule adopts Commission staff's recommendation. This result balances the importance of equal and timely access to discount information with clarity. The term "offer" could have been interpreted in a variety of ways and the text proposed by staff provided additional clarification on the timing of the posting. However, the current requirement, under § 161.3(h)(2), to post information within 24 hours of gas flow is too late to afford an unaffiliated competitor the opportunity to negotiate a comparable deal in today's fast-paced markets.

169. The Transmission Group has not provided any reason for claiming that the posting of a discount "when the discount offer is contractually binding" would discourage a potential shipper from entering into a precedent agreement. The Commission disagrees with the Transmission Group's suggestion that the posting of discounts will discourage precedent agreements.

## V. Conforming Changes

170. The Commission proposes to make conforming changes to the regulations to delete references to Parts 37 and 161, as necessary, and add references to Part 358.

## VI. Additional Policy Changes Not Adopted

171. The NOPR also solicited comments on specific additional policy suggestions, such as structural remedies, capacity limits, revising capacity allocation methods, disgorgement of opportunity costs and prohibiting profit sharing mechanisms. For the most part, the commenters, which were predominantly from the gas industry on these policy suggestions, argued that there was no evidence that justified the need for implementing, on a generic

basis, the additional policy suggestions discussed in the NOPR. Very few commenters supported any of the measures. At this time, the Commission is not adopting any of these additional measures. However, we note that these are the some of the types of remedies that may be imposed if a Transmission Provider violates the standards of conduct.

172. The NOPR also solicited comments on whether the Commission should, in this proceeding or in a separate proceeding, codify the electric market-based rate power sales codes of conduct to govern the relationship between public utilities and their power marketing affiliates. The Commission has decided not to codify the codes of conduct at this time, but may do so in a separate proceeding.

## VII. Regulatory Flexibility Act Certification

173. The Regulatory Flexibility Act<sup>83</sup> requires rulemakings to contain either a description and analysis of the effect that a rule will have on small entities or to certify that the rule will not have a significant economic effect on a substantial number of small entities. Because most Transmission Providers do not fall within the definition of "small entity,"<sup>84</sup> the Commission certifies that this rule will not have a significant economic impact on a substantial number of small entities.

## VIII. Information Collection Statement

174. The Office of Management and Budget's (OMB) regulations require approval of certain information collection requirements imposed by agency rules.<sup>85</sup> Upon approval of a collection of information, OMB will assign an OMB control number and an expiration date. Respondents subject to the filing requirements of this rule will not be penalized for failing to respond to these collections of information unless the collections of information display a valid OMB control number.

175. The Final Rule replaces existing rules under Parts 161 and 37 with comparable rules at Part 358. Under the current requirements at Parts 161 and 37, Transmission Providers are posting certain information with respect to their marketing affiliates or wholesale merchant functions on their respective OASIS nodes or Internet websites. The final rule also requires the Transmission Providers to post the same information on their OASIS or Internet websites with respect to the Transmission

<sup>82</sup> Under 18 CFR 284.13(b)(1) and (2), a pipeline must post on its Internet Web site, no later than the time of the first nomination under a transaction, firm contract information and interruptible agreement information, including the charged rate, the quantity of gas scheduled, receipt and delivery points, the identity of the shipper, and whether the shipper is affiliated.

<sup>83</sup> 5 U.S.C. 601–612 (2000).

<sup>84</sup> See 5 U.S.C. 601(3) (2000).

<sup>85</sup> 5 CFR 1320.11 (2003).