

procedural, ministerial or internal administrative actions and management.<sup>5</sup> This rulemaking is exempt under that provision.

#### IV. Regulatory Flexibility Act

4. The Regulatory Flexibility Act of 1980 (RFA)<sup>6</sup> generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. This final rule makes a ministerial correction to the regulations, correcting the reference to a Federal Reserve Statistical Release. The Commission certifies that it will not have a significant economic impact on a substantial number of small entities. An analysis under the RFA is not required.

#### V. Document Availability

5. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (<http://www.ferc.gov>) and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5 p.m. Eastern time) at 888 First Street, NE., Room 2A, Washington, DC 20426.

6. From the Commission's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

7. User assistance is available for eLibrary and the Commission's website during normal business hours from FERC Online Support at 202-502-6652 (toll free at 1-866-208-3676) or e-mail at [ferconlinesupport@ferc.gov](mailto:ferconlinesupport@ferc.gov), or the Public Reference Room at (202) 502-8371, TTY (202) 502-8659. E-mail the Public Reference Room at [public.referenceroom@ferc.gov](mailto:public.referenceroom@ferc.gov).

#### VI. Effective Date

8. These regulations are effective October 22, 2009. In accordance with 5 U.S.C. 553(d)(3), the Commission finds that good cause exists to make this Final Rule effective immediately. It corrects an out-of-date reference in the Commission's regulations to reflect a change in the Federal Reserve's Statistical Releases. It will not

significantly and adversely affect persons appearing before the Commission. There is therefore no reason to make this rule effective at a later time.

9. The Commission is issuing this rule as a Final Rule without a period for public comment. Under 5 U.S.C. 553(b), notice and comment procedures are unnecessary where a rulemaking concerns only agency procedure and practice, or where the agency finds that notice and comment are unnecessary.<sup>7</sup> The Commission finds that notice and comment are unnecessary because the Commission is merely correcting a reference to a no longer published Federal Reserve Statistical Release. No new burden or regulatory requirement is imposed on regulated entities or the general public. Instead, this Final Rule merely updates an out-of-date reference in the Commission's regulations to reflect a change in the Federal Reserve's Statistical Releases.

#### List of Subjects in 18 CFR Part 35

Electric power rates, Electric utilities, Reporting requirements.

By the Commission.

**Kimberly D. Bose,**  
*Secretary.*

■ In consideration of the foregoing, the Commission amends part 35, Chapter I, Title 18, *Code of Federal Regulations*, as follows:

#### PART 35—FILING OF RATE SCHEDULES AND TARIFFS

■ 1. The authority citation for part 35 continues to read as follows:

**Authority:** 16 U.S.C. 791a–825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

#### § 35.19 [Amended]

■ 2. In § 35.19a, paragraph (a)(2)(iii)(A) is amended to remove the phrase “Statistical Release G. 13” and to add the phrase “Statistical Release H. 15” in its place.

[FR Doc. E9–25253 Filed 10–21–09; 8:45 am]

**BILLING CODE 6717–01–P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

#### 18 CFR Part 358

[Docket No. RM07–1–001; Order No. 717–A]

#### Standards of Conduct for Transmission Providers

Issued October 15, 2009.

**AGENCY:** Federal Energy Regulatory Commission, DOE.

**ACTION:** Final rule; order on rehearing and clarification.

**SUMMARY:** The Federal Energy Regulatory Commission (Commission) generally reaffirms its determinations in Order No. 717, but grants rehearing on and clarifies certain provisions. Order No. 717–A aims to make the Standards of Conduct clearer and to refocus the rules on the areas where there is the greatest potential for abuse. The order addresses requests for rehearing and clarification of the following issues: Applicability of the Standards of Conduct to transmission owners with no marketing affiliate transactions; whether the Independent Functioning Rule applies to balancing authority employees; which activities of transmission function employees or marketing function employees are subject to the Independent Functioning Rule; whether local distribution companies making off-system sales on nonaffiliated pipelines are subject to the Standards of Conduct; whether the Standards of Conduct apply to a pipeline's sale of its own production; applicability of the Standards of Conduct to asset management agreements; whether incidental purchases to remain in balance or sales of unneeded gas supply subject the company to the Standards of Conduct; applicability of the No Conduit Rule to certain situations; and applicability of the Transparency Rule to certain situations.

**DATES:** *Effective Date:* This rule will become effective November 23, 2009.

**FOR FURTHER INFORMATION CONTACT:** Leonard Tao, Office of the General Counsel—Energy Markets, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8214.

#### SUPPLEMENTARY INFORMATION:

Federal Reserve Statistical Release, and otherwise does not change the methods for calculating refunds or for determining the applicable interest rates. See 5 U.S.C. 804(3)(C).

<sup>5</sup> 18 CFR 380.4(1).

<sup>6</sup> 5 U.S.C. 601–12.

<sup>7</sup> We similarly find that this rule does not substantially affect the rights or obligations of parties to Commission proceedings, since it merely corrects a reference to a no longer published

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Before Commissioners: Jon Wellinghoff, Chairman; Sueden G. Kelly, Marc Spitzer, and Philip D. Moeller.

**I. Introduction**

1. On October 16, 2008, the Commission issued Order No. 717 amending the Standards of Conduct for Transmission Providers (the Standards of Conduct or the Standards) to make them clearer and to refocus the rules on the areas where there is the greatest potential for abuse.<sup>1</sup> In this order, the Commission addresses requests for rehearing and clarification of Order No. 717.

**II. Background**

2. The Commission first adopted the Standards of Conduct in 1988, in Order No. 497.<sup>2</sup> The Commission adopted similar Standards for the electric

industry in 1996, in Order No. 889,<sup>3</sup> prohibiting public utilities from giving undue preferences to their marketing affiliates or wholesale merchant functions. Both the electric and gas Standards sought to deter undue preferences by (i) separating a transmission provider's employees engaged in transmission services from those engaged in its marketing services, and (ii) requiring that all transmission customers, affiliated and non-affiliated, be treated on a non-discriminatory basis.

3. In 2003, the Commission issued Order No. 2004,<sup>4</sup> which broadened the

Standards to include a new category of affiliate, the energy affiliate.<sup>5</sup> The new Standards were made applicable to both the electric and gas industries, and provided that the transmission employees of a transmission provider<sup>6</sup> must function independently not only from the company's marketing affiliates but from its energy affiliates as well, and that transmission providers may not treat either their energy affiliates or their marketing affiliates on a preferential basis. Order No. 2004 also imposed requirements to publicly post information concerning a transmission provider's energy affiliates. On appeal, the U.S. Court of Appeals for the D.C.

<sup>1</sup> *Standards of Conduct for Transmission Providers*, Order No. 717, 73 FR 63796 (Oct. 27, 2008), FERC Stats. & Regs. ¶ 31,280 (2008) (Order No. 717).

<sup>2</sup> *Inquiry Into Alleged Anticompetitive Practices Related to Marketing Affiliates of Interstate Pipelines*, Order No. 497, 53 FR 22139 (Jun. 14, 1988), FERC Stats. & Regs., Regulations Preambles 1986–1990 ¶ 30,820 (1988); Order No. 497–A, *order on rehearing*, 54 FR 52781 (Dec. 22, 1989), FERC Stats. & Regs., Regulations Preambles 1986–1990 ¶ 30,868 (1989); Order No. 497–B, *order extending sunset date*, 55 FR 53291 (Dec. 28, 1990), FERC Stats. & Regs., Regulations Preambles 1986–1990 ¶ 30,908 (1990); Order No. 497–C, *order extending sunset date*, 57 FR 9 (Jan. 2, 1992), FERC Stats. & Regs., Regulations Preambles 1991–June 1996 ¶ 30,934 (1991), *rehearing denied*, 57 FR 5815 (Feb. 18, 1992), 58 FERC ¶ 61,139 (1992); *aff'd in part and remanded in part sub nom. Tenneco Gas v. FERC*, 969 F.2d 1187 (D.C. Cir. 1992) (Tenneco) (collectively, Order No. 497).

<sup>3</sup> *Open Access Same-Time Information System (Formerly Real-Time Information Network) and Standards of Conduct*, Order No. 889, 61 FR 21737 (May 10, 1996), FERC Stats. & Regs., Regulations Preambles January 1991–June 1996 ¶ 31,035 (1996); Order No. 889–A, *order on reh'g*, 62 FR 12484 (Mar. 14, 1997), FERC Stats. & Regs., Regulations Preambles July 1996–December 2000 ¶ 31,049 (1997); Order No. 889–B, *reh'g denied*, 62 FR 64715 (Dec. 9, 1997), 81 FERC ¶ 61,253 (1997) (collectively, Order No. 889).

<sup>4</sup> *Standards of Conduct for Transmission Providers*, Order No. 2004, FERC Stats. & Regs. ¶ 31,155 (2003), *order on rehearing*, Order No. 2004–A, FERC Stats. & Regs. ¶ 31,161, *order on rehearing*, Order No. 2004–B, FERC Stats. & Regs. ¶ 31,166, *order on rehearing*, Order No. 2004–C, FERC Stats. & Regs. ¶ 31,172 (2004), *order on rehearing*, Order No. 2004–D, 110 FERC ¶ 61,320 (2005), *vacated and remanded as it applies to natural gas pipelines sub nom. National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831 (D.C. Cir. 2006) (*National Fuel*); *see Standards of Conduct for Transmission Providers*, Order No. 690, FERC Stats. & Regs. ¶ 31,237, *order on rehearing*, Order No. 690–A, FERC Stats. & Regs. ¶ 31,243 (2007); *see also Standards of Conduct for Transmission Providers*, Notice of Proposed Rulemaking, FERC

Stats. & Regs. ¶ 32,611 (2007); Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,630 (2008).

<sup>5</sup> The Order 2004 standards of conduct defined an energy affiliate as an affiliate of a transmission provider that (1) engages in or is involved in transmission transactions in U.S. energy or transmission markets; (2) manages or controls transmission capacity of a transmission provider in U.S. energy or transmission markets; (3) buys, sells, trades or administers natural gas or electric energy in U.S. energy or transmission markets; or (4) engages in financial transactions relating to the sale or transmission of natural gas or electric energy in U.S. energy or transmission markets. Order No. 2004, FERC Stats. & Regs. ¶ 31,155 at P 40; *see also* 18 CFR 358.3(d). Certain categories of entities were excluded from this definition in subsequent subsections of the regulations.

<sup>6</sup> A transmission provider was defined as (1) any public utility that owns, operates or controls facilities used for transmission of electric energy in interstate commerce; or (2) any interstate natural gas pipeline that transports gas for others pursuant to subpart A of part 157 or subparts B or G of part 284 of the same chapter of the regulations. Order No. 2004, FERC Stats. & Regs. ¶ 31,155 at P 33–34; *see also* 18 CFR 358.3(a).

Circuit overturned the Standards as applied to gas transmission providers, on the grounds that the evidence of energy affiliate abuse cited by the Commission was not in the record.<sup>7</sup>

4. The Commission issued an Interim Rule on January 9, 2007,<sup>8</sup> which repromulgated the portions of the Standards not challenged in *National Fuel* as applied to natural gas transmission providers. On January 18, 2007, the Commission issued its initial notice of proposed rulemaking (NOPR),<sup>9</sup> requesting comment on a variety of issues, including whether the concept of energy affiliates should be retained for the electric industry. Following consideration of the comments filed and the Commission's own experience in administering the Standards, the Commission modified the approach advanced in the initial NOPR. The Commission issued a second NOPR on March 21, 2008,<sup>10</sup> and invited comment both on its general approach and on its specific provisions. In the second NOPR, the Commission proposed to return to the approach of separating by function transmission personnel from marketing personnel, an approach that had been adopted in Order Nos. 497 and 889. The Commission also proposed to clarify and streamline the Standards in order to enhance compliance and enforcement, and to increase transparency in the area of transmission/affiliate interactions to aid in the detection of any undue discrimination.

5. The reforms adopted in Order No. 717 were intended to eliminate the elements that have rendered the Standards difficult to enforce and apply. They combined the best elements of Order No. 2004 (especially the integration of gas and electric Standards, an element not contested in *National Fuel*) with those of the Standards originally adopted for the gas industry in Order No. 497 and for the electric industry in Order No. 889. Specifically, Order No. 717 (i) eliminated the concept of energy affiliates and (ii) eliminated the corporate separation approach in favor of the employee functional approach

used in Order Nos. 497 and 889. In addition, the reforms adopted in Order No. 717 conformed the Standards with the *National Fuel* opinion.

### III. Discussion

#### *A. Jurisdiction and Applicability of the Standards: Applicability to Transmission Providers With No Marketing Affiliate Transactions*

6. In Order No. 717, we addressed the question of whether the Standards' applicability to interstate pipelines in § 358.1(a) should parallel the Standards' applicability to the electric industry in § 358.1(b). Section 358.1(a) generally states that part 358 applies to any interstate pipeline that transports gas for others and conducts transmission transactions with an affiliate that engages in marketing functions.<sup>11</sup> In contrast, the NOPR proposed that § 358.1(b) should state only that this part applies to any public utility that owns, operates, or controls facilities used for the transmission of electric energy in interstate commerce. The specific question addressed in Order No. 717 concerned the phrase "and conducts transmission transactions with an affiliate that engages in marketing functions" and whether this language should be retained in § 358.1(a).<sup>12</sup>

7. We determined that the language in § 358.1(a) should parallel the language in § 358.1(b) since there was no evidence in the record that pipelines that do not conduct transmission transactions with an affiliate engaged in marketing functions are in a position to engage in the type of affiliate abuse to which the Standards are directed.<sup>13</sup> We concluded that rather than remove the phrase in question from § 358.1(a), this provision should be added to § 358.1(b) so that the limitation would apply to public utilities as well as pipelines.<sup>14</sup> We found that a public utility or a pipeline that does not engage in any transmission transactions with a marketing affiliate should be excluded from the Standards coverage.

#### Requests for Rehearing and Clarification

8. Several parties raise the issue of the applicability of the Standards to marketing function employees of affiliates that do not conduct transmission transactions with affiliated transmission providers. For example, the Electric Power Supply Association (EPSA) interprets these provisions as applying the Standards only to

transmission companies that conduct transactions with their marketing affiliates. According to EPSA, some pipeline/transmission providers have multiple marketing affiliates and these providers do not engage in transactions with all of their affiliates.<sup>15</sup> EPSA states that it is unclear whether that pipeline or transmission provider is subject to the Standards with all of its marketing affiliates, or just those with which it conducts transactions.<sup>16</sup> EPSA argues that the Independent Functioning Rule in § 358.5 should only apply to the relationship between the transmission function employees and the marketing function employees of those marketing affiliates with which the provider conducts transactions.<sup>17</sup>

9. The Interstate Natural Gas Association of America (INGAA), MidAmerican Energy Holdings Company (MidAmerican), and the Edison Electric Institute (EEI) also interpret the Standards as not extending to employees of affiliates that do not conduct transmission transactions with the pipeline or public utility transmission provider.<sup>18</sup> INGAA states that it is unclear how the regulations apply where a pipeline has at least one affiliate engaged in marketing functions that conducts transmission transactions on the pipeline, but has other affiliates that do not. INGAA argues that the Standards cannot lawfully be applied to marketing function employees of affiliates that do not conduct transmission transactions with the affiliated pipeline.<sup>19</sup> INGAA contends that if the Standards are intended to apply to the relationship between a pipeline and the marketing function employees of affiliates that do not conduct transmission transactions on that affiliated pipeline, the Commission has exceeded its authority.<sup>20</sup>

10. MidAmerican argues that when an affiliate does not engage in transmission transactions on an affiliated transmission provider's system, there is little or no potential for affiliate abuse, and to the extent that there could be inappropriate interaction with affiliates, such conduct is already proscribed by the No Conduit Rule in § 358.6 and the Transparency Rule in § 358.7.<sup>21</sup>

<sup>7</sup> *National Fuel*, 468 F.3d at 841.

<sup>8</sup> *Standards of Conduct for Transmission Providers*, Order No. 690, 72 FR 2427 (Jan. 19, 2007); FERC Stats. & Regs. ¶ 31,237 (2007) (Interim Rule); *clarified by, Standards of Conduct for Transmission Providers*, Order No. 690-A, 72 FR 14235 (Mar. 27, 2007); FERC Stats. & Regs. ¶ 31,243 (2007).

<sup>9</sup> *Standards of Conduct for Transmission Providers*, 72 FR 3958 (Jan. 29, 2007), FERC Stats. & Regs. ¶ 32,611 (2007).

<sup>10</sup> *Standards of Conduct for Transmission Providers*, 73 FR 16228 (Mar. 27, 2008), FERC Stats. & Regs. ¶ 32,630 (2008).

<sup>11</sup> 18 CFR 358.1(a) (2009).

<sup>12</sup> Order No. 717, FERC Stats. & Regs. ¶ 31,280 at P 16.

<sup>13</sup> *Id.* P 20.

<sup>14</sup> *Id.* P 23.

<sup>15</sup> EPSA Nov. 17, 2008 Request for Clarification at 2.

<sup>16</sup> *Id.* at 3.

<sup>17</sup> *Id.* at 4.

<sup>18</sup> INGAA Nov. 17, 2008 Request for Clarification and Rehearing at 4; MidAmerican Nov. 17, 2008 Request for Rehearing or Clarification at 5; EEI Nov. 17, 2008 Request for Clarification at 12–13.

<sup>19</sup> INGAA at 7–9.

<sup>20</sup> *Id.*

<sup>21</sup> MidAmerican at 5.

11. MidAmerican is concerned that paragraph 104 of Order No. 717 suggests that all marketing function employees within a corporate holding company structure are to be considered marketing function employees of all affiliated transmission providers.<sup>22</sup> MidAmerican contends that employees of an affiliate who engage in marketing functions are not likely to be privy to non-public transmission function information of an affiliated transmission provider unless the affiliate engages in transmission transactions with that transmission provider.<sup>23</sup> MidAmerican further argues that to the extent that an employee of an affiliate engaged in marketing functions became privy to non-public transmission function information about another affiliated transmission provider's system, he or she is still proscribed from being a conduit for that information under the Standards and the transmission provider would also have the obligation to post the disclosed information pursuant to the Transparency Rule.<sup>24</sup>

12. EEI requests clarification that, regardless of whether a corporate family owns electric transmission providers, gas transmission providers, or both, that the Standards of Conduct apply only (a) between transmission function employees of a gas transmission provider and employees within the corporate family engaged in gas marketing functions, and (b) between transmission function employees of an electric transmission provider and employees within the corporate family engaged in electric marketing functions.<sup>25</sup> EEI contends that it would be unfair to subject companies with both gas and electric transmission providers to restrictions on relationships that do not apply to the same relationships in companies that have only gas or only electric transmission providers.<sup>26</sup>

13. EEI states that paragraphs 16–23 of Order No. 717 indicate that the rules only apply between transmission function employees and those marketing function employees who are employed by a company that conducts transmission transactions with the transmission provider. EEI requests clarification as to whether this interpretation is accurate.<sup>27</sup>

14. Under EEI's interpretation of these provisions, an employee that makes sales of electric energy is performing a

marketing function only if that employee works for a public utility transmission provider or a company that is affiliated with such a provider.<sup>28</sup> EEI requests confirmation of this interpretation.

15. The Transmission Access Policy Study Group (TAPS) argues that the Commission should either eliminate the exemption for electric transmission providers that do not conduct transmission transactions with marketing affiliates, or clarify that transmission owners in regional transmission organizations (RTOs) remain subject to the Standards absent a waiver.<sup>29</sup> TAPS contends that if this exemption is not eliminated for the electric transmission providers, transmission owners in RTO regions may interpret § 358.1(b) as exempting them from the Standards regardless of whether they have sought and obtained a waiver.<sup>30</sup> Specifically, TAPS argues that the Commission should expand upon “conduct transmission transactions with an affiliate that engages in marketing functions.”<sup>31</sup> According to TAPS, transmission owners within an RTO may argue that only the RTO conducts transmission transactions with market participants and thus these transmission owners would be exempt from the Standards.<sup>32</sup> Alternatively, TAPS asks that the Commission clarify that the new language in § 358.1(b) does not exempt transmission owners in RTO regions who conduct marketing activities (or who have affiliates that are engaged in marketing activities) in the RTO market.<sup>33</sup>

#### Commission Determination

16. Consistent with our findings in Order No. 717 that a public utility or interstate natural gas pipeline that does not engage in any transmission transactions with a marketing affiliate should be excluded from the Standards' coverage,<sup>34</sup> we clarify that the term “marketing function employee” of a transmission provider, as defined in § 358.3(d), does not include an employee of an affiliate that does not engage in transmission transactions on the affiliated transmission provider's transmission system. Furthermore, we note that § 358.1(a) and (b) generally limit the applicability of the Standards

of Conduct to transmission providers that conduct transmission transactions with an affiliate that engages in marketing functions.

17. In response to EEI, we confirm that an employee who makes sales of electric energy is performing a marketing function only if the employee works for a public utility transmission provider or a company affiliated with such a provider.

18. We deny TAPS' request that we eliminate the exemption for electric transmission providers that do not conduct transmission transactions with marketing affiliates. As described above, the Commission determined in Order No. 717 that “a public utility that does not engage in any transmission transactions with a marketing affiliate should be excluded from the Standards' coverage”<sup>35</sup> because there is no evidence that this type of relationship triggers concerns that the public utility will engage in undue preference in favor of an affiliate. However, we clarify that a public utility transmission owner that is in a Commission-approved RTO or that is part of a Commission-approved independent system operator (ISO) and has access to non-public transmission function information remains subject to the Standards of Conduct unless it has obtained a waiver.

#### B. Independent Functioning Rule

19. In Order No. 717, we continued the policy of requiring transmission function employees of a transmission provider to function independently of the marketing function employees of the transmission provider. This policy is referred to as the Independent Functioning Rule. The relevant consideration for purposes of applying the Independent Functioning Rule is the function performed by the employee himself. To implement this approach, we defined several key terms, including “transmission functions” (§ 358.3(h)), “marketing functions” (§ 358.3(c)), and “transmission function employees” (§ 358.3(i)).

20. We defined “transmission functions” as “the planning, directing, organizing or carrying out of day-to-day transmission operations, including the granting and denying of transmission service requests.”<sup>36</sup> Through this definition, we intended to focus on “those areas most susceptible to affiliate abuse,” which we identified as “short-term real time operations, including those decisions made in advance of real

<sup>22</sup> *Id.* at 7.

<sup>23</sup> *Id.* at 7–11.

<sup>24</sup> *Id.* at 8.

<sup>25</sup> EEI at 12.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 13.

<sup>28</sup> *Id.* at 11–12.

<sup>29</sup> TAPS Nov. 17, 2008 Petition for Rehearing or Clarification at 29.

<sup>30</sup> *Id.* at 30.

<sup>31</sup> *Id.* at 31.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 33.

<sup>34</sup> Order No. 717, FERC Stats. & Regs. ¶ 31,280 at P 20 and P 23.

<sup>35</sup> *Id.* P 23.

<sup>36</sup> *Id.* P 40.

time but directed at real time operations.”<sup>37</sup>

21. With regard to the definition of transmission function employee, we agreed that field, maintenance and construction workers, as well as engineers and clerical workers, are not normally involved in the day-to-day operations of the transmission system. Thus, in general they would not fall within the scope of the definition of transmission function employee.<sup>38</sup> However, we declined to add a further exclusion in the definition for *de minimis* involvement.<sup>39</sup> We also found that the question of whether balancing authority personnel are included in the definition of transmission function employee depends on the circumstances. If the transmission provider also serves as a balancing authority and an employee’s duties encompass both transmission provider and balancing authority activities, the employee is a transmission function employee.<sup>40</sup> We also provided several examples of what activities constitute the day-to-day operation of the transmission system. Included in these examples was balancing load with energy or capacity.<sup>41</sup>

#### 1. Transmission Function

22. Both Wisconsin Electric Power Company (Wisconsin Electric) and EEI request further clarification of whether personnel that balance load with energy or capacity are considered “transmission function employees” under the Standards.<sup>42</sup> EEI contends that economic decisions regarding the source of energy or capacity to be used to balance load may be made by marketing function employees and requests that the Commission affirmatively find that such activities are not transmission functions.<sup>43</sup> Wisconsin Electric argues that the Commission’s statement in paragraph 122 of Order No. 717 that balancing load with energy or capacity is among the day-to-day operations of the transmission system is inconsistent with the Commission’s statement in paragraph 48 of Order No. 717 that excluded a balancing authority from the definition of a “transmission function employee” where the balancing authority and transmission functions are separate, and the employee performs no duties outside of

those specific to a balancing authority employee.<sup>44</sup>

23. Wisconsin Electric requests that the Commission clarify that a balancing area employee who balances load with generation (including scheduled interchange) and performs no other transmission functions is not a “transmission function employee” for purposes of the Standards.<sup>45</sup> If the Commission intends that balancing load with energy or capacity is a transmission function, then Wisconsin Electric requests that the Commission clarify and identify which of the other balancing authority requirements under the NERC Reliability Standards are also transmission functions and which are not.<sup>46</sup>

#### Commission Determination

24. We clarify that paragraph 122 of Order No. 717 incorrectly included “balancing load with energy or capacity” as an example of what is included in the day-to-day operation of the transmission system. As we stated in Order No. 717, “[i]f the transmission provider also serves as a balancing authority, and an employee’s duties encompass both transmission provider and balancing authority activities, such an employee would be a transmission function employee (provided his or her duties are encompassed by the definition of transmission function employee). If, however, the two functions are separate, and the employee performs no duties outside of those specific to a balancing authority employee, he or she would not be considered a transmission function employee.”<sup>47</sup> Thus, personnel who balance load with energy or generating capacity are not considered “transmission function employee[s]” under the Standards where the balancing authority and transmission functions are separate, and the employee does not perform duties or tasks of a transmission function employee.<sup>48</sup>

#### 2. Transmission Function Employees

25. TAPS is concerned that the transmission function definition places too much emphasis on short-term or real-time operations in an effort to exclude long-term planning employees

from the transmission function and that this emphasis might be misconstrued.<sup>49</sup> Specifically, TAPS is concerned that the short-term focus might be misinterpreted as limiting the Commission’s determination that employees engaged in the “granting and denying of transmission service requests” are transmission function employees.<sup>50</sup> TAPS asks the Commission to clarify that personnel engaged in “granting or denying transmission service requests” are transmission function employees regardless of the duration of service requested.<sup>51</sup>

26. TAPS also asks the Commission to clarify that the transmission function includes not just the employees who post on the OASIS that a particular request has been granted or denied but, also, the employees who are responsible for performing the underlying system impact studies or otherwise determining whether the transmission system can support the requested services.<sup>52</sup> TAPS asserts that engineers who make engineering decisions regarding the operation and maintenance of transmission facilities and engineers who determine whether transmission requests can be accommodated by the existing transmission system are clearly performing activities that are integral to a transmission provider’s administration of its tariff and are central to the “planning, directing, organizing or carrying out of day-to-day transmission operations, including the granting and denying of transmission service requests.”<sup>53</sup>

#### Commission Determination

27. The Commission clarifies that personnel engaged in “granting or denying transmission service requests” are transmission function employees regardless of the duration of service requested. We find that granting or denying of transmission service requests is an integral part of “planning, directing, organizing or carrying out of day-to-day transmission operations.”<sup>54</sup> The Commission also clarifies that “transmission function employee” includes an employee responsible for performing system impact studies or determining whether the transmission system can support the requested services as this type of employee is planning, directing, organizing or

<sup>44</sup> Wisconsin Electric at 4.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 5.

<sup>47</sup> Order No. 717 at P 48.

<sup>48</sup> We reiterate that the No Conduit Rule still applies and would prohibit the transmission provider from using personnel who balance load with energy or generating capacity as conduits for the disclosure of non-public transmission information to marketing function employees.

<sup>49</sup> TAPS at 41.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 42–43.

<sup>53</sup> *Id.* at 42–43 (citing 18 CFR 358.3(h)).

<sup>54</sup> 18 CFR 258.3(h).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* P 46.

<sup>39</sup> *Id.* P 47.

<sup>40</sup> *Id.* P 48.

<sup>41</sup> *Id.* P 122.

<sup>42</sup> Wisconsin Electric Nov. 17, 2008 Request for Clarification at 3; EEI at 7.

<sup>43</sup> EEI at 7.

carrying out the day-to-day transmission operations.

### 3. Marketing Functions

28. In Order No. 717, we made the Standards applicable to “any public utility that owns, operates, or controls facilities used for the transmission of electric energy in interstate commerce and conducts transmission transactions with an affiliate that engages in marketing functions”<sup>55</sup> and also any interstate natural gas pipeline that transports gas for others and “conducts transmission transactions with an affiliate that engages in marketing functions.”<sup>56</sup>

29. As noted above, we defined several terms in the order. Marketing functions include “in the case of public utilities and their affiliates, the sale for resale in interstate commerce, or the submission of offers to sell in interstate commerce, of \* \* \* financial or physical transmission rights.”<sup>57</sup> We adopted the following definition of marketing functions for pipelines and their affiliates: “The sale for resale in interstate commerce, or the submission of offers to sell in interstate commerce, natural gas, subject to the following exclusions: (i) Bundled retail sales, (ii) Incidental purchases or sales of natural gas to operate interstate natural gas pipeline transmission facilities, (iii) Sales of natural gas solely from a seller’s own production, (iv) Sales of natural gas solely from a seller’s own gathering or processing facilities, and (v) Sales by an intrastate natural gas pipeline, by a Hinshaw pipeline exempt from the Natural Gas Act (NGA), or by a local distribution company making an on-system sale.”<sup>58</sup> We also defined a marketing function employee as “an employee, contractor, consultant or agent of a transmission provider or of an affiliate of a transmission provider who actively and personally engages on a day-to-day basis in marketing functions.”

#### a. Electric Industry

30. EEI seeks clarification as to which sales of transmission rights are marketing functions, and which sales are transmission functions.<sup>59</sup> EEI suggests that as a general rule, any sale of transmission service under an open access transmission service or a pre-Order No. 888 grandfathered agreement be considered a transmission function, while any resale or reassignment of such

service should be considered a marketing function.<sup>60</sup> EEI also suggests that the rule must allow the limited sorts of “resale” that occur from a facility that has been leased, or when transmission is being provided on a back-to-back basis, to be treated as transmission functions, not marketing functions.<sup>61</sup>

31. TAPS requests that the Commission restore (1) the Order 889-era separation of transmission function employees from employees engaged in purchases for wholesale sales;<sup>62</sup> and (2) Order 2004’s required separation of transmission function personnel from employees making purchases for retail load.<sup>63</sup> TAPS also contends that the Commission should require the separation of transmission function personnel from employees making bundled retail sales.<sup>64</sup> TAPS argues that the marketing definition should be revised to include bids to buy products traded in organized markets, particularly financial transmission rights.<sup>65</sup> Finally, TAPS requests reconsideration of the Commission’s decision to exempt from the marketing definition retail sales by a provider of last resort (POLR).<sup>66</sup>

32. Transmission Dependent Utility Systems (TDUS) asks that the Commission exclude from the definition of marketing functions sales by generation and transmission cooperatives to their members.<sup>67</sup> According to TDUS, Order No. 717 eliminated purchasing-related activities from coverage under the Standards.<sup>68</sup> TDUS states that under the new Standards, employees of generation and transmission cooperatives will not be subject to the Standards due to their purchasing activities alone.<sup>69</sup> However, TDUS believes that there is a question left as to whether such employees’ involvement in sales of power to members will subject them to the Standards and asserts that it should not.<sup>70</sup> TDUS asserts that because the generation and transmission cooperative’s role with respect to its member load is nearly identical to that of a vertically integrated investor-owned utility’s role with respect to its retail load, employees of generation and

transmission cooperatives should have the same access to generation and transmission function information as the employees of investor-owned utilities.<sup>71</sup>

### Commission Determination

33. We grant EEI’s request for clarification that any sale of transmission service under an open access transmission service or a pre-Order No. 888 grandfathered agreement be considered a transmission function, while any resale or reassignment of such service be considered a marketing function. Under Order No. 890, a transmission customer may sell all or a portion of its transmission rights to an eligible customer (*i.e.*, an assignee). When this type of transaction occurs, the transmission customer becomes a reseller and the assignee must sign a service agreement with the transmission provider. The transmission provider is obligated to credit or charge the reseller for any difference in price between the assignee’s agreement and the reseller’s original agreement.<sup>72</sup> Thus, the transmission provider continues in the role of providing transmission service and makes the payments to both the reseller and its customer. However, the resale or reassignment between the reseller and the assignee is a marketing function.

34. While we grant EEI’s requested clarification as discussed above, we reject its suggestion that limited sorts of “resale” that occur from a facility being leased, or transmission that is provided on a back-to-back basis, be treated as transmission functions. We deny this clarification because EEI has failed to adequately support or explain its request. We note, however, that EEI appears to be describing a narrow set of circumstances that may be more suitable for a waiver request.

35. We deny TAPS’ request for rehearing that the marketing function definition be amended to include purchases as well as sales. As we noted in Order No. 717, restricting the definition of marketing function to include only sales more closely matches the statutory prohibitions against undue preference.<sup>73</sup> Specifically, sections 205 and 206 of the Federal Power Act prohibit undue preference or advantage

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> TAPS at 13–22.

<sup>63</sup> *Id.* at 22–26.

<sup>64</sup> *Id.* at 26–29.

<sup>65</sup> *Id.* at 33–36.

<sup>66</sup> *Id.* at 37–40.

<sup>67</sup> TDUS Nov. 17, 2008 Request for Clarification or Rehearing at 2–3.

<sup>68</sup> *Id.* at 2.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 3.

<sup>72</sup> *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on rehearing*, Order No. 890–A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on rehearing*, Order No. 890–B, 123 FERC ¶ 61,299 (2008) *order on rehearing*, Order No. 890–C, 126 FERC ¶ 61,228 (2009).

<sup>73</sup> Order No. 717, FERC Stats. & Regs. ¶ 31,280 at P 77.

<sup>55</sup> 18 CFR 358.1(b).

<sup>56</sup> 18 CFR 358.1(a).

<sup>57</sup> 18 CFR 358.3(c)(1).

<sup>58</sup> Order No. 717, FERC Stats. & Regs. ¶ 31,280 at P 83.

<sup>59</sup> EEI at 14–15.

to any person with respect to “any transmission or sale subject to the jurisdiction of the Commission \* \* \*.”<sup>74</sup> Similarly, sections 4 and 5 of the Natural Gas Act prohibit undue preference with respect to “any transportation or sale of natural gas subject to the jurisdiction of the Commission \* \* \*.”<sup>75</sup> Because the Commission’s authority to impose the Standards of Conduct to prevent undue preference is rooted in these sections, we find that TAPS’ request to expand the marketing function definition to include purchases to be inconsistent with our statutory authority.

36. In response to the TAPS statement that excluding employees responsible for purchases from the reach of the Standards of Conduct alters the Commission’s approach in Order No. 889, we note that in Order No. 717 the Commission found that the removal of purchases from the definition of marketing function “frees companies to conduct the informational exchanges necessary to engage in integrated resource planning, and eliminates the difficulties which might otherwise be experienced by executive personnel who have overall procurement responsibilities that include both transmission and marketing. At the same time, it preserves the protection against affiliate abuse, as it is those employees who are making wholesale sales of electricity, not purchases, who can improperly benefit from transmission function information obtained from the affiliated transmission provider.”<sup>76</sup> Given these findings and the Commission’s consideration of its more than decade-long experience implementing the Order No. 889 provisions, we reiterate that there is no need to include purchases in the marketing function definition as a means of preventing undue preference.<sup>77</sup> For these same reasons, we also deny TAPS’ request that we require the separation of transmission function employees from those employees making purchases for retail load and its request that we include bids to buy

products within the definition of marketing function.

37. Similarly, we reject TAPS’ request that employees making bundled retail sales<sup>78</sup> be included in the definition of marketing function. In Order No. 888, the Commission stated that it had exclusive jurisdiction over the rates, terms and conditions of unbundled retail transmission in interstate commerce.<sup>79</sup> However, the Commission declined to assert jurisdiction over bundled retail transmission, reasoning that “when transmission is sold at retail as part and parcel of the delivered product called electric energy, the transaction is a sale of electric energy at retail.”<sup>80</sup> The U.S. Supreme Court affirmed the Commission’s decision to assert jurisdiction over unbundled but not bundled retail transmission, finding that the Commission made a statutorily permissible choice.<sup>81</sup> TAPS essentially is asking us to end this long-standing jurisdictional divide, at least with regard to the Standards. We decline to do so.

38. We also deny TAPS’ request that we reconsider the decision to exempt retail sales by a POLR from the definition of marketing functions. TAPS asserts that POLR service constitutes unbundled retail sales.<sup>82</sup> However, the Commission stated in Order No. 2004 that POLR sales could be accorded treatment equivalent to that accorded to bundled retail sales.<sup>83</sup> Bundled retail sales are sales where the power and transmission components associated with the sale of electric energy to retail customers are provided together in a single bundled package.<sup>84</sup> The

important distinction between unbundled and retail sales is that the generation component may be purchased separately in unbundled service.<sup>85</sup> Under POLR service the generation offered can only be purchased through the regulated public utility as a part of the “bundled” package of transmission, distribution and generation. Generally, POLR service is offered in states that permit retail competition. POLR service is also generally state-mandated with either state-approved rates or a part of a state-approved and regulated process for deriving the generation price. The POLR service is provided to retail customers on a default basis and POLR employees do not market POLR service.

39. Previously, we declined to accord POLR service the same exemption as other bundled retail sales, opting instead to consider its status on a case-by-case basis.<sup>86</sup> The Commission has granted past waivers based on the fact that POLR employees do not market POLR service, do not engage in competitive functions and do not schedule or reserve transmission service.<sup>87</sup> This experience with waiver requests has led us to the conclusion that no justification exists for treating POLR sales differently than other bundled retail sales. Therefore, we will deny TAPS’ request for rehearing concerning POLR.

40. Finally, as TDUS requests, we clarify that if an employee of a generation and transmission cooperative simply serves retail load and does not engage in activities included in the “marketing functions” definition in § 358.3, then this employee is not a “marketing function employee.”

electric energy and the cost of its delivery. *New York v. FERC*, 535 U.S. 1, 5 (2002).

<sup>85</sup> We note that even if the rates or prices for components are separately stated, or itemized, on the end users’ bills this does not render the POLR service “unbundled.” See, e.g., *Northern Natural Gas Co., v. FERC*, 929 F.2d 1261, 1273 (8th Cir. 1991). (Stating a rate separately from the related jurisdictional rate does not “magically unbundle” the activity).

<sup>86</sup> TAPS’ reliance on the few cases in which we denied a waiver request is misplaced. None of the denials were based on the risk of abuse being too great. For example, in *Allegheny Power Service Corp.*, 85 FERC ¶ 61,390 (1998), Allegheny requested a waiver of the functional unbundling requirement with regard to employees who made wholesale purchases for unbundled retail sales. Thus, this decision does not constitute precedent regarding a request for a bundled retail sales waiver. See also, *PECO*, 89 FERC ¶ 61,014 (1999). (PECO’s Supply Acquisition unit performed unbundled retail merchant services and thus the Standards applied).

<sup>87</sup> See, e.g., *High Island Offshore System*, 116 FERC ¶ 61,047 (2006).

<sup>78</sup> The term “bundled retail sales employees” means those employees of the public utility transmission provider or its affiliates who market or sell the bundled electric energy product (including generation, transmission, and distribution) delivered to the transmission provider’s firm and non-firm retail customers. Order No. 2004–A, FERC Stats. & Regs. ¶ 31,161 at P 119 n.80.

<sup>79</sup> *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036, 31,781 (1996), order on reh’g, Order No. 888–A, FERC Stats. & Regs. ¶ 31,048 (1997), order on reh’g, Order No. 888–B, 81 FERC ¶ 61,248, order on reh’g, Order No. 888–C, 82 FERC ¶ 61,046 (1998), *aff’d in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff’d sub nom. New York v. FERC*, 535 U.S. 1 (2002).

<sup>80</sup> *Id.*

<sup>81</sup> *New York v. FERC*, 535 U.S. 1 at 28.

<sup>82</sup> TAPS at 39–40.

<sup>83</sup> See Order No. 2004–A, FERC Stats. & Regs. ¶ 31,161 at P 127.

<sup>84</sup> See, e.g., *Revision of Annual Charges Assessed to Public Utilities*, 94 FERC ¶ 61,290, at 62,037 (2001). We note that the Supreme Court has described “bundled” as meaning that consumers pay a single charge that includes both the cost of

<sup>74</sup> 16 U.S.C. 824d(b) and 16 U.S.C. 824e(a) (emphasis added).

<sup>75</sup> 15 U.S.C. 717c(b) and 15 U.S.C. 717d(a) (emphasis added).

<sup>76</sup> Order No. 717, FERC Stats. & Regs. ¶ 31,280 at P 77 (footnote omitted).

<sup>77</sup> We note that the courts have held that an agency may alter its past interpretation in light of reconsideration of relevant facts and its mandate. *American Trucking Ass’n v. Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397, 416 (1967). See also *Hatch v. FERC*, 654 F.2d 825, 834 (D.C. Cir. 1981). See also *New York v. FERC*, 535 U.S. 1 at 28 (2002) (The Commission’s choice not to assert jurisdiction represents a statutorily permissible policy choice).



## b. Natural Gas Industry

41. We noted in Order No. 717 that if a local distribution company (LDC) does not conduct transmission transactions with an affiliated pipeline, its off-system sales on non-affiliated pipelines are irrelevant as far as the Standards are concerned.<sup>88</sup> However, there may be situations where an affiliated LDC, an intrastate pipeline, and a Hinshaw pipeline could be subject to the Standards of Conduct, such as when one of these affiliates engages in off-system sales of gas that has been transported on the affiliated pipeline. In such a case, the pipeline and the affiliate (which is engaging in marketing functions) will be required to observe the Standards of Conduct by, among other things, having the marketing function employees function independently from the transmission function employees.

## (i) Off-System Sales by LDCs

42. The American Gas Association (AGA), Duke Energy Corporation (Duke), National Fuel Gas Distribution Corporation and National Fuel Gas Supply Corporation (National Fuel), the New York Public Service Commission (NYPSC), and Southwest Gas Corporation (Southwest Gas) all ask the Commission to clarify that an LDC may make off-system sales on non-affiliated pipelines without being subject to the Standards.<sup>89</sup> Specifically, the concern raised is whether an LDC that makes off-system sales on non-affiliated pipelines would be subject to the Standards for those sales because it also conducts transmission transactions with an affiliated interstate pipeline for the purpose of making bundled retail sales or on-system sales.<sup>90</sup> These parties all rely on Order No. 497 and *National Fuel Gas Supply Corp.*<sup>91</sup> to support their contention that the Commission should find that the Standards do not apply in this instance.<sup>92</sup>

43. The parties argue that failing to make this clarification will have effectively expanded the Standards beyond those adopted under Order No. 497 to encompass all of an LDC's off-system sales for resale including those sales where the gas was not transported

on the affiliated interstate pipeline.<sup>93</sup> To resolve this matter, Duke suggests that the Commission either (1) revise the definition of "marketing function" in § 358.3(c)(2) of the regulations to exempt off-system sales by an LDC that do not involve the use of transmission capacity of an affiliated transmission provider; or (2) revise the applicability language of § 358.1(a) to make clear that the Standards of Conduct do not apply to an interstate pipeline's transportation of gas for an affiliate, if it "does not involve transportation of gas for the affiliate's marketing function."<sup>94</sup>

44. Southwest Gas contends that both Order Nos. 497 and 690 excluded LDC sales from the definition of "marketing" if the gas was sold on-system to retail end-users, as well as if the gas was sold outside of its service territory as long as none of the gas sold off-system was also transported by an affiliated interstate pipeline.<sup>95</sup> Southwest Gas states that an LDC's sale of gas outside its retail service area in a transaction that does not involve the affiliated pipeline should not trigger the Standards nor should they be triggered if the LDC ships gas on an affiliated pipeline in other transactions for sale within the LDC's retail service territory.<sup>96</sup>

45. If the Commission denies the request for clarification or rehearing, National Fuel requests a waiver of the Standards necessary for National Fuel Distribution Corporation to conduct off-system sales that do not involve its affiliated pipeline.<sup>97</sup> Similarly, the NYPSC seeks clarification that the waiver previously granted to National Fuel remains in effect pursuant to the Commission's related determination that all existing waivers relating to the Standards remain in full force and effect.<sup>98</sup>

<sup>93</sup> See, e.g., *id.* at 11.

<sup>94</sup> Duke Request at 3.

<sup>95</sup> Southwest Gas at 9–10.

<sup>96</sup> *Id.* at 11–12. Southwest Gas also states in its pleading that there is no evidence that regulated LDCs could abuse their relationship with an affiliated pipeline if the LDC sells gas outside its retail service area and none of the off-system gas is transported on an affiliated pipeline. Southwest Gas at 2. Southwest Gas argues that Order No. 717 improperly expands the applicability criteria from those in effect under Order No. 497 to cover any transportation by a pipeline for an affiliate that engages in marketing functions even if none of those transactions involved transportation by the affiliate pipeline. *Id.*

<sup>97</sup> National Fuel at 31. National Fuel also requests a waiver of the Standards as they may pertain to *de minimis* sales necessary to remain in balance. This waiver request is addressed *infra*.

<sup>98</sup> NYPSC at 7. The NYPSC disputes the interpretation of *National Fuel Gas Supply Corp.*, 64 FERC ¶ 61,192 (1993), as the granting of a waiver request. However, if the Commission concludes that a waiver was granted in that proceeding, the NYPSC contends that the waiver should be continued.

46. Finally, AGA states that in Order No. 717, the Commission exempted from the definition of "marketing functions" as applied to natural gas pipelines "sales by an intrastate natural gas pipeline, by a Hinshaw interstate pipeline exempt from the Natural Gas Act, or by a local distribution company making an on-system sale."<sup>99</sup> AGA states that the comma placements in separating each entity suggests that only an LDC's on-system sales are exempt and that all of a Hinshaw pipeline's sales are exempt.<sup>100</sup> AGA requests that the Commission clarify whether it intended to exempt all of a Hinshaw pipeline's sales or only its on-system sales.<sup>101</sup>

## Commission Determination

47. In Order No. 717, the Commission stated that if a pipeline does not conduct transmission transactions with an affiliate that engages in marketing functions, it is not subject to the Standards under § 358.1(a).<sup>102</sup> We further explained that if an LDC does not conduct transmission transactions with an affiliated interstate pipeline, its off-system sales on an unaffiliated pipeline are irrelevant insofar as the Standards are concerned.<sup>103</sup>

48. Consistent with *National Fuel Gas Supply Corp.*,<sup>104</sup> we further clarify that an LDC making off-system sales of gas that has been transported on non-affiliated pipelines is not subject to the Standards of Conduct if it conducts transmission transactions with an affiliated interstate pipeline for the purpose of making bundled retail sales or on-system sales. In light of this clarification we reject Duke Energy's suggested amendments to the Standards. We also reject National Fuel's request for a waiver of the Standards because it has been rendered moot.

49. We agree with AGA that the comma placements separating each entity in the definition of "marketing functions" in § 358.3(c) creates confusion. The Commission clarifies that we intended to exempt all on-system sales by an intrastate natural gas pipeline, by a Hinshaw interstate pipeline exempt from the NGA, or by a local distribution company and we will accordingly revise § 358.3(c)(2)(v).<sup>105</sup>

<sup>99</sup> AGA Request for Clarification or Rehearing at 14 (quoting 18 CFR 358.3(c)(2)(v)).

<sup>100</sup> *Id.* at 14.

<sup>101</sup> *Id.*

<sup>102</sup> Order No. 717, FERC Stats. & Regs. ¶ 31,280 at P 91.

<sup>103</sup> *Id.*

<sup>104</sup> 64 FERC ¶ 61,192 (1993).

<sup>105</sup> The change to include a local distribution company operating under section 7(f) of the Natural Gas Act in 18 CFR 358.3(c)(2)(v) is discussed *infra*.

<sup>88</sup> Order No. 717, FERC Stats. & Regs. ¶ 31,280 at P 91.

<sup>89</sup> AGA Nov. 17, 2008 Request for Clarification or Rehearing at 8; Duke Nov. 17, 2008 Request for Rehearing or Clarification at 4; National Fuel Nov. 17, 2008 Motion for Clarification or Rehearing or, in the Alternative, Request for Limited Waiver at 7–8; NYPSC Nov. 17, 2008 Request for Rehearing or Clarification at 3–4; and Southwest Gas at 9–10.

<sup>90</sup> See, e.g., AGA Request at 4.

<sup>91</sup> 64 FERC ¶ 61,192 (1993).

<sup>92</sup> See, e.g., AGA at 9 (citing *National Fuel Gas Supply Corp.*).



## (ii) Sales From Own Production

50. The American Public Gas Association (APGA) objects to the Commission's determination to exclude from the definition of "marketing functions" the sale of natural gas from a seller's own production and from a seller's own gathering or processing facilities.<sup>106</sup> APGA states that there is no logical, legal or factual basis for including within the Standards affiliated sellers of third party gas, but excluding from the rule the pipeline itself and affiliated sellers where they are selling from their own production.<sup>107</sup>

51. APGA argues that because the Commission has adopted an employee functional approach, the available evidence of actual abuse between sales employees and affiliated transmission providers fully supports a rule requiring their separation.<sup>108</sup> APGA states that while these cases may not have been sufficient under the corporate separation approach to the Standards under Order No. 2004 and that the court reviewed in *National Fuel*, under the employee functional approach, certain cases of abuse support the discrete proposition that all employees who actively and personally engage on a day-to-day basis in natural gas sales should be prohibited from obtaining non-public information about the day-to-day transmission operations of affiliated pipelines. APGA asserts that the origin of the natural gas involved should have no bearing on the issue whatsoever.<sup>109</sup>

52. Calypso U.S. Pipeline LLC and Calypso LNG LLC (Calypso) ask the Commission to further clarify the term "seller's own production" in § 358.3(c)(3). Specifically, Calypso contends that the exemption should encompass foreign-sourced gas regardless of whether the transmission provider owns the mineral rights at the foreign wellhead or acquires ownership of the gas at the outlet of the liquefaction facility, or on board a liquefied natural gas (LNG) vessel, so long as it owns the gas when it is introduced into the transmission provider's facilities as the only gas that the transmission provider is transporting.<sup>110</sup> Calypso interprets the term "own production" to mean gas owned by the transmission provider's marketing affiliate rather than gas that was owned when still in the ground or

was extracted by the transmission provider (or its marketing affiliate).<sup>111</sup>

53. To the extent that the Commission intended to confine the exemption to foreign-sourced gas that was owned by the transmission provider's marketing affiliate at the foreign wellhead or some other point upstream being introduced into the transmission provider's facilities, then Calypso seeks rehearing on this point.<sup>112</sup> Calypso asserts that when the only gas the transmission provider transports is owned by the transmission provider's marketing affiliate, the transmission provider should be exempt from the requirement that its transmission function employees function independently from its marketing function employees. Calypso argues that this result would be the same as the case where the only gas flowing was the domestic production of the transmission provider.<sup>113</sup>

54. Calypso states that the key factor in applying this exemption is not ownership at the wellhead, but rather (i) the absence of someone against whom the transmission provider can discriminate, and (ii) the proposition that the Commission "cannot impede vertical integration between a pipeline and its affiliates without 'adequate justification.'" <sup>114</sup>

## Commission Determination

55. We deny APGA's request for rehearing concerning the Commission's determination to exclude from the definition of "marketing functions" the sale of natural gas from a seller's own production and from a seller's own gathering and processing facilities. In Order No. 497-A, the Commission excluded from the scope of the rule "[p]roducers, gatherers or processors, acting in their traditional roles, that sell gas solely from their own production, gathering, or processing facilities."<sup>115</sup> In excluding these sellers of gas from the scope of the rule, the Commission explained that these entities do not act within the scope of the term "marketing" as it is used in the rule because these "entities are acting in the roles that their names imply"<sup>116</sup> rather than engaging in "marketing functions." We do not see, nor has APGA demonstrated, how these entities' roles have changed since Order No. 497 that would require the Commission to now conclude that they are engaging in

marketing functions for the purposes of the Standards of Conduct.

56. In Order No. 2004-A, the Commission also found that the roles of gatherers or processors did not support their inclusion as energy affiliates subject to the standards of conduct. Specifically, the Commission stated in Order No. 2004-A that if a gatherer or processor merely provides gathering or processing services, only purchases natural gas to supply operational needs, and does not engage in other transmission-related activities, then it is not an energy affiliate subject to the standards of conduct.<sup>117</sup> Moreover, we found that "when gatherers and processors engage only in gathering and processing, they provide services to wholesale market participants but do not compete with them."<sup>118</sup>

57. We also do not agree with APGA that the adoption in Order No. 717 of an employee functional approach from a corporate functional approach dictates that we eliminate these exclusions from the definition of "marketing functions." The adoption of the employee functional approach in Order No. 717 is simply a reversion to the employee functional approach in effect under Order No. 497. Over the Commission's decades-long experience implementing standards of conduct, the Commission has not found a pattern of abuse concerning sales of natural gas solely from a seller's own production or a seller's own gathering and processing facilities that would necessitate a change to this exclusion to the "marketing functions" definition, even under the employee functional approach.<sup>119</sup> The Commission has addressed through its enforcement actions, including civil penalties, the few cases of sales personnel and affiliate transmission providers improperly sharing non-public transmission function information.<sup>120</sup>

58. Notwithstanding the fact that the Standards of Conduct do not govern the relationship between a transmission provider and producers, gatherers or processors, acting in their traditional roles, that sell gas solely from their own

<sup>117</sup> Order No. 2004-A, FERC Stats. & Regs. ¶ 31,161 at P 97.

<sup>118</sup> *Id.*; see also Order No. 2004-B, FERC Stats. & Regs. ¶ 31,166 at P 77.

<sup>119</sup> The Commission has not found evidence of undue preference that was exclusively a result of sales of natural gas solely from a seller's own production or its own gathering or processing facilities.

<sup>120</sup> See, e.g., *Dominion Resources, Inc.*, 108 FERC ¶ 61,110 (2004) (Hackberry); *The Williams Companies, Inc.*, 111 FERC ¶ 61,392 (2005); *Idaho Power Co.*, 103 FERC ¶ 61,182 (2003); *Cleco Corp.*, 104 FERC ¶ 61,125 (2003); and *Transcontinental Gas Pipe Line Corp.*, 102 FERC ¶ 61,302 (2003).

<sup>106</sup> APGA Nov. 17, 2009 Request for Rehearing at 4.

<sup>107</sup> *Id.* at 5.

<sup>108</sup> *Id.* at 6.

<sup>109</sup> *Id.*

<sup>110</sup> Calypso Nov. 17, 2009 Request for Clarification or Rehearing at 4.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 5.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 7.

<sup>115</sup> Order No. 497-A, FERC Stats. & Regs. ¶ 30,868 at P 12 (footnotes omitted).

<sup>116</sup> *Id.*

production, gathering, or processing facilities, we note that section 4 of the Natural Gas Act prohibits a pipeline from granting any undue preference or advantage to any person or subjecting any person to any undue prejudice or disadvantage.<sup>121</sup> For all of the above reasons, we deny APGA's request to change the "marketing functions" exclusions in § 358.3(c)(2).

59. We grant Calypso's request that we clarify the term "seller's own production" in § 358.3(c)(3). In *Hackberry*, we adopted a light-handed regulatory approach to LNG terminals,<sup>122</sup> viewing LNG import terminals as analogous to production facilities.<sup>123</sup> This revised approach to LNG regulation was subsequently reflected in EPAAct 2005.<sup>124</sup> In light of our view that LNG import terminals are analogous to production facilities, we clarify that the exemption encompasses foreign sourced gas regardless of whether the seller owns the mineral rights at the foreign wellhead or acquires ownership on board an LNG vessel, so long as it owns the gas before it enters the transmission provider's transmission facilities and the gas is the only gas the transmission provider is transporting. In this scenario, there is no one for the transmission provider to discriminate against.

#### (iii) Asset Management Agreements

60. Southwest Gas asserts that the Commission failed to address (1) the applicability of the Standards to pipelines affiliated with shippers releasing capacity to asset managers under asset management agreements, and (2) the question of whether NGA section 7(f) companies are within the scope of the LDC exemption.<sup>125</sup> Southwest Gas seeks clarification that where a party releases capacity to an asset manager under an asset management agreement where there is also an assignment of gas supply, the releasing party under the asset management agreement does not engage in a marketing function and its affiliated pipelines are not subject to the Standards.<sup>126</sup>

61. Southwest Gas contends that even where a party to an asset management agreement assigns gas supply, there is no basis for the party's participation in

the asset management agreement to trigger the Standards for a pipeline affiliated with that releasing party.<sup>127</sup> Southwest Gas further asserts that there is "no record evidence or a demonstrated theoretical threat to bring releasing parties under an asset management agreement and their affiliated pipelines within the scope of the Standards merely by virtue of their participation in an asset management agreement."<sup>128</sup>

#### Commission Determination

62. In Order Nos. 712 and 712-A,<sup>129</sup> the Commission revised its capacity release regulations to facilitate the use of asset management agreements. The Commission found that these agreements were in the public interest because they are beneficial to numerous market participants and to the market in general.<sup>130</sup> In the asset management agreement context, the releasing shipper is not releasing unneeded capacity but capacity it needs to serve its own supply function. Releasing shippers are thus releasing capacity for the primary purpose of transferring the capacity to entities that they perceive as having greater skill and expertise in both purchasing low cost gas supplies and maximizing the value of the capacity when it is not needed to meet the releasing shipper's gas supply needs. Essentially, asset management agreements entail a releasing shipper transferring capacity to a third party expert who will perform the functions that the releasing shipper would normally have to do itself, *i.e.* purchase gas supplies and releasing capacity or making bundled sales when the releasing shipper does not need the capacity to satisfy its own needs.<sup>131</sup>

63. In Order No. 717, we clarified that under the Independent Functioning Rule and the No Conduit Rule, it would be the employees of the asset manager acting as agents or contractors for the pipeline or LDC, who would qualify as marketing function employees after the asset management arrangement was concluded and not the employees of the releasing party.<sup>132</sup> Therefore, we grant Southwest Gas' request for clarification and find that the releasing shipper is not performing a marketing function when

it assigns gas supply pursuant to an asset management agreement. However, if the specific asset management agreement leaves the releasing shipper any ability to conduct sales for resale or provides that the releasing shipper is to retain control of the transactions entered into by the asset manager, the releasing shipper would remain subject to the Independent Functioning Rule with regard to that specific agreement.

#### (iv) Balancing

64. In Order No. 717, the Commission exempted from the definition of marketing functions incidental purchases or sales of natural gas to operate interstate natural gas pipeline transmission facilities. AGA requests that the Commission clarify that an affiliate of an interstate pipeline is not engaged in "marketing functions" under § 358.3(c)(2)(ii) to the extent that such affiliate makes incidental purchases or sales of natural gas to remain in balance under applicable pipeline tariffs.<sup>133</sup> AGA believes that the scope of the exemption should not be limited to the pipeline itself because there is a counterparty (often a shipper) for each sale and purchase the pipeline makes to keep its system in balance.<sup>134</sup> AGA contends that such purchases and sales do not present any significant opportunity for a pipeline to unduly discriminate in favor of an affiliate because the affiliate must follow the pipeline's cash-out and balancing tariff provisions.

65. Both National Fuel and INGAA request that the Commission clarify that *de minimis* off-system sales that are related to an LDC's balancing requirements are not captured in the definition of marketing function.<sup>135</sup> INGAA requests that the Commission either reestablish the separate exemption for sales by an affiliate that are made in order to remain in balance under a pipeline tariff or operational balancing agreement, or explicitly clarify that § 358.3(c)(2)(ii) covers such exemptions.<sup>136</sup> In the alternative, National Fuel requests rehearing to revise the regulations to provide specifically that *de minimis* off-system sales that are in connection with the resolution of the LDC's inadvertent

<sup>121</sup> 15 U.S.C. 717b-1.

<sup>122</sup> *Hackberry LNG Terminal L.L.C.*, 101 FERC ¶ 61,294 (2002), *order issuing certificates and granting rehearing*, 104 FERC ¶ 61,269 (2003). Some LNG terminals continue to allow open access service pursuant to Part 284.

<sup>123</sup> See *Hackberry*, 101 FERC ¶ 61,294 at P 27.

<sup>124</sup> See 15 U.S.C. 717b.

<sup>125</sup> Southwest Gas at 5.

<sup>126</sup> *Id.* at 6.

<sup>127</sup> *Id.* at 8.

<sup>128</sup> *Id.* at 9.

<sup>129</sup> *Promotion of a More Efficient Capacity Release Market*, Order No. 712, 73 FR 37058 (June 30, 2008), FERC Stats. & Regs. ¶ 31,271 (2008), *order on rehearing*, Order No. 712-A, 73 FR 72692 (Dec. 1, 2008), FERC Stats. & Regs. ¶ 31,284 (2008).

<sup>130</sup> Order No. 712-A, FERC Stats. & Regs. ¶ 31,284 at P 68 and P 71.

<sup>131</sup> *Id.* P 70.

<sup>132</sup> Order No. 717, FERC Stats. & Regs. ¶ 31,280 at P 97.

<sup>133</sup> AGA at 13. As noted above, we defined marketing functions for pipelines and their affiliate as "the sale for resale in interstate commerce, or the submission of offers to sell in interstate commerce, of natural gas," subject to several exclusions including an exclusion for incidental purchases or sales of natural gas to operate interstate natural gas pipeline transmission facilities. See Order No. 717, FERC Stats. & Regs. ¶ 31,280 at P 83.

<sup>134</sup> AGA at 13.

<sup>135</sup> National Fuel at 11-12.

<sup>136</sup> INGAA at 12.

imbalances pursuant to pipeline tariffs, do not fit within the definition of “marketing function.”<sup>137</sup>

66. INGAA also requests clarification that the § 358.3(c)(2)(ii) incidental exemption applies to LNG terminals.<sup>138</sup> INGAA states that the same general reasoning that justifies the operational sales exemption for pipelines and their affiliates should apply to LNG terminals.<sup>139</sup>

#### Commission Determination

67. We clarify that an affiliate of an interstate pipeline is not engaged in “marketing functions” under § 358.3(c)(2)(ii) to the extent that such affiliate makes incidental purchases or sales of natural gas to remain in balance under applicable pipeline tariffs. We agree with AGA that these transactions do not present a significant opportunity for undue discrimination. This clarification is consistent with our finding in Order No. 717 that, in the case of interstate pipelines and their affiliates, incidental purchases or sales of natural gas to operate interstate natural gas pipeline transmission facilities do not constitute a marketing function.<sup>140</sup> Furthermore, we note that under the previous regulations adopted in Order No. 2004, we found that an energy affiliate did not include an interstate pipeline that makes incidental purchases or sales of *de minimis* volumes of natural gas to remain in balance under applicable pipeline tariff requirements.<sup>141</sup>

68. In response to National Fuel and INGAA, the Commission clarifies that *de minimis* off-system sales that are related to an LDC’s balancing requirements are not included in the definition of marketing function. As we stated in Order No. 2004–A, “an LDC serving only its on-system customers must comply with pipeline balancing requirements and may be required to buy or sell *de minimis* [sic] quantities of natural gas in the wholesale commodity market, purchase short-term park and loan and storage services, buy or sell imbalances in the pipeline’s cash out mechanism, or take other steps to meet pipeline tariff balancing tolerances on a daily or monthly basis. LDCs with limited participation in wholesale markets to satisfy these needs will continue to be exempt from the definition of Energy Affiliate as long as they are not participating in the other

activities described in § 358.3(d)”<sup>142</sup> *i.e.* marketing activities. While the Commission has eliminated the concept of an energy affiliate, the rationale and its application to marketing activities of LDCs remain unchanged. Accordingly, we clarify that the exclusion in § 358.3(c)(2)(ii) includes *de minimis* off-system sales that are related to an LDC’s balancing requirements under interstate pipeline tariffs.

69. We deny INGAA’s request for clarification regarding LNG terminals and the “incidental exemption.” INGAA has not explained how an incidental exemption would be applied to an LNG facility.

#### (v) Other

70. MidAmerican asks the Commission to clarify that employees of an electric public utility purchasing and selling natural gas for generation or local distribution company functions are not marketing function employees of the electric public utility.<sup>143</sup> The Commission addressed this issue in Order No. 717, finding that the question was rendered moot by the exclusion of purchases of gas from the definition of marketing function.<sup>144</sup> However, MidAmerican states that gas acquisition at retail for generation usually involves incidental sales of unneeded gas supply and therefore, the Commission must address this issue directly.<sup>145</sup> MidAmerican states that while an LDC employee may not be considered to engage in a marketing function at a pipeline if the LDC is excluded by § 358.3(c)(2), there is no similar exemption of LDCs under the definition of the electric marketing function and there is no evidence to suggest that a gas acquisition employee is privy to electric transmission function information.<sup>146</sup>

71. Southwest Gas requests that the Commission clarify the phrase “the submission of offers to sell in interstate commerce” in the definition of natural gas marketing function activities.<sup>147</sup> Southwest Gas explains that the submission of an offer sweeps within its scope not only sales of natural gas in interstate commerce but also activity between market participants prior to the actual sales agreement becoming effective. Southwest Gas believes that in application “submission of offers” is

unclear.<sup>148</sup> Southwest Gas requests clarification of the definition of “marketing functions” to reflect only the sale of gas in interstate commerce.<sup>149</sup>

72. The Williams Companies, Inc. (Williams) request clarification that the exclusion in § 358.3(c)(2)(iii) for “sales of natural gas solely from a seller’s own production” will be interpreted consistent with the similar exclusion adopted in Order No. 497–A as including “situations in which a producer is selling gas that it owns or is selling gas of other interest owners in the same well and reservoir to the extent that the producer has contractual authority to sell such gas.”<sup>150</sup> Williams states that this clarification is consistent with the Commission’s intent, as expressed in Order No. 690–A, to “track the scope of the standards of conduct requirements for natural gas transmission providers in Order No. 497”<sup>151</sup> and to carry forward the historical exclusions in Order No. 717.<sup>152</sup>

73. Alternatively, should the Commission choose not to clarify the exclusion in § 358.3(c)(iii) as described above, Williams requests rehearing, and claims that the Commission has provided no rationale to support interpreting the exclusion in a manner differently from that which was in effect under Order No. 497–A.<sup>153</sup> Williams argues that the Commission should, therefore, grant rehearing and provide that the exclusion in § 358.3(c)(2)(iii) includes sales of gas of other interest owners in the same well and reservoir to the extent that the producer has contractual authority to sell such gas.<sup>154</sup>

#### Commission Determination

74. We deny MidAmerican’s request for clarification regarding electric public utility employees selling unneeded natural gas supply originally purchased for generation or local distribution company functions. MidAmerican asks that these employees not be considered marketing function employees. However, MidAmerican does not provide adequate support for the broad exemption requested. Moreover, MidAmerican does not explain the

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> Williams Nov. 17, 2009 Request for Clarification or Rehearing at 7.

<sup>151</sup> *Standards of Conduct for Transmission Providers*, Order No. 690–A, *order on clarifications and rehearing*, FERC Stats. & Regs. ¶ 31,243, at P 13 (2007).

<sup>152</sup> *Standards of Conduct for Transmission Providers*, FERC Stats. & Regs. ¶ 32,630, at P 36 (2008).

<sup>153</sup> Williams at 8–9.

<sup>154</sup> *Id.* at 9.

<sup>137</sup> National Fuel at 25.

<sup>138</sup> INGAA at 13.

<sup>139</sup> *Id.*

<sup>140</sup> Order No. 717, FERC Stats. & Regs. ¶ 31,280 at P 83.

<sup>141</sup> Order No. 2004, FERC Stats. & Regs. ¶ 31,155 at P 77.

<sup>142</sup> Order No. 2004–A, FERC Stats. & Regs. ¶ 31,161 at P 61.

<sup>143</sup> MidAmerican Request for Rehearing or Clarification at 15.

<sup>144</sup> Order No. 717, FERC Stats. & Regs. ¶ 31,280 at P 103.

<sup>145</sup> MidAmerican at 15.

<sup>146</sup> *Id.* at 16.

<sup>147</sup> Southwest Gas at 13.

circumstances under which the exemption should apply. For example, MidAmerican does not explain how “unnecessary” should be defined.

75. We deny the request for clarification by Southwest Gas to remove “the submission of offers to sell in interstate commerce” from the definition of natural gas marketing function activities so that it reflects only the sale of gas in interstate commerce. The submission of an offer to sell is an indication that a party intends to sell. As such, marketing function employees should not be in contact with transmission function employees once they have submitted offers to sell.

76. The Commission grants the request for clarification by Williams and states that the exclusion in § 358.3(c)(2)(iii) for “sales of natural gas solely from a seller’s own production” is consistent with the similar exclusion adopted in Order No. 497–A that includes “situations in which a producer is selling gas that it owns or is selling gas of other interest owners in the same well and reservoir to the extent that the producer has contractual authority to sell such gas.”<sup>155</sup> As we stated in Order No. 497–A, this does not mean that such entities can never be considered to be marketers of gas as the term is used in the Standards of Conduct. If a producer sells gas that was produced by another, it is acting as a marketer of the gas.<sup>156</sup> Furthermore, a gatherer or processor that sells gas from facilities other than its own is a marketer.<sup>157</sup>

#### 4. Marketing Function Employees

77. Wisconsin Electric seeks clarification as to whether an employee in the legal, finance or regulatory division of a jurisdictional entity, whose intermittent day-to-day duties include the drafting and redrafting of non-price terms and conditions of, or exemptions to, umbrella agreements would be considered a “marketing function employee” under the standards.<sup>158</sup>

78. Wisconsin Electric asks the Commission to provide guidance with respect to which types of activities it considers to be “day-to-day” activities of a marketing function employee.<sup>159</sup> Specifically, Wisconsin Electric requests that the Commission clarify whether individuals responsible for contract administration are “marketing function employees” under the rule and whether

the preparation of monthly or annual requests for financial transmission rights and auction revenue rights constitutes “day-to-day” activities pursuant to the rule.<sup>160</sup>

79. EEI understands that an officer may disapprove a power sales contract without becoming a marketing function employee.<sup>161</sup> However, EEI requests clarification as to whether the officer is permitted to explain why a contract is being disapproved.<sup>162</sup> EEI argues that the ability to provide such overall feedback, which may effectively become general parameters for contract renegotiation, is important for efficient discharge of fiduciary duties and an important part of corporate governance.<sup>163</sup>

#### Commission Determination

80. The Commission clarifies that an employee in the legal, finance or regulatory division of a jurisdictional entity, whose intermittent day-to-day duties include the drafting and redrafting of non-price terms and conditions of, or exemptions to, umbrella agreements is a “marketing function employee.” “Marketing functions” are not limited to only price terms and conditions of a contract, because non-price terms and conditions of a contract could contain information that an affiliate could use to its advantage. For example, delivery or hub locations in a contract are non-price terms that could be used to favor an affiliate. In addition, negotiated terms and conditions could affect the substantive rights of the parties. For this reason, we decline to make a generic finding to limit “marketing functions” to only price terms and conditions, but will consider waiver requests concerning an employee whose intermittent duties involve drafting non-price terms and conditions.

81. Wisconsin Electric requests that the Commission clarify whether individuals responsible for contract administration are “marketing function employees” under the rule. As stated in Order No. 717, the “development of general negotiating parameters for wholesale contracts” is not considered a “day-to-day” activity that characterizes a transmission function or the duties of a marketing function employee.<sup>164</sup> However, if the employee responsible for contract administration “regularly carries out or supervises \* \* \* or is

actively and personally engaged” in the negotiation of the contracts, then he or she is considered a marketing function employee.<sup>165</sup> Because Wisconsin Electric has not provided any information about the duties of its employee responsible for contract administration, the Commission is unable to provide any further clarification.

82. Wisconsin Electric also requests clarification concerning employees who prepare monthly or annual requests for financial transmission rights and auction revenue allocations to hedge the costs of serving load. The Commission states that if these employees are not actively and personally engaged in sales for resale of these products, but only involved in purchases through requests for financial transmission rights and auction revenue rights allocations, then they are not marketing function employees.

83. EEI requests that we clarify that a supervisor is not engaged in a marketing function when that supervisor explains why a contract is being disapproved. As stated in Order No. 717, a supervisor is not engaged in the marketing function activity, if that supervisor is “simply signing off on a deal negotiated or proposed by someone else, and is not providing input into the negotiations.”<sup>166</sup> Similarly, we clarify that as long as the supervisor is not actively and personally engaged on a day-to-day basis in the contract negotiations and is simply providing an explanation concerning the disapproval of a contract, the supervisor is not engaged in a marketing function. However, in this scenario, the supervisor remains subject to the No Conduit Rule.

#### 5. Long-Range Planning, Procurement and Other Interactions

84. MidAmerican asks the Commission to delete the communication bars and acknowledge that communications between marketing and transmission function employees are permitted, but must comply with the Standards.<sup>167</sup> MidAmerican argues that the Commission has too narrowly described and too broadly restricted communications between transmission and marketing function employees.<sup>168</sup> MidAmerican asserts that there are circumstances that may give rise to a need for business communication

<sup>155</sup> Order No. 497–A, FERC Stats. & Regs. ¶ 30,868 at 31,591 n.19.

<sup>156</sup> *Id.* at 31,591–2.

<sup>157</sup> *Id.*

<sup>158</sup> Wisconsin Electric Nov. 17, 2009 Request for Clarification at 6.

<sup>159</sup> *Id.* at 7.

<sup>160</sup> *Id.* at 8.

<sup>161</sup> EEI at 9–10.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> Order No. 717, FERC Stats. & Regs. ¶ 31,280 at P 122.

<sup>165</sup> *See id.* P 117.

<sup>166</sup> Order No. 717, FERC Stats. & Regs. ¶ 31,280 at P 119.

<sup>167</sup> MidAmerican at 14.

<sup>168</sup> *Id.*

between these groups that would not in any way impute restricted non-public transmission function information such as human resources matters.<sup>169</sup>

85. EEI notes that there is a range of business-related activities that have nothing to do with transmission or marketing functions, such as meetings to discuss long term strategic corporate goals, benefit options, safety training, leadership development, and charity drives.<sup>170</sup> EEI requests clarification that the scope of permitted interactions extends to these types of activities.<sup>171</sup> EEI requests clarification that meetings that include transmission function and marketing function employees, but do not relate to transmission or marketing functions, are not barred under the Standards, but remain subject to the No Conduit Rule.<sup>172</sup>

86. EEI suggests that there are other areas that may relate tangentially to transmission or marketing functions for which meetings should be allowed.<sup>173</sup> These include design and implementation of FERC or other compliance programs, and investigation and remediation of potential violations.<sup>174</sup> Accordingly, EEI requests clarification that joint participation in public or quasi-public meetings is permitted, and that joint meetings regarding legal, regulatory, rate, compliance, enforcement, or other corporate or business matters are permitted, subject to the No Conduit Rule.<sup>175</sup>

87. Western Utilities Compliance Group (Western Utilities)<sup>176</sup> also seeks clarification that certain joint meetings and communications between marketing function employees and transmission function employees are permissible. Specifically, Western Utilities requests that we clarify that the Standards do not prohibit joint meetings and communications that do not violate the separation of functions requirement provided in 18 CFR 358.5(b) and that do not include any disclosure of non-public transmission function information to marketing function

employees.<sup>177</sup> Western Utilities contends that previously only joint meetings and communications about transmission related matters were prohibited and that it has established safeguards and procedures to ensure that no sharing of non-public transmission function information occurs at these meetings.<sup>178</sup> According to Western Utilities, examples of the types of joint meetings and communications that should be permitted under the Standards include corporate meetings and training,<sup>179</sup> the development process for reliability standards, ISO/RTO issues, disaster/outage preparedness training,<sup>180</sup> and joint participation in FERC and State regulatory and compliance functions.<sup>181</sup>

88. INGAA also discusses a variety of other examples of the types of joint meetings that should be permitted under the Standards, including affiliate participation in regulatory or industry proceedings or conferences;<sup>182</sup> pipeline sponsored meetings with customers;<sup>183</sup> and pipeline marketing.<sup>184</sup> AGA also believes the Independent Functioning Rule of the Standards of Conduct should not be interpreted to preclude business-related meetings and discussions between transmission function employees and marketing function employees where non-public transmission function information will not be disclosed.<sup>185</sup>

#### Commission Determination

89. The Commission clarifies that certain communications between marketing and transmission function

<sup>177</sup> Western Utilities at 5. INGAA supports this request for clarification. See INGAA August 4, 2009 Answer at 4.

<sup>178</sup> *Id.* at 6.

<sup>179</sup> *Id.* at 8. These include award ceremonies, community service activities, training on leadership, EEO safety and ethics as well as utility-wide management meetings. INGAA states that this category of meetings would also apply to interstate pipelines. INGAA Answer at 4.

<sup>180</sup> *Id.* at 9. Essentially, Western Utilities' question is whether these meetings and communications would be permitted under the exception regarding meetings "to maintain or restore operation of the transmission system or generating units." See 18 CFR 358.7(h)(2).

<sup>181</sup> *Id.* INGAA states that this category of meetings also would apply to interstate pipelines. INGAA Answer at 4.

<sup>182</sup> INGAA Answer at 7.

<sup>183</sup> *Id.* INGAA provided examples of the topics at such meetings including changes to business processes, an upcoming tariff filing or the status of on-going regulatory proceedings.

<sup>184</sup> *Id.* at 8. According to INGAA, this involves marketing the pipeline's services, not gas marketing. These meetings would include discussions of the affiliate's own contracts, sales presentations involving posted available capacity or expansion projects and services.

<sup>185</sup> AGA Sept. 11, 2009 Supplemental Comments at 4.

employees are permitted. Specifically, the Commission clarifies that meetings including both transmission function and marketing function employees are not barred under the Standards of Conduct as long as the meetings do not relate to transmission or marketing functions. However, the No Conduit Rule still applies to these meetings.

90. We decline to provide a generic clarification regarding EEI's request that we allow meetings that "relate tangentially to transmission or marketing functions," as this phrase is too nebulous for us to determine the extent to which non-public transmission function information might be disclosed at these meetings. However, we do clarify that so long as non-public transmission function information is not disclosed between transmission and marketing function employees as part of the development process for reliability standards, then joint meetings including both transmission and marketing function employees are permissible. Similarly, joint meetings including both transmission and marketing function employees to discuss RTO and ISO issues are permissible if non-public transmission function information is not disclosed between transmission and marketing function employees. Furthermore, we clarify that transmission function employees and marketing function employees may jointly participate in regulatory and compliance functions, including Federal Energy Regulatory Commission compliance activities, as long as these discussions do not include any disclosure of non-public transmission function information.

91. However, we decline the Western Utilities' request that we find that joint meetings for disaster/outage preparedness training fit within the permitted interactions "to maintain or restore operation of the transmission system or generating units, \* \* \*" as described in § 358.7(h)(2). The exclusion described in § 358.7(h)(2) is limited to true emergency situations, rather than preparation for a disaster. However, we clarify that joint meetings including both transmission and marketing function employees for disaster/outage preparedness training are permissible as long as these employees do not share non-public transmission function information. Furthermore, the Commission will consider on a case-by-case basis requests for waiver of this prohibition against joint meetings for disaster/outage preparedness training during which non-public transmission function information will be discussed.

<sup>169</sup> *Id.*

<sup>170</sup> EEI at 7.

<sup>171</sup> *Id.* at 8.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 9.

<sup>176</sup> Western Utilities is comprised of Arizona Public Service Company, Avista Corporation, El Paso Electric Company, Idaho Power Company, Pacific Gas and Electric Company, PacifiCorp, Portland General Electric Company, Puget Sound Energy, Southern California Edison Company, and Tucson Electric Power Company.

92. With regard to the examples of joint meetings suggested by INGAA, we reiterate that so long as non-public transmission function information is not disclosed between transmission and marketing function employees, the meetings are permissible. If INGAA or another entity has a concern about whether the meeting would run afoul of the Standards of Conduct, then the entity should apply for a waiver in advance.

### C. The No Conduit Rule

93. In Order No. 717, we continued the no conduit prohibition of the then existing Standards, but modified the rule to encompass only marketing function employees. The No Conduit Rule prohibits employees of a transmission provider from disclosing non-public transmission function information to the transmission provider's marketing function employees.<sup>186</sup> Contractors, consultants, agents, marketing function employees of an affiliate are covered by this prohibition.<sup>187</sup>

94. Wisconsin Electric states that as currently written, the text of § 358.6 prohibits the disclosure of non-public transmission function information to any of the transmission provider's "marketing function employees."<sup>188</sup> Wisconsin Electric contends that the Standards of Conduct do not extend the prohibition to the "marketing function employees" of the transmission provider's affiliate.<sup>189</sup> Wisconsin Electric requests that the Commission clarify that this omission was intentional.<sup>190</sup>

95. Wisconsin Electric further states that it is unclear whether the Commission intended the No Conduit Rule in § 358.6(b) to require that the employees, contractors, consultants or agents of an affiliate of a transmission provider that is engaged in marketing functions be prohibited from disclosing non-public transmission function information to any of the transmission provider's "marketing function employees" or whether the Commission intended only to proscribe the activities of employees, contractors, consultants or agents of an affiliate of a transmission provider that are engaged in transmission functions from disclosing non-public transmission function information to any of the transmission

provider's "marketing function employees."<sup>191</sup>

96. Additionally, Wisconsin Electric notes that § 358.8(b)(2) does not extend the requirement to distribute the written procedures in § 358.7(d) to the transmission provider's affiliates.<sup>192</sup> Wisconsin Electric requests clarification that the omission was intentional.<sup>193</sup>

### Commission Determination

97. Wisconsin Electric contends that as currently written, the No Conduit Rule does not prohibit employees of a transmission provider from disclosing non-public transmission function information to marketing function employees of a transmission provider's affiliate. That is not the case. The No Conduit Rule prohibits disclosure of non-public transmission function information to any of the "marketing function employee[s]" of the transmission provider or its affiliate. As previously stated in Order No. 717, "[m]arketing function employees are defined in § 358.3(d) to include employees, contractors, consultants or agents not only of the transmission provider, but also of an affiliate of the transmission provider."<sup>194</sup> Therefore, the No Conduit Rule extends to "marketing function employee[s]" of the transmission provider's affiliate. For this same reason, Wisconsin Electric misunderstands the scope of the Implementation Requirements in § 358.8(b)(2). Because "marketing function employee" includes an employee of "an affiliate of a transmission provider," the Implementation Requirements in § 358.8(b)(2) extend its distribution requirement to include marketing function employees of the transmission provider's affiliate.

98. Wisconsin Electric asks whether the Commission intended the No Conduit Rule to prohibit employees, contractors, consultants or agents of an affiliate of a transmission provider that are engaged in transmission functions from acting as a conduit to disclose non-public transmission function information to any of the transmission provider's "marketing function employees." Wisconsin Electric's requested clarification to the No Conduit Rule would prohibit only transmission function employees from acting as a conduit. However, the No Conduit Rule generally states that a

transmission provider is prohibited from using anyone as a conduit to disclose non-public transmission function information to the transmission provider's marketing function employees. The No Conduit Rule is not simply limited to transmission function employees from acting as a conduit. Because Wisconsin Electric's clarification request would defeat the purpose of the No Conduit Rule, we decline to change the meaning of this section.

### D. Transparency Rule

99. In Order No. 717, we also adopted a Transparency Rule, the provisions of which are designed to alert interested persons and the Commission to potential acts of undue preference. The previously existing posting requirements were moved to this section.<sup>195</sup>

100. MidAmerican states that the rules should recognize that support employees may be employed by one transmission provider but assist other transmission providers in the same holding company without triggering a requirement for equal access to non-public transmission function information used in their jobs.<sup>196</sup> While MidAmerican does not suggest revival of the concept of shared employees, it suggests a change to the language in § 358.2(d) to clarify that transmission providers within the same holding company may have shared business functions that may exchange non-public transmission function information without the need for disclosure.<sup>197</sup>

101. INGAA urges the Commission to delete, or in the alternative, amend the "General Principle" stated in § 358.2(d) that "[a] transmission provider must provide equal access to non-public transmission function information to all its transmission function customers, affiliated and non-affiliated, except in the case of confidential customer information or Critical Energy Infrastructure information" so that it conforms to the transparency rules under § 358.7.<sup>198</sup> INGAA believes that § 358.2(d) fails to recognize the disclosure exemption for specific requests for transmission service. INGAA points out that § 358.7(b) indicates that there is no obligation to disclose a marketing function employee's specific request for transmission service.<sup>199</sup> INGAA asserts

<sup>186</sup> See 18 U.S.C. 358.6.

<sup>187</sup> Order No. 717, FERC Stats. & Regs. ¶ 31,280 at P 201-02.

<sup>188</sup> Wisconsin Electric at 8.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 8-9.

<sup>193</sup> *Id.* at 9.

<sup>194</sup> Order No. 717, FERC Stats. & Regs. ¶ 61,280 at P 202. See also 18 CFR 358.3(d) (Marketing function employee includes an affiliate of a transmission provider).

<sup>195</sup> Order No. 717, FERC Stats. & Regs. ¶ 61,280 at P 205.

<sup>196</sup> MidAmerican at 11.

<sup>197</sup> *Id.* at 12.

<sup>198</sup> INGAA at 9.

<sup>199</sup> *Id.*

that § 358.2(d) can be read broadly to suggest that all discussion between a transmission function employee and an employee of an affiliate who is not a marketing function employee must be disclosed if it is non-public transmission function information.<sup>200</sup>

102. National Fuel asks that the Commission remove or modify the new “equal access” principle set out at § 358.2(d) by limiting its scope to non-public transmission information provided to marketing function employees, and eliminating its confusing partial list of exceptions.<sup>201</sup> National Fuel argues that because its applicability is not limited to non-public transmission function information provided to marketing function employees, § 358.2(d) is far broader than the Transparency Rule it attempts to summarize.<sup>202</sup> National Fuel further asserts that another problem with § 358.2(d) is that, unlike the Standards of Conduct’s other principles, this principle includes specific exceptions, but in so doing implicitly excludes mention of other exceptions contained in the Transparency Rule.<sup>203</sup> National Fuel contends that reference to specific regulatory exceptions in a statement of general principle should be unnecessary and reference to some but not all of the specific regulatory exceptions creates confusion in the regulations.<sup>204</sup>

103. AGA notes that pipelines are no longer required to post on the Internet within 24 hours each emergency that resulted in a deviation from the Standards, as § 358.4(a)(2) had required pipelines to do prior to Order No. 717.<sup>205</sup> However, AGA notes that § 358.7(h) retains the requirement that a transmission provider make available to the Commission upon request the record of certain non-public transmission function information exchanges between transmission function employees and marketing function employees. AGA requests that the Commission clearly define a process by which interested persons may obtain from the Commission the records it receives from pipelines regarding emergency deviations from the Standards, and a process by which interested persons may request that the Commission seek such records for a pipeline.<sup>206</sup>

104. EEI requests clarification that the “internet Web site” posting requirements can be met by posting information on publicly accessible portions of OASIS.<sup>207</sup>

105. The Natural Gas Supply Association (NGSA) argues that the Commission erred by removing the discount posting provision from the Standards as proposed in the NOPR.<sup>208</sup> Specifically, NGSA contends that the reporting requirement under 18 CFR 284.13(b)(1)(iii) is not sufficient to satisfy the transparency goals of the Standards.<sup>209</sup> NGSA remarks that the Commission failed to notice the distinction between the timing of the posting required under 18 CFR 284.13(b)(1)(iii) and that required under the Standards. The former provision requires postings no later than the first nomination under a transaction whereas the Standards would have required a contemporaneous posting had the language been adopted as proposed in the NOPR.<sup>210</sup> NGSA requests that the Commission adopt the discount posting provisions in the Standards of Conduct as proposed in the NOPR in order to retain the contemporaneous timing of posting.

106. NGSA also argues that the Commission erred by eliminating the requirement of posting tariff waivers for non-affiliates.<sup>211</sup> NGSA argues that the complete elimination of the requirement to post when a pipeline waives its filed tariff in favor of a non-affiliate shields such actions from disclosure, thereby making it impossible for pipeline shippers to determine whether they are being treated comparably and not in an unduly discriminatory manner.<sup>212</sup> NGSA requests that the Commission require that the waiver posting apply to all waivers granted and not only those granted to an affiliate.<sup>213</sup>

107. NGSA also contends that the Commission erred by eliminating all posting requirements with respect to exercises of discretion provided for in the pipeline’s tariff.<sup>214</sup> NGSA argues that the simple fact that certain acts are permitted under a pipeline’s tariff is not sufficient reason to eliminate posting requirements because exercises of discretion can still result in discriminatory behavior.<sup>215</sup> NGSA notes that discounting rates is an act of

discretion that is nonetheless subject to posting because it allows others to monitor whether they are being treated similarly or not.<sup>216</sup> NGSA claims that there is no reason for the Commission to treat other acts of discretion any differently.<sup>217</sup> NGSA asserts that the Commission should adopt a rule of thumb whereby a pipeline would post individual acts of discretion that are not generic in application, which are not available to all shippers and that cannot be denied when requested.<sup>218</sup>

108. NGSA requests that the Commission clarify that (1) a marketing function employee who believes that he may have received non-public transmission function information must notify the transmission provider regardless of how such information was obtained and (2) if the transmission provider determines that the information disclosed to the marketing function employee was, in fact, a violation, it must post the disclosed information.<sup>219</sup> NGSA states that Order No. 717 eliminates the proposal for transmission providers to post non-public information disclosed to a marketing affiliate by a third party.<sup>220</sup> NGSA contends that the Commission went from proposing to bar marketing function employees from receiving non-public transmission function information from any source, and requiring posting of such information if received, to a final rule that eliminates both of these requirements and requests the clarification as a middle ground.<sup>221</sup>

109. TAPS contends that the Commission should require transmission providers to identify their marketing function employees by name, job title and description, and position in the chain of command on their websites.<sup>222</sup> TAPS argues that this requirement would facilitate monitoring of compliance with the Independent Functioning Rule and help employees comply with the No Conduit Rule by providing a centralized and authoritative list of the employees to whom employees may not provide non-public transmission function information.<sup>223</sup>

110. EEI requests clarification that transmission providers are not required to post the names of transmission function employees on the Internet.<sup>224</sup>

<sup>200</sup> *Id.*

<sup>201</sup> National Fuel at 34.

<sup>202</sup> *Id.* at 33–34.

<sup>203</sup> *Id.* at 34.

<sup>204</sup> *Id.*

<sup>205</sup> AGA at 16.

<sup>206</sup> AGA at 15–16.

<sup>207</sup> EEI at 13.

<sup>208</sup> NGSA Nov. 17, 2008 Request for Clarification or Rehearing at 5.

<sup>209</sup> *Id.* at 6.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 8.

<sup>212</sup> *Id.* at 9.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 11.

<sup>215</sup> *Id.* at 12.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 15.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 16.

<sup>222</sup> TAPS at 45.

<sup>223</sup> *Id.* at 46.

<sup>224</sup> EEI at 18.



EEI states that the regulatory text makes no mention of posting of names, but paragraph 246 of Order No. 717 does make reference to “section 358.7(f)(1) covering the posting of job titles and names of transmission function employees.”<sup>225</sup>

111. EEI notes that Order No. 717 retains the concept that an “affiliate” can include a “functional unit” of a transmission provider and that the rules also require that a transmission provider maintain its books of account and records separately from its affiliates that employ or retain marketing function employees.<sup>226</sup> EEI requests clarification that a “functional unit” of a transmission provider that performs marketing functions is not required to keep its books separately from those of the transmission provider.<sup>227</sup>

112. National Fuel contends that the language in § 358.7(b) regarding the transaction specific exemption is unduly narrow and should be refined.<sup>228</sup> National Fuel argues that the regulation should encompass communications related to transportation agreements (not merely service requests) and those concerning requests for interconnections and new infrastructure.<sup>229</sup>

#### Commission Determination

113. We grant the clarification requested by MidAmerican to clarify one of the General Principles in § 358.2(d) so that it is consistent with other sections of part 358. Specifically, we clarify that transmission providers may allow their transmission function employees to exchange non-public transmission function information to non-marketing function employees without the need for disclosure. While we do not revive the concept of shared employees, we agree with MidAmerican that the language in § 358.2(d) needs to be clarified so as not to imply that transmission providers would have to provide equal access to non-public transmission function information to all customers following disclosure of non-public transmission function information to non-marketing function employees. For example, if a unit of one transmission provider provides information technology support for other transmission providers in a holding company system, these non-marketing function employees may become privy to non-public transmission function information.

However, we note that these employees remain obligated to abide by the No Conduit Rule. We will revise the language in § 358.2(d) to reflect this clarification.

114. The Commission agrees with INGAA and National Fuel that the “General Principle” in § 358.2(d) does not identify the disclosure exemption for specific requests for transmission service under § 358.7. While we agree with National Fuel that § 358.2(d) applies to non-public information provided to marketing function employees, it was not the Commission’s intention to have the “General Principle” describe all exemptions more fully described in subsequent sections of the Standards of Conduct. However, to alleviate any confusion surrounding the scope of the “General Principle,” we will revise the language in § 358.2(a), § 358.2(b), § 358.2(c), and § 358.2(d) as noted herein.

115. We deny AGA’s request that the Commission define a process by which interested persons may obtain from the Commission the records it receives from pipelines regarding emergency deviations from the Standards, and a process by which interested persons may request that the Commission seek such records for a pipeline. Under § 358.7(h)(1), a transmission provider’s transmission function employees are allowed to exchange certain non-public transmission function information with marketing function employees as necessary to maintain or restore operation of the transmission system and according to the requirements in § 358.7(h)(2) without making a contemporaneous record of the exchange during emergency situations. For these emergency situations, a record must be made as soon as practicable following the emergency and must be made available to the Commission upon request.

116. The Commission has never required the information exchanged under this emergency exception be made publicly available and declines to create such a process here or to create a process for an entity to ask the Commission to exercise its discretion in requesting such records. The Independent Functioning Rule in former § 358.4(a)(2) only required posting of a notice of an emergency, not posting of any information exchanged. As we stated in the NOPR with respect to employee interactions regarding reliability functions, “it [is] the first order of business on the part of a transmission provider to ensure reliability of operations.”<sup>230</sup> We

therefore provided this exception to the Independent Functioning Rule to ensure that an entity can focus on responding to the emergency without concern for contemporaneous recordkeeping.<sup>231</sup>

117. We grant EEI’s request and provide confirmation for purposes of compliance with the Internet posting requirements under the Standards of Conduct that it is acceptable to post information on a publicly accessible portion of OASIS that can be reached from a transmission provider’s Web site by Internet link. As we noted in Order No. 717, some transmission owners who are members of RTOs or ISOs may not have their own OASIS<sup>232</sup> and this clarification ensures that information will be accessible to all interested entities.

118. The Commission denies NGSa’s request to adopt the discount posting provisions in the Standards of Conduct as proposed in the NOPR. Posting no later than the first nomination is consistent with how all other shippers are treated and provides the necessary transparency.

119. We deny NGSa’s request to require that the waiver posting requirement apply to all waivers granted and not only those granted to an affiliate. Section 284.13(b)(1)(viii) already requires posting of all instances where a transportation contract deviates from the pipeline’s tariff, and the Standards of Conduct are not intended to be duplicative of the panoply of pipeline-specific posting requirements. Rather, the gravamen of the abuse targeted by the Standards is undue preference to affiliates. And, as Order No. 717 stated, a blanket requirement to post all waivers and exercises of discretion goes beyond what is needed to alert customers and others to possible acts of undue discrimination or preferences in favor of an affiliate.<sup>233</sup> Furthermore, we note that if a tariff does not permit a particular waiver, a pipeline must come to the Commission to request a waiver, which would provide notice of the request. If the tariff gives the pipeline discretion to waive provisions, then the Commission would have already considered whether notice was necessary for that particular waiver provision after the pipeline first proposed such tariff language. In many cases such tariff provisions require the pipeline to provide some sort of notice. Because NGSa has not shown a need for a blanket posting requirement applicable to all tariff waivers granted to

<sup>225</sup> *Id.*

<sup>226</sup> EEI at 17.

<sup>227</sup> EEI at 17.

<sup>228</sup> National Fuel at 36–37.

<sup>229</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> Order No. 717, FERC Stats. & Regs. ¶ 31,280 at P 247.

<sup>233</sup> *Id.* P 214.

<sup>230</sup> NOPR, FERC Stats. & Regs. ¶ 32,630 at P 33.

non-affiliates, we decline to grant NGSAs's request for rehearing.<sup>234</sup>

120. The Commission denies NGSAs's request to adopt a rule of thumb whereby a pipeline would post individual acts of discretion that are not generic in application, which are not available to all shippers and that cannot be denied when requested. As we stated in support of our determination in Order No. 717, an act of discretion occurs when the specific tariff provision involves an exercise of judgment on the part of the transmission provider, *e.g.*, which type of credit is acceptable. When a pipeline submits a specific tariff provision that allows the pipeline to exercise discretion to the Commission for review and approval, the pipeline also serves copies of the filing on its customers. The Commission also provides notice of the filing and the opportunity for comments, as such, the Commission considers customers to have had notice that the pipeline could exercise discretion under that particular tariff provision. Transmission providers exercise their discretion and make judgment calls on an ongoing basis and recording all of these matters would place a substantial administrative burden on them when the customers have already had notice that the pipeline can exercise such discretion for a specific tariff provision.<sup>235</sup> Furthermore, audits would reveal acts of discriminatory discounting.

121. The Commission denies NGSAs's request for clarification that marketing function employees be required to report any disclosure of non-public transmission function information to the transmission provider. The No Conduit Rule will continue to prohibit a transmission provider from using anyone as a conduit for disclosure of non-public transmission function information to a marketing function employee including an employee, contractor, consultant or agent of an affiliate of a transmission provider that is engaged in marketing functions. As we stated in Order No. 717, we eliminated the prohibition in proposed section 358.6(a)(2), which would have prohibited marketing function employees from receiving non-public transmission function information from any source because of the difficulties in determining whether a marketing function employee may have willingly and knowingly or inadvertently

received such information.<sup>236</sup> However, we reiterate, as we said in Order No. 717, that "if a transmission provider uses anyone as a conduit for improper disclosures, such an event would be considered an improper disclosure and should be posted."<sup>237</sup> We also noted in Order No. 717 in discussing Standards of Conduct training that transmission function employees and marketing function employees are the two core categories of employees that should be most cognizant of the rules. Although we deleted the prohibition against marketing function employees receiving transmission function information due to the possibility such receipt could be inadvertent, "it is expected that if someone attempted to pass such information to a marketing function employee, the marketing function employee would not only refuse it but would report the individual to the company's chief compliance officer or other appropriate individual."<sup>238</sup>

122. The Commission denies TAPS' request that we require transmission providers to identify their marketing function employees by name, job title and description, and position in the chain of command on their Web sites. Specifically, we find no basis for TAPS' contention that names of marketing function employees and their position in the chain of command are necessary for either monitoring a transmission provider's compliance with the Independent Functioning Rule or facilitating employee compliance with the No Conduit Rule. Based on our past experience, we find that a listing of job title and description is sufficient for Standards of Conduct compliance. Furthermore, any benefit that would result from a listing of names and an explanation of the chain of command would be marginal at best.

123. We grant EEI's clarification request with regard to posting of names of transmission function employees on the Internet. We clarify that transmission providers are not required to post the names of transmission function employees on the Internet. Order No. 717 incorrectly mentioned "names" in explaining the requirement in § 358.7(f)(1) in P 246.

124. We will also grant EEI's request and clarify that a "functional unit" of a transmission provider that performs marketing functions is not required to keep its books separately from those of the transmission provider. However, we note that the No Conduit Rule prohibits a transmission provider from allowing

non-public transmission function information to be disclosed to marketing function employees through a joint set of books and records.

125. The Commission denies National Fuel's request to revise § 358.7(b) to encompass communications related to transportation agreements and those concerning requests for interconnections and new infrastructure. However, we clarify that the transaction specific exemption is not limited to communications concerning requests for transmission service. The transaction specific exemption includes communications related to transportation agreements, specific interconnections and new infrastructure needed for the specific request.

#### *E. Other Definitions—Transmission Function Information*

126. EEI seeks clarification that information needed to make economic decisions affecting generation dispatch, such as unit commitment, purchase and sale decisions, should not be classified as non-public transmission function information and is thus not subject to the recordation requirement in 18 CFR 358.7(h).<sup>239</sup> Western Utilities agrees with EEI's contention that information related to generation dispatch should not be considered non-public transmission function information.<sup>240</sup> Western Utilities argues that this exception should be expanded to include unit commitment.

127. EEI notes that the regulatory text adopted by Order No. 717 provides that "a transmission provider's transmission function employees and marketing function employees may exchange certain non-public transmission function information \* \* \* in which case the transmission provider must make and retain a contemporaneous record of all such exchanges except in emergency circumstances" and therefore by its terms applies only to exchanges of non-public transmission function information.<sup>241</sup> EEI further states that the types of information that may be exchanged subject to this recordation process include "[i]nformation necessary to maintain or restore operation of the transmission system or generating units, or that may affect the dispatch of generating units."<sup>242</sup> EEI notes that the confusion surrounds whether the new exclusion, and its recordation process, is intended to apply to all information used in

<sup>234</sup> See, *e.g.*, *Norstar Operating LLC v. Columbia Gas Transmission Corp.*, 118 FERC ¶ 61,221, at P 147 (2007) (tariff requires posting of waiver of gas quality provision).

<sup>235</sup> Order No. 717, FERC Stats. & Regs. ¶ 31,280 at P 216.

<sup>236</sup> *Id.* P 200-01.

<sup>237</sup> *Id.* P 236.

<sup>238</sup> *Id.* P 306.

<sup>239</sup> EEI at 1-2.

<sup>240</sup> Western Utilities at 12. See also EEI at 6.

<sup>241</sup> EEI at 5 (citing 18 CFR 358.7(h)(1)).

<sup>242</sup> *Id.* (citing 18 CFR 358.7(h)(2)).

generation dispatch.<sup>243</sup> EEI requests clarification concerning whether information about a company's own generation and load, such as the type of information discussed in *Indianapolis Power & Light Co.*, 90 FERC ¶ 61,174 at 61, 575–76 and *Indianapolis Power & Light Co.*, 92 FERC ¶ 61,002 at 61,003, may be provided to marketing function employees without being subject to the recordation requirement.<sup>244</sup>

128. EEI also requests clarification that the other categories of information identified in § 358.7(h)(2)—*i.e.*, information pertaining to compliance with Reliability Standards and information necessary to maintain or restore operation of the transmission system or generating units—are not *per se* deemed transmission function information subject to the recordation requirement.<sup>245</sup> Western Utilities also requests clarification of this subsection, arguing that § 358.7(h)(2)(i) creates two types of information subject to the exclusion, information pertaining to compliance with Reliability Standards as well as information necessary to maintain or restore operations.<sup>246</sup> Similarly, MidAmerican requests that the Commission clarify that not all information involving reliability and generation dispatch is non-public transmission function information.<sup>247</sup> For example, MidAmerican notes that while unit economics or rail outage may affect the dispatch of generating units, this type of information does not fall within the scope of non-public transmission function information.<sup>248</sup>

129. EEI also requests further specificity on the content required for records for purposes of ensuring compliance with the recordation requirement.<sup>249</sup> EEI believes that a record of the names of employees participating, the date, time, duration, and subject matters discussed should be sufficient and asks the Commission to confirm this interpretation.<sup>250</sup>

130. EEI requests clarification regarding the treatment of information that is not close in time to current day-to-day transmission operations.<sup>251</sup> Specifically, EEI requests clarification as to (i) whether information that was transmission function information in real-time is no longer transmission function information when the events in question have passed, and if so, how

much time should pass before information is no longer regarded as transmission function information, and (ii) whether information about future occurrences, such as a transmission outage planned thirteen months in the future, is transmission function information, and again, where the line is drawn.<sup>252</sup>

#### Commission Determination

131. We clarify for EEI that certain types of information about a company's own generation, load, and generation dispatch are not subject to the recordation requirement in § 358.7(h). Section 358.3(j) defines “transmission function information” as “information relating to transmission functions.” Section 358.3(h) defines “transmission function” as “the planning, directing, organizing, or carrying out of day-to-day transmission operations, including the granting and denying of transmission service requests.” To the extent that information concerning a company's own generation, load, and generation dispatch is not “transmission function information” as defined in § 358.3(j), then this information may be provided to marketing function employees without being subject to the recordation requirement.

132. We grant EEI's clarification request and clarify that the other categories of information identified in § 358.7(h)(2) are not *per se* transmission function information subject to the recordation requirement, but could be if the information falls within the definition of transmission function information in § 358.3. In response to EEI and Western Utilities, we also clarify that information related to unit commitment is not “non-public transmission function information” *per se*. However, should transmission function employees inadvertently provide “non-public transmission function information” to the marketing function employees, as transmission function employees work with marketing function employees to develop the unit commitment and dispatch plan, we remind transmission providers that § 358.7(h) would require recordation of this inadvertent disclosure.

133. In response to Western Utilities' request regarding information subject to the exclusion in § 358.7(h)(2), we clarify that the “and” is intended to mean that there are two types of information subject to the exclusion. The regulatory text in § 358.7(h)(2) is simply a list.

134. We grant EEI's request for more specificity on the content required for

records for purposes of ensuring compliance with the recordation requirement. We agree that names, date, time, duration, and subject matter are sufficient content for purposes of the records. When recording the subject matter, transmission providers should record details that are clear enough to allow the Commission to determine what non-public information was exchanged and why this exchange of information was necessary.

135. We grant EEI's clarification request in part and deny it in part regarding the treatment of information that is not close in time to current day-to-day transmission operations, whether the events are past or future. Given the differences in how various entities operate, we decline to create a general rule regarding the staleness of non-public transmission function information. Individual waivers may be sought from the Commission for those instances in which an entity desires to share non-public transmission function information otherwise prohibited by the Standards of Conduct. However, we clarify that information about a planned transmission outage is always transmission function information no matter how far in the future the planned transmission outage will occur.

136. The Commission clarifies that not all generation dispatch and reliability information is non-public transmission function information. MidAmerican states that unit economics or rail outage may affect the dispatch of generating units, but that this type of information does not fall within the scope of non-public transmission function information. We agree with its statement and so clarify.

#### F. Training Requirements

137. EEI states that if read literally, the training requirements could suggest that all supervisory employees within the company require training. EEI requests clarification as to whether the training requirements apply to all supervisory employees within the company or just those supervisors who are likely to become privy to transmission function information themselves or who supervise the other employees subject to the Standards.<sup>253</sup>

138. MidAmerican believes that the requirements in § 358.8(b)(2) are adequate to ensure that employees with the greatest potential to provide undue preference to marketing function personnel have received information and training on the Standards. MidAmerican argues that § 358.8(b)(1) is unnecessary and inconsistent with

<sup>243</sup> *Id.* at 5.

<sup>244</sup> *Id.* at 6.

<sup>245</sup> *Id.*

<sup>246</sup> Western Utilities at 8.

<sup>247</sup> MidAmerican at 16.

<sup>248</sup> MidAmerican at 16–17.

<sup>249</sup> EEI at 6.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 16.

<sup>252</sup> *Id.*

<sup>253</sup> EEI at 16.

§ 358.8(2).<sup>254</sup> MidAmerican states that by using the term “affiliates” in § 358.8(b)(1), the Commission appears to be requiring transmission providers to somehow provide Standards information to all of their affiliates’ employees, including, potentially, non-energy companies, foreign companies and companies that would not have any understanding of the Commission.<sup>255</sup> MidAmerican also argues that this obligation is inconsistent with § 358.8(b)(2), which limits the distribution of written procedures to transmission provider employees likely to become privy to transmission function information.<sup>256</sup>

139. Western Utilities claims that the Commission’s explanation of how often employees must be trained conflicts with § 358.8(c)(1). In Order No. 717, the Commission stated the following:

Furthermore, it is not necessary for the transmission provider to track annual dates for each employee; if the transmission provider prefers, it may train all its employees, or all its employees in a given category, at a certain time each year. New employees, after their initial training, can be fit within this schedule. However, *the employee should not go longer than a year without participating in training.*<sup>257</sup>

However, § 358.8(c)(1) provides that a transmission provider “must provide annual training.” Western Utilities requests that the Commission clarify that “a year” refers to a calendar year, not 365 days.<sup>258</sup> Western Utilities contends that if training must occur every 365 days, each new employee will need to be on an individual schedule rather than simply fitting into the company’s regular training schedule.

#### Commission Determination

140. The Commission grants clarification regarding which supervisory employees are subject to the training requirements. In Order No. 717, we stated that there is a clear need for officers, directors, and supervisory employees to have an understanding of the Standards since they will “be in a position to interact with both transmission function employees and marketing function employees, or be responsible for responding to any questions or concerns about the Standards from the employees who report to them.”<sup>259</sup> We clarify in response to EEI that the training

requirement applies to supervisory employees who supervise other employees subject to the Standards or who may come in contact with non-public transmission function information.

141. The Commission disagrees with MidAmerican that § 358.8(b)(1) is unnecessary and inconsistent with § 358.8(b)(2) and denies its request to delete § 358.8(b)(1). Section 358.8(b)(1) is a general requirement that a transmission provider have measures in place to ensure that the Independent Functioning Rule and the No Conduit Rule are observed by its employees and those of its affiliates. While the number of employees subject to the Independent Functioning Rule may be smaller, the No Conduit Rule prohibits a transmission provider from using anyone as a conduit. Therefore, a transmission provider must have measures in place to ensure that these requirements are followed. It is up to the transmission provider to design and implement those measures. However, in § 358.8(b)(2) we specifically require that transmission providers distribute written procedures to those employees likely to become privy to transmission function information.

142. We clarify in response to Western Utilities that we intended “a year” to mean a calendar year and not “365 days” in our explanation of how often employees must be trained in Order No. 717.

#### G. Miscellaneous Matters

143. EEI notes that § 358.2(d) uses the term “transmission function customers” and recommends that this undefined term be changed to “transmission customers.”<sup>260</sup>

144. EEI requests clarification that the NAESB requirements that have been rendered obsolete by Order No. 717 may be disregarded.<sup>261</sup> Specifically, EEI refers to Business Practices for OASIS Standards and Communication Protocols (WEQ-002), which provides requirements for posting on OASIS links to information that was required by the pre-Order No. 717 Standards, but is no longer required, such as organizational charts.<sup>262</sup>

145. EPSA requests clarification on whether generators scheduling transmission through an RTO or ISO must adhere to the posting requirements of the Independent Functioning Rule under § 358.1.<sup>263</sup> EPSA asserts that the waiver found in § 358.1(c) of the

Commission’s regulations applies, on its face, only to wholesale transmission providers.<sup>264</sup> EPSA states that while transmission providers may file for a waiver of the Standards of Conduct if they belong to a Commission-approved ISO or RTO, it is not clear whether an affiliated wholesale generator would still be subject to the posting requirements of the Independent Functioning Rule if it is scheduled through an RTO.<sup>265</sup>

146. Southwest Gas contends that the phrase “by a local distribution company” contained within § 358.3(c)(2)(v) does not reflect clearly the fact that the exemption from marketing function includes those LDCs that operate across state lines under NGA section 7(f).<sup>266</sup> Southwest Gas argues that while these companies are natural gas companies under the NGA, they function as LDCs and there is no evidence of affiliate abuse by NGA section 7(f) companies.<sup>267</sup> Southwest Gas requests revision of the regulatory text of § 358.3(c)(2)(v) to include NGA section 7(f) companies.

#### Commission Determination

147. We grant the clarification request by EEI in regards to changing the term “transmission function customers” in § 358.2(d) and change the term to “transmission customers.”

148. We grant the clarification request of EEI regarding compliance with the NAESB Business Practice Standards to note that, as stated in a NOPR issued earlier this year,<sup>268</sup> the Commission will not require public utilities to comply with the NAESB Business Practice Standards incorporated by reference by the Commission that require information to be posted in a manner inconsistent with Order No. 717 until such time as the Commission issues a new standard conforming to the changes in Order No. 717. While the NOPR made this determination for the requirements of WEQ-001-13.1.2, version 1.5, we note that the same is true for all aspects of the NAESB Business Practice Standards that are inconsistent with Order No. 717’s posting requirements. We understand that NAESB is working on making appropriate revisions.

149. We deny EPSA’s request for clarification concerning whether a wholesale generator scheduling transportation transactions with an RTO is obligated by the posting requirements

<sup>254</sup> MidAmerican at 13–14.

<sup>255</sup> *Id.* at 13.

<sup>256</sup> *Id.*

<sup>257</sup> Order No. 717, FERC Stats. & Regs. ¶ 31,280 at P 309 (emphasis added).

<sup>258</sup> Western Utilities at 14.

<sup>259</sup> Order No. 717, FERC Stats. & Regs. ¶ 31,280 at P 307.

<sup>260</sup> EEI at 18.

<sup>261</sup> *Id.* at 17.

<sup>262</sup> *Id.*

<sup>263</sup> EPSA at 1–2.

<sup>264</sup> *Id.* at 2.

<sup>265</sup> *Id.*

<sup>266</sup> Southwest Gas at 12.

<sup>267</sup> *Id.*

<sup>268</sup> *Standards for Business Practices and Communication Protocols for Public Utilities*, FERC Stats. & Regs. ¶ 32,640, at P 16 (2009).

of the Independent Functioning Rule. We note that the Independent Functioning Rule in § 358.5 no longer contains posting requirements. For this reason, we find that EPISA's request for clarification has been rendered moot.

150. The Commission grants the clarification request by Southwest Gas to include NGA section 7(f) companies within the LDC exemption, and will revise the regulatory text of § 358.3(c)(2)(v) to read, "On-system sales by an intrastate natural gas pipeline, by a Hinshaw interstate pipeline exempt from the Natural Gas Act, by a local distribution company, or by a local distribution company operating under section 7(f) of the Natural Gas Act."<sup>269</sup> While section 7(f) companies are natural gas companies under the NGA, they function as LDCs and should be treated the same as LDCs for purposes of the LDC exemption under the Standards of Conduct.

**IV. Document Availability**

151. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (<http://www.ferc.gov>) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5 p.m. Eastern time) at 888 First Street, NE., Room 2A, Washington, DC 20426.

152. From FERC's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

153. User assistance is available for eLibrary and the FERC's Web site during normal business hours from FERC Online Support at 202-502-6652 (toll free at 1-866-208-3676) or e-mail at [ferconlinesupport@ferc.gov](mailto:ferconlinesupport@ferc.gov), or the Public Reference Room at (202) 502-8371, TTY (202) 502-8659. E-mail the Public Reference Room at [public.referenceroom@ferc.gov](mailto:public.referenceroom@ferc.gov).

**V. Effective Date**

154. Changes to Order No. 717 adopted in this order on rehearing and clarification are effective November 23, 2009.

<sup>269</sup> The change to the regulatory language moving "on-system sale" to the beginning of section 358.3(c)(2)(v) is discussed *supra*.

**List of Subjects in 18 CFR Part 358**

Electric power plants, Electric utilities, Natural gas, Reporting and recordkeeping requirements.

By the Commission.  
**Nathaniel J. Davis, Sr.**,  
*Deputy Secretary.*

■ In consideration of the foregoing, the Commission amends Part 358, Chapter I, Title 18, *Code of Federal Regulations*, as follows.

**PART 358—STANDARDS OF CONDUCT**

■ 1. The authority citation continues to read as follows:

**Authority:** 15 U.S.C. 717-717w, 3301-3432; 16 U.S.C. 791-825r, 2601-2645; 31 U.S.C. 9701; 42 U.S.C. 7101-7352.

■ 2. Section 358.2 is revised to read as follows:

**§ 358.2 General principles.**

(a) As more fully described and implemented in subsequent sections of this part, a transmission provider must treat all transmission customers, affiliated and non-affiliated, on a not unduly discriminatory basis, and must not make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage with respect to any transportation of natural gas or transmission of electric energy in interstate commerce, or with respect to the wholesale sale of natural gas or of electric energy in interstate commerce.

(b) As more fully described and implemented in subsequent sections of this part, a transmission provider's transmission function employees must function independently from its marketing function employees, except as permitted in this part or otherwise permitted by Commission order.

(c) As more fully described and implemented in subsequent sections of this part, a transmission provider and its employees, contractors, consultants and agents are prohibited from disclosing, or using a conduit to disclose, non-public transmission function information to the transmission provider's marketing function employees.

(d) As more fully described and implemented in subsequent sections of this part, a transmission provider must provide equal access to non-public transmission function information disclosed to marketing function employees to all its transmission customers, affiliated and non-affiliated, except as permitted in this part or otherwise permitted by Commission order.

■ 3. In § 358.3, paragraph (c)(2)(v) is revised to read as follows:

**§ 358.3 Definitions.**

\* \* \* \* \*

(c) \* \* \*

(2) \* \* \*

(v) On-system sales by an intrastate natural gas pipeline, by a Hinshaw interstate pipeline exempt from the Natural Gas Act, by a local distribution company, or by a local distribution company operating under section 7(f) of the Natural Gas Act.

\* \* \* \* \*

[FR Doc. E9-25252 Filed 10-21-09; 8:45 am]

BILLING CODE 6717-01-P

**SOCIAL SECURITY ADMINISTRATION**

**20 CFR Part 404**

[Docket No. SSA-2007-0066]

RIN 0960-AG57

**Revised Medical Criteria for Evaluating Malignant Neoplastic Diseases**

**AGENCY:** Social Security Administration.

**ACTION:** Final rule; correction.

**SUMMARY:** This document corrects the preamble to a final rule published in the **Federal Register** on October 6, 2009, regarding a revision of a medical listing for malignant neoplastic diseases. In that preamble, we cited an incorrect date of publication for the Notice of Proposed Rule Making (NPRM) that had preceded the final rule.

**DATES:** Effective November 5, 2009.

**FOR FURTHER INFORMATION CONTACT:** Mark Kuhn, 410-965-1020.

**SUPPLEMENTARY INFORMATION:**

**Correction**

In the preamble to the final rule published October 6, 2009 (74 FR 51229) we stated the NPRM (73 FR 22871) was published on April 24, 2008. The NPRM was actually published on April 28, 2008.

In FR Doc. E9-23896 appearing on page 51229 in the **Federal Register** of Tuesday, October 6, 2009, make the following correction in the **SUPPLEMENTARY INFORMATION** section. On page 51229, in the third column, in the fifth line of the first paragraph under Background, change "April 24, 2008" to "April 28, 2008."

Dated: October 16, 2009.

**Dean Landis,**

*Associate Commissioner for Regulations, Social Security Administration.*

[FR Doc. E9-25424 Filed 10-21-09; 8:45 am]

BILLING CODE 4191-02-P