May 14, 2008

Ms. Kimberly T. Bose
Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20008

Re: Word versus PDF version of Appendix to INGAA Comments in Docket No. RM07-1, Standards of Conduct for Transmission Providers

Dear Secretary Bose:

It has come to our attention that the appendix to the comments filed by the Interstate Natural Gas Association of America (INGAA) in this Docket cannot be fully appreciated by the reader in the PDF format in which it was filed, and accordingly INGAA is submitting herewith a Word version of the appendix, along with the PDF version of the comments.

INGAA prepared its comments along with the appendix in Word format. The appendix in particular was designed to show the reader, using the Word program's redline/strikeout feature, the difference between the regulatory text proposed by the Commission, and the changes to that text that INGAA is proposing in its comments.

In preparing the comments for filing, we attached the appendix to the comments, and then converted the entire document to the PDF format. Unfortunately, the redline/strikeout feature from the Word program was lost in the "PDF'd" version of the appendix. As a result, the appendix does not now show the difference between the Commission's and INGAA's proposed regulatory text, as INGAA intended.

To facilitate the comparison, and make the substance of the changes advocated by INGAA's comments more readily understandable, INGAA requests that the Commission post on its e-Library in this docket, along with the PDF version of its comments that has already been filed, this explanatory letter along with a separate Word version of the appendix to the comments. The versions of the comments and appendix attached are identical to INGAA's original filing, except that the appendix is in Word and is a separate document .

If you have any questions, please contact me.

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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Standards of Conduct for Transmission Providers	))	Docket No. RM07-1-000

COMMENTS OF
THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA

Pursuant to the Federal Energy Regulatory Commission's Notice of Proposed Rulemaking ("NOPR") issued on March 21, 2008,[1] the Interstate Natural Gas Association of America ("INGAA ") submits the following comments on the Commission's proposed Standards of Conduct rule ("Standards") governing the relationship between natural gas transmission providers (i.e., interstate pipelines) and their affiliates engaged in Marketing Functions. In the NOPR, the Commission proposes new Standards to replace those proposed by the Commission in January 2007 in response to the decision by the United States Court of Appeals for the District of Columbia Circuit in *National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831 (D.C. Cir. 2006) ("*National Fuel*"). In *National Fuel*, the Court vacated the Standards in effect under Order No. 2004, *et seq.*,[2] as those standards applied to natural gas pipelines, and remanded the orders to the Commission. The Court found that the Commission had not justified its extension of

[1] *Standards of Conduct for Transmission Providers*, 122 FERC ¶ 61,263 (2008).

[2] *Standards of Conduct for Transmission Providers,* Order No. 2004, FERC Stats. & Regs. [Regulations Preambles 2001-2005] ¶ 31,155 (2003), *order on reh'g.,* Order No. 2004-A, *id*. at ¶ 31,161 (2004); *order on reh'g*, Order No. 2004-B, *id*. at ¶ 31,166 (2004); *order on reh'g*, Order No. 2004-C, *id*. at ¶ 31,172, *order on reh'g*, Order No. 2004-D, 110 FERC ¶ 61,320 (2005), *vacated and remanded as to interstate pipelines, National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831 (D.C. Cir. 2006).

the Standards, previously found at 18 C.F.R. Part 161, to the relationship between natural gas transmission providers and their non-marketing affiliates.

On January 9, 2007, the Commission issued an Interim Rule intended to repromulgate Standards in a manner consistent with the mandate of *National Fuel* on an interim basis, pending issuance of a final rule to replace the Order No. 2004 Standards.[3] On January 18, 2007, the Commission issued a proposed rule, and sought comments on the Standards contemplated by that proposal.[4]

After analyzing the comments submitted in response to the January 2007 proposed rule, the Commission determined that reforms more comprehensive than those contemplated by the January proposal were necessary. Accordingly, rather than adopting a final rule based on the January 2007 proposed rule, the NOPR abandons the "incremental" reforms outlined in January in favor of "broader reforms."[5] The broader reforms are intended to eliminate the complexities of the Order No. 2004 Standards, which the Commission found to have been unworkable. The Commission determined that the Order No. 2004 Standards have frustrated industry attempts at compliance because the industry's focus was diverted from the need to properly separate the employees that market commodities from those that perform Transmission Functions, and sacrifices legitimate vertical integration efficiencies to the ultimate detriment of consumers. To combat these deficiencies, the Commission proposes to streamline and

[3] *Standards of Conduct for Transmission Providers*, Order No. 690, FERC Stats. & Regs. ¶ 31,237 (2007).

[4] *Standards of Conduct for Transmission Providers*, Notice of Proposed Rulemaking, 72 Fed. Reg. 3,958 (Jan. 29, 2007), FERC Stats. & Regs. ¶ 32,611 (2007) ("January 2007 proposed rule").

[5] *See* NOPR at P 12.

clarify the Standards by: (1) focusing on "marketing" activities rather than the more expansive concept of "Energy Affiliate" activities; and (2) adopting a "functional" or "employee" separation approach (focusing on the functions performed by individual employees) rather than Order No. 2004's "corporate" separation approach (focusing on the primary business function of an entire division or corporation). The Commission proposes three core Standards elements: the independent functioning rule, the no-conduit rule and the transparency rule.

The Commission's proposal is a thoughtful and judicious approach to setting workable standards for the interstate natural gas pipeline industry. INGAA appreciates the Commission's determination to change course and reject a set of regulations that were becoming increasingly more difficult to understand and follow. INGAA also recognizes the Commission's challenge in trying to establish a set of regulations that will apply to both the gas and electric industries. INGAA's comments support the Commission's efforts, suggesting modifications or clarifications that will result in a set of standards that are as clear as possible and that address those real areas of potential abuse that the Commission and Court have identified through credible evidence, while ensuring that the benefits of lawful business activity integration will be preserved.

SUMMARY

As discussed in detail below, INGAA requests that the Commission issue a final rule in this docket consistent with the following comments:

1. ***Per Se* Rules (page 6):** The Commission should explain what it intends by referring to the Standards as *per se* rules and identify which provisions of the Standards it considers *per se* rules. INGAA is concerned that although the Standards proposed are in many cases clearer than in the past,

the lines drawn are not sufficiently clear in many cases to identify violations on a *per se* basis. In those cases the Commission should apply a "rule of reason" approach.

2. **Applicability (page 9):**

(a) Consistent with its express intent to restrict application of the Standards "to pipelines that conduct transportation transactions with their marketing affiliates" (NOPR at P 58), and with the *National Fuel* decision, the Commission should make explicit that the Standards do not apply to Transmission Providers and their affiliates with Marketing Functions that do not "hold or control capacity" on their affiliated pipeline.

(b) The Commission should retain existing definitions of "Affiliate" and "Control" for interstate natural gas pipelines.

3. **Definition of Marketing Function (page 14):**

(a) The Commission should define Marketing Functions separately for natural gas and electric transmission providers.

(b) For natural gas Transmission Providers, the Marketing Function should be sales of natural gas for resale in interstate commerce, and should not include certain sales that, because of their nature or the traditional role of the seller, should not be considered Marketing Functions.

4. **Definition of Marketing Function and Transmission Function Employees (page 20)**

(a) When Do Supervisory Employees become Transmission Function Employees or Marketing Function Employees?

(i) The Commission should apply a rule of reason analysis to determine whether the purpose of a supervisory employee's conduct was to evade the Standards, and find a violation only where there is intent to thwart the Standards.

(ii) The Commission should apply a rule of reason analysis to determine whether a supervisory employee, up to and including a senior officer or director, is a Transmission Function Employee or a Marketing Function Employee; senior officers and directors must be permitted to make decisions on matters that are of a sufficient magnitude so as to affect the corporate enterprise, even if the decision relates to the Transmission or Marketing Function.

(iii) Whether officers and other supervisory employees at the business unit level should be considered Marketing or Transmission Function Employees depends upon the extent to which they participate to a substantial extent in day-to-day Marketing and Transmission Functions.

(iv) The transfer or receipt of non-public transportation information by supervisory employees, including senior officers or directors, should be a violation of the Standards only upon a showing of an intent to violate the Standards.

(b) The Commission should clarify that risk management employees are not actively, regularly and personally engaged in day-to-day Transmission or Marketing Functions when they perform risk management activities.

(c) Field and maintenance employees who do not take part in advanced planning for facility closures or are involved in shutting down facilities based on economic reasons, and clerical employees, should not be deemed Transmission Function Employees.

5. **The No Conduit Rule (page 41):** The no conduit rule should not, and could not lawfully, prohibit Marketing Function Employees from receiving non-public transmission information from a source other than the transmission provider.

6. **The Mandatory Training Requirement (page 46):** Field and maintenance employees who are not Transmission Function Employees should not be subject to training requirements. Clerical employees should not be defined as Transmission Function Employees and, therefore, should not be subject to training requirements. In addition, mandatory training should encompass only those employees and contractors that have system access to commercially significant Transmission Function Information.

7. **Recording and Posting Requirements (page 50):**

(a) The Commission should require only that tariff waivers be archived and posted, and not require pipelines to both log and post every instance in which they exercise discretion afforded in the pipeline's tariff.

(b) The Commission should clarify that the requirements to log and post waivers does not apply to information contained in other required postings.

(c) If the Commission does not abandon the proposal to post exercises of discretion, pipelines should not be required to log and post exercises of discretion affecting operations.

8. **Posting Requirements (page 54):**

(a) The Commission should clarify that the posting requirements proposed in the NOPR require only the posting of information related to those affiliates with Marketing Functions that hold or control capacity on their affiliated pipeline.

(b) Transmission providers should not be required to record information received from Marketing Function Employees.

9. **Compliance Timing (page 58)**: The Commission should conform the rules for newly constructed pipelines with the rules for existing pipelines. Proposed § 358.8(a) is inconsistent with the proposed scope of the Standards and would result in different treatment for newly-constructed and existing pipelines.

10. **Order No. 2004 Waivers (page 61):** Waivers and partial waivers granted under Order No. 2004 should remain in effect.

I. The Commission Should Explain What It Means When It Describes The Standards As "*Per Se*" Rules

The NOPR characterizes its approach to structuring the Standards as establishing "*per se* rules that address the greatest prospect for undue preference."[6] The NOPR explains that whereas failure to comply with a *per se* rule of the Standards "automatically establishes a sanctionable violation," an alleged violation of the Federal Power Act ("FPA") or the Natural Gas Act ("NGA") "would require an investigation into both the facts and the surrounding circumstances to determine if, in fact, an undue discrimination occurred."[7] The Commission asserts that the combination of public disclosure and contemporaneous recording required by the Standards will provide the "information needed to identify violations of the *per se* rules of the Standards, for which no further investigation would be needed."[8] INGAA is concerned that although the Standards

[6] NOPR at P 22.

[7] *Id*. at note.22.

[8] *Id*. at P 55.

proposed are in many cases clearer than in the past, the lines drawn are not sufficiently clear in many cases to identify violations on a *per se* basis.

The use of the term "*per se*" inadvertently has created some confusion and caused apprehension in the industry. Confusion is created by labeling the Standards *per se*, while at the same time including as part of the Standards the FPA's and NGA's general prohibitions regarding undue discrimination and preference.[9] Apprehension arises because "*per se*" is a term of art in other areas of law. For example, in the area of anti-trust law, *per se* is used typically to describe rules that do not require a showing of harm to the marketplace to establish a violation because it is assumed that a violation of such rules causes harm.[10] However, even in the anti-trust context, the modern trend favors a rule of reason approach rather than the strict *per se* approach that fails to provide an adequate opportunity for an entity to demonstrate the legitimate purposes of, or the lack of any harm caused by, the activity in question.[11] Furthermore, in the anti-trust context, the *per se* rule is an exception to the standard rule of reason approach, and use of the *per se* rule cannot be justified simply on the basis of administrative convenience, but is instead limited to instances where the conduct at issue is manifestly anticompetitive.[12]

Thus, there is uncertainty in the industry as to whether the Commission is importing this anti-trust *per se* concept, or some other definition of *per se*, into the

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[9] *See, e.g.*, proposed 18 C.F.R. § 358.2(a), proposed 18 C.F.R. § 358.4(a)(2) and (3).

[10] *See, e.g., White Motor Co. v. U.S.*, 372 U.S. 253, 262 (1963) (Per se violations of anti-trust laws are those "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to precise harm they have caused or the business excuse for their use.").

[11] *See Leegin Creative Leather Products v. Psks, Inc.*, 127 S.Ct. 2705, 2718 (2007).

[12] *Id.*

Standards. By use of the term "*per se*," INGAA understands the Commission to be saying that certain of the Standards lay down clear requirements (e.g., the requirements to post certain information within certain prescribed time periods, or the annual training requirement) or clear prohibitions and that failure to follow these clear rules is an automatic violation of the Standards. (With respect to any such violation, the Commission still would apply its enforcement policy statement to determine what the appropriate remedy, if any, should be, considering, *inter alia*, whether the market suffered harm and mitigating circumstances.) Most other Standards, however, are not amenable to such a *per se* approach. For example, if the employees under consideration in an alleged violation of the independent functioning rule under proposed § 358.5 were supervisory employees, such as senior officers or directors, the Commission would need to perform a rule of reason analysis to determine whether the employees in that situation were in fact Transmission Function or Marketing Function Employees under proposed Section 358.3(d) and (i). Similarly, whether a transmission provider has violated a non-discrimination requirement under section 358.4(a) by treating customers in an "unduly discriminatory manner" or provided an "undue preference" would be subject to a rule of reason analysis, permitting a showing that the action in question should not be deemed preferential. Such application of the rule of reason through inquiry or investigation would be a necessary first step before finding a violation of the Standards.

In order to allay confusion and apprehension as to the possible meaning and implication of the Commission's use of the term "*per se* rules," INGAA respectfully requests that the Commission clarify that its intention is in conformance with these comments by INGAA.

II. The Commission Should Insure That The Standards' Coverage Is Appropriately Restricted In Terms Of Conducting Transactions On An Affiliated Pipeline And In Terms Of "Affiliation" And "Control"

A. The Standards Should Not Apply To Pipelines That Do Not Conduct Transmission Transactions with Their Marketing Affiliates.

The Commission observes that in § 358.1(a) it has proposed to retain the restriction on applicability to pipelines that conduct transportation transactions with their marketing affiliates.[13] The Commission requests comment, however, "as to whether this section and the following § 358.1(b), dealing with electric transmission providers, should be made parallel by deleting this provision (or in some other way)."[14] *Id.* INGAA understands the Commission to be asking, in effect, whether it can dispense with the restriction on applicability under § 358.1(a) for pipelines in the interest of dealing with pipelines and electric transmission providers with the same language or in the same section. In INGAA's view, an explicit restriction of the application of the Standards only to pipelines that conduct transmission transactions with their marketing affiliate, and only to the extent of the relationship between the pipeline and that marketing affiliate, is an integral part of the Standards that should be retained in the regulatory text.

In *National Fuel*, the Court held that the Commission must justify an extension of the rule to cover affiliates that do not "hold or control capacity" on their affiliated pipeline because of the stronger theoretical threat of abuse from those that do hold or control such capacity.[15] *Cf. Tenneco,* 969 F.2d at 1199 (while Commission reasonably

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[13] NOPR at P 58.

[14] *Id*. (emphasis added).

[15] *National Fuel* at p. 845.

concluded that pipelines "should not be able to prefer their affiliates with information the pipelines obtain from their preferred market position [,]" that does not support an extension of rules to "information pipelines obtained not as a result of their preferred market position."); *id.* at 1201 (advantages a pipeline gives its affiliate are improper only to the extent that they flow from the pipeline's anti-competitive market power. Otherwise vertical integration produces permissible efficiencies….").

The Commission does not offer any justification for extending the rule by removing the restriction. The Commission appears to suggest, however, that the explicit restriction is not necessary because, even if pipelines may "conceivably" have affiliates with Marketing Function Employees with which it does not conduct transportation transactions, "pipelines need no longer be concerned with the inability to share information with the *officers* of such affiliates with Marketing Function Employees under our proposed reform of the independent functioning rule").[16] This understates the concern. First, pipelines do indeed have affiliates with Marketing Function Employees (under the definition proposed by the Commission) with which they do not conduct transportation transactions, so that the restriction has more than hypothetical utility. The suggestion that pipelines should not be concerned by application of the rules as proposed because the independent functioning requirement would not apply to officers and other supervisory personnel in certain circumstances is also not realistic. As discussed below, there remain substantial issues with respect to directors and other supervisory employees in terms of determining whether they will be deemed Transmission or Marketing Function Employees. More fundamentally, however, economies of vertical integration

[16] NOPR at 59 (emphasis added).

will be lost if the employees that regularly perform Marketing and Transmission Functions must function independently in circumstances where there is no demonstrated potential for abuse, i.e., where the affiliate with Marketing Function Employees does not conduct transmission transactions with the affiliated pipeline.

Furthermore, INGAA urges the Commission to refine its regulations to more accurately reflect the *National Fuel* court decision and the holding of cases under the Order No. 497 Standards of Conduct. Under Order No. 497, the applicability of the rule to a pipeline with more than one marketing affiliate was determined separately for each affiliate. If a marketer did not conduct transportation transactions with its affiliated pipeline, that relationship was not subject to the rule, even if another marketing affiliate of the pipeline conducted such transactions. For entities involved in both exempt and non-exempt sales (e.g., LDCs engaged in off-system sales), the Standards of Conduct were only applicable to the pipeline-affiliate relationship if the pipeline transported gas in connection with the affiliate's non-exempt sales.

In *National Fuel*, the Court required that the Commission provide persuasive record justification for application of the Standards to affiliates that do not "hold or control capacity" on their affiliated pipeline because of the stronger theoretical threat of abuse from those affiliates that do hold or control capacity. The record in this proceeding does not contain the support required by the *National Fuel* court decision to apply the Standards to a situation where the gas sold in a Marketing Function sale is not shipped by the seller using capacity it holds or controls on an affiliated pipeline. In view of the Order No. 497 case law discussed above, and the further explication of the bounds of lawfully applied Standards rendered by the National Fuel court, INGAA suggests that the Commission revise proposed section 358.1(a) in the following manner:

> (a) This part applies to 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 this chapter to the extent that an Affiliate that engages in Marketing Functions, as defined in § 358.3, holds or controls capacity on such affiliated interstate natural gas pipeline**.**

In addition, INGAA requests that the Commission incorporate this exclusion into the definition of "Marketing Function" as set forth in INGAA's proposed revisions to that definition.

> (c) "Marketing Function" with respect to an interstate natural gas pipeline means the sale for resale in interstate commerce of natural gas to any person or entity, but does not include:
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> * * *
>
> (5) Sales of natural gas by a seller that does not ship such gas using capacity held or controlled by the seller on the Affiliated Transmission Provider;

B. The Commission Should Retain Existing Definitions Of "Affiliate" And "Control" For Interstate Natural Gas Pipelines.

The NOPR proposes a new definition of "affiliate" to replace the Standards of Conduct's longstanding definitions of "affiliate" and "control," which date from Order No. 497. The NOPR does not explain the proposed regulatory text and provides no reason for adopting this proposed definition, except to say that it conforms to the new definition recently adopted in Order No. 707 and codified at 18 C.F.R. § 35.43(a)(1).[17]

[17] 73 Fed. Reg. at 16,233 (P 35 & n.54) *citing* Cross-Subsidization Restrictions on Affiliate Transactions, Order No. 707, 73 Fed. Reg. 11,013 (Feb. 29, 2008).

As an initial matter, Order No. 707 is addressed only to electric Transmission Providers, and not natural gas transmission providers. While there may be reasons to make conforming changes to the Standards as they apply to the electric Transmission Providers, and INGAA expresses no opinion here on whether such reasons exist, there is no reason to apply these definitions to natural gas Transmission Providers. The well established regulatory language has worked well for the gas industry for years. The Commission should retain the current definitions of “affiliate” and “control” and continue to apply them to interstate natural gas pipelines.

In addition, INGAA requests that the Commission confirm the application of the Standards to interstate pipelines that are jointly owned by two or more otherwise non-affiliated companies. Given the high cost of developing new pipeline infrastructure, a number of pipelines are owned jointly by non-affiliated companies that have formed joint ventures to finance and construct new projects. Some partners in the joint venture may have other pipeline affiliates (aside from the jointly-owned pipeline) and some partners may have affiliates engaged in gas marketing activities. For example, Pipeline A is owned jointly by Company B and Company C, who are non-affiliates. Company B also has wholly-owned pipeline subsidiaries and Company C has wholly-owned affiliates engaged in Marketing Functions. Company C’s affiliates may be Marketing Affiliates of Pipeline A if they hold capacity on Pipeline A. It is INGAA’s understanding, however, that Company B’s other pipeline affiliates and Company C’s Marketing Affiliates, would not be considered to be affiliates of each other, because there is no common ownership or control. INGAA requests that the Commission confirm that this understanding is correct.

Such a confirmation would eliminate an existing market uncertainty that has hindered infrastructure development.

III. Definition of Marketing Function

A. Marketing Should Be Defined Separately for Electric and Natural Gas Transmission Providers.

The term "Marketing Function," as applied to interstate natural gas pipelines should be limited to sales for resale in interstate commerce of natural gas that is shipped on capacity held or controlled by the seller on the affiliated pipeline. While that appears to be the Commission's intent, the proposed definition of the term could be read more expansively. The Commission has not provided a basis for expanding the Standards to cover the relationship between a pipeline and its electric marketing employees and affiliates, or otherwise to expand the rules to cover employees not making sales of natural gas. Without proper justification, such an expansion, including an expansion to capture the purchase of natural gas, or employees engaged in the sale of pipeline capacity, would be directly contrary to the court's decision in *National Fuel*. To avoid confusion, the Commission should provide separate definitions of the term "Marketing Function" for natural gas pipelines and electric transmission providers. Providing separate definitions, where necessary to address differences in the regulated industries, would not undermine the Commission's approach of promulgating a single set of Standards applicable to electric and natural gas transmission providers, but instead would provide increased clarity and inform transmission providers of the rules applicable to their particular industry.

B. Certain Sales, Because Of Their Nature, Or The Traditional Role Of The Seller, Should Not Be Considered A Marketing Function Under The Standards.

The Commission proposes to carry forward certain exclusions from the Standards. The prior Standards excluded, from the definition of marketing, sales from the seller's own production, gathering or processing facilities. While the NOPR would seek to retain this exclusion, the Commission inadvertently appears to have limited the application of the exclusion in the proposed rule. The NOPR proposes to exclude from the definition of marketing sales from the "transmission provider's" gathering or processing facilities and from the "transmission provider's" production. Presumably, as was the case under the prior Standards, the Commission intends that the exclusion extend to sales from gathering, processing and production facilities owned by affiliates of the transmission provider. As the Commission noted in Order No. 2004-B, "when gatherers and processors engage only in gathering and processing, they provide services to wholesale market participants but do not compete with them."[18] This logic still applies, and any revision to the Standards that seeks to define producers, gatherers and processors as marketers would be inconsistent with the court's decision in *National Fuel.*

In consideration of the operational realities associated with the operation of production, gathering and processing facilities, the Commission also should exclude sales by the owners or operators of these facilities when these owners or operators must purchase gas to meet contractual commitments.[19] Owners or operators of production,

[18] Order No. 2004-B at P 28.

[19] Similarly, FERC should treat LNG terminals like it treats producers, processors and gatherers. LNG terminal owners or operators may make sales of natural gas to operate their LNG receipt terminals. These sales should not be deemed Marketing Functions and should be provided as an exemption from Marketing Functions under § 358.3.

gathering and processing facilities are often required to provide a consistent level of output. Gas available from production, gathering and processing facilities may be insufficient to meet these contractual commitments, and the owners or operators of these facilities must then purchase gas to make up shortfalls in the output of their facilities. The sales of this replacement gas serve the same purposes as sales of gas from the production, gathering or processing facilities of the seller, and provide the same services to wholesale market participants. These types of sales are a historical activity traditionally undertaken by these sellers in their roles as producers, gatherers and processors. In addition, gatherers and processors are sometimes required to replace the "shrinkage" or "processing volumetric reduction" ("PVR") in the gas due to processing. These sales are similar to sales made to stay in balance under operational balancing agreements or tariff requirements. As such, the Commission should exclude these sales from the definition of Marketing Function.

In addition, certain activities related to sales by LDCs, intrastate pipelines and other shippers necessary to stay in balance that were excluded under Order No. 2004 now are captured inadvertently by the NOPR's regulatory text. This exclusion was removed from the proposed regulations with the deletion of the concept of Energy Affiliates. However, the Commission has not provided a rational basis to bring such sales within the definition of Marketing Function, and the reasons for excluding such sales, as set forth in Order No. 2004, *et seq.*, are still valid.[20] These categories of sales do not present an opportunity for affiliate abuse, as such sales are operational in nature, and typically are limited in amount and in duration. Such an unexplained expansion of the Standard's

[20] Order No. 2004-A at P 61.

coverage is inconsistent with the letter and spirit of *National Fuel*, and with the Commission's intent as expressed in the Interim Rule. The Commission should restore the exclusion related to sales by LDCs, intrastate pipelines and other shippers necessary to stay in balance.

To address these and other issues on a permanent basis, INGAA proposes that the Commission provide separate definitions of "Marketing Function" for the natural gas and electric industries, and modify the definition of "Marketing Function" as applied to natural gas transmission to read as follows:[21]

> (c) "Marketing Functions" with respect to an interstate natural gas pipeline means the sale for resale in interstate commerce of natural gas to any person or entity, but does not include:
>
> (1) Sales of natural gas to facilitate the operation of interstate natural gas pipeline transmission facilities;
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> (2) Sales necessary to remain in balance under tariff or operational agreements or other such requirements;
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> (3) Sales of natural gas solely from natural gas producing, gathering or processing facilities, owned or operated by the seller, or sales of gas by owners or operators of natural gas producing, gathering or processing facilities necessary to meet shortfalls in the output of such facilities, regardless of the source of such gas;
>
> (4) Sales of natural gas by a Hinshaw pipeline, an intrastate natural gas pipeline or a local distribution company that are either (i) on-system sales or (ii) off-system sales to the limited extent necessary to support its on-system sales business;

[21] This proposed regulatory text does not reveal changes from the text proposed by the Commission in the NOPR. The Appendix show these and other changes proposed by INGAA in "redline."

> (5) Sales of natural gas by a seller that does not ship such gas using capacity held or controlled by the seller on an Affiliated Transmission Provider; and
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> (6) Sales of natural gas by an LNG receipt terminal for operational purposes.[22]

This proposed regulatory text further clarifies the Standards in three important areas. First, under this proposal a producer remains exempt if it sells gas from facilities that it owns or operates. Typically, producers do not own all of the gas they produce. Instead, others hold royalty or working interests in the gas that is produced by facilities the producer operates.[23] Similar activities are conducted by gatherers and processors in their traditional roles. Accordingly, this clarification ensures that sales of gas from the facilities of these entities are excluded from the concept of Marketing Function under the Standards.

Second, sales by a producer, gatherer, processor, Hinshaw pipeline, intrastate pipeline or local distribution company remain excluded from the definition of Marketing Function if those sales are for the purpose of remaining in balance under applicable "tariff" requirements, operational balancing agreements, or other such requirements. This language reflects that many entities rely on agreements, and not on a pipeline's tariff, to address balancing requirements.

Third, the Commission should take this opportunity to fully delineate the scope of its treatment of LDCs, and intrastate and Hinshaw pipelines under its revised Standards.

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[22] Most of the proposed modifications to the definition of "marketing function" are discussed in this section of the Comments. Modifications not specifically addressed in this section are addressed elsewhere in the Comments.

[23] *See* Order No. 497-A, ¶ 30,868 at 31,591 n.19 (exemption 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).

The benefits of vertical integration flow directly to the ultimate consumers that the Commission is established to protect when state-regulated entities act in permissible and lawful concert with their affiliated interstate pipelines. In order to serve their retail on-system customers, an LDC and many intrastate pipelines must buy natural gas in the commodity markets, and must secure transportation services for the delivery of that natural gas. LDCs and such intrastate pipelines must make at least some off-system sales. This is because these entities must buy enough gas to meet their predicted peak load obligations. In circumstances where requirements are lower than expected, prudent and effective management of the entity's local retail business calls for the sale of unneeded natural gas to mitigate commodity expenses, which otherwise would be passed through to on-system customers. In fact, in some situations, the LDC or intrastate pipeline has no alternative but to sell surplus commodity that cannot be stored.

These activities, which are a predictable and integral aspect of an LDC or an intrastate pipeline's services to its on-system customers, should not be a Marketing Function for purposes of these Standards. There is no evidence in the record that off-system sales of natural gas by an LDC or intrastate pipeline, if made for the purpose of managing effectively the assets acquired to serve on-system customers, is the type of activity that has been abused. Going back to the *Tenneco* case, the fundamental concern was the interaction between interstate pipelines and marketing affiliates.[24] *National Fuel* found insufficient evidence for an extension of the Standards to non-marketing affiliates. The Commission should be careful not to continue an impermissible extension of the

[24] *See Tenneco Gas v. FERC,* 969 F.2d 1187 (1992).

Standards to non-marketing affiliates by sweeping activity that is an historical part of the LDC and intrastate pipeline business into the definition of Marketing Functions.

The Commission has ample ability to distinguish between off-system sales ancillary to the LDC's or intrastate pipeline's traditional business and generic off-system marketing on a case-by-case basis. The Commission can examine factors such as: (1) whether the LDC or intrastate pipeline has purchased more natural gas than is needed to meet its reasonably predicted on-system natural gas requirements; and (2) whether the LDC or intrastate pipeline has secured the transportation capacity needed to transport the natural gas from the point of purchase to the state regulated retail load that it serves. Unless such factors show that an LDC, intrastate or Hinshaw pipeline purposefully is acquiring natural gas supplies that it knows are not required to meet its on-system needs, it would be presumed to be buying and selling gas to support its on-system sales. This approach is necessary to balance lawfully the need to disturb the benefits of integration to the least extent necessary to ensure effective enforcement.

IV. Definition of Marketing Function Employee and Transmission Function Employee

A. A Critical Need for Guidance – When Do Supervisory Employees Become Transmission Function Employees Or Marketing Function Employees?

The proposed Standards concentrate on the job function of individual employees and limit the activities of Transmission Function Employees and Marketing Function Employees. The Standards require that Transmission Function Employees and Marketing Function Employees function separately and limit the information that Transmission Function Employees may provide to Marketing Function Employees.

Accordingly, a critical determination that must be made in achieving good faith compliance with the Standards is identifying which employees are Transmission Function Employees and which are Marketing Function Employees. And the most difficult of these critical determinations relates to the status of supervisory employees, from the supervisory level up to senior officers and directors.

1. The Commission's Determination That A Marketing Function Or Transmission Function Employee Must Be "Actively and Personally" Involved In Transmission Or Marketing Functions Provides A Framework For Developing A Workable Rule Of Reason Approach That Should Find Broad Support.

In its comments on the January 2007 proposed rule, INGAA strongly advocated that the Commission apply a rule of reason to the determination of the status of supervisory employees. Those comments focused on senior officers and directors and emphasized the obligations that supervisory employees at this level have to the corporation as a whole. Only a rule of reason approach to this subject, relying on the underlying facts in each situation, can accomplish the goal of balancing appropriately the dual purposes of promoting vertical integration benefits and prohibiting undue discrimination and preference. The NOPR responds to this challenge by defining Transmission Function Employees and Marketing Function Employees as those employees "actively and personally" involved in those respective functions. This is a rule of reason approach, which INGAA supports and believes the industry should embrace. INGAA proposes the following revisions to the proposed regulatory text to ensure that senior officers and directors and other supervisory employees, as well as risk management personnel, have all necessary flexibility to carry out their responsibilities fully, including fiduciary obligations relating to corporate governance, and reporting and other obligations under Sarbanes-Oxley:

> Transmission Function Employee means an employee, contractor, consultant or agent of a Transmission Provider who actively, regularly and personally engages in day-to-day Transmission Functions, with the exception of field and maintenance employees who do not take part in advanced planning for facility closures or are involved in shutting down facilities based on economic reasons, and clerical employees. An officer, director, or employee with risk management responsibilities is not considered to be actively, regularly and personally engaged in day-to-day Transmission Functions when acting to fulfill his or her obligations as an officer, director, or risk manager.
>
> Marketing Function Employee means an employee, contractor, consultant or agent of a Transmission Provider or of an Affiliate of a Transmission Provider who actively, regularly and personally engages in day-to-day Marketing Functions on the affiliated Transmission Provider, with the exception of field and maintenance employees who do not take part in advanced planning for facility closures or are involved in shutting down facilities based on economic reasons, and clerical employees. An officer, director, or employee with risk management responsibilities is not considered to be actively, regularly and personally engaged in day-to-day Marketing Functions when acting to fulfill his or her obligations as an officer, director, or risk manager.

As this proposed language implies, the fundamental distinction between a senior officer or director or other supervisory employee being deemed a Transmission Function Employee or not should be driven by the purpose of the individual's conduct. A good faith attempt by an employee to fulfill his or her corporate responsibilities should not result in that employee being characterized as a Transmission Function Employee or Marketing Function Employee. Activities not relating to these responsibilities and designed to evade the prohibitions of the Standards should be subject to a remedy.

This approach requires an analysis, on a case-by-case basis, of the facts and circumstances surrounding any conduct identified for review. The Commission should look to the intent of the employee involved, as well as to the nature of the activity and how the activity relates to the employee's overall responsibilities within the corporate structure, to make a determination. Was the intent to grant an undue preference on the affiliate or was the employee properly fulfilling his or her corporate responsibilities and obeying the no conduit rule? This type of analysis will best help the Commission achieve its dual goal of promoting the benefits of integration and prohibiting undue discrimination and preference. To provide additional clarity regarding how the Commission will approach its rule of reason analysis, INGAA provides below some hypothetical situations and asks the Commission to confirm that INGAA's analysis of these situations is correct. These examples and the discussion surrounding them provide additional explanation and support for the proposed regulation text set out above.

2. Senior Officers and Directors Pursuing Their Corporate Responsibilities Are Not "Actively, Regularly and Personally" Engaged in Either Day–to-Day Transmission Or Marketing Functions.

Corporations are entrusted to the management of senior officers and directors who are responsible to the shareholders or other owners of the business for the financial well being of the corporation as a whole. These senior officers and directors are required by their fiduciary obligations to the entire corporation, including their statutory information gathering and reporting responsibilities under Sarbanes-Oxley and other similar laws, to identify all material information concerning their company and to become fully informed regarding all material aspects of their enterprise. Among other duties, senior officers and directors determine the strategic direction of the corporation and set overarching policies and goals for the enterprise and its various components. These senior officers and directors must be permitted to make decisions on matters that are of a sufficient magnitude so as to affect the corporate enterprise, even if the decision relates to the Transmission or Marketing Function. In contrast, senior officers and directors are not responsible for making decisions regarding the routine operations of the transmission and marketing business units that arise on a daily or regular basis.

The Order No. 2004 Standards recognized and supported these broad responsibilities of senior officers and directors, and the staffs assisting them in their duties, by providing that these officers and directors may be shared among all of the lines of business of a corporation and may receive any and all information about their organization, including non-public transmission information, in order to meet their corporate governance and other statutory obligations, with the safeguards of the No-Conduit Rule. Any Commission regulations that would tend to impair the ability of senior officers and directors to carry out these fiduciary responsibilities must be narrowly drawn to address only those specific circumstances where there has been a demonstrated threat of affiliate abuse.

The NOPR appears to accommodate this approach. The NOPR would treat senior officers and directors as Transmission or Marketing Function Employees only if they are "actively and personally" involved in "transmission system operations and the planning, directing, organizing or carrying out of transmission operations, including granting and denying of transmission service requests."[25] The clarifying regulation text proposed

[25] *See* Proposed 18 C.F.R. § 358.3(h) and (i).

above, together with the Commission's affirmation that it will look to the purpose and intent of the activities undertaken by employees, will provide the necessary clarity for senior officers and directors to meet all of their responsibilities, including the responsibility to abide by the Commission's Standards.

As an initial matter, the Commission should affirm that senior officers and directors may receive any and all information, including real time information, from their organizations. This information may be received from either the Transmission Function or the Marketing Function, and may be received as frequently as the senior officers and directors believe is appropriate in the execution of their responsibilities. The very question of whether a given piece of information is material is something that these officers have a right to consider. Accordingly, the Commission's Standards should not place limitations on the information senior officers and directors may have.

Allowing access to transmission information necessarily raises the more complex issue of what senior officers and directors may do with that information. In their roles as managers of the corporation as a whole, senior officers or directors must make business decisions that affect all aspects of the corporation, including both the Marketing and Transmission Functions. In making these decisions, senior officers and directors cannot ignore Transmission Function information that they receive. However, the no conduit rule in the Standards is a well designed check on the activities of supervisory employees. Senior officers or directors cannot provide non-public Transmission Function Information to a Marketing Function Employee, and this requirement will allow the Commission to pursue a rule of reason approach to its treatment of supervisory employees while remaining confident that there will be no undue discrimination or preference.

For example, a transmission service contract could involve such a large financial commitment, requiring substantial construction, or have such long-term implications, or raise such significant policy issues for the company, that the involvement of a senior officer or director might be required under delegation of authority rules to approve such a contract or even participate in high level senior officer to senior officer negotiations on the most critical terms of the arrangement. This type of activity should not convert a senior officer or director into a Transmission Function Employee. The activity undertaken by the senior officer or director in this example is the result of the nature of the transaction and the implications of the transaction on the corporate enterprise. This example does not represent the typical and regular "planning, directing, organizing or carrying out of transmission operations." This type of participation by a senior officer or director in a substantial contract with significant consequences for the corporation would not constitute regular participation by that senior officer or director in a Transmission Function. As such, the Commission should clarify that this type of activity does not make a senior officer a Transmission or Marketing Function Employee.

Another helpful example involves the construction of pipeline infrastructure. A transmission provider may present to a senior officer or director group a proposal for new infrastructure. In support of its request for authorization to build, the transmission provider may choose to assemble substantial, credible information that shows the advisability of concentrating on a particular producing region, as contrasted with other potential areas for construction where the transmission provider believes production would be uneconomic. The senior officers and directors should be able to determine whether or not to approve the project. If at a subsequent time the corporation's Marketing Function makes a proposal to the same senior officer or director group seeking to invest substantial funds and other resources of the corporation in developing a program focused on the very natural gas producing region that the transmission provider determined was uneconomic, the senior officers and directors should be permitted to take several actions under the Standards. If the officers and directors believe that the transmission provider's information is correct, the senior officers and directors could reject the proposal of the marketing company. The senior officers and directors also could decide to attempt to reconcile the two proposals by conducting their own study to verify the information assembled by the transmission provider and the marketing company, and the senior officers and directors could approve or disapprove the proposals on the basis of this separate study. Alternatively, the senior officers and directors could require each division independently to further develop their proposals, including a requirement that the senior officers and directors be provided with additional information on markets or other specific aspects of the proposals.

What is important is that the Standards not require that senior officers and directors permit divisions of the company to take a particular action that the senior officers believe is a mistake for the corporation simply because that belief is based, in whole or in part, on information the senior officers received from other parts of the enterprise, such as the transmission provider. Because the decision as to where and how to invest substantial funds of the corporation is of sufficient magnitude to require the involvement of senior officers and directors, these executives must be permitted to make such decisions. Of course, these senior officers and directors should not be permitted to inform the marketing company of the substance of the information provided by the transmission provider or that the transmission provider will be constructing new capacity to reach a particular producing area, and such sharing of information would be prohibited under the no conduit rule. However, after undertaking any further studies ordered by the senior officers and directors, the Marketing Function could determine to focus its efforts on the same production area identified by the transmission provider. That determination would not violate the Standards.

3. The Commission Should Recognize That Whether Officers and Other Supervisory Employees at the Business Unit Level Should Be Considered Marketing or Transmission Function Employees Depends Upon Whether They Participate to a Substantial Extent in Day-to-Day Marketing and Transmission Functions.

As the examples discussed above demonstrate, the fact that a high ranking senior officer or director, for example at the corporate level, is from time to time personally engaged in a Marketing or Transmission Function should not necessarily cause that employee to be deemed a Marketing or Transmission Function Employee. The fact is even the most senior corporate officers may be personally involved in some decisions that have a substantial impact on the enterprise such that their personal involvement is required to fulfill their fiduciary obligations.

The same is true with respect to officers and certain other supervisory employees at the business unit level. There are a number of factors that must be considered in the determination of whether such an employee is a Marketing or Transmission Function Employee. To provide the guidance necessary for regulated companies, the Commission should expressly acknowledge that the concept of “actively, regularly and personally” incorporates the concept of the "degree" to which the supervisory employee is involved in decision-making with respect to these functions. The further up the supervisory chain of command, the less a supervisory employee will be involved in such decisions. The extent of such involvement depends on a number of factors, including the structure and size of the organization and that supervisor's other responsibilities within the organization.

In the NOPR, the Commission has appropriately recognized the need for, and has attempted to provide the industry with some guidance as to how it intends to apply the Standards. In the area of supervisory employees, particularly at the business unit level, more guidance is needed. While INGAA understands and agrees that the inquiry will always be based on the facts presented in any case, it requests the Commission to provide as much guidance as possible. More specifically, INGAA requests the Commission to provide an analysis of the factors it will apply in determining whether employees under the following scenarios will be considered to be Marketing or Transmission Function Employees.

i. Marketing Function Employees

Many integrated natural gas companies do not have stand-alone marketing companies. Instead, marketing divisions are often part of a non-regulated business unit that may also provide services related to one or more of the following: production, gathering, processing, liquids, upstream activities or even other commodities. Certain supervisory employees may have responsibilities for one or more activities within the business unit. As a result, some "supervisory employees' within these business units may not be sufficiently involved in the day-to-day operations of the Marketing Function to consider them to be Marketing Function Employees. If it can be determined that these supervisory employees are not sufficiently involved in the day-to-day activities of the marketing division, the balance between guarding against the risk of preferential treatment and allowing the company to benefit from vertical integration efficiencies should be struck in favor of efficiency. It is important that these supervisory employees be permitted to participate in corporate discussions in order to achieve efficiencies without fear of running afoul of the Standards.

The issue confronting pipelines in making this determination in the first instance, therefore, is whether a particular supervisory employee is sufficiently engaged in Marketing Functions to consider him or her a Marketing Function Employee. For example, assume a large enterprise is separated into regulated and non-regulated business units, both subsidiaries of a parent corporation. The non-regulated subsidiary has five divisions, one of which is marketing. The marketing division has four departments, one of which relates to the physical trading of natural gas. This department has five traders reporting to two managers, who report to a Vice President of Marketing, who in turn reports to the officer in charge of the non-regulated subsidiary, say a CFO. The non-regulated subsidiary CFO reports to a senior officer of the parent corporation.

Assume the corporation has implemented delegation of authority rules that require approvals at various levels for transactions depending on the magnitude of the transaction measured either in dollars or term of contract. For example, assume that transactions with the following terms require the following approvals:

< 1 month	traders without approval
< 3 months	manager approval
< 1 year	VP of Marketing approval
> 1 year	CFO, Non-Regulated Subsidiary, approval

Assume further that (1) 80% of transactions are for less than one month and are executed by traders without any further approval; (2) 15% requires manager approval; (3) 4% requires the VP of Marketing's approval; and (4) 1% requires CFO approval. Assume in this example that the traders and managers are involved full time in the marketing of natural gas. The VP of Marketing has overall responsibility for the marketing of gas, but also is involved in the marketing of power and crude oil, upstream services relating to well hook-ups, processing and liquids, and the divestiture of old contracts. Assume he spends 25% of his time in matters relating to the marketing of natural gas. The CFO has responsibility over the entire non-regulated subsidiary, including four divisions other than marketing, and attends periodic meetings in which strategies and performance metrics relating to all divisions are discussed. The senior officers at the parent level are not required to approve any marketing transactions, but are involved in risk management discussions that may relate in part to the Marketing Function. [26]

[26] For the reasons discussed in the preceding section, in this example the senior officers and directors at the corporate level should not be considered to be a Marketing Function Employee. In the example provided herein, the corporate officer is not involved in the approval process of marketing transactions, and is involved only from a corporate risk management perspective.

In this example, INGAA asks the Commission to comment on the following analysis to provide its members with a better understanding of how the Commission intends to analyze these issues:

1. INGAA would assume that the traders and managers in the natural gas trading department are Marketing Function Employees because they are involved in day-to-day marketing activities and make the majority of the decisions relating to marketing transactions.

2. The Vice President of Marketing presents a closer question. He has overall responsibility for the marketing of gas, but also is involved in functions other than natural gas marketing, such that he spends only 25% of his time in matters relating to gas marketing. He also only approves 4% of marketing transactions. INGAA seeks guidance on how the Commission would analyze whether this type of supervisory employee is a Marketing Function Employee.

3. The CFO of the non-regulated subsidiary may be personally involved in a few transactions of significant magnitude, and is involved in discussions of the strategies and performance of all of the divisions, including marketing. Because the CFO is responsible for five divisions, his participation in the day-to-day operation of each of these divisions is limited to events or transactions that have a sufficient magnitude as to require his participation. INGAA requests that the Commission clarify that this CFO would not be considered to be a Marketing Function

Employee because he or she would not be sufficiently involved in day-to-day Marketing Functions.

ii. Transmission Function Employees

The analysis of whether a supervisory employee is a Transmission Function Employee is similar in that it may depend on the size and structure of the organization and role of that employee within the organization. .For example, at one extreme is a relatively small pipeline company in which the president of the company participates in day-to-day decision-making. At the other extreme would be a corporation that has a president or CEO of a pipeline group that includes several large pipelines. By necessity, this officer has time to get personally involved only in transactions or issues that can result in significant consequences to the organization. Generally, INGAA would find that the president of the small pipeline company would more likely to be properly classified as a Transmission Function Employee than the President of the pipeline group that has several large pipelines. Of course, whether the smaller pipeline president should be classified as a Transmission Function Employee might still depend on other factors, such as the activities other than pipeline operations that he has responsibility for. For example, an officer in charge of only pipeline operations may be more involved in pipeline operations than an officer that has responsibility over, and spends a significant amount of time with, operations and other divisions such as human resources, accounting, legal and finance.

Delegations of authority may be pertinent to the issue of the degree of an officer's involvement in Transmission Functions. Based on dollar limitations, lower level supervisors may be given authority to approve the majority of transportation transactions, while the dollar limits for more senior officers are established to require such approval only infrequently. Similarly, lower level supervisors may get involved in addressing constraints on the system, but constraints that cause a major outage may require the participation of more senior officers in the decision-making process.

INGAA requests the Commission to verify that the factors described above will be taken into account, and to provide more guidance on how such factors will be analyzed, in the determination of whether a supervisory employee is a Transmission Function Employee. INGAA requests clarification that the Commission will analyze the degree to which a supervisory employee personally, actively and regularly engages in day-to-day Transmission Functions, the magnitude and consequences of the transmission issues or transactions in which the employee gets involved, and the degree to which the employee has responsibility for areas other than Transmission Functions. Under such an analysis, the more activities a supervisory employee has responsibility for within the organization, and the less time the employee devotes to the day-to-day transmission operations, the less reason to consider such employee a Transmission Function Employee.

4. The Commission Should Clarify That the Transfer or Receipt of Non-Public Transportation Information by Supervisory Employees, Including Senior Officers or Directors, Will Be a Violation of the Standards Only Upon a Showing of an Intent to Violate the Standards.

As discussed above, the determination of whether a supervisory employee is a Marketing or Transmission Function Employee can only be determined appropriately through informed application of a rule of reason. Regulated companies should not be subject to enforcement actions, fines and penalties based on erroneous, but good faith, judgments concerning whether a supervisory employee's involvement in Marketing or Transmission Functions is sufficient to render him or her a Marketing or Transmission Function Employee.

The fundamental distinction between appropriate and inappropriate conduct by supervisory employees, up to and including senior officers and directors, relates to the purpose of an individual's conduct. For example, a senior officer or director is acting properly when he or she pursues in good faith the fulfillment of his or her corporate responsibilities, as opposed to engaging in activities designed to evade the purposes of the Standards. Recognition by the Commission of this distinction in the Final Rule is critical to ensuring sound corporate governance of the enterprise. Because a proper application of this distinction to any given set of facts requires the balancing of competing obligations by supervisory employees and can be complex, the Commission should adopt as part of its rule of reason approach here, as it did in the context of the market manipulation rule, that it will find a violation of Standards by a supervisory employee, including senior officers or directors, only upon a showing of the requisite scienter, which would be determined on a case by case basis.

B. The Commission Should Clarify That Risk Management Employees Are Not "Actively, Regularly and Personally" Engaged In Either Transmission or Marketing Functions When Performing Risk Management Activities.

The Commission concludes in the NOPR that as a result of its focus on employee job functions, rather than affiliate corporate functions, there no longer is a need for the concept of shared employees.[27] The Commission states:

> Employees such as attorneys, accountants, risk management personnel and rate design employees do not fall within the scope of the independent functioning rule, so long as they are acting in their roles as attorneys, accountants, risk management personnel and rate design employees, rather than as Transmission Function Employees or Marketing Function Employees.[28]

In the NOPR, the Commission recognizes that risk management employees are employees that "are not generally in a position to give a marketing affiliate an undue preference, and that the sharing of these employees has allowed the transmission provider to realize efficiencies not otherwise available to it."[29] In order for corporations to continue to realize such efficiencies and to adequately evaluate and manage risk, INGAA respectfully requests that the Commission clarify that risk management employees are not actively, regularly and personally engaged in Transmission or Marketing Functions when they perform their risk management functions, as more fully explained below, and that such employees do not become Transmission or Marketing Function Employees when they direct transmission and marketing business units to take or refrain from certain actions in furtherance of risk management.

[27] NOPR at P 41.

[28] *Id.*

[29] *Id.* at P 24 (citing Order No. 2004 at P 97).

Proper corporate governance requires energy companies to perform risk management functions that, on an enterprise-wide basis, require certain employees to obtain information from all business units of a corporation. Sometimes, these functions are performed through a holding or service company. The risk management group manages risks stemming from regulation, competition, politics, changing technology, credit issues, market changes and commodity price risks. Risk management assists in determining how much risk the enterprise's management is willing to take, identifying and assessing risk, and establishing methods for responding appropriately. This involves understanding the interrelated risks faced by each business unit and taking action to minimize the risk facing the enterprise as a whole.

In Order No. 2004, the Commission allowed risk management employees to be shared provided that such employees were not "operating" employees of the transmission provider, Marketing Affiliate or Energy Affiliate, and that they did not act as conduits for improperly sharing information.[30] In Order No. 2004-A, the Commission clarified the types of risk management functions that could be shared.[31] In Order No. 2004-B, the Commission reiterated that by allowing the sharing of risk management functions, it did not intend to allow the risk management employees to act as operating employees of the pipelines or Marketing/Energy Affiliates. Specifically, the Commission held that shared risk management employees should not direct the pipeline or Marketing/Energy Affiliates' responses to the risks they identify.[32]

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[30] Order No. 2004 at P 112.

[31] Order No. 2004-A at P 153.

[32] Order No. 2004-B at P 68.

The Commission's rulings above were challenged in *National Fuel*. Because it vacated Order No. 2004 in its entirety as it applied to natural gas pipelines, the Court did not specifically address risk management employees in its opinion. Given that the regulations pertaining to risk management employees were vacated, the Commission in the Interim Rule treated the appeal as if the Court had held the regulations on risk management employees infirm.[33] Thus, the Commission stated that the Interim Rule would "omit the restrictions on shared risk management activities and employees."[34]

To ensure that companies can obtain the efficiencies of shared risk management personnel, INGAA requests that the Commission clarify that risk management employees will be permitted not only to evaluate risk, but also to direct the business units to take action to minimize the risks identified -- yet remaining subject to the No-Conduit Rule -- without becoming Transmission or Marketing Function Employees. These activities include directing business units to enter into transactions, such as physical or financial hedges, in order to mitigate risks that exist in light of the aggregate position of the corporate enterprise. It would frustrate the purpose of risk management if such employees determined that the corporation's aggregate position created an unacceptable price risk, but the corporation was unable to manage that risk by directing its business units to take action to mitigate the corporation's overall portfolio risk.

In addition to managing commodity price risk, risk management personnel may need to direct business units to take actions relating to insurance coverage or environmental risks, or simply to implement controls or processes for the business units

[33] Interim Rule at P 8.

[34] *Id.*

to manage their own risks. Risk management employees may also manage credit risk. These employees must be able to receive credit information from the business units, evaluate the information and communicate the results of the credit evaluation to both the Transmission and Marketing Functions. If a risk management employee discovers that a shipper on the pipeline has exceeded its credit limitation, for example, it must be able to utilize this information in evaluating the level of overall credit that should be extended to that same shipper by other business units, including the Marketing Function. Conversely, risk management employees may need to perform analyses based on information received in part from the Marketing Function. The risk management function should be able to use these analyses in making determinations for, and directing the risk management responses of, the pipeline. If the corporation's risk management function determines that the level of credit required for a particular contract exceeds acceptable limits, the communication of that fact to the Transmission Function or the Marketing Function is not a transmission function activity, even in the event the risk management function instructs the Transmission Function or Marketing Function not to extend additional credit to a potential customer or to require from that customer additional collateral consistent with tariff creditworthiness requirements.

In summary, risk management employees must be free to direct the corporation's business units to take (or not take) actions that such employees believe are necessary to mitigate risks to the corporate enterprise, notwithstanding the fact that the decisions of these employees may be based on information produced by the Transmission or Marketing Function. INGAA understands the Commission's position on risk management employees to allow such employees to engage in the types of activities discussed above because they are neither Transmission Functions nor Marketing Functions, and requests the Commission to clarify that this understanding is correct.

INGAA respectfully requests the Commission to revise the proposed definitions of Marketing Function Employee and Transmission Function Employee as set out above to make clear that risk management employees will not be considered to be Marketing Function or Transmission Function Employees, respectively, so long as they are acting pursuant to their risk management responsibilities and obligations.

C. Certain Field, Maintenance and Clerical Employees Should Not Be Deemed Transmission Function Employees.

The NOPR would include field and maintenance employees in the definition of Transmission Function Employee, whereas the current regulations allow sharing of all but most of these personnel because they are not treated as Transmission Function Employees.[35] This is inconsistent with the Commission's prior treatment of these employees, and should be changed.

In Order No. 2004-B, the Commission clarified that field and maintenance employees, including field supervisors who do not take part in advance planning for facility closures or are involved in shutting down facilities based on economic reasons, can be shared. Order No. 2004-B, 108 FERC ¶ 61,118 at P 59 (2004). In the twenty years of the administration of this rule, INGAA is not aware of a single instance where the exemption of these field employees has resulted in the transmission of non-public Transmission Function Information to Marketing Function Employees or in any violation of the Standards. As a practical matter, field and maintenance employees do not interact

[35] *See* NOPR at P 42.

with Marketing Function Employees."[36] Moreover, in some companies, field employees do not have computers, making it even more unlikely that a field employee could identify a Marketing Function Employee and communicate with that person. For the same reasons, the Commission has provided a long-standing exemption from the separation requirements for clerical employees. See Order No. 497-E, FERC Stats and Regs [1991-1996] ¶ 30,987 at 30,996 (1993].

Because the Commission did not provide a basis for expanding the Standards to cover field and maintenance and clerical employees, the Commission should continue this exemption.[37] Moreover, as discussed below in VI, bringing field and maintenance personnel within the scope of the Standards will require training of these employees, which will create a significant burden for Transmission Providers.

V. The No Conduit Rule Should Not, and Could Not Lawfully, Prohibit Marketing Function Employees From Receiving Non-Public Transmission Information From A Source Other Than The Pipeline

Under the existing Standards, a transmission provider's employees are prohibited from disclosing non-public information about the transmission system to Marketing Affiliates. 18 C.F.R. § 358.5(b). Under the "no conduit" rule, neither a transmission provider nor its employees are permitted to use anyone as a conduit for sharing such information. 18 C.F.R. § 358.5(b)(7). The no-conduit rule was intended to prohibit Transmission Function Employees from circumventing the disclosure prohibition by

[36] NOPR at P 42.

[37] *See* proposed 18 C.F.R. § 358.7(f)(1) ("A transmission provider must post . . . the job titles and job descriptions of its transmission function employees, with the exception of clerical, maintenance and field positions.").

transferring such non-public transmission information indirectly to marketing affiliates through a shared employee or other third party.[38]

In the NOPR, the Commission proposes to expand the no-conduit rule. In addition to prohibiting transmission provider employees from using anyone as a conduit to transfer non-public information to Marketing Function Employees, the Commission proposes to prohibit Marketing Function Employees from *receiving* non-public Transmission Function Information *from any source*. Proposed § 358.6(a)(2). Similarly, proposed Section 358.2 states that Transmission Function Information may not be passed to "or received by" a Marketing Function Employee unless the information has been made public. In the preamble, the Commission explains that this expansion of the no-conduit rule is designed to reach all sources of a prohibited informational exchange.[39]

This proposed expansion should not be implemented. The contemporaneous disclosure requirements of the Standards were originally designed to prevent transmission providers from providing undue preferences to their marketing affiliates through the use of market power over the provision of transportation service. *See Tenneco Gas v. FERC*, 969 F.2d 1187, 1197-1201 (D.C. Cir. 1992). Thus, Transmission Providers may be prohibited from transferring, directly or indirectly, non-public Transmission Information obtained from affiliated marketers. *Id.* at 1199. As the court explained, however, Transmission Providers cannot be prohibited from providing information, such as sales or marketing information, that the provider did not obtain as a result of market power over transmission. *Id.*

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[38] *See, e.g.*, the affiliate restrictions, 18 C.F.R. § 35.39(g), adopted in Order No. 697, *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services By Public Utilities*, 119 FERC ¶ 61,295 (2007).

[39] NOPR at P 46.

The Commission's proposal to reach all sources of an exchange of transmission information runs afoul of these principles. A Marketing Function Employee cannot be prohibited from receiving non-public transportation information from sources other than the pipeline that does not implicate any market power that the Transmission Provider may have over transmission service. Marketing Function Employees are active participants in the marketplace that gather information from many different sources. Unless the source of the non-public Transmission Information was an employee of the Transmission Provider who was intentionally seeking to benefit the marketing affiliate by using a third party as a conduit for the transfer of this information, there is no basis to prohibit the marketing affiliate from receiving this information.

Moreover, pipelines cannot control the actions of third parties and cannot be charged with violations of the Standards for actions beyond their control. For example, a pipeline may provide Transmission Function Information to a potential unaffiliated transportation customer in connection with a contemplated transaction and that customer may in turn provide the information to several sellers of gas, including the pipeline's Marketing Function Employee. Pipelines cannot be expected to prohibit and police the transfer of information by third parties, and cannot be held responsible for the actions of third parties. In addition, the proposed prohibition would place a pipeline's affiliate with Marketing Functions at a competitive disadvantage in the marketplace. In the example above, if the pipeline's affiliate with Marketing Functions were not able to receive the same information from the prospective shipper that the shipper was providing to other competing sellers, it would be at a competitive disadvantage. In addition, generally blocking a pipeline's affiliate with Marketing Function Employees from receiving information through normal open market channels would place that entity at a competitive disadvantage.

Proposed Section 358.7 (a) allows a Transmission Provider to cure a prohibited disclosure of non-public transmission information by either posting the information that was disclosed, or in the case of customer information, posting that the customer information was disclosed. Even assuming this cure applies to the receipt of such information by a Marketing Function Employee,[40] such a cure could not justify the rule in the first instance, and would not provide a satisfactory result for several reasons.

First, as discussed above, the Commission cannot, consistent with *Tenneco*, prohibit the disclosure of information that was not derived from any transmission market power attributed to the pipeline. Thus, to the extent a Marketing Function Employee obtains information from independent sources, the receipt of information cannot be prohibited. Second, it is critical that a pipeline be able to maintain the confidentiality of commercially sensitive information, particularly in connection with project development. For example, suppose a pipeline were negotiating for a shipper's support of a pipeline project with a long-term transportation contract, and the pipeline provided the prospective shipper with sensitive capacity, routing, cost or pricing information. Suppose that some of this information was transferred, intentionally or inadvertently, by an employee of the prospective shipper to a third party, and the information was later conveyed to the pipeline's Marketing Function Employee.

As a threshold matter, the Marketing Function Employee would have no way of knowing either the source of the information or whether the information it obtained in the

[40] On its face, the section applies only to transmission provider disclosures of information, as opposed to the receipt of information by marketing affiliates.

marketplace was accurate or not, and the pipeline would have no way of knowing that the Marketing Function Employee was in receipt of the information. A pipeline cannot be required to post information received by a Marketing Function Employee if was not aware that the information was in fact received by that employee. Indeed, in light of the independent functioning principles of the standards, and the fact that these employees may be employed by a separate legal entity, it is likely that the pipeline will not be aware of its Marketing Function Employee's receipt of such information. Moreover, even if the pipeline were informed of the employee's receipt of the information, and the information was deemed to be accurate, the pipeline would be disadvantaged in the marketplace if it were required to post the information for its competitors to use in attempting to secure the prospective shipper for its own competing project. In fact, such a rule could lead hypothetically to the intentional transfer of information by an employee of a third party to the pipeline's Marketing Function Employee in a deliberate attempt to require such a posting to the benefit of a competing project developer. For this reason, should the Commission decline to withdraw its proposal to extend the no-conduit rule to the receipt of information by a Marketing Function Employee, INGAA requests that the language in Section 358.7 (a)(2) be revised to read as follows:

> (2) If a Transmission Provider discloses non-public Transmission Customer Information in a manner contrary to the requirements of § 358.6(a), or if a Marketing Function Employee receives non-public Transmission Information from a third party who is not acting as a conduit for the Transmission Provider as set forth in § 358.6(a)(2), the Transmission Provider must, as soon as it becomes aware of the disclosure, immediately post notice on the OASIS or Internet website, as applicable, that non-public Transmission Customer Information or non-public Transmission Information was disclosed.

In sum, extending the no-conduit rule to the receipt of information by a Marketing Function Employee would be legally infirm, would expose pipelines to violations for actions over which they have no control, and could lead to the required disclosure of commercially sensitive information that would result in unfair competition.

VI. The Commission Should Refine And Clarify The Scope Of Mandatory Training

The NOPR would require annual Standards of Conduct training and the distribution of written procedures to all "transmission function employees, marketing function employees, officers, directors, supervisory employees, and any other employees likely to become privy to Transmission Function information."[41] INGAA understands the importance of training and is not opposed to formalizing the annual cycle. However, the scope of trainees under the proposed regulations is overly broad in a number of respects, and should be narrowed and clarified to foster manageable and effective training programs.

One difficulty with the proposed training requirement stems from the breadth of the catch-all provision that training is necessary for those employees receiving Transmission Function Information. That term is defined in proposed § 358.3(j) as "information relating to transmission functions." This definition would certainly capture the kinds of information that could provide a commercial advantage in the hands of Marketing Function Employees, such as available system capacity, and the pipeline's plans for facility expansions or maintenance shut-downs, but it also can be read to include a multitude of commercially irrelevant "raw data" about the pipeline's facilities. The typical construction worker, surveyor, mechanic, line patroller, technician and maintenance worker will of necessity pick up isolated grains of "transmission function

[41] Proposed §§ 358.8(b)(2) and 358.8(c)

information," in the broadest sense, as they perform their work, but will not obtain or have access to synthesized, "macro" level information that would be relevant to services provided by the pipeline. Mandatory training of "field and maintenance" employees that have not heretofore been considered to be Transmission Function Employees (*i.e.,* those that do not take part in advance planning for facility closures or are not involved in shutting down facilities based on economic reasons) would not serve the Commission's objectives and would complicate the pipeline's efforts to train employees that have access to information of commercial value. As the name implies, most field and maintenance employees deal with the day-to-day mechanics of a part of the pipeline system, and do not acquire significant overall operational information in their daily work activities. These employees may not have computers and, thus, may not have access to the system to gain pipeline transmission information. In addition, because of their location and duties, they do not have contact with marketing personnel. Training of these employees would impose an unjustified burden on the pipeline.

Standards training is administered now online by most pipelines. On many pipelines, field-level employees are not provided with computers since they do not need them to perform their duties. Other than sending personnel out to train each of these individuals separately, which would be expensive both in terms of the time spent on travel and lost work time, these pipelines would have to either: (1) purchase numerous computers and install equipment and software which would not be used other than to administer the training or; (2) require employees to travel to a location where they could be trained. In either case, this would take significant time away from employees' primary responsibility, which is to maintain a safe and effectively operating pipeline. Since these employees are unlikely to have access to the kind of Transmission Function Information that could provide competitive benefits to affiliates, such a burden is unwarranted.

Similarly, the Commission should clarify the Transmission Provider's obligation to train contractors. The Commission's definition of a Transmission Function Employee includes a contractor, but INGAA does not believe that the Commission intends to require training of every person who works on any task relating to the physical construction or operation of a pipeline's system under the employment of a contractor. It would be impossible to comply with such a training requirement. Pipelines hire contractors to perform a wide range of services relating to construction and maintenance activities, such as mowing, painting, installation and leak repair, restoration, surveying, line location, inspection, and environmental services. A construction contractor, for example, will often not know which workers will be assigned to a particular work site until the commencement of the work day. Moreover, contractors often change these workers from day to day and week to week. These workers generally are given information dealing only with the immediate physical demands of the moment. They generally do not have access to the pipeline's computer systems and could not access information on that pipeline's operations. Further, because field-level employees of contractors in many cases have little continuity working on a particular pipeline, they will have very little understanding of that particular pipeline's operations and, consequently, are not likely to possess enough information and understanding of that information rising to the level of transportation information. Finally, because a third-party employer is obligated both by contract and by state law dealing with trade secrets to maintain confidentiality of the information received from the pipeline with which it contracts, there would be no opportunity for an individual to pass along information obtained on the job. Thus, there is no practical reason for training.

Accordingly, the Commission should clarify that contractor training may be limited to those specific contractors who would be considered Transmission Function Employees if they worked directly for the pipeline. As part of the determination whether these contractors fall within this category, they would be the contractors that potentially would interact with the Marketing Function Employees and who have access to pipeline databases containing the Transmission Provider’s non-public Transmission Information that would, if revealed to a transmission customer of the Transmission Provider, provide a competitive advantage to that customer. Specific examples of the individuals that fit this description are engineering consultants who are involved in the planning stages of pipeline projects, or contractors who are located in the pipeline’s offices who receive or have access to the computer systems containing non-public transmission information on an ongoing or recurring basis. This approach would provide reasonable guidance to pipelines with respect to the contractor training.

In addition, the Commission has extended the training requirement to Marketing Function Employees. In many corporate structures, the training of the Marketing Function Employees of the Affiliate that performs the Marketing Function would not be possible and in most cases, would be unnecessary. For example, if two pipelines form a joint venture pipeline, the Marketing Affiliates of the two owners become the Marketing Affiliates of the joint venture pipeline to the extent that the Marketing Affiliates conduct transportation transactions on the joint venture pipeline. Existing joint venture pipelines are simply not in a position to demand that the Marketing Affiliate Employees of another entity be trained. In any event, in the situation described, the Marketing Affiliate employee would be trained in any event due to their relationship with the pipeline with which they are jointly owned.

To refine and clarify the scope of the training requirement as suggested above, INGAA recommends the following changes to the proposed regulatory text. First, as discussed in Section III B, the definition of Transmission Function Employee should be modified to retain the current exclusion of certain field and maintenance employees. Second, the training requirement should be explicitly focused on those employees or contractors as described above. INGAA therefore recommends that proposed § 358.8(b)(2) be revised as follows:

> A Transmission Provider must distribute the written procedures referred to in § 358.7(d) to all its Transmission Function Employees, Marketing Function Employees, officers, directors, supervisory employees and any other employees with system access to pipeline databases containing non-public Transmission Function Information of the Transmission Provider that would, if revealed to a customer of the Transmission Provider, provide a competitive advantage to that customer.

VII. Pipelines Should Not Be Required To Log and Post Exercises of Discretion

In proposed § 358.4(a)(5), the Commission seeks to resurrect Order No. 2004's requirement that a pipeline post "notice of each waiver of a tariff provision that it grants, and notice of each exercise of discretion that it exercises, detailing the circumstances and manner under which the waiver or exercise of discretion occurred." INGAA strongly recommends that this proposal not be included in the final rule. The Commission has provided no justification for imposing such a vague and overbroad requirement that is inconsistent with the Commission's stated objective of improving the Standards' clarity.

A. The Proposal Is Vague and Unsupported and Should Not Be Adopted.

The longstanding provision under Order No. 497 and the currently effective interim regulations required that a pipeline "maintain a written log of waivers of tariff provisions that provide for such discretionary waivers."[42] Notwithstanding the *National Fuel* decision, the Commission is now proposing to return to the approach reflected in Order No. 2004 and require that a pipeline log and post "exercises of discretion." Proposed § 358.4(a)(5) is entirely unsupported and should not be adopted. The NOPR does not mention or provide any reasoned basis for imposing this requirement or departing from the longstanding requirement to post tariff waivers. The proposal is vague and overbroad in that it does not define "exercises of discretion" or point to any specific examples of preferences that the requirement is designed to address. The proposal undermines the Commission's stated objective of providing the industry with better clarity regarding Standards of Conduct requirements, in light of the Commission's authority to assess $1 million dollar per day in civil penalties. Simply put, the proposal is unreasonable and should not be adopted.

B. Exercises of Discretion, Pipelines Should Not Be Required To Log and Post Exercises of Discretion Affecting Operations.

If the proposal to require that pipelines post exercises of discretion is not abandoned, then the Commission should provide meaningful guidance regarding the scope of the requirement. In particular, INGAA urges that the Commission clarify that

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[42] *See* former 18 C.F.R. § 161.3(k) and §358.5(c)(4)(ii). In addition, the Commission's January 2007 Notice of Proposed Rulemaking proposed to retain the requirement that a pipeline maintain a log of waivers of tariff provisions providing for discretionary waivers. 72 Fed. Reg. 3958, 3963, 3974 (Jan. 29, 2007).

pipelines are not required to post decisions inherent in a pipeline's day-to-day operations or decisions involving actions that already require posting.

1. Pipelines Should Not Be Required To Post Exercises of Discretion Involving System Operations.

Discretion is inherent in the operation of any business enterprise, and the complex operation of dynamic pipeline systems is no different. In fact, the Commission has recognized that pipelines must be able to exercise discretion in the day-to day operations of their systems. [43] In addition, Order No. 2004-B,[44] the Commission agreed that posting logs regarding pipeline operational decisions was not necessary. INGAA requests that, at a minimum, the Commission reaffirm that any requirement to post exercises of discretion not include the daily decisions pipelines make with respect to system operations.

2. Pipelines Should Not Be Required to Log and Post Information Contained in Other Required Postings.

Pipelines should not be required to log and post decisions reflected in information that already must be posted under other regulatory or tariff requirements.[45] For example, if a pipeline decides to issue an operational flow order, a notice must be posted giving shippers prior notice of the event. If the pipeline determines that capacity is available for

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[43] *See, e.g., Texas Eastern Transmission Corp.*, 51 FPC 443 (1974) ("experience has shown that the actual daily operation of a pipeline system, whether in curtailment or not, must be left to the discretion of the operating personnel intimately familiar with the peculiarities of each system."); *Texas Eastern Transmission Corp.*, 72 FERC ¶ 61,278 (1995) ("the Commission has traditionally allowed pipelines considerable discretion in managing situations that threaten the integrity of their system."); *Northwest Pipeline Co.*, 72 FERC ¶ 61,271 (1995) ("pipelines need reasonable discretion to manage the operation of their systems"); *Panhandle Eastern Pipe Line Co.*, 82 FERC ¶ 61,188 (1998).

[44] Standards of Conduct for Transmission Providers, Order No. 2004-B, 69 Fed. Reg. 48,371, 48,382 (P 99) (Aug. 10, 2004).

[45] For example, Section 284.13 of the Commission's regulations, 18 C.F.R. § 284.13(b)(1)(viii), requires pipelines to post, among other things, any "special details pertaining to a pipeline transportation contract, including whether the contract is a negotiated rate contract, conditions applicable to a discounted transportation contract, and all aspects in which the contract deviates from the pipeline's tariff."

interruptible service, the capacity is posted as operationally available pursuant to Section 284.13(d). There is no need to require a separate posting of these "discretionary" actions. Requiring the same information to be posted numerous times to comply with different regulatory obligations serves no useful purpose. Such a duplicative requirement does nothing to guard against undue preference and places an undue burden on pipelines. Therefore, consistent with the Commission's ruling in Order No. 2004-B, pipelines should not be required to post as exercises of discretion, decisions that must be posted under other regulatory or tariff requirements.[46]

3. Pipelines Should Not Be Required To Log and Post A Stated List of Options Provided in the Tariff or an Option to "Otherwise" Agree to a Provision of Service.

Pipelines' tariffs contain provisions such as a provision that allows the transmission provider to either credit against a shipper's invoice or send a check to the shipper for the payment of penalty revenue credits. Other tariff provisions allow a customer to provide documentation electronically via the Internet instead of a hard copy. These types of actions have no bearing on a pipeline's services and requiring them to be posted as acts of discretion will provide no benefit to customers.

Similarly, a provision allowing a pipeline and its customer to choose from a menu of options stated in the tariff, such as through the use of permissive verbs like "may" and "should" do not provide any opportunity for undue discrimination and actions taken pursuant to these tariff provisions should not be considered "exercises of discretion." Importantly, the Commission already has reviewed the tariff provision and stated options,

[46] 69 Fed. Reg. at 48,382 (P 98).

and determined them to be just and reasonable. The tariff sets forth the parameters of the pipeline's discretion and informs customers and the Commission of the options available to shippers. Allowing pipelines and their customers the discretion to choose among options stated in a tariff enables the pipeline to meet individual customer needs.

The time to take up issues related to specific tariff provisions providing discretion is when those provisions are filed with the Commission. When a pipeline proposes a tariff provision that allows for discretion in application, the proposal can be evaluated to determine whether it is just and reasonable and, to the extent legitimate concerns exist about a particular provision, the Commission can address such concerns on a case-by-case basis. However, once approved as just and reasonable, the pipeline should be allowed to follow the dictates of its tariff without the Commission imposing additional levels of regulatory scrutiny and compliance burdens. If customers believe a pipeline is applying its tariff in an inequitable or discriminatory fashion, those customers can file a complaint with the Commission to address those concerns.[47]

VIII. Posting Requirements

A. The Posting Requirements Should Be Amended To Require Information Related Only To Marketing Affiliates That Hold Or Control Capacity On Their Affiliated Pipeline.

INGAA requests that the Commission clarify that the posting requirements contemplated by the NOPR require posting of information related only to those

[47] *See South Georgia Natural Gas Co.*, 66 FERC ¶ 61,112 at 61,186 (1994) (holding that to the extent customers believe a pipeline is abusing its discretion, such customers may "file a complaint under section 5 of the Natural Gas Act."), *see also National Fuel* at 844 (holding that to expand the Standards to cover non-marketing affiliates, FERC must "explain why the individual complaint procedure under Section 5 of the Natural Gas Act does not suffice to ensure that pipelines are not abusing their relationships with non-marketing affiliates.").

marketing affiliates that hold or control capacity on their affiliated pipeline. The proposed regulations would require a pipeline to post "the names and addresses of all its affiliates that employ or retain Marketing Function Employees."[48] This requirement overlooks the fact that the Standards would not apply to the relationship between a pipeline and an affiliate that does not hold or control capacity on its affiliated pipeline. Moreover, it appears inconsistent with Order No. 599,[49] where the Commission determined that "the posting requirements would not apply to interstate natural gas pipelines that do not have transportation transactions with their marketing affiliates. Nor does the name and address of a marketing affiliate have to be posted unless the marketing affiliate has transportation transactions on the affiliated pipeline." Given that precedent and that the Commission proposes to exempt from the Standards those entities that do not conduct transportation transactions with their affiliated pipeline, the posting requirements also should not attach to the relationship between a pipeline and such an affiliate.

To avoid confusion the Commission should clarify the exact scope of the requirement to post information about affiliates. Clarification of the Standards in this manner would further the Commission's goal of providing Standards that are understandable, enforceable and that transmission providers are able to implement.

B. Transmission Providers Should Not Be Required to Record Information Received from Marketing Function Employees.

The proposed regulations would permit Transmission Function Employees and Marketing Function Employees to "exchange" certain information pertaining to

[48] *See* proposed 18 C.F.R. § 358.7(e)(1).

[49] FERC Stats and Regs [1996-2000] ¶ 31,064 at 30,712.

generation necessary to perform generation dispatch or necessary to maintain or restore operation of the transmission system, subject to the requirement that the Transmission Provider make a contemporaneous record of the "information exchange."[50] The use of the word "exchange" implies that a transmission provider not only would be required to make a record of non-public information provided to Marketing Function Employees, but also would be required to make a record of information received *from* Marketing Function Employees. If this is the case, the proposed language is too broad and exceeds the scope of the Standards which do not prohibit a transmission provider from receiving non-public information from Marketing Function Employees. The Commission should clarify that a transmission provider's obligation to make a record under these proposed provisions is limited to non-public Transmission Information *provided to* a Marketing Function Employee and does not apply to information *received from* a Marketing Function Employee.

The Standards are intended to prevent Transmission Providers from using their control over transportation capacity to grant preferential treatment to affiliates in the provision of transportation services.[51] From their inception, the Standards have prohibited transmission providers from disclosing non-public information regarding their transmission systems or their customers to affiliated marketers.[52] The Standards do not, however, prohibit a transmission provider from receiving non-public information from a marketing or energy affiliate.

[50] Proposed §§ 358.5(b), 358.6(b), 358.7(h).

[51] *See, e.g.,*969 F.2d 1187, 1199 (D.C. Cir. 1992).

[52] 18 C.F.R. § 358.5 (non-discrimination requirements); *see* former Standards E, F, and G 18 C.F.R. §§ 161.3(e), (f), and (g) (2002).

The proposed language, however, would require that a Transmission Provider record "exchanges" of non-public information in specified circumstances where such exchanges with Marketing Function Employees are permitted. The use of the word "exchange" implies that a pipeline would be required to record non-public information *received from* marketing function employees, even though a transmission provider's receipt of such information from Marketing Function Employees is entirely permissible, indeed, necessary at any time. The Commission has articulated no basis and identified no purpose for imposing such an expansive requirement. In fact, such a requirement is not necessary to achieve the stated objectives of the Standards and is inconsistent with their longstanding application and scope. INGAA, therefore, requests that the Commission modify the proposed regulatory text as follows to make clear that a transmission provider is required to make a record only of non-public transmission function information that the transmission provider may permissibly *provide to* marketing function employees.

§ 358.2 General principles.

(d) A Transmission Provider must create, and maintain for a period of three years, records of non-public Transmission Function Information that the Transmission Provider is permitted to provide to Marketing Function Employees under §§ 358.5(b) and 358.6(b).

§ 358.5 Independent functioning rule.

(b) Exemption for permitted information. Notwithstanding the requirements of paragraph (a) of this section, Transmission Function Employees may provide certain non-public Transmission Function Information, listed below, to Marketing Function Employees, in which case the Transmission Provider must make a contemporaneous record of such information provided, subject to an exception for emergency circumstances, as provided in § 358.7(h). The permitted information is as follows:

(1) Information regarding generation necessary to perform generation dispatch, or

(2) Information necessary to maintain or restore operation of the transmission system.

§ 358.6 No conduit rule.

(b) Exemption for permitted information. Notwithstanding the requirements of paragraph (a) of this section, Transmission Function Employees may provide certain non-public Transmission Function Information, listed below, to Marketing Function Employees, in which case the Transmission Provider must make a contemporaneous record of such information provided, subject to an exception for emergency circumstances, as provided in § 358.7(h). The permitted information is as follows:

(1) Information regarding generation necessary to perform generation dispatch, or
(2) Information necessary to maintain or restore operation of the transmission system.

§ 358.7(h) Recordation of permitted information provided to Marketing Function Employees. Notwithstanding the requirements of §§ 358.5(a) and 358.6(a), Transmission Function Employees may provide certain non-public Transmission Function Information, listed below, to Marketing Function Employees, in which case the Transmission Provider must make and retain a contemporaneous record of all such non-public Transmission Function Information provided, except in emergency circumstances, in which case a record must be made of the non-public Transmission Function Information provided as soon as practicable after the fact. The Transmission Provider shall make the record available to the Commission upon request. The record may consist of handwritten or typed notes, electronic records such as e-mails and text messages, recorded telephone exchanges, and the like, and must be retained for a period of three years. The permitted information is as follows:

(1) Information regarding generation necessary to perform generation dispatch, or
(2) Information necessary to maintain or restore operation of the transmission system.

IX. Proposed § 358.8(a) Is Inconsistent with the Proposed Scope of the Standards Of Conduct and Would Result in Different Treatment for Newly-Constructed and Existing Pipelines.

Proposed § 358.8(a) would require that a transmission provider fully comply with the Standards "by the earlier of: (1) The date it has a rate on file with the Commission, or (2) The date it commences transmission transactions." The NOPR states that this proposed regulatory text is intended to apply to newly-constructed interstate natural gas pipelines, but does not explain the basis of the proposed language. INGAA requests that the Commission modify proposed § 358.8 because it does not reflect the Standards' purpose of preventing a pipeline from providing preferences to an affiliate in the provision of transportation services. The language also is inconsistent with the applicability language of proposed § 358.1(a) and would result in treating new and existing pipelines differently.

As recognized by the D.C. Circuit in *Tenneco Gas v. FERC*, the purpose of the Standards is to "prevent preferential treatment of an affiliated marketer by an interstate pipeline in the provision of transportation services." Consistent with this objective, the Commission's longstanding approach under Order No. 497, and case law decided under that rule, held that the Standards did not apply unless the pipeline engaged in transportation transactions with a marketing or brokering affiliate. In National Fuel, the D.C. Circuit Court of Appeals admonished the Commission that, if it were to extend the Standards to entities that neither hold nor control capacity, the Commission would need to provide justification. In response to that decision, the preamble to the January 2007 Interim Rule returned to the original scope of Order No. 497.

The NOPR expressly states that under the proposed regulations, a pipeline would not be required to comply with the Standards unless it engages in transportation transactions with an affiliate engaged in marketing function. Proposed § 358.8(a), however, would require that a new pipeline comply with the Standards either on the date it "has a rate on file with the Commission," or "the date it commences transmission transactions," whichever is earlier. Absent from this proposed text is the prerequisite that the pipeline must provide transportation service for an affiliate engaged in marketing transactions and that holds or controls capacity on the affiliated pipeline. Clearly, a pipeline can have a rate on file and engage in transmission transactions without providing transportation service to an affiliate. The proposed language is neither explained nor supported in the NOPR, and is inconsistent with the stated intent of the NOPR.

In addition, proposed § 358.8(a) would unreasonably create a different applicability standard for newly-constructed pipelines and existing pipelines. Consistent with the longstanding scope of the Standards, the Commission's proposed § 358.1(a) states that the Standards apply to pipelines that "conduct[] transmission transactions with an affiliate that engages in marketing functions." Proposed § 358.8(a), however, omits the prerequisite that a pipeline transport for an affiliate engaged in transmission transactions before the Standards apply. The NOPR does not attempt to explain or support treating existing and new pipelines differently. Indeed, treating them differently is patently unreasonable. Just as an existing pipeline cannot provide a preference to an affiliate that does not transport gas on the pipeline's system, a new pipeline cannot provide a transportation preference to an affiliate for which the pipeline does not transport natural gas. The Commission has provided no justification for establishing two standards for new and existing pipelines.

The proposed language also is inconsistent with the Commission's explicit findings that it has no evidence of affiliate abuse occurring before transportation commences. As the Commission has acknowledged, all interstate pipelines must comply with the prohibition against undue discrimination and undue preference found in sections 4 and 5 of the NGA regardless of whether the Standards also apply. Allegations of preferential treatment, whether they involve an affiliate or not, before a pipeline commences transportation can be raised during the pipeline's Section 7 certificate proceeding. In this proceeding, any concern about the allocation of capacity or improperly conducted open seasons can be raised before the Commission and be fully vetted. Alternatively, as noted by the court in National Fuel, concerns about affiliate preferences can be addressed in the context of a complaint filed under Section 5 of the Natural Gas Act.

INGAA urges the Commission to modify the proposed regulatory text so that a new interstate pipeline is not required to comply with Standards unless it provides transportation service to an affiliate engaged in marketing functions, and so that the language is consistent with the applicability requirements for existing pipelines. INGAA recommends that the proposed regulatory text be modified as follows:

§ 358.8 Implementation Requirements.

(a) Effective date. A Transmission Provider must be in full compliance with the standards of conduct within 30 days of the date on which an affiliate that engages in Marketing Functions holds or controls capacity on the Affiliated Transmission Provider.

~~(1) The date it has a rate on file with the Commission, or~~
~~(2) The date it commences transmission transactions.~~

X. Waivers Granted Under Order No. 2004 Should Remain In Effect

The Commission issued full exemptions from the Standards to many interstate pipelines because such pipelines had neither energy nor marketing affiliates. In addition, partial exemptions were granted to reflect various corporate organization structures.[53] The Initial NOPR states that "waivers or exemptions that the Commission issued under Order No. 2004 remain valid and are not negatively impacted by the *National Fuel* decision."[54] The current NOPR does not acknowledge the continued validity of waivers or exemptions issued under Order No. 2004. INGAA requests that the Commission clarify that waivers and exemptions previously granted will not be affected when the new Standards become effective if the circumstances supporting the exemptions when they were granted have not changed. INGAA recognizes that, should an exempted pipeline gain a marketing affiliate, the appropriate entities would then become subject to the requirements of Part 358.

[53] *See Alcoa Power Generating, Inc., et al.*, 108 FERC ¶ 61,243 at PP 204-208 (2004); *reh'g denied,* Order No. 2004-C, FERC Stats & Regs. 2001-2005 ¶ 31,172 PP 47-49; *reh'g dismissed*; *Algonquin Gas Transmission, LLC, et al.*, 111 FERC ¶ 61,099 at PP 90-93 (2005); *Pine Prairie Energy Center, LLC, et al.*, 114 FERC ¶ 61,033 at PP 8-12 (2006).

[54] Initial NOPR at P 8.

CONCLUSION

INGAA requests that the Commission amend its proposed Standards consistent with the foregoing comments.

Respectfully submitted,

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