

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Nora Mead Brownell, and Suedeen G. Kelly.

National Fuel Gas Supply Corporation	Docket No. TS04-248-001
Equitrans, Inc.	Docket No. TS04-270-000
PacifiCorp and TransAlta Centralia Generation, LLC	Docket Nos. TS06-7-000 OA06-4-000
Kinder Morgan Pipelines	Docket No. TS04-249-002
Ohio Valley Electric Corporation and Indiana-Kentucky Electric Corporation	Docket No. TS04-252-001
NewCorp Resources Electric Cooperative, Inc.	Docket Nos. TS04-62-000 TS04-62-001

ORDER ON REQUESTS FOR WAIVER FROM THE STANDARDS OF CONDUCT,  
ORDER NOS. 888 AND 889, REQUESTS FOR REHEARING  
AND COMPLIANCE FILINGS

(Issued July 20, 2006)

1. On November 25, 2003, the Commission issued a Final Rule Adopting Standards of Conduct for Transmission Providers (Order No. 2004).<sup>1</sup> Under Order No. 2004, the Standards of Conduct govern the relationships between Transmission Providers and all of their Marketing and Energy Affiliates. Order No. 2004 states that Transmission

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<sup>1</sup> *Standards of Conduct for Transmission Providers*, Order No. 2004, FERC Stats. & Regs., Regulations Preambles ¶ 31,155 (2003), *order on reh'g*, Order No. 2004-A, FERC Stats. & Regs. ¶ 31,161 (2004), 107 FERC ¶ 61,032 (2004), *order on reh'g*, Order No. 2004-B, FERC Stats. & Regs. ¶ 31,166 (2004), 108 FERC ¶ 61,118 (2004), *order on reh'g*, Order No. 2004-C, FERC Stats. & Regs. ¶ 31,172 (2004), *order on reh'g*, Order No. 2004-D, 110 FERC ¶ 61,320 (2005), *appeal pending*, (U.S.C.A., D.C. Circuit, Docket Nos. 04-1178, et al.).

Providers may request waivers or exemptions from all or some of the requirements of Part 358 for good cause. *See* 18 C.F.R. § 358.1(d) (2005).

2. Between July 2004 and January 2006, the above-captioned Transmission Providers submitted: (1) requests for full or partial waiver of or exemption from the Standards of Conduct or Order Nos. 888 or 889; (2) requests for clarification; (3) compliance filings; (4) or requests for rehearing. Notices of the filings were published in the Federal Register. The Commission is granting and denying the requests for waiver, clarification and rehearing, and accepting and rejecting the compliance filings, as discussed herein. If any of the underlying facts upon which this order is based change, the Transmission Providers must inform the Commission of those changes.

**I. National Fuel Gas Supply Corporation (National Fuel) - Docket No. TS04-248-001**

3. This order grants in part and denies in part requests for rehearing of the Commission's September 20, 2004 Order regarding National Fuel's request for waiver of the Standards of Conduct, accepts in part and requires additional changes with respect to National Fuel's February 3, 2005 compliance filing and grants National Fuel's request for clarification.

**A. Background**

4. On September 20, 2004, the Commission denied National Fuel's request for waiver of the Standards of Conduct with regard to National Fuel's local distribution company (LDC) affiliate, National Fuel Gas Distribution Corporation (Distribution).<sup>2</sup> The Commission denied National Fuel's request to exempt Distribution from Energy Affiliate status, but stated that, with modest restructuring, National Fuel would be able to provide dispatch services to Distribution. The Commission noted that it appeared from the record that the employees of Distribution who engage in Energy Affiliate activities (e.g., the employees responsible for acquiring gas supply for Distribution and arranging transportation of that supply on upstream pipelines) are in Distribution's Gas Supply

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<sup>2</sup> *Alcoa Power Generating Inc., et al.*, 108 FERC ¶ 61,243 (2004). On February 9, and September 1, 2004, National Fuel filed requests for waiver of the Standards of Conduct. National Fuel requested that the Commission grant a waiver for Distribution so long as Distribution does not make off-system sales of gas that is shipped on National Fuel's system, except as covered by several preexisting waivers granted by the Commission. Alternatively, National Fuel asked for a limited waiver under which (1) the requirements of the Standards of Conduct would apply to the operational flow orders (OFOs) and other critical notices by National Fuel to Distribution and (2) National Fuel would continue to be permitted to provide dispatch services for Distribution.

Administration Department (GSAD). The Commission stated that to prevent undue preferences to Distribution, National Fuel must not share transmission or third-party customer information with the employees of Distribution who engage in Energy Affiliate activities. The Commission found that National Fuel's assertion that it would not give Distribution advance information on OFOs was not enough to warrant exemption from the other requirements of the Standards of Conduct because National Fuel had third-party customer information as well as information from interconnecting pipelines which, if shared, would confer undue preferences on Distribution.

5. The Commission stated that it also appeared that the other employees of Distribution, such as those involved in dispatch operations, are not engaged in Energy Affiliate activities. The Commission noted that segregating employees who perform Energy Affiliate activities could allow National Fuel to communicate with the remaining Distribution employees so long as the no-conduit rule was observed.<sup>3</sup> Therefore, the Commission directed National Fuel to submit a plan that addressed whether the employees who perform Energy Affiliate activities for Distribution are or will be sufficiently segregated from the remaining employees of Distribution so that National Fuel can continue to perform dispatch functions for Distribution without sharing prohibited information with the employees of Distribution who perform Energy Affiliate activities.

6. Finally, the Commission stated that National Fuel's pre-Order No. 2004 Standards of Conduct waivers conflict with the limited LDC exemption of section 358.3(d)(6)(v) and required National Fuel to include in its compliance filing justification for continuing each of the pre-existing waivers.

#### **B. National Fuel's Request for Rehearing**

7. On October 20, 2004,<sup>4</sup> National Fuel filed a request for rehearing and clarification of the September 20 Order denying its waiver request and the directive that National Fuel provide justification for continuing the waivers the Commission had granted to National Fuel prior to Order No. 2004.

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<sup>3</sup> The Commission also stated that, under section 358.5(b)(8) of the Commission's regulations, National Fuel may share day-to-day operational-type information with Distribution necessary to maintain National Fuel's operations, including information on confirmations, nominations and schedules with upstream producers and gathering facilities, operational data relating to interconnection points, and communications relating to maintenance of interconnected facilities.

<sup>4</sup> National Fuel filed an erratum to its filing on October 22, 2004.

8. With respect to the Commission's denial of National Fuel's request for waiver regarding Distribution, National Fuel states that it appears that it must erect a communications wall between Distribution's dispatchers and Distribution's GSAD, which acquires gas supply and arranges for interstate transportation of the gas supply. National Fuel states, as it did in its initial waiver request, that the erection of a communications wall between the dispatch center and GSAD would degrade the reliability of service on National Fuel's system due to its unique configuration and the nature of its Enhanced Firm Transportation (EFT) service.

9. National Fuel also seeks rehearing with respect to permissible communications arguing that Distribution must communicate frequently with National Fuel personnel regarding nominated and scheduled quantities under Distribution's various service agreements. National Fuel states that in daily discussions, National Fuel reviews Distribution's intended next day use of National Fuel capacity, and National Fuel provides feedback to Distribution regarding the operational impact of that intended use, and operational factors that Distribution should consider in making its nominations. National Fuel states that it is willing to hold similar discussion with other EFT and Enhanced Storage Service customers, but that Distribution holds 96 percent of National Fuel's market. Moreover, National Fuel states that it cannot recall a circumstance in which it asked an unaffiliated shipper to revise nominations. National Fuel asserts that when it consults with Distribution to revise a nomination, it usually results in more capacity for other shippers. In its Request for Rehearing and Clarification, National Fuel proposes to prohibit the disclosure to Distribution personnel of third-party customer information and information about interconnecting pipelines.

10. Finally, National Fuel also requests rehearing of the Commission's requirement to justify pre-existing waivers. Specifically, National Fuel is concerned about the waiver permitting storage balance transfers pursuant to required retail unbundling programs.<sup>5</sup> National Fuel argues that in Order No. 2004, the Commission stated that it would continue previously granted exemptions or partial waivers unless, after investigation or audit, the Commission determined that the entity no longer qualifies for the exemption.<sup>6</sup> National Fuel argues that there has been no such audit or investigation and that the Commission's observation that the waiver conflicts with the new Standards of Conduct does not support or justify disqualification.

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<sup>5</sup> *National Fuel Gas Supply Corp.*, 81 FERC ¶ 61,097 (1997).

<sup>6</sup> Order No. 2004 at P 27

**C. Compliance Filing**

11. On February 3, 2005, National Fuel made its compliance filing, which also included its justification for pre-existing waivers and a supplemental petition for clarification.

12. With respect to justifying the continuance of the pre-existing waivers that the Commission granted National Fuel for the pre-Order No. 2004 Standards of Conduct, National Fuel seeks to continue only one of those waivers, the waiver permitting storage balance transfers pursuant to state required retail unbundling programs. National Fuel again cites language in Order No. 2004 stating that the Commission will continue exemptions and partial waivers granted under the prior Standards of Conduct unless after an investigation or audit the Commission determines that the entity no longer qualifies for the exemption or the entity has abused the exemption. Order No. 2004 at P 27.

13. National Fuel states that no customer or state regulatory commission has complained about National Fuel's implementation of this waiver and that no deficiencies were noted concerning this waiver in a settlement between Commission staff and National Fuel regarding National Fuel's compliance with the former Standards of Conduct between January 1, 1999 and May 7, 2003.

14. National Fuel states that the storage transfer waiver allows the transfer of gas to marketers in connection with the release of storage capacity under the New York and Pennsylvania state customer choice programs. National Fuel asserts that the sales in question occur when a choice program marketer changes the number of retail customers served and is required by the state regulator to acquire proportional additional storage capacity via release from Distribution. The accompanying transfer of storage inventory is mandatory and involves no discretion on Distribution's part. National Fuel further asserts that the transfers occur at prices fixed by the state regulator and take place entirely under state tariffs for consumption behind the city gate. National Fuel notes that in the order granting the waiver, the Commission noted that Distribution would not have the opportunity to behave in an anti-competitive manner.

**D. Distribution's Request for Rehearing and Comments in Support of Compliance Plan**

15. On October 20, 2004, Distribution filed a request for rehearing of the September 20, 2004 Order. Distribution states that it is not an Energy Affiliate at present, having stopped off-system sales prior to September 22, 2004. Distribution states that it is not feasible to separate GSAD from other Distribution employees because gas dispatching and gas supply are not separate activities. Distribution states that it does not employ personnel who engage in dispatching, but utilizes National Fuel personnel who allocate a portion of their time to Distribution. The National Fuel dispatchers are in

frequent contact with Distribution's GSAD personnel to ensure that information about the supply and load requirement of Distribution are being met. Distribution claims that it would not be operationally feasible to have to separate Distribution dispatch employees because of the process of matching gas load and gas supply on a complex distribution system. Distribution contends that its GSAD personnel must be in close communication with the National Fuel dispatch personnel to match the flow of gas from Distribution's five upstream pipeline suppliers and from storage to National Fuel, with fluctuating demands at scores of delivery points on Distribution's system.

16. With respect to the waiver relating to storage transfers, Distribution states that it is continuing the storage transfers because it is obligated to continue those sales as a result of state requirements. Distribution makes the same arguments as National Fuel for retaining the storage transfer waiver, also noting that the Commission specifically limited the waiver to: (1) non-discretionary sales of gas inventory as of the state-provided effective date; (2) to end users or marketers that sell gas to end-users on Distribution's system; (3) at prices set by uniformly applied formulae approved by state commissions; (4) that accompany the permanent or temporary release of storage capacity; and (5) take place pursuant to retail unbundling programs.

**E. Comments by PSCNY**

17. On March 14, 2005, Public Service Commission of New York (PSCNY) filed comments supporting the retention of the storage transfer waiver. PSCNY asserts that the circumstances under which the storage transfer waiver was previously approved by the Commission have not changed, and, therefore, there is no reason for the Commission to render a different conclusion. PSCNY contends that continuing the pre-existing waiver will ensure reliability, efficiency and safety of both National Fuel's and Distribution's respective gas systems without compromising the Commission's policy objectives underlying Order No. 2004. PSCNY asserts that if the waiver is not extended both National Fuel and Distribution would face excessive and unnecessary compliance costs, which would result in increased costs to consumers.

**F. Discussion on Requests for Rehearing**

18. The Commission finds that separation of GSAD personnel is no longer necessary. It appears that Distribution is currently not an Energy Affiliate because it is an affiliated LDC that qualifies for exemption under section 358.3(d)(6)(v) of the Commission's regulations because it stopped providing off-system sales prior to the implementation date of Order No. 2004, and because the Commission is, as discussed below, allowing the storage transfer waiver to continue. So long as this remains the case, the separation of dispatch personnel is not required.

19. With respect to the storage transfer waiver, the Commission grants rehearing and will allow the storage transfer waiver to continue provided that all of the prerequisites previously stated for that waiver are met. The Commission agrees that because these transactions are non-discretionary and closely regulated there is little risk of undue discrimination. With this waiver, Distribution may be treated as an affiliated LDC that qualifies for the exemption under section 358.3(d)(6)(v), and not as an Energy Affiliate.

**G. Discussion on Compliance Plan**

20. National Fuel and Distribution submitted two compliance plans. Part I presumes Distribution will not be treated as an Energy Affiliate and Part II presumes that Distribution will be treated as an Energy Affiliate. Because, as stated above, Distribution will not be treated as an Energy Affiliate, there is no need to address Part II.

21. In Part I of the compliance plan, Distribution employees who are not in shared departments are isolated from access to National Fuel's non-public customer information and transmission information regarding National Fuel's transmission system, shippers and upstream pipelines "which might afford Distribution an undue preference or advantage" excluding certain types of operational communications.<sup>7</sup> While Distribution, as concluded above, will not be considered an Energy Affiliate, National Fuel should act to ensure that employees shared with Distribution do not act as conduits to a Marketing or Energy Affiliate for any information that is subject to the prohibitions of section 358.5. The Commission finds the language "which might afford Distribution an undue preference or advantage" to be unduly vague and could be read as narrowing the scope of the information sharing restrictions of the Standards of Conduct. Section 358.5 prohibits the disclosure to a Marketing or Energy Affiliate of any information about the Transmission Provider's or another company's transmission system that is not contemporaneously available to all users. Similarly, section 358.5 prohibits the disclosure of any information acquired from or about non-affiliated transmission customers or potential customers. These prohibitions are absolute and are not tempered by the application of judgment about whether the information conveyed might afford an undue preference or advantage. Within 30 days of the date of this Order, National Fuel must revise its compliance plan accordingly.

22. Part I of the compliance plan provides that all shared employees, executives, senior management and all other National Fuel or Distribution employees who have access to non-public transmission information shall have training that focuses on the obligation not to act as a conduit for transmitting protected information to GSAD employees. The Commission reminds National Fuel that employees with access to non-public transmission or customer information must have training on all of the requirements

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<sup>7</sup>National Fuel and Distribution Compliance Plan at 1.

of the Standards of Conduct, not just the no conduit rule. The compliance plan also states that refresher training will be conducted annually and as necessary for transferred employees. The Commission finds this acceptable.

#### **H. Discussion of National Fuel's Request for Clarification**

23. National Fuel also asks for clarification because it states that Paragraph 115 of the September 20 Order appears to be based on the impression that National Fuel has concluded that Distribution is disqualified from the LDC exemption because Distribution engages in hedging transactions. National Fuel states that it has not made such a conclusion and believes that Distribution's hedging transactions do not make it an Energy Affiliate.

24. In Order No. 2004-C, in response to requests for rehearing by National Fuel and others, the Commission clarified that "normal purchases and sales of gas," as those terms are generally used for accounting purposes, are not considered to be financial, futures, or hedging transactions under the Standards of Conduct. Order No. 2004-C at P 12. In Order No. 2004-C, the Commission also allowed exempt LDCs to participate in financial transactions necessary for price risk management solely for the benefit of on-system retail customers. *Id.* Therefore, the Commission grants clarification that if Distribution uses hedging only to manage price risks attributable to serving its on-system, state-regulated bundled retail load, the hedging does not disqualify it from the LDC exemption in section 358.3(d)(6)(v) of the Commission's regulations.

#### **II. Equitrans, Inc. (Equitrans) – Docket No. TS04-270-000**

25. On July 8, 2004, Equitrans filed a request for a limited waiver of section 385.4(a)(3)(ii) of the Commission's regulations,<sup>8</sup> to allow it to share gas flow engineers in its gas control center with Equitable Gas Company (Equitable Gas), its affiliated LDC that is an Energy Affiliate. On September 22, 2004, Equitrans filed a supplemental petition (September 22 Request) claiming that the September 20 Order provided guidance that Equitrans decided to follow and implement with respect to sharing its Gas Control Department with Equitable Gas. In the September 22 Request, Equitrans also seeks clarification that its rates personnel would not be treated as Transmission Function Employees.

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<sup>8</sup> Under section 358.4(a)(3)(ii), a Transmission Provider is prohibited from permitting the employees of its Marketing or Energy Affiliates from having access to the system control center or similar facilities used for transmission operations or reliability functions that differs in any way from the access available to other transmission customers.



### **Gas Control Department**

26. Equitrans claims that the gas flow engineers in its Gas Control Department will no longer report to employees of Equitable Gas who perform Energy Affiliate activities; rather the gas control employees will report to the Vice President of Marketing of Equitrans. In addition, Equitrans states that it has revised its training to emphasize that gas control employees and non-operating employees of the Energy Affiliates to whom they communicate transmission information, will strictly observe the no-conduit rule.<sup>9</sup> Equitrans argues that this is consistent with the discussion in the September 20 Order related to National Fuel Gas Supply Corporation.<sup>10</sup> Equitrans included its organizational chart in the September 22 Request and concludes that the restructuring reflected in the chart brings it into compliance with the Standards of Conduct.<sup>11</sup>

### **Rates Personnel**

27. In the September 22 Request, Equitrans contends that the sharing of its rates personnel with its Energy Affiliates will have no adverse or discriminatory impacts on competition and seeks clarification that its rates personnel would not be classified as Transmission Function employees as the term is defined in section 358.3(j) of the Commission's regulations. If the Commission denies its request for clarification, Equitrans seeks a waiver of section 358.4(a) to the extent that the Commission's interpretation would prohibit Equitrans from sharing its rates personnel with its Energy Affiliate, Equitable Gas.

28. In support of its contention, Equitrans refers to the Commission's discussion related to PPL Electric Utilities Corporation (PPL) in the September 20 Order.<sup>12</sup> Equitrans explains that the rate department's function is to design rates and advocate the Company's position in public rate proceedings. Thus, Equitrans argues that these individuals are similar to lawyers and accountants who provide legal and regulatory advice and who help develop and advocate policy in public forums. Equitrans points out that its last three rate cases were filed in 1993, 1997 and 2004, while Equitable Gas's last

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<sup>9</sup> See 18 C.F.R. § 358.4(a)(5) (2005).

<sup>10</sup> September 20 Order at P 126.

<sup>11</sup> Equitrans has since posted updated organizational charts that reflect a new structure (most recent version dated March 27, 2006) on its Internet website. <https://www.eqt.com/equitrans/organization.asp?pipeline=equitrans> (June 25 and July 3, 2006)

<sup>12</sup> See September 20 Order at P 169-170.

rate case was filed in 1997. Thus, Equitrans believes that it would be redundant to establish another rates department to make filings that occur on average every three years. Last, Equitrans indicated that if it had to establish an additional rates team it would cost \$400,000 initially and an additional \$350,000 annually along with a loss of significant institutional knowledge.

29. Equitrans asserts its situation differs from PPL. Equitrans does not challenge that employees who administer FERC tariffs, including granting waivers or exercising discretion where the tariff allows, are Transmission Function employees. However at Equitrans, administering tariffs is handled entirely by the marketing group without assistance from the rates group. Further, Equitrans does not challenge that employees who determine which prices will be offered to existing shippers and potential shippers, including the administration of discount policies, are Transmission Function employees. But, Equitrans claims that these functions are also performed by Equitrans's marketing department.

**A. Interventions, Protests and Comments**

30. On August 10, 2004, PSE&G Energy Resources & Trade LLC (PSEG) filed a motion to intervene with respect to Equitrans's original waiver request.

31. On August 17, 2004, Independent Oil & Gas Association of West Virginia (IOGA) also filed a motion to intervene with respect to Equitrans's original waiver request together with comments. IOGA neither supports nor opposes Equitrans's waiver request, but rather asks that the Commission condition any waiver on a "strict compliance with the 'no-conduit' provision of Order No. 2004 to ensure that the gas flow engineers do not pass transmission or marketing information from Equitrans to its energy affiliates." IOGA also expressed concern over how Equitrans and its affiliates allocate the cost of shared employees and wants the Commission to ensure that a system is in place to prevent Equitrans and its affiliates from improperly shifting costs to interstate ratepayers.

**B. Discussion**

32. With respect to the placement of gas flow engineers/Gas Control Department in the corporate structure, the information in Equitrans's September 20 Request together with the attached organizational chart indicate that the gas flow engineers no longer report to Equitable Gas employees who deal with Energy Affiliate information, but rather report directly to the Vice President of Marketing of Equitrans.

33. However, the organizational charts and job descriptions currently posted on Equitrans's Internet website indicate that Equitrans has gone through additional reorganization since the time of its filing. As of March 27, 2006 (the date identified on

Equitrans's most recent organizational charts), the Vice President of Marketing no longer is identified on the organizational charts or job descriptions. Rather, the Director of Gas Systems Control reports to the Senior Vice President of Asset Optimization, who is responsible for directing, controlling and managing the commercial activities for Equitrans's transmission and gathering assets, including strategic planning and analysis, review requirements and asset optimization. Individuals who he oversees are also responsible for rates, scheduling, billing and marketing.<sup>13</sup> Equitrans's current organizational charts and job descriptions are insufficient for the Commission to determine whether the gas flow engineers are adequately segregated from individuals engaged in or supervising Marketing or Energy Affiliate activities. Equitrans does not identify which employees are working on behalf of Equitrans or Equitable Gas; nor does it clearly mark which employees are engaging in transmission functions or which employees are engaging in Marketing or Energy Affiliate Activities. As a result, within 30 days of the date of this order, Equitrans must post an organizational chart and job descriptions that clearly identify specific companies and the types of activities employees are performing. If employees are providing services to both Equitrans and Equitable Gas, Equitrans must clearly identify that on the organizational charts and in the job descriptions.

34. In reviewing Equitrans's Internet website, Commission staff also noted that Equitrans's "Compliance Policy of Equitrans, L.P., (dated October 28, 2004), is out-of-date as it contains references to positions that are no longer identified on the organizational charts and job descriptions. Within 30 days of the date of this order, Equitrans must update its Compliance Policy on its Internet website.<sup>14</sup>

35. With respect to shared rate personnel, the Commission denies Equitrans's request for clarification, and denies Equitrans's request for limited waiver of section 358.4(a). Under section 358.3(j), rates personnel are Transmission Function employees for purposes of the Standards of Conduct. These employees cannot be shared with an Energy Affiliate.

36. Equitrans's reliance on Order No. 2004-B at P 74 is misplaced since that discussion relates only to attorneys. Equitrans's assertion that its rates personnel differ from the situation discussed in PPL is equally misplaced. Equitrans concedes that the rates employees at issue are transmission employees. As the Commission said in PPL, activities such as designing rates, administering tariffs (which establish rates for service

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<sup>13</sup> <https://www.eqt.com/equitrans/organization.asp?pipeline=equitrans> (June 25, and July 3, 2006).

<sup>14</sup> <https://www.eqt.com/equitrans/organization.asp?pipeline=equitrans> (June 25, 2006)

as well as the terms and conditions of service for the transmission of electricity or transportation of natural gas, including operating conditions), and calculating gas cost adjustment charges are transmission functions that involve the planning and carrying out of transmission-related operations.<sup>15</sup> In addition, the employees engaging in rate design activities likely have a significant amount of access to Equitrans's transmission, customer and marketing information.<sup>16</sup>

37. Equitrans's contention that its rates personnel are professionals just like lawyers and accountants who are regularly entrusted with information that they hold confidential is not persuasive. Both lawyers and accountants have professional ethical obligations that do not cover rates personnel. Moreover, the rates personnel would not be able to avoid using preferential knowledge that s/he had obtained by designing rates for Equitrans when designing rates for Equitable Gas. The Commission disagrees with Equitrans's contentions that employees could not take advantage of preferential access to Equitrans's transmission or customer information for the benefit of Equitable Gas. The Commission has considered the costs of Equitrans's compliance with the Standards of Conduct, and finds, on balance, that the costs are reasonable to achieve the Commission's goal of preventing unduly discriminatory behavior in a competitive market.<sup>17</sup>

### **III. PacifiCorp and TransAlta Centralia Generation L.L.C. – Docket Nos. TS06-7-000 and OA06-4-000**

38. On January 5, 2006, Pacificorp and TransAlta Centralia Generation LLC (TACG) filed an application pursuant to section 203 of the Federal Power Act (FPA) requesting commission authorization for the disposition of jurisdictional facilities from PacifiCorp to TACG.<sup>18</sup> In the same pleading, TACG requested waiver of compliance with Orders Nos. 888, 889, and 2004 in connection with its contemplated ownership and operation of a transmission line (Centralia Line). As discussed below, this order grants the request for waiver of compliance with requirements of Order Nos. 888, 889, and 2004.

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<sup>15</sup> See September 20 Order at P 169.

<sup>16</sup> See September 20 Order at P 170 citing Order No. 2004-A at P 131.

<sup>17</sup> *Id.* at P 20.

<sup>18</sup> On March 1, 2006, the Commission granted PacifiCorp's and TACG's request for Commission authorization for the disposition and acquisition of jurisdictional facilities from PacifiCorp to TACG. *PacifiCorp and TransAlta Centralia Generation, LLC*, 114 FERC ¶ 62,201 (2006).

**A. Public Notice, Interventions, and Protests**

39. No motions to intervene or interventions were filed.

**B. Background**

40. TACG is an Exempt Wholesale Generator (EWG) that owns the three-mile, uni-directional 239 KV Centralia Line that is used solely for the purposes of making retail deliveries from the Bonneville Power Administration (BPA) grid to the Centralia Coal Mine and providing back-up power to the Centralia Steam Plant. TACG requests a waiver of Order Nos. 888, 889 and 2004 on the grounds that it owns only limited and discrete transmission facilities that do not form part of an integrated grid.

**C. Discussion**

41. With respect to TACG's request for waiver of Orders Nos. 888, 889, and 2004, the Commission grants the requested waivers.

42. With respect to Order No. 888, the Commission will waive these requirements for "public utilities that can show that they own, operate, or control only limited and discrete transmission facilities (facilities that do not form an integrated grid), until such time as the public utility receives a request for transmission service."<sup>19</sup>

43. Similarly, the Commission grants waivers of Order No. 889 requirements "if the applicant owns, operates, or controls only limited or discrete facilities (rather than an integrated transmission grid)."<sup>20</sup> Such waivers are allowed to remain in effect until such time as a potential customer evaluating its transmission needs complains that it could not get information necessary to complete its evaluation.<sup>21</sup>

44. In Order No. 2004, the Commission stated that Transmission Providers that did not previously request waivers under Order No. 889 may seek waivers from the requirements of Part 358.<sup>22</sup> TACG requests waiver under Order No. 2004 since the Centralia Line is a limited and discrete interconnection facility that does not form an integrated part of the BPA grid and does not form a part of the interstate transmission grid and is not used to provide service to third parties. Based on TAGC's representations

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<sup>19</sup> *Black Creek Hydro, Inc.*, 77 FERC ¶ 61,232 at 61,941 (1996) (*Black Creek*).

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

<sup>21</sup> *Id.*

<sup>22</sup> Order No. 2004, at P 28.

in its filing, the Commission concludes that the *Black Creek Hydro* requirements are met. In these circumstances, the Commission will waive the requirements of Order Nos. 888, 889 and 2004 with respect to TAGC.

#### **IV. Kinder Morgan Pipelines (KM Pipelines) - Docket No. TS04-249-002**

45. The Commission is accepting the KM Pipelines' May 19, 2005 compliance filing.<sup>23</sup> On April 19, 2005, the Commission generally approved the KM Pipelines October 19, 2004 Compliance Plan, in which the KM Pipelines proposed to isolate the Commodity Unit of the intrastate pipeline affiliates and treat it as an Energy Affiliate.<sup>24</sup> Rather than treating all of the KM Pipelines' affiliated intrastate pipelines as Energy Affiliates, the Commodity Unit would be physically and functionally separate from the KM Pipelines.<sup>25</sup> The KM Pipelines submitted the October 19, 2004 Compliance Plan in response to a Commission order allowing the KM Pipelines to share transmission employees with its intrastate pipelines (which are Energy Affiliates) provided that they acceptably separate the employees who perform Energy Affiliate activities for the intrastate pipelines (i.e., the Commodity Unit) from the remainder of their intrastate pipeline employees, who are shared with the KM Pipelines' Transmission Function employees.<sup>26</sup>

46. In the April 19, 2005 Order, the Commission directed the KM Pipelines to submit a further compliance filing to describe and explain the information or events relating to the intrastate pipeline business the shared transmission function personnel will discuss with the employees of the Commodity Unit. The Commission also directed the KM Pipelines to provide a copy of the organizational chart on its intranet site that identifies Commodity Unit employees and their positions so that the Commission can determine

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<sup>23</sup> The affiliated KM Pipelines are Natural Gas Pipeline Company of America ("Natural"), Kinder Morgan Interstate Gas Transmission LLC ("KMIGT"), Trailblazer Pipeline Company ("Trailblazer"), Canyon Creek Compression Company ("Canyon"), Horizon Pipeline Company, L.L.C. ("Horizon"), and TransColorado Gas Transmission Company ("TransColorado").

<sup>24</sup> *Algonquin Gas Transmission, L.L.C., et al*, 111 FERC ¶ 61,099 (2005). As of July 3, 2006, the KM Pipelines' internet website named four intrastate pipelines that have Commodity Units that are Energy Affiliates: Kinder Morgan Texas Pipeline, L.P.; Kinder Morgan Tejas Pipeline, L.P.; Kinder Morgan North Texas Pipeline, L.P.; and Kinder Morgan Border Pipeline, L.P.

<sup>25</sup> Under the KM Pipelines' proposal, the KM Pipelines would share Transmission Function personnel with their intrastate pipeline affiliates.

<sup>26</sup> *Alcoa Power Generating Inc.*, 108 FERC ¶ 61,243, P 91.

whether these employees have been clearly identified. Finally, the Commission directed the KM Pipelines to clarify whether the President of the Intrastate Pipeline group has received training in the Standards of Conduct and understands that he may not serve as a conduit for improperly sharing transmission or customer information with the Commodity Unit.

47. The KM Pipelines made the directed compliance filing on May 18, 2005. As discussed below, the Commission accepts the KM Pipelines' compliance filing.

**A. Public Notice, Interventions, and Protests**

48. No protests, comments or interventions were filed.

**B. Discussion**

49. In its May 18 compliance filing, the KM Pipelines state that the services related to transmission functions that are shared by the KM Pipelines and their affiliated intrastate pipelines include storage management, system design, project management, operations, gas control and engineering. The KM Pipelines state that there are three categories of information or events relating to the intrastate pipeline business that the shared transmission function personnel of the intrastate pipelines and the employees of the Commodity Unit discuss: (1) short term business activity of the intrastate pipelines; (2) operation and maintenance activity of the intrastate pipelines; and (3) long-term system capability of the intrastate pipelines. The KM Pipelines state that none of these categories includes prohibited interstate transmission or confidential customer information.

50. Based on the KM Pipelines' responses, the Commission concludes that the compliance filing is acceptable because the communications described concern intrastate transmission services. Communications and information sharing relating to intrastate transmission projects, transactions and services are not covered by the Standards of Conduct. The Commission cautions that if any of the conversations also involve interstate transmission information that is not covered by one of the information sharing exceptions to the Standards of Conduct (e.g., the transaction specific exception in section 358.5(b)(5)), then the information sharing prohibitions and the contemporaneous posting requirement of the Standards of Conduct apply because the Energy Affiliates' (intrastate pipelines') transmission employees are shared with the KM Pipelines.

51. With regard to the Commission's direction that the KM Pipelines address whether the President of the Intrastate Pipelines has received training in the Standards of Conduct and understands that he may not serve as a conduit for improperly sharing transmission or customer information with the Commodity Unit, the KM Pipelines' May 18 compliance filing states that following the Commission's grant of the partial waiver, the President of

the Intrastate Pipeline group received training on the Standards of Conduct and additional specific training on the no-conduit rule. The KM Pipelines submitted an affidavit from the President of the Intrastate Pipelines (as of May 4, 2005) stating that he has received Standards of Conduct training, specialized training on the no-conduit rule and additional training on the partial waiver granted by the Commission. In the affidavit, the President of Intrastate Pipelines states that he understands that he may not serve as a conduit for improperly sharing transmission or customer information with any employee of the Commodity Sales Group.

52. Based on the KM Pipelines' assertions described above, the Commission concludes that the KM Pipelines have satisfactorily addressed the Commission's concerns regarding the training of the President of Intrastate Pipelines.

53. Finally, with respect to the organizational chart of their intrastate pipelines that the KM Pipelines submitted in their May 18 compliance filing, the Commission concludes that the organizational chart adequately shows the separation between the Commodity Unit and the remainder of the intrastate pipelines.

**V. Ohio Valley Electric Corporation and Indiana-Kentucky Electric Corporation - Docket No. TS04-252-001**

54. On October 20, 2004, Ohio Valley Electric Corporation and its wholly-owned subsidiary, Indiana-Kentucky Electric Corporation (collectively, OVEC) submitted a compliance filing in response to the Commission's September 20, 2004 Order denying OVEC's request for partial exemption from the independent functioning requirements of the Standards of Conduct so as to allow OVEC to share marketing and transmission functions and employees in a single control room.<sup>27</sup> In this order, the Commission finds that OVEC has complied with the September 20 Order.

55. In its filing, OVEC states that it intends to separate its current control room staff into two groups: one group to perform transmission functions; and another group to perform energy scheduling functions and to assign each control room employee (including those who were previously performing both functions) to one or the other new group. OVEC proposes to appoint a supervisor for each of the transmission functions and the energy scheduling functions. OVEC states that any shared officers will not act as conduits to provide information to those who are prohibited from receiving it.

56. OVEC also proposes to ensure the physical security and separation of the two functions by housing the energy scheduling group in an area in its offices in Piketon, Ohio separate from the transmission function employees located in its control room.

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<sup>27</sup> See *Alcoa Power Generating Inc.*, 108 FERC ¶ 61,243, at P 147-155.



OVEC states that the energy scheduling employees will not have access to the control room and other facilities used for OVEC's transmission system operations or reliability functions. OVEC states, further, that the control room will be secured through the use of key cards or other methods.

57. Finally, OVEC proposes to take the following additional steps to restrict information access and ensure computer system security. OVEC will arrange for separate access to computer applications and other electronic data used for the transmission function and the energy scheduling function. OVEC will design its computer system to ensure that energy scheduling function employees have access only to transmission information on the same basis as that information is available to customers on the OVEC OASIS or otherwise available to the general public without restriction. OVEC also proposes to restrict access to the computer system used to perform the transmission function by internal password identification practices. OVEC states that its Transmission Function employees will be prohibited from disclosing to energy scheduling function employees any transmission information that is not available on the OVEC OASIS or otherwise available to the public. OVEC also requested an extension of time to complete these proposed steps.

**A. Public Notice, Interventions and Protests**

58. No motions to intervene or protests were filed.

**B. Discussion**

59. The Commission finds that OVEC's proposals to ensure the separation of its transmission function employees and its energy scheduling function employees are adequate to comply with the independent functioning requirement of the Standards of Conduct. Commission staff's review of OVEC's OASIS indicates that OVEC's request for an extension of time is moot, as OVEC has already completed the changes.<sup>28</sup>

**VI. NewCorp Resources Electric Cooperative, Inc. (NewCorp), Docket Nos. TS04-62-000 and TS04-62-001**

60. We address NewCorp's May 19, 2005 compliance filing and grant its request for exemption from the Standards of Conduct. NewCorp is an electric transmission

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<sup>28</sup> See OVEC's Procedures for Implementation of FERV Standards of Conduct for Ohio Valley Electric Corporation and Indiana-Kentucky Electric Corporation. [Http://www.oatioasis.com/OVEC/OVECdocs/Standards\\_of\\_Conduct\\_Implementation\\_05.pdf](http://www.oatioasis.com/OVEC/OVECdocs/Standards_of_Conduct_Implementation_05.pdf) (July 5, 2006).

cooperative with an Open Access Transmission Tariff (OATT).<sup>29</sup> NewCorp is a subsidiary of Cap Rock Energy Corporation (Cap Rock), which is NewCorp's sole customer.<sup>30</sup> Cap Rock serves retail customers in rural counties in the Permian Basin area of West Texas. The officers of NewCorp also hold positions of responsibility with Cap Rock, and NewCorp uses Cap Rock's personnel to service and maintain its facilities on a reimbursable basis.

#### A. Background

61. On February 9, 2004, NewCorp filed a request for a full or partial exemption from the Standards of Conduct. On April 19, 2005, the Commission denied the request because NewCorp had not provided sufficient information.<sup>31</sup> The Commission, therefore, directed NewCorp to identify the individuals who participate in market activities or commodity-related functions, and explain why those individuals or group of individuals cannot be separated from employees performing transmission-related functions.

62. In its May 19, 2005 compliance filing, NewCorp states that it is a transmission-only entity and that Cap Rock is a State-regulated distribution entity. NewCorp points out that, since it filed its request for exemption, there has been a change of circumstances that supports its assertion that it qualifies for the retail sales affiliate exemption in section 358.3(d)(6)(v) of the Commission's regulations.<sup>32</sup> Specifically, NewCorp states that Cap Rock no longer participates in Southwestern Public Service Company's program to sell surplus energy. According to NewCorp, Cap Rock's withdrawal from that program removes any ambiguity about Cap Rock's qualifications for the retail sales affiliate exemption under section 358.3(d)(6)(v) of the Commission's regulations.

63. NewCorp asserts that no NewCorp or Cap Rock employees are engaged in off-system sales or commodity-related functions. According to NewCorp, no employee from either company engages in energy trades or commodity transactions. NewCorp notes,

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<sup>29</sup> NewCorp operates a looped transmission system consisting of approximately 305 miles of 138 kV transmission lines, and has 16 substations. Cap Rock owns the retail distribution system which is served from NewCorp's 16 substations. The NewCorp transmission system is interconnected to Southwestern Public Service Company (Southwestern) at NewCorp's Jones and Vealmoor substations.

<sup>30</sup> Cap Rock purchases energy from Southwestern and delivers it to its retail customers via NewCorp's transmission system.

<sup>31</sup> *Algonquin Gas Transmission*, 111 FERC ¶ 61,099, at P 75-89.

<sup>32</sup> Section 358.3(d)(6)(iv) subsequently was redesignated as § 358.3(d)(6)(v).

however, that one Cap Rock employee, Mr. Ulen North,<sup>33</sup> purchases electric energy on NewCorp's behalf to serve Cap Rock's native, retail customer loads. NewCorp explains that it uses Cap Rock personnel on a cost-reimbursement basis.

64. NewCorp argues that it is entitled to exemption or full or partial waiver under the *Black Creek* standard because it is a small utility. NewCorp asserts that (1) it made approximately 635,000 MWh hours of energy sales in 2003; (2) it now makes no sales of energy, but it transmits energy as a Transmission Provider for Cap Rock; (3) it has no employees of its own; (4) its system consists of 305 miles of looped, 138 kV transmission lines; (5) it is a small, discrete transmission system that serves only one customer; and (6) it is not part of a tightly integrated power pool.

65. NewCorp points out that the Commission has granted waivers of the Standards of Conduct to other similarly-situated entities. According to NewCorp, it is smaller in size and less integrated than those entities that were granted waivers, and has no employees. NewCorp asserts that it is in compliance with the non-discrimination provisions of the Standards of Conduct. NewCorp states that it is requesting exemption or waiver from those provisions that would preclude it from using Cap Rock personnel on a reimbursable basis.

#### **B. Public Notice, Interventions, and Protests**

66. Pioneer Natural Resources USA, Inc. (Pioneer) filed a motion to intervene and protest out of time opposing NewCorp's compliance filing and renewed request for exemption from the Standards of Conduct. Pioneer argues that NewCorp's compliance filing failed to: (1) identify all the persons who are participating in market activities or commodity-related functions; (2) explain why the individuals engaged in procuring power to serve Cap Rock's load cannot be separated from the individuals who provide transmission functions; (3) explain which individuals perform the transmission tariff administration functions; (4) explain the scope of Mr. North's duties, the extent to which he has access to transmission information, and why he cannot be separated from individuals performing transmission-related duties; (5) explain whether any other Cap Rock employees are responsible for engaging in the merchant activities necessary to serve Cap Rock's native load; and (6) explain which Cap Rock employees are responsible for administering NewCorp's OATT.

67. Pioneer requests the Commission to reject NewCorp's assertion that Cap Rock is not an Energy Affiliate or that, if Cap Rock is an Energy Affiliate, it is exempt under section 358.3(d)(6)(v) because it purchases natural gas or energy solely for its own

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<sup>33</sup> Mr. North is the Executive Vice President of Cap Rock.

consumption. Pioneer argues that Cap Rock does not consume the power it purchases because Cap Rock sells power to its retail customers.

68. Pioneer argues that: (1) NewCorp's transmission system is an integrated transmission grid and not limited and discrete; (2) NewCorp is not entitled to a waiver as a small utility because other factors concerning issues addressed by the Texas Railroad Commission are present indicating that such a waiver is not appropriate; (3) NewCorp has not demonstrated that it can or will implement its OATT in a non-discriminatory manner; (4) NewCorp is likely to discriminate in administration of its OATT given the fact that Cap Rock performs all of NewCorp's Transmission Provider functions and transmission customer functions; (5) NewCorp's request for limited waiver to allow it to use Cap Rock's personnel is, in fact, a request for waiver of all of the Standards of Conduct; and (6) there is evidence in a Texas Public Utility Commission proceeding<sup>34</sup> that NewCorp and Cap Rock engaged in instances of poor management, self-dealing and affiliate abuse.

69. Pioneer, therefore, requests the Commission to deny NewCorp's request for exemption from or waiver of the Standards of Conduct and to require NewCorp to comply with the Standards of Conduct.

### **C. NewCorp's Answer**

70. In response to Pioneer's protest, as an initial matter, NewCorp points out that Pioneer's protest is untimely and, therefore, it should be ignored or stricken from the record.

71. NewCorp argues that it is entitled to a small utility exemption under the *Black Creek* criteria. It points out that the Commission previously granted it a waiver from the requirements to establish and maintain an OASIS site and to comply with the former standards of conduct in Order No. 889. NewCorp asserts that its circumstances have not changed since the Commission granted it the Order No. 889 waiver. NewCorp points out that, in Order No. 2004, the Commission determined to continue the exemptions and partial waivers for entities that had previously been granted waivers under Order No. 889. NewCorp also clarifies that Mr. Ulen is no longer involved in any purchases or sales of electric power.

72. NewCorp argues that it should not have to comply with the independent functioning requirements of section 358.4 and the information disclosure restrictions

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<sup>34</sup> Petition to Inquire into the Reasonableness of the Rates and Services of Cap Rock Energy Corporation, SOAH Docket No. 473-04-3554, PUC Docket No. 28813 (2005).

of section 358.5(a), (b)(1), (b)(2) and (b)(3) of the Standards of Conduct because (1) NewCorp has no other customer besides Cap Rock; (2) NewCorp cannot discriminate in favor of Cap Rock when no other customer seeks transmission service from NewCorp; and (3) Cap Rock does not have any wholesale competitors.

#### **D. Discussion**

##### **1. Procedural Matters**

73. We will accept Pioneer's untimely protest given its interest in this proceeding, the early stage of the proceeding and the absence of any undue prejudice or delay.

##### **2. Commission Determination**

74. The Commission will grant NewCorp an exemption from the Standards of Conduct in Order No. 2004 as a small public utility based on the *Black Creek* criteria used to grant such entities waiver or exemptions of Order Nos. 888 and 889. The Commission granted waivers or exemptions to small public utilities that own, operate, or control only limited and discrete transmission facilities (facilities that do not form an integrated transmission grid), unless the small public utility is a member of a tight power pool or other circumstances are present which indicate that a waiver is not justified. The Commission provided that, in order to qualify as a small public utility, the applicant must be a public utility that meets the Small Business Administration definition of a small electric utility, i.e., disposes of no more than 4 million MWh annually.

75. We note that the corporate structure for NewCorp and Cap Rock is intended to separate the Commission-regulated aspects of its energy business from the State-regulated aspects. NewCorp made energy sales in 2003 of approximately 635,000 MWh, which is below the 4 million MWh threshold for a small electric utility. In 2004, NewCorp made approximately 156,600 MW in energy sales from January to April, 2004, after which it began to provide transmission-only service. At this time, NewCorp makes no sales of energy; rather, it transmits essentially the same total amount of energy as a Transmission Provider for Cap Rock. NewCorp is a looped system of 305.9 miles of 138 kV transmission lines, and sixteen substations, two of which interconnect in the north with Southwestern. There is no path out of the southern end of the looped system. NewCorp currently serves no customer other than Cap Rock and there is no indication that NewCorp has denied service to any requester.

76. Pioneer argues that other factors are present that would indicate that a waiver of the Standards of Conduct is not appropriate. Specifically, Pioneer argues that NewCorp (1) has not demonstrated that it can or will implement its OATT in a non-discriminatory manner; and (2) is likely to discriminate in the administration of its OATT given the fact that Cap Rock performs all of NewCorp's Transmission Provider functions and

transmission customer functions. Pioneer also argues that NewCorp's request for limited waiver to allow it to use Cap Rock's personnel is, in fact a request for waiver all of the Standards of Conduct.

77. Pioneer's arguments are speculative. To date, Cap Rock is NewCorp's only customer. NewCorp must treat all potential customers in a non-discriminatory manner. Waiver of the Standards of Conduct does not relieve a Transmission Provider from the requirements of sections 205 and 206 of the Federal Power Act which prohibit the Transmission Provider from unduly preferential or unduly discriminatory conduct. If any customer or potential customer believes that NewCorp has violated these fundamental principles, it may file a complaint with the Commission.

78. Because we are granting NewCorp's request for waiver of the Standards of Conduct as a small entity, we need not address its request that we find that Cap Rock is not an Energy Affiliate.

The Commission orders:

(A) As discussed herein, the Commission is granting National Fuel Gas Supply Corporation's request for waiver and the requests for rehearing with respect to the storage transfers, granting clarification and requiring a revision to the compliance plan. Within 30 days of the date of this Order, National Fuel Gas Supply Corporation must file a revised compliance plan as directed herein.

(B) As discussed herein, the Commission is accepting and rejecting the compliance filing submitted by Equitrans, Inc. Within 30 days of the date of this Order, Equitrans, Inc. must post organizational charts and job descriptions and update its Compliance Policy on its Internet website as described herein.

(C) As discussed herein, the Commission is granting PacificCorp's and TransAlta Centralia Generation LLC's requests for waiver.

(D) As discussed herein, the Commission is accepting Kinder Morgan Pipelines' compliance filing.

(E) As discussed herein, the Commission is accepting the compliance filing of Ohio Valley Electric Corporation and Indiana-Kentucky Electric Corporation.

(F) As discussed herein, the Commission is granting NewCorp Resources Electric Cooperative, Inc. a waiver from the Standards of Conduct.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.