

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 358

(Docket No. RM07-6-001; Order No. 690-A)

(Issued March 21, 2007)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Order on Clarification and Rehearing.

SUMMARY: This order responds to four requests for clarification or, in the alternative, rehearing of the interim rule which the Federal Energy Regulatory Commission issued on January 9, 2007. The Commission issued the interim rule in response to the decision of the United States Court of Appeals for the District of Columbia vacating and remanding the standards of conduct rule, Order No. 2004, as applicable to interstate natural gas pipelines, in National Fuel Gas Supply Corporation v. FERC, 468 F.3d 831 (D.C. Cir. 2006).

In this order, the Commission grants clarification that the standards of conduct for natural gas transmission providers under the interim rule apply only to natural gas transmission providers that are affiliated with a marketing or brokering entity that conducts transportation transactions on such natural gas transmission provider's pipeline. The Commission also grants clarification that the definition for a marketing or brokering entity for a natural gas transmission provider is identical to the definition under the pre-Order No. 2004 standards of conduct. With regards to the other issues for which

clarification or rehearing is sought, the Commission will defer consideration of these matters in this proceeding and address them contemporaneously with the rulemaking proceeding in Docket No. RM07-1-000.

EFFECTIVE DATE: This rule is effective on March 21, 2007.

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UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

Standards of Conduct for Transmission Providers

Docket No. RM07-6-001

ORDER NO. 690-A

ORDER ON CLARIFICATION AND REHEARING

(Issued March 21, 2007)

**I. Introduction**

1. On January 9, 2007, the Commission issued an interim rule promulgating interim standards of conduct regulations that govern the relationship between natural gas transmission providers and their marketing affiliates.<sup>1</sup> The Commission issued the interim rule to respond to the decision of the United States Court of Appeals for the District of Columbia concerning the Standards of Conduct for Transmission Providers

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<sup>1</sup> Standards of Conduct for Transmission Providers, Order No. 690, 72 FR 2427 (Jan. 19, 2007); FERC Stats. & Regs. ¶ 31,327 (2007). (Interim Rule). The Commission issued an errata notice on January 22, 2007 that made corrections to paragraph 18 and the regulatory text.

under Order No. 2004.<sup>2</sup> The purpose of the interim rule was to repromulgate the standards of conduct not challenged in the National Fuel appeal in the interim while the Commission considered how to respond to the court's decision on a permanent basis. Subsequently, on January 18, 2007, the Commission issued a Notice of Proposed Rulemaking (NOPR) in which the Commission proposed making the provisions of the interim rule permanent, as well as proposing other changes to the standards of conduct for natural gas and electric transmission providers.<sup>3</sup> The Commission invited comments on the proposals in the NOPR, and comments are due on March 30, 2007.<sup>4</sup>

2. Four petitioners, the Interstate Natural Gas Association of America (INGAA), CenterPoint Energy Gas Transmission Company (CenterPoint), the National Fuel Companies (National Fuel) and Spectra Energy Transmission, LLC (Spectra) (petitioners or four petitioners), filed requests for clarification or, in the alternative, rehearing of the

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<sup>2</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, III FERC Stats. & Regs. ¶ 31,161 (2004), 107 FERC ¶ 61,032 (2004), order on reh'g, Order No. 2004-B, III FERC Stats. & Regs. ¶ 31,166 (2004), 108 FERC ¶ 61,118 (2004), order on reh'g, Order No. 2004-C, 109 FERC ¶ 61,325 (2004), order on reh'g, Order No. 2004-D, 110 FERC ¶ 61,320 (2005), vacated and remanded as it applies to natural gas pipelines, National Fuel Gas Supply Corporation v. FERC, 468 F.3d 831 (D.C. Cir. 2006) (National Fuel).

<sup>3</sup> Standards of Conduct for Transmission Providers, 72 FR 3958 (Jan. 29, 2007), FERC Stats. & Regs. ¶ 32,611 (2007).

<sup>4</sup> On March 1, 2007, the Commission issued an order extending the deadline for submitting initial comments by 15 days to March 30, 2007 and extending the deadline for submitting reply comments an additional 10 days to April 30, 2007.

interim rule.<sup>5</sup> INGAA and CenterPoint seek expedited consideration so that a decision is issued prior to the comment deadline for the NOPR. As discussed below, the Commission grants clarification that the standards of conduct for natural gas transmission providers under the interim rule apply only to natural gas transmission providers that are affiliated with a marketing or brokering entity that conducts transportation transactions on such natural gas transmission provider's pipeline, and that the definition for "marketing or brokering" is consistent with the definition of that term under the natural gas transmission standards of conduct prior to Order No. 2004. The Commission will amend the regulatory text accordingly to reflect these clarifications. With regards to the other issues for which clarification or rehearing is sought, the Commission will address those issues contemporaneously with the rulemaking proceeding in Docket No. RM07-1-000.

## **II. The D.C. Circuit's Decision in National Fuel**

3. In National Fuel, the court found that the Commission did not support the standards of conduct's expansive definition of energy affiliates, vacated Order Nos. 2004, 2004-A, 2004-B, 2004-C and 2004-D (collectively referred to as Order No. 2004) as applied to natural gas pipelines, and remanded the orders to the Commission.<sup>6</sup>

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<sup>5</sup> CenterPoint incorporated by reference INGAA's filing.

<sup>6</sup> National Fuel, slip op. at 4. Order No. 2004 was not appealed as it applies to electric utility transmission providers.

Specifically, the court rejected the Commission's extension of the standards of conduct beyond pipelines' relationships with their marketing affiliates to govern pipelines' relationships with numerous non-marketing affiliates, such as producers, gatherers, and local distribution companies (non-marketing energy affiliates), as well as extending the standards of conduct to affiliates that do not ship on their affiliated pipelines.<sup>7</sup> In light of these findings, the court found moot the other issues raised on appeal.<sup>8</sup>

### **III. The Interim Rule**

4. In the interim rule, the Commission repromulgated the standards of conduct not challenged in the National Fuel appeal and adopted or revised other provisions of the standards of conduct that had been the subject of the appeal, while the Commission considers how to respond to the court's decision on a permanent basis.<sup>9</sup> The Commission intended the interim rule to eliminate any uncertainty about how the standards of conduct apply to natural gas transmission providers while the Commission developed a final rule.<sup>10</sup> The Commission adhered to both the letter and the spirit of the court's decision in National Fuel by fashioning an interim rule under which the standards of conduct do not

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<sup>7</sup> Id., slip op. at 25.

<sup>8</sup> Id., slip op. at 4.

<sup>9</sup> Interim Rule at P 2.

<sup>10</sup> Id.

apply to the relationship between natural gas transmission providers and non-marketing energy affiliates, which is the aspect of the standards of conduct that the court found infirm.<sup>11</sup>

5. Although the D.C. Circuit did not consider petitioners' other issues on appeal, under the interim rule the Commission treated each of those issues as if the court had also overturned those sections. Specifically, for natural gas transmission providers, the interim rule: (1) omitted restrictions on shared risk management employees<sup>12</sup> and (2) revised the requirement for logging waivers of tariff provisions so that it was identical to the Order No. 497 requirements.<sup>13</sup> The Commission also incorporated modifications

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<sup>11</sup> Id. at P 5 and 7.

<sup>12</sup> Section 358.4(a)(6) of the Commission's regulations states that "Transmission Providers are permitted to share risk management employees that are not engaged in Transmission Functions or sales or commodity Functions with their Marketing and Energy Affiliates." 18 CFR 358.4(a)(6). The interim rule modified this provision by adding a second sentence that states, "This provision does not apply to natural gas transmission providers."

<sup>13</sup> Section 358.5(c)(4) of the Commission's regulations states that "The Transmission Provider must maintain a written log, available for Commission audit, detailing the circumstances and manner in which it exercised its discretion under any terms of the tariff. The information contained in this log is to be posted on the OASIS or Internet web site within 24 hours of when a Transmission Provider exercises its discretion under any terms of the tariff." 18 CFR 358.5(c)(4). The interim rule changed 18 CFR 358.5(c)(4) by renumbering it as 18 CFR 358.5(c)(4)(i) and added a new provision in 18 CFR 358.5(c)(4)(ii) as follows: "[N]atural gas Transmission Providers must maintain a written log of waivers that the natural gas Transmission Provider grants with respect to tariff provisions that provide for such discretionary waivers and provide the log to any person requesting it within 24 hours of the request." 18 CFR 358.5(c)(4)(ii).

consistent with petitioners' appeals of two issues discussed in the preamble of Order No. 2004, but not codified in regulatory text. Specifically, the interim rule stated that: (1) natural gas transmission providers could treat lawyers as permissibly shared employees; and (2) newly certificated natural gas pipeline transmission providers would not be required to observe the standards of conduct until they commence transmission services.<sup>14</sup>

6. The Commission issued the interim rule consistent with the three factors articulated in Mid-Tex Electric Cooperative, Inc. v. FERC (Mid-Tex)<sup>15</sup> for issuing an interim rule without prior notice and comment under the Administrative Procedure Act.<sup>16</sup> First, the Commission stressed that the interim rule was not intended to serve as a permanent rule and that it was commencing a rulemaking proceeding through the issuance of a NOPR (issued nine days after the interim rule).<sup>17</sup> Second, the interim rule followed the court's opinion in National Fuel because, for natural gas pipelines, it eliminated the provisions of Order No. 2004 that were subject to appeal and instead adopted provisions originally promulgated in Order No. 497, which was upheld in

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<sup>14</sup> Former 18 CFR 161.3(k); Interim Rule at P 22.

<sup>15</sup> Mid-Tex Electric Cooperative, Inc. v. FERC, 822 F.2d 1123 (D.C. Cir. 1987).

<sup>16</sup> Interim Rule at P 3-6.

<sup>17</sup> Id. at P 6.



relevant part by the court in Tenneco Gas v. FERC.<sup>18</sup> Third, the Commission issued the interim rule to avoid regulatory confusion. When the Commission adopted Order No. 2004, it rescinded the standards of conduct promulgated by Order No. 497. Because National Fuel vacated Order No. 2004 as applied to natural gas transmission providers, without the interim rule there would have been no existing regulations governing the relationship between natural gas transmission providers and their marketing affiliates. Such a situation would not have been in the public interest because the standards of conduct have for almost two decades played an important role in the Commission's program to ensure non-discriminatory access by pipeline customers to competitive natural gas markets.<sup>19</sup>

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<sup>18</sup> Order No. 497, 53 FR 22139 (June 14, 1988), FERC Stats. & Regs., Regulations Preambles 1986-1990 ¶ 30,820 (June 1, 1988); Order No. 497-A, order on reh'g, 54 FR 52781 (Dec. 22, 1989), FERC Stats. & Regs., Regulations Preambles 1986-1990 ¶ 30,868 (Dec. 15, 1989); Order No. 497-B, order extending sunset date, 55 FR 53291 (Dec. 28, 1990), FERC Stats. & Regs., Regulations Preambles 1986-1990 ¶ 30,908 (Dec. 13, 1990); Order No. 497-C, order extending sunset date, 57 FR 9 (Jan. 2, 1992), FERC Stats. & Regs., Regulations Preambles 1991-1996 ¶ 30,934 (Dec. 20, 1991), reh'g denied, 57 FR 5815 (Feb. 18, 1992), 58 FERC ¶ 61,139 (Feb. 10, 1992); Tenneco Gas v. FERC (affirmed in part and remanded in part), 969 F.2d 1187 (D.C. Cir. 1992); Order No. 497-D, order on remand and extending sunset date, 57 FR 58978 (Dec. 14, 1992), FERC Stats. & Regs., Regulations Preambles 1991-1996 ¶ 30,958 (Dec. 4, 1992); Order No. 497-E, order on reh'g and extending sunset date, 59 FR 243 (Jan. 4, 1994), FERC Stats. & Regs., Regulations Preambles 1991-1996 ¶ 30,987 (Dec. 23, 1993); Order No. 497-F, order denying reh'g and granting clarification, 59 FR 15336 (Apr. 1, 1994), 66 FERC ¶ 61,347 (Mar. 24, 1994); and Order No. 497-G, order extending sunset date, 59 FR 32884 (June 27, 1994), FERC Stats. & Regs., Regulations Preambles 1991-1996 ¶ 30,996 (June 17, 1994).

<sup>19</sup> Interim Rule at P 6.

#### **IV. Petitions for Clarification and Rehearing**

7. Petitioners filed requests for clarification or rehearing on five issues.

First, the four petitioners seek clarification or rehearing as to whether the interim rule limits the application of the standards of conduct to natural gas transmission providers that are affiliated with a marketing or brokering entity that conducts transportation transactions on such natural gas transmission provider's pipeline. The four petitioners contend that under Order No. 497, a natural gas transmission provider was not subject to the standards of conduct if its marketing affiliate did not engage in transportation transactions on its pipeline. INGAA states that if the Commission intended the interim rule to return to the pre-Order No. 2004 standards of conduct requirements for natural gas pipelines, this condition must be included or the interim rule should not have been issued without notice or comment. All four petitioners request that § 358.1 of the interim rule be amended to include the language from the prior standards of conduct in former § 161.1, which limited the application of the standards of conduct to natural gas transmission providers which conduct transportation transactions with its marketing or brokering affiliates.<sup>20</sup>

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<sup>20</sup> Former 18 CFR 161.1 stated that "This part applies to any interstate natural gas pipeline that transports gas for others pursuant to subpart A of part 157, and subparts B or G or part 284 and is affiliated in any way with a natural gas marketing or brokering entity and conducts transportation transactions with its marketing or brokering affiliate."

8. Second, the petitioners assert that the Commission erred in defining marketing affiliate in § 358.3(k) of the Commission's regulations. INGAA contends that the definition of "Marketing Affiliate" in § 358.3(k) should treat natural gas pipeline transmission providers separately from electric transmission providers: for natural gas transmission providers, the definition of marketing affiliate should reference the definition of "marketing or brokering" in § 358.3(l). For electric transmission providers, the definition of marketing affiliate should reference the definition of "marketing, sales, or brokering" in § 358.3(e). This change, INGAA contends, would make clear that § 358.3(e)'s definition of "marketing, sales or brokering" is not relevant to identifying the marketing affiliates of natural gas transmission providers. INGAA asserts that sales of electric energy were not part of the definition of "marketing or brokering" under the former natural gas standards of conduct under Order No. 497, and thus should not apply to natural gas transmission providers under the interim rule. All four petitioners support an identical language change to the definition of marketing affiliate in § 358.3(k) to clarify this point.

9. Third, the four petitioners contend that § 358.1(e) of the Commission's regulations promulgated in the interim rule has the unintended consequence of including more

entities as marketing affiliates than under the prior gas standards of conduct.<sup>21</sup>

Specifically, INGAA and National Fuel contend that an entity that falls under one of the exceptions to the definition of an energy affiliate under § 358.3(d)(6) of the Commission's regulations could now be considered to be classified as a marketing affiliate of a gas pipeline.

10. Fourth, the four petitioners contend that the Commission erred by amending § 358.4(a)(6) of the Commission's regulations to remove, for natural gas transmission providers, the exception allowing transmission providers to share risk management employees with marketing and energy affiliates provided that the risk managers are not engaged in transmission functions or sales or commodity functions. INGAA contends it appealed this issue to the D.C. Circuit on the grounds that the Commission had imposed too many restrictions on the sharing of risk management personnel. As such, the four petitioners contend that the Commission should add a provision that expressly permits natural gas transmission providers to share risk management employees with their marketing affiliates.

11. Finally, the four petitioners request that the Commission clarify the effect of restoring the language of former § 161.3(k) of the Commission's regulations, requiring natural gas transmission providers to maintain a waiver log, in new § 358.5(c)(4)(ii) of

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<sup>21</sup> Section 358.1(e) of the Commission's regulations states that the standards of conduct do not govern the relationship between a natural gas transmission provider and its energy affiliate. 18 CFR 358.1(e).

the Commission's regulations. Specifically, they assert that the current provision (as well as the prior provision in § 161.3(k)) apply only to granting waivers under the tariff and does not apply to acts of discretion under the tariff. INGAA requests that the Commission clarify that a pipeline will be in compliance with the interim rule if the pipeline logs waivers, but not every act of discretion, in a situation when (1) a pipeline tariff expressly permits the pipeline to waive a specific tariff requirement; and (2) the pipeline waives a tariff requirement.

**V. Commission Determination**

12. As noted earlier, the Commission's intent in promulgating the interim rule with respect to natural gas transmission providers was to restore the pre-Order No. 2004 standards of conduct in order to avoid a regulatory gap once the D.C. Circuit issued its decision in National Fuel vacating Order No. 2004 as applied to natural gas transmission providers. The interim rule was intended to be a temporary measure while the Commission promulgated permanent regulations in light of National Fuel, a process the Commission started in the NOPR in Docket No. RM07-1-000. The Commission did not intend for the interim rule to create any new standards of conduct obligations or new exceptions for natural gas transmission providers that were not in place prior to Order No. 2004.

13. As such, the Commission will grant clarification to revise the standards of conduct regulations under the interim rule to reflect the prior standards of conduct for natural gas

transmission providers under Order No. 497. Specifically, the Commission agrees with the requests to: (a) revise § 358.1 to include the language from former § 161.1 limiting the standards of conduct to natural gas transmission providers that conduct transmission transactions with their marketing or brokering affiliates; and (b) revise the definition of “marketing affiliate” in § 358.3(k) to tie it to the definition of “marketing and brokering” for natural gas transmission provider in § 358.3(l) (which uses the definition under Order No. 497). With respect to entities covered by the standards of conduct, these clarifications reflect the Commission’s intent that the scope of the interim rule track the scope of the standards of conduct requirements for natural gas transmission providers in Order No. 497.

14. Accordingly, the standards of conduct will not govern the relationship of a natural gas transmission provider and its affiliate that engages in marketing or brokering activities (as defined in § 358.3(l)) if that affiliate does not conduct transportation transactions on that natural gas transmission provider’s pipeline. Also the standards of conduct do not govern the relationship between a natural gas transmission provider and its electric affiliate that engages in electric marketing, sales or brokering activities (as defined in § 358.3(e)) as long as that electric affiliate does not (i) engage in natural gas marketing activities under § 358.3(l) and (ii) conduct transportation transactions on the affiliated natural gas transmission provider’s pipeline.

15. The Commission intends to address the remainder of the issues raised by the four petitioners contemporaneously with the rulemaking proceeding in Docket No. RM07-1-000. Unlike the requests for which the Commission is granting clarification, the four petitioners' remaining requests do not seek to have the Commission restore the language of the standards of conduct for natural gas transmission providers as it existed prior to Order No. 2004. Instead, the four petitioners' remaining requests seek rehearing by asserting that certain provisions in Order No. 2004 which the court had vacated should be applicable to them or by seeking interpretations of language that the Commission restored from Order No. 497. As such, the consideration of such issues goes beyond the scope of what the Commission intended in the interim rule, namely, to restore the rules in place prior to National Fuel until the current rulemaking proceeding is completed. The Commission believes that consideration of the remaining issues with the rulemaking proceeding in Docket No. RM07-1-000 will lead to a more efficient disposition of the four petitioners' remaining contentions, because they relate to which provisions of Order No. 2004 should be retained and how they should be interpreted. Again, the Commission affirms that the clarifications made to the standards of conduct for natural gas transmission providers in the interim rule were not intended to create new standards of conduct requirements beyond the requirements prior to Order No. 2004.

#### **VI. Document Availability**

16. In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to view and/or print the

contents of this document via the Internet through FERC's Home Page (<http://www.ferc.gov>) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, N.E., Room 2A, Washington D.C. 20426.

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

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## **VII. Effective Date**

19. These revisions in this order on clarification and rehearing are effective on March 21, 2007.



List of subjects in 18 CFR Part 358

Natural gas, Reporting and recordkeeping requirements.

By the Commission.

( S E A L )

Philis J. Posey,  
Acting Secretary.

In consideration of the foregoing, the Commission amends part 358, Chapter I, Title 18, Code of Federal Regulations, to read as follows:

**PART 358 -- STANDARDS OF CONDUCT**

1. The authority citation for part 358 continues to read as follows:

**Authority:**

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

2. In § 358.1, paragraph (a) is revised to read as follows:

**§ 358.1 Applicability.**

(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 and is affiliated in any way with a marketing or brokering entity and conducts transportation transactions with its marketing or brokering affiliate.

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3. In § 358.3, paragraph (k) is revised to read as follows:

**§ 358.3 Definitions.**

(k) Marketing Affiliate means an Affiliate as that term is defined in § 358.3(b) or a unit that

(1) With respect to a natural gas pipeline Transmission Provider, engages in “marketing and brokering” activities as those terms are defined at § 358.3(l); and

(2) With respect to an electric Transmission Provider, engages in marketing, sales or brokering activities as those terms are defined at § 358.3(e).

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