

FERC Proposes Revised Standards of Conduct

January 23, 2007

On January 18th, the Federal Energy Regulatory Commission (FERC or Commission) issued a notice of proposed rulemaking (NOPR) to revise its standards of conduct applicable to gas and electric transmission providers. With respect to interstate natural gas pipelines, the Commission is proposing to narrow the standards' application to cover only pipelines' relationships with their marketing affiliates (FERC implemented this approach on an interim basis earlier this month – *see below*). The Commission seeks comments on whether the application of the standards of conduct should be similarly narrowed for electric transmission providers. Also with respect to electric public utilities, the NOPR proposes to modify the standards of conduct to facilitate integrated resource planning and competitive procurement of power for a utility's bundled retail load. **Initial comments on the proposed regulations will be due 45 days after the NOPR is published in the *Federal Register*, and reply comments will be due 20 days thereafter.**

Proposed Standards of Conduct for Natural Gas Pipelines

The Commission's proposed rule responds to a November 2006 decision by the Court of Appeals for the D.C. Circuit that vacated and remanded the standards of conduct adopted in Order No. 2004 as they applied to natural gas pipelines. (See VNF Issue Alert on [Standards of Conduct](#).) In response to the court's decision, on January 9th the Commission issued an interim rule (Order No. 690) clarifying that the standards of conduct apply only to relationships between interstate pipelines and their marketing affiliates, removing other provisions challenged before the court, and repromulgating those elements of Order No. 2004 that were not challenged. (See VNF Issue Alert on [Interim Standards of Conduct](#).) The NOPR would codify on a permanent basis the approach taken in the interim rule with respect to natural gas pipelines, except as noted below. The following are key provisions of the Commission's proposed rule:

Narrowed Scope of the Standards of Conduct. The Commission is proposing to permanently limit the application of the standards of conduct with respect to natural gas pipelines to apply only to their relationships with marketing affiliates. The standards would no longer apply to the relationship between pipelines and their energy affiliates. (The NOPR also seeks comment on whether the standards of conduct should be similarly narrowed for electric transmission providers to cover only their relationships with their marketing affiliates.)

Revised Definition of Marketing, Sales or Brokering. The NOPR proposes to modify the definition of "marketing, sales or brokering" to include pre-Order No. 2004 exceptions for affiliates selling gas from their own production or their own gathering or processing facilities, and for sellers that are intrastate natural gas pipelines or local distribution companies making on-system sales. The Commission also proposes to expand the definition to include entities managing or controlling third-party transmission capacity, such as asset managers or agents, so that such entities would be marketing affiliates.

Exceptions to the Independent Functioning Requirement. FERC's interim rule relieved natural gas pipelines of Order No. 2004's restriction on sharing risk management employees with marketing affiliates and clarified that a lawyer for a natural gas pipeline who participates in a business decision by rendering legal advice does not become a transmission function employee who cannot be shared with marketing affiliates. The Commission proposes to make these modifications permanent and seeks comments on whether similar changes also should apply to electric transmission providers.

Discretionary Tariff Provisions. The Commission proposes to permanently reinstate the pre-Order No. 2004 requirement that natural gas pipelines "maintain a written log of waivers" granted "with respect to tariff provisions that provide for such discretionary waivers," in lieu of the broader

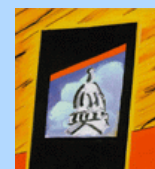
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requirement that pipelines maintain a log “detailing the circumstances and manner in which they exercised their discretion under any terms of the tariff.” The NOPR would not modify the broader Order No. 2004 requirement for electric transmission providers, including the requirement that they post such information within 24 hours of having exercised discretion.

Compliance by New Interstate Pipelines. The Commission is proposing to require that transmission providers “be in full compliance with the standards of conduct within 30 days of becoming subject to the Commission’s jurisdiction.” The proposed regulatory text appears to be different from the interim rule, which clarified that newly formed natural gas pipelines are not required to observe the standards of conduct until they commence transportation transactions with their marketing affiliates.

For Additional Information

Van Ness Feldman actively represented clients in the rulemaking that led to Order No. 2004, and counsels clients on the full range of standards of conduct implementation and compliance issues. For additional information on the proposed rule, or for assistance in participating in the rulemaking proceeding, please contact Curt Moffatt, Doug Smith, or Susan Moore in Washington D.C. at (202) 298-1800, Pam Anderson in Seattle at (206) 623-9372, or any member of our Natural Gas practice.

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