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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

[18 C.F.R. Parts 161 and 250]

Inquiry into Alleged Anticompetitive Practices Related to Marketing Affiliates of Interstate Pipelines

Docket No. RM87-5-001

ORDER NO. 497-A

ORDER ON REHEARING

(Issued December 15, 1989)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final Rule; Order on Rehearing.

SUMMARY: The Commission issued a final rule in Order No. 497 (53 Fed. Reg. 22,139 (June 14, 1988), III FERC Stats. & Regs. ¶ 30,820 on June 1, 1988, adopting standards of conduct and reporting requirements to govern the relationship between interstate pipelines and their gas marketing affiliates.

This order on rehearing denies in part and grants in part rehearing of Order No. 497. This order also extends the final rule's reporting requirements for an additional year, from December 31, 1989 to December 31, 1990.

EFFECTIVE DATE: With the exception of the Commission's extension of the reporting requirements in Order No. 497, the revisions made to the final rule in this order on rehearing are effective [insert 30 days after publication in the Federal Register]. In order to prevent a gap in the rule's reporting requirements, the extension of the sunset date for the rule's reporting requirments is effective January 1, 1990.

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UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

[18 C.F.R. Parts 161 and 250]

Before Commissioners: Martin L. Allday, Chairman;
Charles A. Trabandt, Elizabeth Anne Moler
and Jerry J. Langdon.

Inquiry into Alleged Anti-competitive Practices Related to Marketing Affiliates of Interstate Pipelines	)	Docket No. RM87-5-001

ORDER NO. 497-A

ORDER ON REHEARING

(Issued December 15, 1989)

I. INTRODUCTION

The Federal Energy Regulatory Commission (Commission) is denying in part and granting in part rehearing of Order No. 497 issued in this docket and is clarifying certain provisions of the final rule.

II. PUBLIC REPORTING BURDEN

This order on rehearing makes modest revisions in the reporting requirements contained in Order No. 497 which, collectively, do not materially alter the overall reporting burden in the final rule that is already in effect. The order extends these reporting requirements and the sunset provision for an additional year, from December 31, 1989 to December 31, 1990. The Office of Management and Budget approved the reporting requirements in the final rule on August 18, 1988. This approval is effective until December 31, 1989.

III. BACKGROUND

The Commission issued a final rule in this proceeding on June 1, 1988. 1/ The final rule was the result of a lengthy rulemaking proceeding that began with the issuance of a notice of inquiry (NOI) in November 1986. 2/ The Commission issued the NOI in response to several petitions for rulemaking 3/ and several cases that had raised the issue of potential abuse in the relationship between interstate natural gas pipelines and their marketing or brokering affiliates. 4/

1/ 53 Fed. Reg. 22,139 (June 14, 1988), III FERC Stats. & Regs. ¶ 30,820 (June 1, 1988).

2/ "Notice of Inquiry into Alleged Anticompetitive Practices Related to Marketing Affiliates of Interstate Pipelines" on November 14, 1986 [51 Fed. Reg. 41,982 (Nov. 20, 1986), FERC Stats. & Regs. ¶ 35,520]. The Commission received 107 responses to the NOI.

3/ Petitions of Hadson Gas Systems, Inc. in Docket No. RM86-19-000, Minnesota Department of Public Service in Docket No. RM87-1-000, and Shell Gas Trading Company in Docket No. RM87-2-000.

4/ Northern Natural Gas Co., Docket No. RP82-71-001, et al., 20 FERC ¶ 61,040 (1982); Mountain Fuel Resources, Inc., Docket No. RP86-87-001, 36 FERC ¶ 61,150 (1986); ANR Pipeline Co., Docket No. RP86-105-000, 35 FERC ¶ 61,400 (1986); Independent Petroleum Association of Mountain States v. Panhandle Eastern Pipeline Co., Docket No. CP86-584-000, 36 FERC ¶ 61,282 (1986); Southern Natural Gas Co., Docket No. CP86-277-001, et al., 36 FERC ¶ 61,275 (1986); Texas Gas Transmission Corp., Docket No. CP86-349-001, 36 FERC ¶ 61,274 (1986); Arkla Exploration Co., Docket No. CI86-376-000, et al., 37 FERC ¶ 61,011 (1986); Southern Natural Gas Co., Docket No. CI86-371-000, et al., 36 FERC ¶ 61,401 (1986); Tenneco Oil Co., et al., Docket No. CI86-254-000, et al., 36 FERC ¶ 61,399 (1986).

In response to the comments received to the NOI, the Commission issued a notice of proposed rulemaking (NOPR) on June 2, 1987. 5/ The NOPR proposed to establish standards of conduct to govern the pipeline-affiliate relationship and reporting requirements to provide data to determine whether anticompetitive practices were occurring. The NOPR also outlined other possible approaches to prevent undue discrimination such as divorcement, 6/ divestiture, and organizational separation of the pipeline and its affiliate. Additionally, the NOPR sought comments as to whether only Order No. 436 pipelines should be permitted to have marketing affiliates.

In the final rule the Commission adopted the standards of conduct and reporting requirements outlined in the NOPR, with certain modifications. The Commission also established a tentative sunset date of December 31, 1989 for the rule's reporting requirements. The Commission added that it would examine the need to extend the rule's reporting requirements at the end of this period and would do so if such action was necessary. Other changes were made to reduce the reporting requirements and to eliminate reporting of data that might result

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5/ 52 Fed. Reg. 21,578 (June 8, 1987), FERC Stats. & Regs. ¶ 32,445. The Commission also held an Opportunity for Oral Presentation on October 20, 1987, to allow presenters to air their comments more fully.

6/ Under divorcement, a pipeline would be allowed to have a marketing affiliate but could do no business with the affiliate.

in the release of competitively sensitive information. 7/ The final rule also restricted the availability of discounts to affiliates of pipelines that do not transport under a blanket certificate under Subpart G of Part 284 of the Commission's regulations. Under the final rule, such a pipeline may not charge an affiliate a rate lower than the highest rate it charges in any transaction not involving its marketing affiliate.

The Commission declined in the final rule to require divorcement, divestiture, or organizational separation or to limit marketing affiliates to Order No. 436 pipelines. The Commission, however, stated that it might impose remedies such as divorcement or divestiture on a case-by-case basis where necessary to prevent competitive abuses.

IV. DISCUSSION

The Commission received 44 rehearing requests as well as a number of requests to stay all or portions of the final rule or

7/ The NOPR proposed that a pipeline make publicly available a log of all transportation transactions. The final rule required such a log for affiliate transactions only. The NOPR also proposed to require (1) that the log identify any affiliation of the requestor of transportation with the supplier of the gas and (2) that pipeline transportation personnel maintain a log of contacts. Neither of these proposals was adopted in the final rule. Rather than require the log to identify the supplier and the end user as proposed in the NOPR, the final rule required identification only of the production area and the state where the gas is consumed. The final rule delayed the initial filing date for the information from 30 to 60 days. The NOPR proposed updating non-log information every 30 days while the final rule required such updates on a quarterly basis.

to waive particular provisions of the rule for individual pipelines. 8/

Many of the arguments made on rehearing are the same as those raised in the comments to the NOI and the NOPR. Pipelines and their affiliates continue to argue that the rule is unnecessary, is overly burdensome and would force the pipeline to release confidential data that would put the affiliated marketer at a competitive disadvantage. 9/ Independent marketers and producers argue that the rule did not go far enough to prevent affiliate abuses. They argue that the Commission should have ordered divestiture 10/ or at least structural separation of pipelines and their affiliates. 11/

In the final rule, however, the Commission determined that the potential for anticompetitive conduct between a pipeline and its affiliate was sufficient to warrant action. In determining the appropriate action to take, the Commission sought to fashion

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8/ The list of petitioners is contained in the Appendix. The stay and waiver requests are being addressed in a separate order issued contemporaneously with this order.

9/ See, e.g., Interstate Natural Association of America (INGAA), Enron Interstate Pipelines (Enron), Tenneco Gas Pipeline Group (Tenneco).

10/ Access Energy Corp.

11/ See, e.g., Hadson Gas Systems (Hadson), Producer Associations, National Gas Clearinghouse, Inc. The Maryland People's Counsel also argues that the Commission should have allowed marketing affiliates only for Part 284 Subpart G pipelines.

a rule that would prevent these abuses with the least regulatory infringement necessary. The Commission believes that the course it adopted in the final rule of establishing standards of conduct and reporting requirements has been effective in curbing affiliate abuses without the need for more intrusive measures. To the extent that the Commission addressed the above arguments in the final rule, it will not reiterate its rationale at great length on rehearing. Several arguments, however, do merit additional discussion. The Commission is also clarifying certain provisions of the rule and modifying certain aspects of the rule. Any rehearing requests that may be filed in response to this order on rehearing should be limited to new matters raised by this order.

A. <u>Need for the Rule</u>.

The Commission continues to believe that the potential for affiliate abuse is sufficiently substantial to support the rule as promulgated.

In adhering to its approach adopted in the final rule, the Commission is not persuaded by the pipelines' arguments that the rule is unnecessary. As the Commission noted in the NOPR, the Commission had received complaints of abuses. Comments received in response to the NOI indicated that there were no industry-wide standards as to the type of activities that could lead to affiliate abuse and that undetected anticompetitive activities could be occurring. A substantial portion of pipelines' transportation transactions were and are being conducted on behalf of their marketing affiliate, and pipelines have an economic incentive to favor their affiliates. Thus, the potential for abuse was and is significant enough to warrant Commission action. Also, absent established standards, pipelines would run the risk that their practices with their affiliates might later be found to be unlawful. The standards of conduct provide guidelines for the Commission's Enforcement Task Force in dealing with complaints alleging pipeline-affiliate abuse, and establish a framework in which a pipeline and its affiliate can structure their relationship in a lawful manner. These standards, together with the rule's reporting requirements, give the public and the Commission staff the ability to detect and prevent unlawfully discriminatory activity.

The Commission has also concluded that stronger action, such as divestment, divorcement, or organizational separation is not supported by the record presently before the Commission. Nor does the Commission believe it necessary to require a pipeline to have a blanket certificate under Subpart G of Part 284 in order to conduct transportation transactions with its affiliate. 12/ This conclusion is confirmed by our analysis of the data submitted by pipelines in response to the rule's reporting

12/ In this regard, the Commission notes that the issue is largely moot in that all of the major interstate pipelines have either accepted or applied for such certificates.

requirements. The data do not reveal any pattern of affiliate favoritism in areas such as discounts, queue positioning, processing time for transportation requests, take-or-pay, or the disposition of requests. The Commission will continue to monitor the information submitted to determine if stronger generic action is necessary and will continue to act on a case-by-case basis to prevent affiliate abuse where such action is appropriate. 13/

B. Scope of the Rule.

1. Entities covered by the rule.

In response to many rehearing requests the Commission is revising and clarifying the types of entities and transactions that are covered by the rule. 14/

13/ In this regard, the Commission notes its recent order in Docket No. RP88-68-000, et al., inter alia, directing Transcontinental Gas Pipe Line Corporation (Transco) to show cause why its recent transactions with its marketing affiliate TEMCO are not in violation of Order No. 497 and why Transco should not be required to divest or divorce itself from TEMCO.

14/ After the final rule went into effect, the Commission adopted Order No. 509, "Interpretation of, and Regulations under, Section 5 of the Outer Continental Shelf Lands Act Governing Transportation of Natural Gas by Interstate Natural Gas Pipelines on the Outer Continental Shelf," Order No. 509, 53 Fed. Reg. 50,925 (Dec. 19, 1988), III FERC Stats. & Regs. ¶ 30,842 (Dec. 9, 1988) reh'g. denied, 54 Fed. Reg. 8301 (Feb. 28, 1989), 46 FERC ¶ 61,177 (Feb. 21, 1989). Order No. 509 provides every interstate pipeline that transports gas on or across the Outer Continental Shelf with a blanket certificate authorizing and requiring nondiscriminatory transportation of natural gas on behalf of others. These certificates are issued pursuant to Subpart K of Part 284, a new subpart promulgated in the final rule. The Commission is amending the regulatory text of Order No. 497 to bring pipelines holding these Subpart K certificates (continued...)

First, the Commission is excluding only from the rule's reporting requirements in § 250.16, but not from the standards of conduct, transactions involving an affiliate that a pipeline conducts pursuant to an individual certificate previously issued under section 7(c) of the Natural Gas Act (NGA). 15/ These certificates were issued under Subpart A of Part 157 of the Commission's regulations pursuant to detailed applications by the pipelines for authorization to provide such service. The applications disclosed the affiliate involvement and all other relevant details of these transactions, and the Commission fully considered these facts before issuing the certificates. These certificates are already subject to whatever reporting requirements the Commission deemed appropriate to prevent discrimination in providing the requested service, and the pipelines have relied on these certificates as issued. Therefore, the Commission believes that to subject these transactions to the additional reporting requirements in the rule would be unnecessarily burdensome. A pipeline, however, continues to be subject to the standards of conduct in the rule

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14/(...continued)
within the scope of the rule.

The Commission is also deleting the requirement in the regulatory text that Part 157, Subpart E pipelines are included in the rule because such a requirement is redundant. Subpart E pipelines already are subject to Subpart G of Part 284.

15/ 15 U.S.C. § 717f (1982).

regardless of the type of certificate authority it possesses to transport on behalf of an affiliate.

The Commission has authorized marketing affiliate transactions in individual transportation certificates in the past, and will not disturb ongoing transportation conducted pursuant to previously issued certificates of that type. However, as a matter of policy, in the future the Commission will not issue new certificates for individual transportation transactions that involve transportation of gas sold by the pipeline's marketing affiliate unless the pipeline agrees to comply with all of the requirements of this rule, including the reporting requirements.

Second, the Commission is clarifying the types of transactions with a marketing affiliate that make a pipeline subject to the final rule. Section 250.16 of the regulations, as promulgated in the rule, exempts from the rule a pipeline "that does not conduct <u>any</u> transactions with its affiliated marketer." In the NOPR and the final rule the Commission explained that it was concerned with possible abuses in providing transportation services. Thus, the standards of conduct in the final rule related to a pipeline's transportation rather than merchant function. Similarly, the reporting requirements contained in the final rule required the filing and maintenance of data regarding transportation requests and service. As this type of potential abuse was the focus of the rule, the use of the word "any" in this context is overbroad. Therefore, the Commission is revising this section to exempt from the rule pipelines that do not conduct transportation transactions with an affiliate, rather than any transactions. 16/ Simply put, if a pipeline does not transport on behalf of an affiliate, there is no opportunity for it to provide the affiliate a preference in transportation. The Commission intends the term transportation, as used in this rule. to include any transactions which provide for receipt of gas at one point and redelivery of gas to a second point, including exchanges, back-hauls and other transactions in which the gas being transported is owned, brokered or sold by the affiliate.

Third, in response to many rehearing requests, the Commission is clarifying the types of activity that constitute marketing 17/ for purposes of the rule. For the purposes of

16/ Because the rule is designed to ensure that a marketing affiliate does not receive a preference in the provision of transportation services, the standards of conduct implement that purpose by extending to areas of the pipeline-affiliate relationship that are ancillary to transportation. For example, one standard prohibits a pipeline from providing its affiliate with information the pipeline receives from a non-affiliated shipper. Another standard provides that if a pipeline shares information related to the transportation, sale or marketing of gas with its affiliate, it must also contemporaneously disclose the information to all potential shippers. Yet another requires that the employees of the pipeline and the affiliate function independently of each other to the maximum extent possible. And the data required to be reported encompasses non-transportation aspects of the transportation transaction, such as, for instance, whether the pipeline's affiliate sold the transported gas at a loss.

17/ For purposes of this rule, the term "marketing" and "brokering" are synonymous.

defining the scope of this rule, a marketer generally is one who either: (1) makes a "first sale" of gas as the term "first sale" is defined in section 2(21) of the NGPA 18/ and codified in section 270.203 of the Commission's regulations; or (2) who makes a sale for resale of gas subject to the NGA. There are sellers of gas, however, that the Commission does not intend to include in the scope of this rule: producers, gatherers or processors, acting in their traditional roles, that sell gas solely from their own production, 19/ gathering, or processing facilities. 20/ In making those sales such entities are acting in the roles that their names imply. Hence, even though such sales might fit a dictionary definition of the word "marketing"

18/ 15 U.S.C. § 3301 (1982).

19/ This 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 Commission has distinguished a producer that sells its own production from a producer that is acting as a marketer. In OXY USA Inc., 44 FERC ¶ 61,439 (1988) reh'g denied 46 FERC ¶ 61,256 (1989), the Commission granted OXY an unlimited term blanket certificate to make sales of its own production. In this context OXY was acting in its traditional role as a producer. However, the order limited the term in which OXY could act as a marketer. This limitation on OXY's marketing function was included because OXY is affiliated with an interstate pipeline.

20/ There may be circumstances in which a pipeline or its affiliate may attempt to exercise monopoly power over these types of facilities to deny non-affiliates access to transportation services. The Commission will deal with these situations on an individual basis. See Northern Natural Gas Company, 43 FERC ¶ 61,473 (1988); and Northwest Pipeline Corporation, 43 FERC ¶ 61,491 (1988).

they are not included within the scope of the term "marketing" as it is used in this rule.

That is not to say, however, that these entities can never be considered to be marketers of gas as that term is used in the rule. For example if a producer sells gas that was produced by another, it is acting as a marketer of that gas, not the producer of the gas. Likewise, a gatherer or processor that sells gas from facilities other than its own is acting as a marketer rather than as a gatherer or processor.

There are also situations in which a pipeline or a local distribution company (LDC) is not acting in its traditional role but as a marketer. Traditionally, pipelines and LDCs purchase and arrange for the transportation of gas for their own system supply and then sell that gas to their customers. It is when a pipeline or LDC acts outside of this role that it can engage in the types of sales for which an independent marketer could compete. In making such sales the affiliated pipeline or LDC is competing for space on the transporting pipeline. For example, when a pipeline or LDC sells gas off-system, it is not providing a traditional service to its service area customers but rather is competing with others in making that sale. As such, it is a marketer of that gas within the scope of the rule.

Similarly, when an intrastate pipeline makes sales under NGPA section 311(b), 21/ it is competing with others for that sale as does an LDC that sells gas pursuant to section 284.224 of the Commission's regulations. 22/ The Commission has also granted interstate pipelines blanket certificates to make interruptible sales of gas that is excess to their system supply. Because these sales are made in the open market, the pipeline must compete with others to make the sale. This raises the potential that another pipeline affiliated with that pipeline would have an incentive to favor the affiliate in transporting the off system gas sold under the blanket certificate. 23/ However, we believe that the reporting requirements and prohibitions against undue discrimination contained in those blanket certificates are sufficient to prevent the potential abuses targeted by this rule. Therefore, we are excluding from

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21/ As codified at 18 C.F.R. § 284.142 (1988). That provision allows intrastate pipelines, without prior Commission approval, to sell gas to an interstate pipeline or local distribution company served by an interstate pipeline.

22/ That provision, in part, allows LDCs to make sales to interstate pipelines and other LDCs served by interstate pipelines.

23/ The Commission has approved this type of certificate in several circumstances. See Northern Natural Gas Co., 42 FERC ¶ 61,303 (1988), reh'g denied 43 FERC ¶ 61,519 (1988), Transwestern Pipeline Company, 43 FERC ¶ 61,240 (1988) reh'g granted, 44 FERC ¶ 61,164 (1988); El Paso Natural Gas Company, 45 FERC ¶ 61,322 (1988); Southern Natural Gas Company, 45 FERC ¶ 61,461 (1988); Natural Gas Pipeline Company, 45 FERC ¶ 61,465 (1988); CNG Transmission Corporation, 45 FERC ¶ 61,466 (1988).

the scope of the rule transactions involving interruptible sales of surplus system supply made pursuant to a blanket certificate issued for that purpose. Thus, neither the reporting requirements nor the standards of conduct in this rule will be applied to those transactions.

Therefore, although the term "marketing" as it is used in this rule generally encompasses first sales of gas, it excludes certain first sales that the Commission does not intend to encompass within the rule, and includes other sales in which anticompetitive conduct could occur and that the Commission does wish to encompass in the rule. Although a part of the activities of an affiliated producer, gatherer, processor, interstate or intrastate pipeline, or LDC may fall outside of the scope of the rule, those entities will be considered marketers for purposes of the rule in the illustrative situations discussed above. In summary, the Commission has determined that the following activities will be treated as "marketing" within the scope of the rule: (1) "first sales" of gas, or sales of gas for resale by a seller that is not an interstate pipeline, except when the seller is selling solely its own production or when the seller is selling gas solely from its own processing or gathering facilities; (2) off-system sales by an affiliated intrastate pipeline or sales under NGPA section 311(b); and (3) off-system sales by an affiliated LDC or sales under section 284.224 of the Commission's regulations.

2. First sale status.

In the final rule, the Commission retained the "first sale" status of certain sales by pipeline marketing affiliates. Because of this status, affiliate sales of certain NGPA categories of gas are not subject to the Commission's NGA jurisdiction. Without this status, the affiliate would be subject to price regulation under section 4 of the NGA. 24/

The Producer Associations suggest that the Commission act expeditiously on applications filed by the public to remove this "first sales" status on an individual basis. It states that this would give the pipeline an incentive to deal with the public in an equitable manner. While the Commission continues to believe that it can effectively deter affiliate abuse by regulating the pipeline rather than the marketing affiliate it will use its authority to act under § 270.203 to remove an affiliate's first sale status if individual circumstances so warrant.

3. Ten percent presumption of control.

In the final rule the Commission stated that "'affiliate' when used in relation to any person, means another person which controls, is controlled by, or is under common control with, such person." 25/ The Commission stated that the term "'control' ... includes, but is not limited to, the possession, directly or

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24/ 15 U.S.C. § 717(c) (1982).

25/ The definition of "affiliate" is taken from section 2(27) of the NGPA. 15 U.S.C. § 3301 (1982).

indirectly, of the authority to direct or cause the direction of the management or policies of a company." The Commission added that a voting interest of 10 percent or more created a presumption of control, and therefore an affiliate relationship.

Several joint venture pipelines request clarification as to whether they are "affiliates" of their pipeline owners. 26/ They argue that although these owners may individually have more than a 10 percent voting interest, no one owner can control the pipeline to the extent that it would give preference to an individual owner's affiliate.

The Commission believes that whenever a pipeline and its marketing or brokering entity share overlapping economic interests the potential arises that the pipeline may grant its affiliate a preference in order to benefit the corporate whole. The greater the degree of such overlapping interests, the greater the potential for abuse. It is because overlapping economic interests create an incentive to grant an affiliate preference that the Commission adopted a broad definition of control for purposes of the rule. This definition is not limited to the ability to directly control the management of a company but also includes situations in which a pipeline, by itself or in

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26/ Sea Robin Pipeline Company, Great Lakes Transmission Company, High Island Offshore System, Trailblazer Pipeline Company, Northern Border Pipeline Company. These requests are being addressed in a separate order that is being issued contemporaneously with this order.

conjunction with others, has an economic incentive to favor an affiliate. This situation can arise, for example, in the case of a joint venture pipeline in which the pipeline is owned by several other pipelines. In this situation, a single pipeline owner may not be in a position to favor its affiliate over the affiliates of other pipeline owners. However, the pipeline owners as a group have an incentive to grant preferences to their own affiliates over other shippers. This situation could lead to a practice of granting preferences to these affiliates to the detriment of other shippers.

While any overlapping economic interest gives rise to the possibility that a preference may occur, a 10 percent voting interest raises this potential to a level where close monitoring of the pipeline-affiliate relationship is necessary. Thus, the existence of a 10 percent or more voting interest is a sufficient degree of economic involvement to create a rebuttable presumption that an affiliate relationship exists. Accordingly, the Commission has revised the definition of "control" in § 161.2 to read as follows:

> "Control" (including the terms "controlling," "controlled by," and "under common control with") includes, but is not limited to, the possession, directly or indirectly and whether acting alone or in conjunction with others, of the authority to direct or cause the direction of the management or policies of a company. A voting interest of 10 percent or more creates a rebuttable presumption of control.

For voting interests of less than 10 percent or for other shared economic interests, the Commission may examine, on a case-by-case basis, the particular circumstances involved in the relationship between the pipeline and a natural gas marketer to determine whether a sufficient incentive and opportunity exists to favor the marketer. If the Commission concludes that the incentive and ability to engage in anticompetitive conduct exists, it will require the pipeline to conform to the rule's standards of conduct and reporting requirements. 27/

C. Standards of Conduct.

The final rule established standards of conduct to govern the pipeline-affiliate relationship. These standards provide that a pipeline:

(1) must apply a tariff provision relating to transportation in the same manner to the same or similarly situated persons if there is discretion in the application of the provision;

(2) must strictly enforce a tariff provision for which there is no discretion in the application of the provision;

(3) may not give its marketing affiliate a preference in scheduling, transportation, storage or curtailment priority;

(4) must process all similar requests for transportation in the same manner and within the same period of time;

(5) may not disclose to an affiliate any information to secure transportation service the pipeline receives from a non-affiliated shipper;

27/ See Midwest Gas Users Association v. FERC, 833 F.2d 341 (D.C. Cir. 1987).

(6) must contemporaneously make available to all potential shippers any information that it gives to an affiliate regarding the transportation of natural gas and gas sales and marketing;

(7) must, to the maximum extent practicable, provide for the independent functioning of operating personnel of the pipeline and the affiliate;

(8) may not condition or tie its agreement to release gas subject to take-or-pay relief to an agreement by the producer (or a customer or end-user) to obtain services from an affiliate of the pipeline or to an offer by the pipeline to provide or expedite transportation service to its affiliate for the released gas; and

(9) must identify, upon request by a potential shipper, any information relating to released gas that is mitigating the pipelines's take-or-pay liability if it has provided this information to its marketing affiliate.

The rule required pipelines to file procedures with the Commission by September 12, 1988, to enable shippers and the Commission to determine how the pipeline is complying with these standards of conduct.

In addition to these standards the Commission is adopting two additional standards. One, if a pipeline offers a transportation discount to an affiliated marketer, it must make a comparable and contemporaneous discount available to all similarly situated non-affiliated shippers. This standard is in addition to the previously adopted restriction (see § 284.7(d)(5)(ii)(B)) on selective discounting by pipelines that do not have Part 284 blanket certificate. In Order No. 497, the Commission recognized that selective discounts by pipelines have the potential for giving rise to undue discrimination. To prevent this discrimination, the Commission restricted the ability of a non-open access pipeline to provide discounts to its affiliate. Upon further consideration, the Commission has determined that the additional standard that it is promulgating in this order is also necessary to prevent affiliate abuse. This new standard applies to section 311 pipelines as well as pipelines that have a Part 284 blanket certificate. If a pipeline is required to make the same discount available to other shippers that it offers to its affiliate, the pipeline will not be able to grant its affiliate a preferential discount.

Second, the Commission is establishing a standard that a pipeline must maintain its books and records separately from those of its affiliate. 28/

Pipelines must revise their standards to include these new factors by [insert date that is 30 days after issuance]. (See § 161.3(j).)

1. Discretionary enforcement of tariff provisions [§ 161.3(a)].

The Commission is adopting a suggestion of EnTrade to require pipelines to maintain and make available for copying on a daily basis a written log of waivers that the pipeline grants with respect to tariff provisions that provide for such discretionary waivers. In this way the Commission and the public

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28/ This is consistent with the Commission's current standard accounting practices. See 18 C.F.R. Part 201 (1988).

will be able to determine whether a pipeline is granting waivers on a nondiscriminatory basis. This information must also be included in the transportation log that is filed with the Commission and to which the public is to have electronic access. [See new § 250.16(b)(xx)]

2. Strict enforcement of tariff provisions [§ 161.3(b)].

Pipelines argue that this standard is unreasonable because minor operational and administrative deviations from a written tariff are an integral part of pipeline operations. 29/ Enron argues that this provision should be limited to major tariff provisions and that a blanket waiver should be granted for operational and administrative provisions that may not be identifiable in advance and that are beyond the control of the pipeline. Arkla and Enron Gas Marketing state that pipelines should be able to waive tariff provisions in accordance with Commission precedent, specifically penalty provisions if they are waived in a nondiscriminatory manner.

The Commission will not allow a pipeline the discretion to waive tariff provisions for an affiliated marketer unless the provision itself gives the pipeline discretion to waive the provision. To allow pipelines this ability, even on a nondiscriminatory basis, could require the Commission to examine, on a case-by-case basis, whether the waiver was in fact

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29/ See, e.g., Enron, INGAA.

discriminatory. If a pipeline wishes to waive a provision, it must apply to the Commission to do so. Alternately, a pipeline may file revised tariff sheets proposing to grant the pipeline this discretion. In that case, the Commission and the public will have an opportunity to examine the pipeline's request and the Commission will be able to determine whether such discretion should be allowed.

3. <u>Prohibition on giving a marketing affiliate preference in scheduling, transportation, storage, or curtailment priority [§ 161.3(c)]</u>.

Shell states that this provision should be clarified so that the prohibition on preferential treatment would not be limited to these four areas. The Commission agrees and is clarifying the regulatory text accordingly. The Commission is also specifically adding a prohibition on granting an affiliate a preference in balancing.

4. <u>Prohibition on disclosure to an affiliate of information to secure transportation received from a non-affiliated shipper [§ 161.3(e)]</u>.

Shell suggests that this provision should reference "potential" shippers as well as shippers. Shell states that potential shippers should be included because a pipeline could conceivably deny transportation to a potential shipper so that it could disclose information it received in the transportation request to its affiliate. The Commission agrees and is amending the regulation to prevent this possibility.

The Commission is also adopting another suggestion by Shell.

Shell states that this standard of conduct should not be limited to information regarding transportation services but should prohibit the disclosure of any information received from a non-affiliate. The Commission sees no reason to allow the pipeline to share any information received from a non-affiliated shipper with its affiliate. Additionally, the Commission notes that under § 161.3(f) a pipeline is required to contemporaneously disclose to all potential shippers any information given to its affiliate relating to natural gas transportation, sales or marketing. This could result in the public disclosure of confidential information that may have inadvertently been disclosed by a non-affiliate to the pipeline and then to the pipeline's affiliate. To prevent this possibility, the Commission is prohibiting a pipeline from sharing any information received from a non-affiliated shipper. [See § 161.3(e)]

5. Contemporaneous disclosure of transportation and gas sales and marketing information to potential shippers [§ 161.3(f)].

At the outset, the Commission has concluded that this standard of conduct applies with respect to any employee or officer that is shared by the pipeline and its marketing affiliate. Thus, any gas sales, marketing or transportation information such an employee may receive in his or her capacity as a pipeline employee will be considered information provided to the affiliate. This information must then be contemporaneously disclosed to all potential shippers. For example, if a pipeline and its parent company decide to embark on a new gas transportation program, and one of the officers of the parent is also an officer of the affiliated marketer, the pipeline has shared the information with the affiliated marketer by virtue of the fact that the officer of the parent company (who is also an officer of the affiliated marketer) knows of it.

i. Contemporaneous disclosure.

Some petitioners ask by what method this information can be made "contemporaneously" available. 30/ The Commission does not wish to dictate a particular method by which pipelines can make the information contemporaneously available. The Commission notes, however, that most pipelines have established electronic bulletin boards to comply with Order No. 497 and it finds that this is an acceptable method of contemporaneously providing the information. 31/ There are also commercial data distribution firms with which a pipeline may contract to post the information on an electronic bulletin board. Whatever method is used, the Commission considers "contemporaneous" to mean that potential

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30/ See, e.g., United Gas Pipeline Company (United), Enron Gas Marketing.

31/ Of the 45 pipelines that have submitted filings to the Commission regarding standards of conduct, 36 have established electronic bulletin boards to meet this requirement.

shippers receive the information no later than the same day the affiliate receives the information. 32/

Citizens Energy requests that the Commission clarify that this information includes all information relating to capacity. The Commission so clarifies.

ii. Transportation and gas sales and marketing information.

Pipelines and their affiliates object to this provision, arguing that disclosing gas sales and marketing information to potential shippers is not necessary to prevent discrimination in the provision of transportation service and that releasing this information would place the marketing affiliate at a competitive disadvantage. 33/

Pipelines and their affiliates further argue that the term "gas sales and marketing" is not defined and could therefore apply to almost all communications between a pipeline and its affiliate. 34/ Tenneco states that it interprets this provision to mean only "general" information as the Commission stated in the preamble to the final rule.

32/ For those pipelines that have not established bulletin boards to contemporaneously provide the information, other acceptable methods of meeting this standard include notifying non-affiliated potential shippers by telephone or facsimile or telex machine. The use of overnight or regular mail is not acceptable.

33/ See, e.g., Tenneco, INGAA, Enron Gas Marketing.

34/ See, e.g., Consolidated Natural Gas Company (CNG), Enron, Enron Gas Marketing.

The Commission finds these arguments unpersuasive. As the Commission noted in the final rule, a pipeline may have sales or marketing information that it obtained as a result of its past monopoly power over transportation. To make this information available to its affiliate but not to others could give the affiliate a competitive advantage. Furthermore, if a pipeline and its affiliate's operating personnel are functioning independently, a pipeline's communications with the affiliate should be limited to specific information regarding the affiliate's transportation request or service. There is no need for a pipeline to share transportation, sales or marketing information with its affiliate other than information necessary to process the affiliate's request or to provide the requested transportation service. However, to the extent it does share information other than that necessary to process affiliate requests or to provide the requested service, it must share that information contemporaneously with all other potential shippers.

Shell and Access Energy argue that the standard should be expanded to include any information given to a marketing affiliate that is not contemporaneously provided to an affiliate's competitors. Hadson states that the provision should not be limited to "general" information as stated in the preamble. Otherwise, it argues that an affiliate could ask a series of "specific" questions to obtain information that would then not have to be revealed to others. The Commission believes that a requirement to disclose contemporaneously all information shared with an affiliate would be too broad. It would place an unwarranted burden on the pipeline to make the information available and could chill essential day-to-day business communications between the pipeline and its affiliate. Additionally, it could result in the disclosure of large amounts of extraneous material for which an independent marketer would have no use.

With respect to the information that must be disclosed, the Commission is clarifying that the rule requires contemporaneous disclosure of transportation, or gas sales, or marketing information. The use of the word "and" ("transportation of natural gas and gas sales and marketing ...") in the regulatory text of section 161.3(f) could lead to the erroneous conclusion that the information required to be disclosed would have to relate to transportation plus sales plus marketing when the intent of the rule is to require disclosure of information relating to any of those matters. The Commission is revising the regulatory text accordingly.

The standard of conduct applies to all information a pipeline provides to its marketing affiliate concerning transportation or gas sales or marketing. The limited "exception" for information concerning specific transportation requests, discussed in the preamble to the final rule (memo at pp. 44-45), was not intended to swallow the rule. Indeed, if the pipeline's response to a routine transportation request includes general information, it must be contemporaneously disclosed to all potential shippers. Some examples will help illustrate the scope of this standard.

Example 1. Pipeline X intends to build a new line under Part 284 of the Commission's regulations. As soon as it reveals that information to its marketing affiliate, pipeline X must contemporaneously reveal the information to all potential shippers because construction concerns natural gas transportation and marketing.

Example 2. Pipeline X discusses its intention to construct the new pipeline with a potential shipper who, in turn, discusses it with pipeline X's marketing affiliate. The marketing affiliate then asks pipeline X a specific question related to the new line. Pipeline X's answer must be contemporaneously disclosed to all potential shippers. Information concerning transportation on a new line would involve new or changed general information, even if it were transmitted to the marketing affiliate in response to a specific question.

Example 3. The new line is certificated and built. Pipeline X's marketing affiliate requests transportation for a customer. Apart from the general reporting requirements of section 250.16 or other applicable rules, pipeline X would not have to disclose the information transmitted to the marketing affiliate to perfect the transportation request or complete the transportation transaction.

iii. Potential shippers.

The rule defined "potential shippers" as "all current transportation and sales customers . . . and all persons who have pending requests for transportation service or for information regarding transportation service. . . ." A number of pipelines argue that the definition of "potential shippers" in the rule is too broad in that it could include anyone who makes a casual, nonspecific inquiry regarding transportation service. 35/ They suggest that the definition be limited to present or prior shippers, 36/ to those who have made requests for service, 37/ to parties requesting the data 38/ or to shippers reasonably able to make use of the data. 39/

The Commission believes that these suggested definitions would be too restrictive. An individual that requests transportation information from a pipeline is one who may use the pipeline's transportation services in the future and therefore

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35/ See, e.g., Panhandle Eastern Pipeline Company and Trunkline Gas Company (Panhandle), Enron, INGAA.

36/ Panhandle.

37/ United, Great Lakes.

38/ Pacific Interstate Transmission Company and Southern California Gas Company (Pacific Interstate), Enron Gas Marketing.

39/ American Gas Association (AGA).

may be the potential object of discrimination. The Commission is unwilling to give pipelines the discretion to determine whether an information request is "casual" or "nonspecific" or whether the shipper could "reasonably" make use of the data. Although contemporaneous disclosure may impose a burden on a pipeline, such disclosure is necessary to prevent marketing affiliates from using inside information to gain a competitive advantage. The Commission notes, however, that a pipeline can avoid much of this burden by establishing an electronic bulletin board to post the information as discussed below.

6. <u>Independent functioning of operating employees [§ 161.3(g)]</u>.

A number of petitioners argue on rehearing, as they did in response to the NOPR, that the Commission should require complete organizational separation of a pipeline and its marketing affiliate 40/ or suggest that, at a minimum, certain personnel such as gas purchasing or accounting personnel should be separated. 41/ Access Energy states that pipelines should be prohibited from using the same supply personnel to purchase gas for both the pipeline and the affiliate. Access argues that this practice implies to producers that the pipeline will purchase more higher-priced sales gas if the producer also sells his production to the affiliate. Others request clarification as to

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40/ <u>See</u>, <u>e.g.</u>, Hadson, Maryland People's Counsel.

41/ <u>See</u>, <u>e.g.</u>, Entrade Corporation.

the types of employees this provision was meant to include. 42/ EnTrade adds that a pipeline should be required to develop a very specific plan setting forth the personnel to be shared and how the opportunity for preferential treatment can be avoided.

The Commission does not believe that it must mandate organizational separation of a pipeline and its marketing affiliate at this time. However, the Commission reiterates that organizational separation of a pipeline and its marketing affiliate "to the maximum extent practicable" is necessary to ensure against affiliate preference and the discriminatory dissemination of information. In resolving complaints with respect to the rule, the Commission will consider the "maximum extent practicable" standard of organizational separation, among other compliance efforts. Operating employees can include officers, directors and managers as well as non-management employees. As a practical matter, the contemporaneous disclosure requirement for information received by a shared employee or officer (discussed above) provides a strong disincentive for a pipeline and its marketing affiliate to share officers or employees. For pipelines that continue to share employees or officers with their marketing affiliates, the contemporaneous disclosure requirement will allow the public to monitor a

42/ See, e.g., Questar Pipeline Company, ANR Pipeline Company and Colorado Interstate Gas Company (ANR/CIG), Entrade.

pipeline's adherence to this standard and will enable the Commission to enforce this requirement.

The Commission will examine on a case-by-case basis whether the pipeline is complying with this standard. In response to EnTrade's suggestion the Commission notes that, in implementing Order No. 497, it already has directed some pipelines to supply additional information as to how this standard is being met. This will enable the Commission to determine the extent to which these personnel have overlapping responsibilities. The Commission will address the issue of whether individual pipelines have satisfactorily complied with this standard by separate orders. If necessary, the Commission will require the pipeline to make organizational changes to separate shared employees. In addition, the requirement to contemporaneously share information that has been provided to an affiliate, as discussed above, should act to encourage pipeline and affiliate operating personnel to function independently.

Hadson and the Producer Associations argue that shared employees should be required to sign an affidavit stating that they have read the standards of conduct and understand the penalties for violating those standards. Access Energy states that shared personnel should be required to keep contemporaneous logs of the time spent working for the pipeline and the affiliate. It states that such a requirement will assure that ratepayers are not subsidizing the affiliate.

The Commission is not adopting these suggestions. To require affidavits or logs would impose additional reporting burdens on the pipeline that the Commission does not believe are necessary in light of the safeguards already included in the rule to prevent affiliate abuse. The Commission will examine required reports and may conduct audits to assure that ratepayers are not subsidizing affiliate activities.

7. Tying of services [§ 161.3(h)].

Williams Natural Gas Company argues that this standard is not necessary for blanket certificate holders because, by the terms of their blanket certificate, they may not discriminate by providing preferential access to transportation. The Commission recognizes that the standards of conduct established in the rule may overlap some of the conditions in a pipeline's Part 284 blanket certificate. The Commission, however, promulgated the standards and the reporting requirements as a method of ensuring that pipelines were meeting the non-discriminatory provisions of their blanket certificates.

8. Identification of released take-or-pay gas [§ 161.3(i)].

On rehearing, the Commission has decided to eliminate this standard of conduct. The Commission considers information given to an affiliate regarding gas released by the pipeline to be "gas sales or marketing" information and therefore already included in the standard of conduct requiring contemporaneous disclosure of information provided to an affiliate. 43/

D. Reporting Requirements (§ 250.16).

The final rule also established reporting requirements to enable the Commission and the public to monitor the pipeline - affiliate relationship. These included tariff sheets setting forth: (1) a list of shared operating personnel and facilities; (2) the specific information and format required for a valid transportation request; (3) procedures to address and resolve complaints by shippers and potential shippers; and (4) procedures to inform shippers and potential shippers on the availability and pricing of transportation service, and the pipeline capacity available for transportation. The rule also required pipelines to file a transportation log of requests made by an affiliated marketer or in which an affiliated marketer was involved. Both the tariffs and the log were to be filed in FERC Form No. 592 in electronic form with a paper copy by September 12, 1988. 44/ On rehearing, the Commission is requiring pipelines to respond initially within 48 hours and in writing within 30 days to a complaint filed by a shipper or potential shipper. Also, the

43/ At Enron's request the Commission is amending the regulatory text to clarify that the log information relating to gas for which take-or-pay relief is granted relates to gas transported by the pipeline. See revised § 250.16(b)(2)(xiii).

44/ This deadline was later extended to September 19, 1988, in order to give pipelines sufficient time to incorporate certain technical changes made in the form.

Commission is revising the regulatory text to separate the tariff and non-tariff reporting requirements to clarify what is to be included in each. 45/

1. Tariff Filings.

Columbia states that a list of operating personnel is inappropriate for a tariff filing. The Commission, however, is including this list as part of the tariff so that the public will have ready access to the information. Once a pipeline submits acceptable tariff sheets with this information, it may update this information in its tariff as required in the final rule without being required to pay additional filing fees.

Enron and United argue that the procedures to address and resolve complaints should be limited to written complaints only and should be limited to complaints related to a requested or furnished service. The Commission disagrees. A pipeline should have an informal method of resolving complaints without requiring the shipper to reduce the complaint to writing. Furthermore, complaints regarding a pipeline's handling of transportation requests may not be limited to situations in which the potential shipper has requested or obtained service. For instance, it could involve a request for information prior to making a request for transportation.

45/ At the request of Columbia Gas Transmission Corporation and Columbia Gulf Transmission Company (Columbia), the Commission is clarifying that the log information is not to be included in the tariff filing.

2. <u>The transportation log.</u>

The final rule requires a pipeline to make publicly available a log of transportation service requests by affiliated marketers or in which an affiliated marketer is involved. This requirement is different from the log as proposed in the NOPR, which would have required public availability of information on both affiliate and non-affiliate requests and service.

Pipelines argue that virtually every item to be included in the log is either unnecessary to detect instances of anticompetitive conduct or would place their affiliates at a competitive disadvantage by requiring the release of commercially sensitive information.

These objections are essentially the same as those raised in response to the NOPR. The Commission in the final rule modified some of the reporting requirements to protect confidential data. 46/ The Commission believes that the reporting requirements promulgated in the final rule are necessary to determine whether anticompetitive conduct is occurring. The Commission realizes that in some instances no single element may show discrimination. However, an examination of different data may show that a pattern of anticompetitive conduct is occurring. For example, a combination of the request date, the requestor's affiliation with the transporter, and the current status and

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46/ <u>See</u> n. 7 <u>supra</u>.

disposition of the request could show whether affiliate requests are being processed sooner or are more readily approved.

The Commission is adopting one suggestion made by several petitioners, relating to the log item that requires a pipeline to report information on the distance between the receipt and delivery point that are farthest apart in the transportation request. The rule requires that this distance be reported in pipeline miles. Several petitioners state that not all pipelines measure distance between individual points. 47/

The purpose of the distance requirement is to determine whether a correlation exists between distance and a pipeline's willingness to transport. The Commission recognizes that the method of measuring distance may vary depending on the type of pipeline system. Nevertheless, the distance between receipt and delivery points is measurable. Therefore, the Commission is deleting the requirement that this distance be reported in pipeline miles and is leaving the method of measuring this distance to the pipeline. So long as the pipeline is consistent in applying its method to each transaction, the measurements will provide a means to compare transactions on each individual system. [See revised § 250.16(b)(2)(ix)]

Several petitioners state that some of the information to be included in the log may not be readily ascertainable or available

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47/ Enron, INGAA, United.

to the pipeline, particularly information relating to whether gas in being sold at a loss, 48/ whether gas being transported is subject to take-or-pay relief, 49/ the source of the gas 50/ and the maximum daily contract volume and total volume of gas to be transported. 51/

The Commission realizes that for each transportation request or service not all the information specified in the log may be available. If a particular item is unavailable that fact should be noted in the log with an explanation of why it is not included. If the information becomes available at a later date, it must be included in the log updates.

Several petitioners request clarification of certain log items.

The log requires a pipeline to file information regarding transportation requests: (1) for which transportation has commenced 30 days or more previously; (2) which have been denied; or (3) which have been pending for more than six months. Natural and others ask what is the starting date for reporting this

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48/ United, Tenneco, ANR/CIG, Enron Gas Marketing.

49/ Texas Gas Transmission, Enron.

50/ Enron states that the sources of gas of a shipper may be varied and, on a continuing basis, the particular source of the gas may change.

51/ Enron states that this information may be unavailable for: (1) contracts with evergreen provisions; (2) contracts that provide for the transportation of overrun volumes; (3) most firm contracts; and (4) interruptible service.

information. The Commission is clarifying that this requirement applies to transportation service that commenced and requests that were denied after July 14, 1988 (the effective date of the rule) or that were pending for six months or more on July 14, 1988.

Tenneco asks whether the "person to be provided transportation service" in § 250.16(b)(6)(iii) is the same as the "shipper". It also asks whether both parties need to be identified where the "shipper" and the "requestor" of the transportation service are different. The Commission clarifies that the shipper is the person to whom the pipeline provides transportation service. In most circumstances the person requesting the service will be the shipper. Where the two are different, however, the pipeline should report both.

The Commission is not adopting a suggestion of United that the log information relating to released take or pay gas should not include take-or-pay settlements that were completed or agreed to in principle prior to September 12, 1988. United argues that this is necessary to ensure that the confidentiality of those settlements is maintained. The Commission agrees that the confidentiality of take-or-pay settlements is essential to preserving the settlement process; however, the Commission has already modified the log requirements proposed in the NOPR to prevent disclosure of competitively sensitive information relating to take-or-pay by eliminating the requirement to disclose the source of the gas. Accordingly, a pipeline need only report the producing area in which the source of gas is located, unless the pipeline has given such information to its affiliate, in which case the contemporaneous reporting requirement of the rule applies. Furthermore, information regarding whether gas is subject to take-or-pay relief will enable the Commission and the public to determine if the pipeline, through its affiliate, is giving preference to these types of transactions. The Commission recognizes the importance of a pipeline's mitigating its take or pay exposure but not at the cost of allowing it to engage in anticompetitive conduct to do so.

The final rule required that most of the information in the log be filed at the end of the month following the month any changes occur. 52/ The regulatory text provided that this report satisfied a pipeline's obligation to report under § 284.13. That section requires a pipeline to maintain and make available for public inspection certain information on transportation requests. On rehearing, the Commission is deleting the statement that a pipeline's obligations under § 284.13 are met by filing the log information. The Commission is making this change because under § 284.13, a pipeline must maintain information on

52/ Information on discounts in the log (§ 250.16(b)(xix)) must be filed within 15 days of the close of a pipeline's billing period.

requests by both affiliate and nonaffiliated shippers, while the log information contains information only on affiliated shippers.

Finally, the rule required that a pipeline provide one paper copy of the log data electronically submitted to the Commission. The Commission has found that one paper copy is insufficient to verify the electronic data and for compliance and monitoring purposes. Therefore, the Commission is requiring pipelines to submit three paper copies of the electronically filed log information.

3. Public access.

The final rule requires pipelines to update the log information on a daily basis and to provide the public with 24 hour electronic access to the log information.

Several petitioners ask whether this electronic access refers to the log information that is filed with the Commission or the log as it is updated daily. 53/ Others request clarification that information need be made publicly available in the log only after transportation service has begun. 54/ The Commission clarifies that this access refers to the log as it is updated but that a pipeline need not provide electronic access to the information for transportation service until the transportation has begun.

53/ See, e.g., INGAA

54/ ANR/CIG, INGAA, Transco Energy Corporation.

United requests clarification that the log only need be updated if there are any changes. In order to assure members of the public that they are receiving the most current information, the Commission is requiring pipelines, on a daily basis, to either update the log or indicate that there have not been any changes in the log.

Pipelines argue that 24 hour access is burdensome and that access should be limited to normal business hours. 55/ Enron states that the public can already get the information through the mail or by going to the pipeline's place of business.

The Commission does not believe that electronic access on a 24 hour a day basis is unduly burdensome. Moreover, any burden to the pipeline is outweighed by the need for others to access the data at their convenience rather than the convenience of the pipeline. The purpose of the requirement was to give potential competitors and the public convenient access to up-to-date information in the log. Restricting access as these petitioners suggest would not accomplish that purpose.

United states that a pipeline should be able to charge a fee to recover the costs of maintaining 24 hour access. In contrast, Access Energy argues that the Commission should expressly prohibit pipelines from charging a fee to gain access to the information.

55/ United, Columbia, and AGA.

The Commission will allow a pipeline to charge reasonable fees to access the information. Alternatively, a pipeline may contract with a commercial data distribution firm to maintain the data for public access. In that case the normal rates the firm charges will apply to those desiring electronic access. 56/ The Commission may evaluate the various electronic bulletin boards as to form, costs and contents, to determine the "reasonableness" of availability and, if necessary, may adopt standards to ensure that compliance is within the spirit of the rule.

E. Civil Penalties.

Many petitioners argue as they did in response to the NOPR that the Commission has no authority to establish civil penalties. The Commission, however, explained its legal rationale for imposing these penalties in the NOPR 57/ and reiterated it in the final rule. The parties on rehearing have not raised any issues of fact, law or policy that were not previously considered.

Enron requests the Commission to state that a pipeline is not in violation of the rule because a shipper has not provided it with the information necessary to comply.

56/ The Commission allowed these types of access charges when it required the pipeline to maintain an electronic bulletin board of transportation transactions in Panhandle Eastern Pipe Line Company, Docket No. CP86-232-005, Order No. 275-B, 42 FERC ¶ 61,076 (Jan. 27, 1988).

57/ 52 Fed. Reg. at 21,583.

The civil penalties provision of the final rule states that penalties may be assessed if the pipeline "knowingly" violates the requirements of the rule. To the extent that a pipeline is unaware that certain information has not been supplied by the shipper, then a penalty would not be appropriate. However, a pipeline that knows or should have known that required information has not been provided may not transport without becoming subject to civil penalties. Resolution of issues such as these, however, depends on the individual facts involved.

F. Selective Discounting.

In the final rule the Commission restricted the ability of a pipeline that does not have a blanket certificate under Subpart G of Part 284 to offer transportation discounts to its affiliates. The rule prohibits a discounted rate to affiliates of these pipelines that is below the highest rate charged to a non-affiliate.

Arkla states that the restriction impermissibly adds a condition to an already filed rate without a finding that the existing rate is unjust and unreasonable. However, the restriction on discounting does not affect a pipeline's filed rates. The pipeline may still charge a rate within the zone established in its tariff. The rule merely requires that if a discount is given to an affiliate the same discount must be given to nonaffiliates.

ANR/CIG and AGA argue that the discounting restriction was not contained in the NOPR, and therefore no notice and comment was provided as required by the Administrative Procedures Act. 58/ In the NOPR, the Commission outlined a wide range of options for addressing potential abuses in the pipeline-affiliate relationship, including measures such as prohibiting a non-open access pipeline from having a marketing affiliate or prohibiting any transactions with an affiliate. These proposed options would have gone significantly further in restricting pipeline affiliate dealings than the restriction on discounting. In light of these options, restricting such a pipeline's ability to discount rates to its affiliate to no less than it is discounting to its non-affiliate is directly within the scope of the NOPR.

Access Energy suggests that pipelines be required to announce their decision on granting transportation discounts by the fifteenth of each month in order to allow independent marketers to determine their transportation rates prior to the time they have to bid on their markets. A pipeline, however, may not be in position to make a determination by this date as to whether it will grant discounts. Since the Commission is adding a new standard that requires a pipeline to make available to similarly situated shippers a discount comparable to the discount

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58/ 5 U.S.C. §§ 552 et seq. (1982).

it offers to its affiliate, such marketers will be in the same position as to the availability of such discounts.

G. Affiliate Losses.

Independent marketers continue to argue that a pipeline should be prohibited from taking a marketing affiliate loss in lieu of a discounted transportation rate because to the corporate whole a loss by an affiliate is the same as a discount. 59/ Alternatively, Access Energy suggests that an affiliate loss should be treated and reported as if it were a discount. It adds that a pipeline should be required to keep contemporaneous records of what gas was dispatched from each receipt point for each market to enable the Commission to determine if a loss has in fact occurred.

In making these arguments the petitioners advance a scenario similar to the following. A pipeline refuses to discount its transportation rates for any shipper. Its marketing affiliate then buys gas for $1.50 per MMBtu, pays $.50 per MMBtu for the nondiscounted transportation rate and sells the transported gas for $1.90 per MMBtu, thereby losing $.10 per MMBtu. Petitioners state that this $.10 loss by the affiliate is the same to the corporate whole as if the pipeline had discounted its transportation rate by $.10. The affiliate has an advantage in

59/ Citizens Energy Corporation and Citizens Gas Supply Corporation (Citizens Energy), Access Energy, EnTrade, Natural Gas Clearinghouse.

providing the service in these circumstances, they argue, because an independent marketer cannot afford to provide the service at a loss while, for the marketing affiliate, this "loss" is no more than a disguised discount available only to the affiliate.

Texaco Gas Marketing raises the potential problem of where a pipeline puts into effect rates that are later found to be excessive and refunds are ordered. It argues that in these circumstances an affiliate is not averse to paying the excessive rates because the payments will go to the same corporate entity. Texaco suggests that, if refunds are later ordered, the refunds not be paid to an affiliate; instead, the amount of the refund should be credited against the rates to be collected prospectively from unaffiliated shippers.

The Commission recognizes that a marketing affiliate may not have a disincentive to engage in transactions in which it may be subject to a loss or to pay whatever rate the pipeline charges for transportation. The Commission in the final rule required pipelines to report whether an affiliate's transactions were being conducted at a loss in order to enable the Commission and potential shippers to monitor this potential for abuse. However, the Commission is not prepared to assume that the hypothetical types of occurrences cited above are occurring on a frequent enough basis to warrant generic action at this time. In fact, the data submitted by the pipelines in the transportation log indicate no circumstance in which an affiliate has sold gas at a loss. However, if the Commission determines that abuses are occurring in these types of transactions, the Commission retains its authority to fashion the appropriate remedy either in individual proceedings or through a rulemaking proceeding.

H. Sunset Date.

As the Commission stated in the final rule, it would examine the need to extend the rule's reporting requirements prior to their sunset date of December 31, 1989. The Commission believes that continuation of these requirements will assist the public and Commission staff in monitoring potential abuses. Therefore, the Commission is extending these requirements for an additional year until December 31, 1990. Because the Commission cannot now determine the need to continue the reporting requirements subsequent to December 31, 1990, the Commission will again examine the need to extend the rule's reporting requirements prior to the new sunset date of December 31, 1990.

Producer Associations state that the sunset date appeared to impose a cut-off of that date on the retention of data by the pipeline. It argues that a pipeline could destroy data on the sunset date and therefore hinder on-going investigations and preclude scrutiny of pipeline conduct. To prevent this possibility, the Commission is requiring pipelines to retain the data on non-affiliate transactions until December 31, 1991. Because the log of affiliate transactions is filed with the

Commission there is no need for the pipeline to retain that information. [See revised § 250.16(c)]

V. PAPERWORK REDUCTION

The Office of Management and Budget's (OMB) regulations 60/ require that OMB approve certain information collection requirements imposed by agency rule. The information collection provisions in this order on rehearing are being submitted to OMB for its approval.

Interested persons can obtain information on the information collection provisions by contacting the Federal Energy Regulatory Commission, 825 North Capitol Street, N.E. Washington, D.C. 20426 (Attention: Michael Miller at (202) 357-9205). Comments on the information collection provisions can be sent to the Office of Information and Regulatory Affairs of OMB, New Executive Office Building, Washington, D.C. 20503 (Attention: Desk Officer for the Federal Energy Regulatory Commission)

VI. EFFECTIVE DATE

With the exception of the Commission's extension of the reporting requirements in Order No. 497, the revisions made to the final rule in this order on rehearing are effective [insert 30 days after publication in the Federal Register]. In order to prevent a gap in the rule's reporting requirements, the extension

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60/ 5 C.F.R. §§ 1320-12 (1988).

of the sunset date for the rule's reporting requirements is effective January 1, 1990.

List of Subjects

18 C.F.R. Part 161

Natural gas
Reporting and recordkeeping requirements

18 C.F.R. Part 250

Natural gas
Reporting and recordkeeping requirements

In consideration of the foregoing, the Commission amends Parts 161 and 250, Chapter I, Title 18 Code of Federal Regulations as set forth below.

By the Commission. Commissioner Moler dissented with a separate statement attached.

(S E A L)

Lois D. Cashell,
Secretary.

PART 161 -- STANDARDS OF CONDUCT FOR INTERSTATE PIPELINES WITH MARKETING AFFILIATES

1. The authority citation for Part 161 continues to read as follows:

Authority. Natural Gas Act, 15 U.S.C. 717-717w (1982); Natural Gas Policy Act of 1978, 15 U.S.C. 3301-3432 (1982); Department of Energy Organization Act, 42 U.S.C. 7101-7352 (1982); E.O. No. 12009, 3 CFR 1978 Comp., p. 142.

2. Section 161.1 is revised to read as follows:

§ 161.1 Applicability.

This part applies to any interstate natural gas pipeline that transports gas for others pursuant to Subpart A of Part 157, and Subparts B, G, H, or K of Part 284 and is affiliated with a natural gas marketing or brokering entity, except a pipeline that does not conduct any transportation transactions with its affiliated marketer.

3. In § 161.2, the definition for "control" is revised and two new definitions, for "marketing" and "transportation", are added in alphabetical order to read as follows:

§ 161.2 Definitions.

* * * * *

"Control" (including the terms "controlling," "controlled by," and "under common control with") includes, but is not limited to, the possession, directly or indirectly and whether acting alone or in conjunction with others, of the authority to direct or cause the direction of the management or policies of a company. A voting interest of 10 percent or more creates a rebuttable presumption of control.

* * * * *

"Marketing" or "brokering" as used in this Part and § 250.16 of this chapter means:

(1) A "first sale" of natural gas as that term is defined in § 270.203 of this chapter, or a sale of natural gas in interstate commerce for resale by a seller that is not an interstate pipeline, except when:

(i) The first seller is selling gas solely from its own production; or

(ii) The first seller is selling gas solely from its own gathering or processing facilities.

(2) An off-system sale by an intrastate natural gas pipeline or a sale under section 311(b) of the Natural Gas Policy Act as codified in § 284.142 of this chapter; or

(3) An off-system sale by a local distribution company or a sale under § 284.224 of this chapter.

"Marketing or brokering" as used in this Part and § 250.16 of this chapter does not include a sale by an interstate natural gas pipeline under a blanket certificate that authorizes the pipeline to make interruptible sales of surplus system supply gas.

"Transportation" as used in this Part and § 250.16 of this chapter includes any transactions which provide for receipt of gas at one point and redelivery of gas to a second point, including exchanges, back-hauls and other transactions in which case the gas transported is owned, brokered or sold by the affiliates.

4. In § 161.3, paragraphs (c), (e), (f), and (i) are revised, and new paragraphs (k) and (l) are added to read as follows:

§ 161.3 Standards of conduct.

* * * * *

(c) It may not, through a tariff provision or otherwise, give its marketing affiliate preference over nonaffiliated customers in matters relating to Part 284 transportation including, but not limited to, scheduling, balancing, transportation, storage, or curtailment priority.

* * * * *

(e) It may not disclose to its affiliate any information the pipeline receives from a nonaffiliated shipper or potential nonaffiliated shipper.

(f) To the extent it provides to a marketing affiliate information related to transportation of natural gas, or gas sales or gas marketing it must provide that information contemporaneously to all potential shippers, affiliated and non-affiliated, on its system.

* * * * *

(i) If a pipeline offers a transportation discount to an affiliated marketer, it must make a comparable discount contemporaneously available to all similarly situated non-affiliated shippers.

* * * * *

(k) A pipeline must maintain its books of account and records (as prescribed under Part 201) separately from those of its affiliate.

(l) A pipeline must maintain and make available for copying on a daily basis a written log of waivers that the pipeline grants with respect to tariff provisions that provide for such discretionary waivers.

PART 250 -- FORMS

5. The authority citation for Part 250 continues to read as follows:

Authority: Department of Energy Organization Act, 42 U.S.C. 7101-7352 (1982); E.O. No. 12009, 3 CFR 1978 Comp., p. 142; Natural Gas Act, 15 U.S.C. 717-717w (1982); Natural Gas Policy Act of 1978, 15 U.S.C. 3301-3432 (1982).

6. In § 250.16, paragraphs (a), (b) introductory text, (b)(1), (b)(2), (b)(6)(ix), (b)(6)(xiii) (b)(6)(xviii) and (b)(6)(xix), are revised, paragraph (b)(6)(xx) is added and paragraphs (c), (d), (e)(2), (g) and (h)(1) are revised to read as follows:

§ 250.16 **Format of compliance plan for transportation services and affiliate transactions.**

(a) Who must comply.

An interstate natural gas pipeline that transports natural gas for others pursuant to Subparts B, G, H, or K of Part 284 and is affiliated, as that term is defined in § 161.2 of this chapter, in any way with a natural gas marketing or brokering entity (except a pipeline that does not conduct any transportation transactions with its affiliated marketer) must:

(1) File the information prescribed in paragraph (b) of this section,

(2) Maintain and provide the information specified in paragraph (c) of this section, and

(3) Maintain all information required under this section from the time the information is received until December 31, 1990.

(b) What to file. An interstate pipeline must file the following information:

(1) New or existing tariff provisions containing the following:

(i) A complete list of operating personnel and facilities shared by the interstate natural gas pipeline and the affiliated marketing or brokering company;

(ii) The specific information and format required from a shipper for a valid request for transportation service, including, for transactions in which an affiliated marketer is involved, the items of information in paragraph (b)(2) of this section;

(iii) The procedures used to address and resolve complaints by shippers and potential shippers including a provision that the pipeline will respond initially within 48 hours and in writing within 30 days to such complaints;

(iv) The procedures used by the natural gas pipeline to inform affiliated and nonaffiliated shippers and potential shippers on:

(A) The availability and pricing of transportation service; and

(B) The capacity of the pipeline available for transportation.

(2) FERC Form No. 592, consisting of a log that contains the following information on all requests for transportation service made by affiliated marketers or in which an affiliated marketer is involved for transportation that would be conducted pursuant to Subpart B, G, H, or K of Part 284:

* * * * *

(6) * * *

(ix) A list of all receipt and delivery points between which the gas is requested to be transported and the distance between the receipt and delivery points that are the furthest apart,

* * * * *

(xiii) Whether any of the gas being transported is subject to take-or-pay relief for the transporting pipeline and, if so, how much,

* * * * *

(xviii) Any complaints by the shipper or end user concerning the requested or furnished service and the disposition of such complaints,

(xix) Whether the transportation is being requested, offered or provided at discounted rates, duration of the discount requested, offered or provided, the maximum rate or fee, the rate or fee actually charged during the billing period, the shipper, corporate affiliation between the shipper and the transporting pipeline, and the quantity of gas scheduled at the discounted rate during the billing period for each delivery point, and

(xx) Whether the pipeline has granted a waiver of a tariff provision in providing the requested service.

(c) <u>What to maintain</u>.

(1) An interstate pipeline must maintain the information in paragraph (b)(2) of this section for all requests for transportation services made by nonaffiliated shippers or in which a nonaffiliated shipper is involved from the time the information is received until December 31, 1990.

(2) The information required to be maintained by this section will be available from September 12, 1988 until December 31, 1991 to:

(i) The Commission on request, and

(ii) The public under Subpart D of Part 388 of this chapter.

(3) The information required to be maintained by this section must be maintained on 9-track magnetic tape or computer disk. The format and specifications for maintenance of the information can be obtained at the Federal Energy Regulatory Commission, Division of Public Information, 825 North Capitol St., N.E., Washington, D.C. 20426.

(d) __When to file.__

(1) The information in paragraph (b)(1) of this section and entries in the log specified in paragraph (b)(2) of this section relating to transportation requests for which transportation has commenced 30 days or more previously, which have been denied, or which have been pending for more than six months, must be filed initially with the Commission by September 19, 1988, and thereafter as required by paragraphs (d)(2) and (d)(4) until December 31, 1990. This requirement applies to transportation service that commenced or transportation requests that were denied after July 14, 1988, or that were pending for six months or more on July 14, 1988.

(2) The information required in paragraphs (b)(3) must be filed quarterly if any changes occur.

(3) The information in paragraph (b)(2) relating to transportation requests must be updated on a daily basis if any changes occur.

(4) The information in paragraph (b)(2) relating to transportation requests for which transportation has commenced 30 days or more previously, which have been denied, or which have been pending more than six months, must be filed:

(i) For the items in paragraph (b)(2)(i) through (xviii) of this section, at the end of the month following the month any changes occur; and

(ii) For the items in paragraph (b)(2)(xix) of this section, within 15 days of the close of the pipeline's billing period. A report of a discount under this section satisfies a pipeline's obligation to report under § 284.7(d)(5)(iv) of this chapter.

(e) How to file. * * *

(2) The magnetic tape or computer disk must be accompanied by three paper printouts of the information submitted on the magnetic tape or computer disk. The format for the paper printout can be obtained at the Federal Energy Regulatory Commission, Division of Public Information, 825 North Capitol St., N.E., Washington, D.C. 20426.

* * * * *

(g) Public access.

(1) An interstate pipeline must maintain and make available to the public all filings with the Commission under paragraph (b)(1) of this section by providing:

(i) One paper copy at the pipeline's principal place of business during regular business hours and;

(ii) Copies by mail of any item requested within seven calendar days of a written request, for which the pipeline may charge the cost of postage and fifteen cents per page photocopied or per computer printout page provided.

(2) An interstate pipeline must provide 24-hour access, by electronic means, to the data specified in paragraph (b)(2) of this section. Access to the information must be provided once the service has begun. A pipeline must, on a daily basis, either update the information or indicate that no changes have occurred in the log information.

(h) Penalty for failure to comply.

(1) Any person who transports gas for others pursuant to Subparts B, G, H, or K of Part 284 of this chapter and who knowingly violates the requirements of § 161.3, § 250.16, or § 284.13 of this chapter will be subject, pursuant to sections 311(c), 501, and 504(b)(6) of the Natural Gas Policy Act of 1978, to a civil penalty, which the Commission may assess, of not more than $5,000 for any one violation.

* * * * *

Note: <u>This index will not appear in the Code of Federal Regulations</u>.

Appendix

1. Access Energy Corporation
2. American Gas Association
3. ANR Pipeline Company & Colorado Interstate Gas Company
4. Arkla, Inc.
5. Association of Texas Intrastate Natural Gas Pipelines
6. Citizens Energy Corporation and Citizens Gas Supply Corporation
7. Columbia Gas Transmission Corporation and Columbia Gulf Transmission Company
8. Consolidated Natural Gas Company
9. Enron Gas Marketing, Inc.
10. Enron Interstate Pipelines
11. Entrade Corporation
12. Great Lakes Transmission Company
13. Hadson Gas Systems
14. High Island Offshore System
15. Industrial Energy Services Company
16. Interstate Natural Gas Association of America
17. Kentucky West Virginia Gas Company and Equitrans, Inc.
18. Laclede Gas Company (filed out of time)
19. Maryland People's Counsel
20. MidCon Marketing Corporation
21. Minnesota Department of Public Service, Energy Issues Intervention Office
22. National Fuel Supply Corporation
23. Natural Gas Clearinghouse
24. Natural Gas Pipeline Company of America
25. Northern Border Pipeline Company
26. Oxy, USA
27. Pacific Interstate Transmission Company and Southern California Gas Company
28. Panhandle Eastern Pipeline Company and Trunkline Gas Company
29. Pelican Interstate Gas System
30. Producer Associations
31. Questar Pipeline Company
32. Sea Robin Pipeline Company
33. Shell Offshore, Inc., Shell Western E&P and Shell Gas Trading Company
34. Sonat Marketing Company
35. Stingray Pipeline Company
36. Tenneco Gas Pipeline Group
37. Texaco Gas Marketing, Inc.
38. Texas Eastern Transmission Company
39. Texas Gas Transmission Corporation
40. Trailblazer Pipeline Company
41. Transco Energy Company
42. United Gas Pipeline Company

43. Western Gas Marketing Limited
44. Williams Natural Gas Company