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UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Parts 161 and 250

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

Inquiry into Alleged Anti-competitive Practices Related to Marketing Affiliates of Interstate Pipelines	)	Docket No. <u>RM87-5-011</u>
	)	
Ozark Gas Transmission System	)	Docket No. CP87-238-002
	)	

ORDER NO. 497-D

ORDER ON REMAND AND EXTENDING SUNSET DATE

(Issued December 4, 1992)

I. INTRODUCTION

On July 21, 1992, the United States Court of Appeals for the District of Columbia Circuit issued its opinion in Tenneco Gas v. Federal Energy Regulatory Commission (Tenneco), 1/ upholding in substantial part Order Nos. 497 and 497-A, 2/ the Commission's

- 1/ 969 F.2d 1187 (D.C. Cir. 1992). Parties had the opportunity to seek rehearing of the court's decision until September 4, 1992, but no petitions for rehearing were filed.
- 2/ Inquiry Into Alleged Anticompetitive Practices Related to Marketing Affiliates of Interstate Pipelines, Order No. 497, 53 FR 22139 (June 14, 1988), FERC Stats. & Regs. [Regulations Preambles 1986-1990] ¶ 30,820 (1988), order on rehearing, Order No. 497-A, 54 FR 52781 (Dec. 22, 1989), FERC Stats. & Regs. [Regulations Preambles 1986-1990] ¶ 30,868 (1989), order extending sunset date, Order No. 497-B, 55 FR 53291 (Dec. 28, 1990), FERC Stats. & Regs. [Regulations Preambles 1986-1990] ¶ 30,908 (1990), order extending sunset date and amending final rule, Order No. 497-C, 57 FR 9 (Jan. 2, 1992), III FERC Stats. & Regs.

(continued...)  
FERC DOCKETED  
*[Signature]*  
DEC 1992

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final rule governing the relationship between interstate natural gas pipelines and their marketing or brokering affiliates. However, the court found that the Commission did not adequately justify its extension of the contemporaneous disclosure requirement of section 161.3(f) 3/ to gas sales and marketing information. Further, in its review of Ozark Gas Transmission System (Ozark) 4/, a consolidated case, the court found that the Commission erred in finding Order No. 497 applicable to Ozark Gas Transmission System (Ozark), a joint venture. Accordingly, the court remanded the proceeding to the Commission. In response to the court's remand, this order revises section 161.3(f) to narrow the scope of the contemporaneous disclosure requirement with respect to sales and marketing information, and finds that Ozark is subject to the requirements of Order No. 497. In addition, this order extends the sunset date of Order No. 497's reporting requirements from December 31, 1992, until December 31, 1993. However, 90 days after the Commission has determined that an individual pipeline is in full compliance with Order No. 636, the pipeline will no longer be required to submit the affiliated

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2/ (...continued)

¶ 30, 934 (1991), reh'g denied, 57 FR 5815, 58 FERC ¶ 61,139 (1992), aff'd in part and remanded in part, Tenneco Gas v. FERC, No. 89-1768 (D.C. Cir. July 21, 1992).

3/ 18 CFR 161.3(f).

4/ 49 FERC ¶ 61,247 (1989).

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transportation log (FERC Form 592) to the Commission. 5/ The pipeline must continue to maintain 6/ and to provide its affiliated transportation log information on its electronic bulletin board (EBB). 7/

## II. PUBLIC REPORTING BURDEN

Since certain categories of gas sales and marketing information will be eliminated from section 161.3 (f), the amount of information that a pipeline must contemporaneously disclose will be reduced. However, the reporting burden will remain the same because such information is not reported on FERC Form No. 592. The Office of Management and Budget (OMB) approved the reporting requirements in the final rule on August 18, 1988. This approval is effective until December 31, 1992.

The current annual reporting burden for collection of information, as revised in Order No. 636, is estimated to be

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5/ Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 57 FR 13267 (April 16, 1992) III FERC Stats & Regs. Preambles ¶ 30,939 (April 8, 1992) (Order No. 636); order on reh'g, Order No. 636-A, 57 FR 36128 (August 12, 1992), III FERC Stats & Regs. Preambles ¶ 30,950 (August 3, 1992).

6/ 18 C.F.R. § 250.16(a)(3) (1992).

7/ In Order No. 636, the Commission created new regulations which, *inter alia*, require all interstate pipelines transporting pursuant to Part 284 of the Commission's regulations to create and maintain EBBs. See §§ 284.8(b)(4) and 284.9(b)(4), 57 FR 13267 (April 16, 1992). Once operational, the EBB would become a pipeline's tool for compliance with Order No. 497's 24-hour electronic information requirement. See 18 C.F.R. § 250.16(g)(2) (1992).

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7,882 hours for FERC Form No. 592 (1902-0157). The industry burden is based on an estimated average of 9.94 hours per filing for the 61 respondents to complete 793 filings of FERC Form No. 592. This estimate includes the time for reviewing instructions, searching existing data sources, gathering and obtaining the data needed, and completing and reviewing the collection of information. Exemption from the requirement to file Form No. 592 90 days after full compliance with Order No. 636 should result in a reduction of the number of respondents.

Hard copy and/or electronic formats for any data collection required by this order may be obtained by contacting: La Dorn Systems Corporation, in Room 3308, 941 North Capitol Street, N.E., Washington, D.C. 20426.

### III. BACKGROUND

On June 1, 1988, the Commission issued Order No. 497, 8/ a final rule in this proceeding, which was the result of a lengthy rulemaking proceeding 9/ begun in response to petitions for

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8/ Inquiry Into Alleged Anticompetitive Practices Related to Marketing Affiliates of Interstate Pipelines, Order No. 497, 53 FR 22139 (June 14, 1988), FERC Stats. & Regs. [Regulations Preambles 1986-1990] ¶ 30,820 (1988).

9/ The proceeding included a Notice of Inquiry into Alleged Anticompetitive Practices Related to Marketing Affiliates of Interstate Pipelines issued November 14, 1986, 51 FR 41982 (Nov. 20, 1986), IV FERC Stats. & Regs. ¶ 35,520 (1986), and a Notice of Proposed Rulemaking Related to Marketing Affiliates of Interstate Pipelines issued June 2, 1987, 52 FR 21578 (June 8, 1987), FERC Stats. & Regs. [Proposed Regulations 1982-1987] ¶ 32,445 (1987).

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rulemaking 10/ and several cases that raised the issue of potential abuse in the relationship between interstate natural gas pipelines and their marketing or brokering affiliates. 11/ The final rule in Order No. 497 adopted standards of conduct, codified at Part 161 of the Commission's regulations, 12/ and reporting requirements, codified at section 250.16 of the Commission's regulations, 13/ intended to prevent the preferential treatment of an affiliated marketer by an interstate pipeline in the provision of transportation services. The final rule also adopted a sunset provision of December 31, 1989, for the reporting requirements of Order No. 497 and specifically reserved the Commission's right to extend the date should the Commission decide there was a need to do so.

On December 15, 1989, the Commission issued Order No. 497-A 14/ which granted partial rehearing of Order No. 497

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

11/ Northern Natural Gas Co., 20 FERC ¶ 61,040 (1982); Mountain Fuel Resources, Inc., 36 FERC ¶ 61,150 (1986); ANR Pipeline Co., 35 FERC ¶ 61,400 (1986); Independent Petroleum Association of Mountain States v. Panhandle Eastern Pipe Line Co., 36 FERC ¶ 61,282 (1986); Southern Natural Gas Co., 26 FERC ¶ 61,275 (1986) and 36 FERC ¶ 61,401 (1986); Texas Gas Transmission Corporation, 36 FERC ¶ 61,274 (1986); Arkla Exploration Co., 37 FERC ¶ 61,011 (1986); and Tenneco Oil Co., et al., 36 FERC ¶ 61,399 (1986).

12/ 18 CFR Part 161.

13/ 18 CFR 250.16.

14/ Order No. 497-A, 54 FR 52781 (Dec. 22, 1989), FERC Stats. & Regs. [Regulations Preambles 1986-1990] ¶ 30,868 (1989).

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and clarified certain provisions of the final rule. Order No. 497-A also extended the final rule's reporting requirements for an additional year, from December 31, 1989, to December 31, 1990, and stated that the Commission would examine the need to further extend the rule's reporting requirements prior to their sunset date of December 31, 1990.

On December 13, 1990, the Commission issued Order No. 497-B 15/ which extended the sunset date of Order No. 497's reporting requirements for an additional year, from December 31, 1990, until December 31, 1991, because several issues regarding Order Nos. 497 and 497-A were pending. The issues included those raised in the protests of filings made by pipelines in response to the issuance of Order No. 497, the applicability of the standards of conduct to discount sales programs, as well as the appeal to the United State Court of Appeals for the District of Columbia Circuit.

On December 20, 1991, the Commission issued Order No. 497-C 16/ which extended Order No. 497's reporting requirements for an additional year, from December 31, 1991, until December 31, 1992, and amended the final rule to reduce the number of paper printouts of the FERC Form No. 592 information that pipelines are required to file. The Commission extended

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15/ Order No. 497-B, 55 FR 53291 (Dec. 28, 1990), FERC Stats. & Regs. [Regulations Preambles 1986-1990] ¶ 30,908 (1990).

16/ Order No. 497-C, 57 FR 9 (Jan. 2, 1992), III FERC Stats. & Regs. ¶ 30,934 (1991), reh'g denied, 57 FR 5815, 58 FERC ¶ 61,139 (1992).

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Order No. 497's reporting requirements for an additional year because certain issues regarding Order Nos. 497 and 497-A were still pending and a new issue had arisen. The issues still pending were the applicability of the standards of conduct to discount sales programs and the appeal of Order No. 497 to the United States Court of Appeals for the District of Columbia Circuit. The new issue was the proposal in the Notice of Proposed Rulemaking in Docket No. RM91-11-00 17/ to require pipelines to comply with Order No. 497's standards of conduct and reporting requirements by considering their unbundled sales operating employees as an operational unit which is the functional equivalent of a marketing affiliate. The Commission concluded that with these issues before it, it would be premature to let the reporting requirements lapse at the end of 1991.

On April 8, 1992, the Commission issued Order No. 636, a final rule in Docket No. RM91-11-000 which requires significant structural changes in the services provided by natural gas pipelines. Order No. 636 continues Order No. 497's standards of conduct for interstate pipelines with marketing affiliates. Order No. 636 also extends Order No. 497's standards of conduct and reporting requirements to transportation transactions where the pipeline provides unbundled gas sales service because the

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17/ In Re Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation, 56 FR 38372 (Aug. 13, 1991), IV FERC Stats. & Regs. ¶ 32,480 (1991).

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pipeline as a merchant would be the functional equivalent of a marketing affiliate.

On July 21, 1992, the United States Court of Appeals for the District of Columbia Circuit issued its opinion in Tenneco, upholding in substantial part Order Nos. 497 and 497-A. However, the court found that the Commission did not adequately justify its extension of the contemporaneous disclosure requirement of section 161.3(f) 18/ to gas sales and marketing information. The court stated that "[o]n remand the Commission should reconsider its justification for applying [the contemporaneous disclosure requirement of section 161.3(f)] to sales and marketing information and ensure that the final requirement is reasonably tailored to meet the Commission's goals of improving the market and benefitting consumers, as well as preventing undue discrimination." 19/ In a related matter, the court also stated that "[a]pplying [the contemporaneous disclosure requirement of 161.3(f)] to released-gas information prior to the issuance of Order No. 497-A might well be fundamentally unfair" and that the Commission could avoid "the expense of litigation over this issue by announcing that it will not retroactively apply [161.3(f)] to released gas information." 20/

Further, in its review of Ozark, the court found that the Commission erred in finding Order No. 497 applicable to Ozark, a

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18/ 18 CFR 161.3(f).

19/ Tenneco Gas v. FERC, 969 F.2d 1187, 1201 (D.C. Cir. 1992).

20/ Id. at 1202.

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joint venture. Ozark is a partnership composed of subsidiaries of four natural gas pipelines, each of which has a 25 percent ownership and voting interest. Two of the owners have marketing affiliates. The court stated that the Commission failed to consider relevant evidence regarding the ability of the owner pipelines with affiliates to control the partnership.

#### IV. DISCUSSION

Section 161.3(f) states that "[t]o the extent [a pipeline] 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 nonaffiliated, on its system." In Tenneco, the court found that "the contemporaneous disclosure requirement -- at least as it affects information regarding transportation, where pipelines have monopolistic market power -- reflects a reasonable effort to promote a competitive market without significantly harming existing efficiencies." 21/ However, with respect to the contemporaneous disclosure of gas sales and marketing information, the court stated that it was "unable to conclude that standard (f)'s application to sales and marketing is justified; nor can we be confident that FERC possessed the statutory authority to regulate the transfer of sales and marketing information from pipelines to their affiliates." 22/ The court remanded the proceeding to the

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21/ Id. at 1199.

22/ Id. at 1199.

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Commission and stated that "[o]n remand, the Commission should consider its justification for applying standard (f) to sales and marketing information and ensure that the final requirement is reasonably tailored to meet the Commission's goals of improving the market and benefitting consumers, as well as preventing undue discrimination." 23/

Based upon the court's opinion, and in light of the structural changes in the gas industry that will occur as a result of Order No. 636, the Commission will revise section 161.3(f) to narrow the scope of the contemporaneous disclosure requirement with respect to sales and marketing information. Under revised standard (f), pipelines will still have to contemporaneously disclose information related to transportation of natural gas. However, with respect to information related to gas sales or marketing, pipelines will only be required to disclose information relating to sales or marketing on its system or the system of an affiliated pipeline. Accordingly, there will be two categories of gas sales or marketing information that will not be required to be contemporaneously disclosed: (1) gas sales or marketing information that is available from public sources and (2) information related to gas sales or marketing off a pipeline's system or the system of an affiliated pipeline. The Commission believes that a contemporaneous disclosure requirement revised in the manner discussed above is reasonably tailored to

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23/ Id. at 1201.

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meet the its goals of improving the market and benefitting consumers, as well as preventing undue discrimination.

First, we will discuss the two categories of sales or marketing information that will be specifically excluded from the contemporaneous disclosure requirement of standard (f). The Commission believes that sales or marketing information that is available from public sources should not be required to be disclosed because that information will be available to all non-affiliated shippers and potential shippers on a pipeline's system. The fact that the disclosure of this information by the pipeline to the marketing affiliate may give the affiliate an advantage over other potential shippers is irrelevant. As the court stated, "advantages a pipeline gives its affiliate are improper only to the extent that they flow from the pipeline's anti-competitive market power." 24/ Moreover, one of the reasons the court gave for remanding standard (f) to the Commission for further explanation was that the standard, as currently written, "prohibits pipelines from sharing with their marketing affiliates information concerning potential marketing opportunities, even where that information was developed from public sources or sources entirely unrelated to a pipeline's transportation service." 25/

The Commission also believes that information related to sales or marketing off a pipeline's system, but not involving the

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24/ Id. at 1201.

25/ Id. at 1200.

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system of an affiliated pipeline, should not be disclosed for several reasons. First, and most obvious, is that such sales or marketing information disclosed by the pipeline to the marketing affiliate will not involve the pipeline's transportation facilities, and, thus, there is no potential for a pipeline to exercise its monopoly power over the transportation facilities in a manner that would give an undue preference to its marketing affiliate. Second, and more importantly, is the role that off-system sales will play in pipelines' restructuring of their services. Under Order No. 636, pipelines will perform an effectively deregulated merchant function. As such, pipelines will seek to make sales both on and off system, an effort that may not necessarily involve their own transportation facilities with respect to off-system sales. In fact, pipelines may need to aggressively market their gas off-system if their current customers choose to only sign up for transportation services because otherwise they will be burdened with portfolios of wellhead contracts. If the pipelines do not shed their unwanted contracts, they could be subject to take-or-pay liability. The Commission believes that to require contemporaneous disclosure of information related to sales or marketing off system, but not involving the system of an affiliated pipeline, could have a chilling effect on pipelines marketing their gas.

While we are limiting the scope of standard (f), pipelines are not relieved of their obligations to refrain from unduly discriminatory conduct that is prohibited under the Natural Gas

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Act or the Natural Gas Policy Act, whether or not that conduct is covered by standard (f) or any of the other standards.

With respect to information relating to sales and marketing on a pipeline's system or the system of an affiliated pipeline, the Commission believes that information should continue to be disclosed for several reasons. First, any information obtained by the pipeline relating to sales and marketing on its system "flow[s] from the pipeline's anticompetitive market power." <sup>26/</sup> The Commission's experience and common sense tell us that a pipeline has access to a great deal of information which it learns in the process of operating its transportation facilities. Its ongoing relationship with shippers on its line yields information on sales and marketing opportunities that are not readily available to others. A contemporaneous disclosure of information relating to sales and marketing on a pipeline's system is necessary because this type of information naturally comes to the attention of a pipeline in connection with the transportation needed to get the gas from the point of availability to the market. The simple knowledge that there is a gas supply and a demand for gas in a particular location increases substantially in value when combined with information regarding potentially available transportation. The Commission believes that disclosing on-system sales or marketing information to an affiliate creates an undue preference because the affiliate

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<sup>26/</sup> Id. at 1201.

would not have learned that information but for its relationship with the pipeline.

Second, the Commission believes that an undue preference would also be created in favor of a marketing affiliate if the pipeline gave it information concerning sales or marketing on the system of an affiliated pipeline. An illustration may be helpful:

Acme Pipeline Company serves the southwestern United States and Apex Pipeline Company serves New England. Both pipelines are owned by the Double A Corporation and both are authorized to make unbundled firm or interruptible sales of gas throughout the country pursuant to section 284.284 of the Commission's regulations. In the course of business, Apex obtains information on a potential gas purchaser on its system which it will be unable to serve. Apex conveys this information to Acme. However, Acme is also unable to serve this potential customer. Acme, in turn, conveys this information to its marketing affiliate, Acme Gas Marketing, which does have gas supplies available to serve the customer on Apex's pipeline in New England.

In this situation, the pipeline would not have learned this information but for its membership in a corporate family with the affiliated pipeline. Further, as discussed above, the marketing affiliate would not have learned of the sales and marketing information but for its relationship with the pipeline.

In a related matter, the court stated that applying standard (f) to released-gas information prior to the issuance of Order No. 497-A might well be fundamentally unfair and that the Commission could avoid the expense of litigation over this issue by announcing that it will not retroactively apply the standard to released gas information. Accordingly, the Commission will not retroactively apply the contemporaneous disclosure

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requirement of standard (f) to released gas information, that is, standard (f)'s application to released gas information would begin with the issuance of Order No. 497-A.

With respect to the issue of Order No. 497's applicability to Ozark, some general background is necessary. Ozark Gas Transmission System is a general partnership with four equal partners:

- Ozark Gas Pipeline Corporation, a wholly-owned subsidiary of Texas Oil and Gas Corporation, which, in turn, is a wholly-owned subsidiary of USX Corporation;
- Tennessee Ozark Gas Pipe Company, a wholly-owned subsidiary of Tennessee Gas Pipeline Company, which is, in turn, a wholly-owned subsidiary of Tenneco, Inc.;
- Columbia Gulf Transmission Company, a wholly-owned subsidiary of the Columbia Gas System, Inc.; and
- Caney River Transmission Company, a wholly-owned subsidiary of ONEOK, Inc.

TXO Production Company (TXO) and Tenngasco Corporation (Tenngasco) are shippers on Ozark's system. TXO is owned by Texas Oil and Gas Corporation and Tenngasco is owned by Tennessee Gas Pipeline Company. Thus, the parent companies of two of Ozark's partners have marketing affiliates who are shippers on the Ozark system. The Commission in its Ozark order stated that because the parent companies have a 25 percent interest in Ozark they are presumed to have control over Ozark. This finding was based on section 161.2 of the Commission's regulations 27/ which states that "[a] voting interest of 10 percent or more creates a rebuttable presumption of control." The Commission

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27/ 18 CFR 161.2.

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found that the requirements of Order No. 497 were applicable to Ozark because "[t]he ownership of Ozark by common parent companies with the shippers raises the possibility that the companies may seek and potentially obtain a preference from Ozark on their behalf or on behalf of their marketing affiliates." 28/

In its opinion in Tenneco v. FERC, the court agreed with Ozark that the Commission failed to address record evidence which called into question the presumption of control, i.e., the Ozark partnership agreement which states that, except in certain limited circumstances, the Ozark Management Committee may only act if there is unanimous approval by each of the partners, who each have one vote. The court stated:

Without remarking at all on the unanimity requirement in the Ozark partnership agreement, FERC rushed to conclude that Ozark had failed to "rebut the presumption that the overlapping economic interests of its owners provide an incentive for the granting of a preference." Ozark Gas Transmission System, 49 F.E.R.C. at 61,870. As we noted above, however, FERC's economic interest analysis is appropriate only after it has properly determined that "control" exists. Here, FERC articulated no findings on whether "control" existed and provided no explanation as to why Ozark's rebuttal evidence did not defeat the presumption of control. 29/

Accordingly, the court remanded for further proceedings consistent with its opinion.

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28/ 49 FERC ¶ 61,247 at 61,870 (1989).

29/ 969 F.2d at 1214.

The Commission finds that despite the fact that there is a unanimous approval provision in the Ozark partnership agreement, the two partners that have parent companies with marketing affiliates shipping on Ozark's line can still exercise "control" over Ozark. Section 161.2 of the Commission's regulations states:

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.

The Commission finds that even with a unanimous approval provision in the partnership agreement, Ozark Pipeline Company and Tennessee Ozark Gas Company, the two partners whose parent companies have marketing affiliates, can each act alone to direct or affect the management or policies of Ozark Gas Transmission. Since there is a unanimous approval requirement, each partner has veto power over any decision by simply withholding its vote. Such power could be exercised in a manner that could unduly prefer the marketing affiliates related to Ozark's partners, for example, by either or both partners refusing to engage in an action that would benefit an independent marketer in competition with one of Ozark's partners' affiliates. The Commission believes that control can be exercised in a negative manner, *i.e.*, by withholding approval of a specific policy or transaction, as well as in an affirmative manner, *i.e.*, by

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actually approving a decision that would unduly prefer a marketing affiliate.

#### **Extension of Reporting Requirements**

Finally, the Commission will also extend the sunset date of Order No. 497's reporting requirements from December 31, 1992, until December 31, 1993, because of the important role they will play in the regulatory structure created by Order No. 636. Order No. 636 does not change the requirements governing the relationship between pipelines and their marketing affiliates. However, Order No. 636 extends the requirements of Order No. 497 to pipelines providing unbundled gas sales service because the pipeline as merchant will be the functional equivalent of a marketing affiliate. <sup>30/</sup> The Commission found in Order No. 636 that unbundling does not eliminate the potential for pipelines to favor their marketing affiliates because there is no change in the pipeline's control over the transportation function. Because of the fact that the potential for abuse in favor of marketing affiliates still exists, as recognized by Order No. 636, and the court found that it was in the Commission's discretion to provide for an annual review of the costs and benefits of Order No. 497's reporting requirements, the Commission will extend the sunset provision until December 31,

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<sup>30/</sup> For this reason, the Commission notes that pipeline sales, after compliance with Order No. 636, need not be performed by the pipeline's marketing affiliate. Rather such sales may be performed on an unbundled basis by a separate sales division of the pipeline. Such sales are subject to certain requirements discussed in Order No. 636 and Order No. 636-A.

1993. This action is consistent with the Commission's finding in Order No. 636-A that abuses in the area of marketing affiliates might not be a perpetual problem and that increased competition that will result after unbundling may reduce the incentive for abuse.

Although Order No. 636 does not change the requirements governing the relationship between pipelines and their marketing affiliates, the structural changes engendered by full compliance with the rule would remove the need to continue filing the affiliated transportation log (FERC Form No. 592) with the Commission. Order No. 636's EBB requirements ensure certain minimum standards for maintaining and communicating information about a pipeline's available capacity, current capacity release offers, and affiliate marketing-related information. 31/ Unless further case-specific action is taken by the Commission, 90 days after the Commission has determined that a pipeline is in full compliance with the requirements of Order No. 636, that pipeline will no longer be required to submit the affiliated transportation log (FERC Form 592) to the Commission. The pipeline must continue to maintain 32/ and to provide its

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31/ In brief, new sections 284.8(b)(4) and 284.9(b)(4) require that a pipeline's EBB must provide for information downloading by users, daily back up of information, purging information on completed transactions, displaying most recent entries ahead of information posted earlier, on-line help, a search function and menu selections.

32/ 18 C.F.R. § 250.16(a)(3) (1992).

affiliated transportation log information on its EBB. 33/ In practice, this means that pipelines remain subject to the standards of conduct and will continue to maintain the Order Nos. 497- and 636-mandated information, but will no longer be required to file FERC Form No. 592 with the Commission. 34/

#### V. INFORMATION COLLECTION STATEMENT

The Office of Management and Budget's (OMB) regulations 35/ require that OMB approve certain information collection requirements imposed by agency rule. The information collection requirements of Order No. 497 are contained in FERC Form No. 592, "Marketing Affiliates of Interstate Pipelines." The Commission is notifying OMB that it is extending the sunset provision for Order No. 497's reporting requirements and submitting the information collection provisions in this notice for its approval.

Interested persons can obtain information on the information collection provisions by contacting the Federal Energy Regulatory

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33/ In Order No. 636, the Commission created new regulations which, inter alia, require all interstate pipelines transporting pursuant to Part 284 of the Commission's regulations to create and maintain EBBs. See §§ 284.8(b)(4) and 284.9(b)(4), 57 FR 13267 (April 16, 1992). Once operational, the EBB would become a pipeline's tool for compliance with Order No. 497's 24-hour electronic information requirement. See 18 C.F.R. § 250.16(g)(2) (1992).

34/ Although pipelines would no longer be required to file FERC Form 592 with the Commission, they would still be required to follow the content requirements of that form in providing electronic access and maintaining affiliated transportation log information.

35/ 5 CFR 1320.14.

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Commission, 941 North Capitol Street, N.E., Washington, D.C. 20426 (Attention: Michael Miller, Information Policy and Standards Branch, (202) 208-1415). 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**

This order is effective [insert date 30 days after publication in the Federal Register].

**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 in part with  
a separate statement attached.  
( S E A L ) Commissioner Terzic dissented.

*Lois D. Cashell*

Lois D. Cashell,  
Secretary.

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

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

Authority: 15 U.S.C. 717-717w, 3301-3432; 42 U.S.C. 7101-7352.

2. In § 161.3, paragraph (f) is revised to read as follows:

**§ 161.3 Standards of conduct.**

\* \* \* \* \*

(f) To the extent it provides to a marketing affiliate information related to transportation of natural gas, or information related to gas sales or gas marketing on its system or the system of an affiliated pipeline, it must provide that information contemporaneously to all potential shippers, affiliated and nonaffiliated, on its system. Pipelines are not required to contemporaneously disclose: (1) gas sales or gas marketing information that is available from public sources and (2) information related to gas sales or gas marketing off a pipeline's system, but not involving the system of an affiliated pipeline.

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**PART 250 -- FORMS**

1. The authority citation for Part 250 is revised to read as follows:

Authority: 15 U.S.C. 717-717w, 3301-3432; 42 U.S.C. 7101-7352.

2. In § 250.16, paragraphs (a)(3), (c)(1), (c)(2) introductory text and (d)(1) are revised to read as follows:

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

**(a) Who must comply. \* \* \***

(3) Maintain all information required under this section from the time the information is received until December 31, 1993.

\* \* \* \* \*

**(c) What to maintain.**

(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, 1993.

(2) The information required to be maintained by this section will be available from September 12, 1988 until December 31, 1994 to:

\* \* \* \* \*

(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 the earlier of: 90 days after the Commission has determined that the pipeline is in full compliance with the requirements of Order No. 636; or December 31, 1993. 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.

\* \* \* \* \*



justify retention of Standard F in the face of the court's explicit remand in Tenneco. There the court found the Commission's explanation for requiring contemporaneous disclosure of sales and marketing information was "unsatisfactory". 6/ On remand, the court required us to justify the disclosure requirement in terms of the pipeline's monopoly control over transportation service. 7/ This the Commission has failed to do.

The order is vague; it does not discuss the types of sales and marketing information that may be obtained in providing transportation services, and thus properly subject to disclosure. Instead, the order cites as truth the bare assumptions previously advanced and rejected by the Tenneco court: that a pipeline's ongoing relationship with shippers yields information on sales and marketing information that is not readily available to others and that disclosing this information only to an affiliate creates an undue preference because the affiliate would not have otherwise learned that information. The order utterly fails to meet the burden of showing how this flows from the pipeline's anticompetitive exercise of market power. Wrapping itself in the court's language, the Commission concludes, without support or explanation, that any information obtained by the pipeline relating to sales and marketing on its system "flow[s] from the pipeline's anticompetitive market powers" and thus must be subject to disclosure. 8/ The Commission, repeating the error exposed by the Tenneco court, asks the world to rely on "common sense" and the Commission's "experience." 9/ That is not good enough. 10/

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6/ 969 F.2d at 1201.

7/ In particular, the Commission was to "ensure that the final requirement is reasonably tailored to meet the Commission's goals of improving the market and benefiting consumers, as well as preventing undue discrimination." 969 F.2d at 1201.

8/ Slip op. at 13; cf. 969 F.2d at 1201 ("[b]ut advantages a pipeline gives its affiliate are improper only to the extent that they flow from the pipeline's anti-competitive market power").

9/ Slip op. at 13.

10/ To be sure, while courts must defer to the "informed discretion" of the Commission, we must demonstrate how we are "informed" by relevant factual evidence. See generally Michigan Consolidated Gas Co. v. FERC, 883 F.2d 117, 123-124 (D.C. Cir. 1989), cert. denied, 494 U.S. 1079 (1990).

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The court has already rejected the circular reasoning that any advantage to a marketing affiliate is a bad advantage. <sup>11/</sup> The advantage a pipeline gives to its marketing affiliate is improper only to the extent that the advantage flows from the pipeline's anticompetitive market power. Otherwise, the court said, we would improperly cripple the permissible efficiencies of vertical integration that "cannot by themselves be considered uses of monopoly power." <sup>12/</sup>

In conclusion, I would eliminate the contemporaneous disclosure requirement for all sales and marketing information. Thus I dissent.

  
Elizabeth Anne Moler  
Commissioner

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<sup>11/</sup> The Commission made essentially the same claims to the court on brief as it does here.

There is no merit to the pipeline's argument that the Commission exceeded its authority in requiring disclosure of sales and marketing information rather than just transportation related information. As the Commission explained, for a pipeline to share sales and marketing information, like transportation information, with its affiliate, and not others, presents an obvious potential for undue discrimination . . . . Since the sales and marketing information, like transportation information, can afford a pipeline affiliate a significant advantage, the Commission had ample opportunity to require its disclosure to all potential shippers if the pipeline discloses such information to its affiliate.

Brief of Respondent Federal Energy Regulatory Commission at 37-38 (citations and footnote omitted).

<sup>12/</sup> 969 F.2d at 1201.