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UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 284

Docket No. RM03-10-000

Amendments to Blanket Sales Certificates

(Issued June 26, 2003)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of Proposed Rulemaking

SUMMARY: The Federal Energy Regulatory Commission (Commission) is proposing to amend the blanket certificates for unbundled gas sales services held by interstate natural gas pipelines and the blanket marketing certificates held by persons making sales for resale of gas at negotiated rates in interstate commerce to require that pipelines and all sellers for resale adhere to a code of conduct with respect to gas sales. The purpose of the proposed revisions is to ensure the integrity of the gas sales market that remains within the Commission's jurisdiction. The notice of proposed rulemaking (NOPR) is another part of the Commission's continuing effort to restore confidence in the nation's energy markets.

DATES: Comments are due [insert date that is 30 days after publication in the FEDERAL REGISTER].

ADDRESSES: Comments may be filed electronically via the eFiling link on the Commission's web site at <http://www.ferc.gov>. Commenters unable to file comments

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electronically must send an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street N.E., Washington, DC, 20426. Refer to the Comment Procedures section of the preamble for additional information on how to file comments.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
William L. Massey, and Nora Mead Brownell.

Amendments to Blanket Sales Certificates

Docket No. RM03-10-000

NOTICE OF PROPOSED RULEMAKING

(Issued June 26, 2003)

**I. INTRODUCTION**

1. The Federal Energy Regulatory Commission (Commission) is proposing to amend the blanket certificates for unbundled gas sales services held by interstate natural gas pipelines and the blanket marketing certificates held by persons making sales for resale of gas at negotiated rates in interstate commerce to require that pipelines and all sellers for resale adhere to a code of conduct with respect to gas sales. The purpose of the proposed revisions is to ensure the integrity of the gas sales market that remains within the Commission's jurisdiction. This notice of proposed rulemaking (NOPR) is another part of the Commission's continuing effort to restore confidence in the nation's energy markets. Contemporaneously with this NOPR, the Commission is also issuing an order proposing to require sellers of electricity at market-based rates to adhere to certain behavioral rules when making sales of electricity.

## II. BACKGROUND

2. A decade ago, as a result of changes in the natural gas industry, Congressional legislation and various Commission rulemaking proceedings restructuring the gas industry, the Commission issued blanket certificates to allow pipelines and other persons selling natural gas to make sales for resale of natural gas at market-based or negotiated rates. These certificates were granted in two final rules issued by the Commission: Order No. 636<sup>1</sup> and Order No. 547.<sup>2</sup>

3. In Order No. 636, the Commission required all pipelines that provide open-access transportation to offer their sales services on an unbundled basis. To this end, the Commission issued to pipelines holding a blanket transportation certificate under subpart G of Part 284 of the Commission's regulations, or performing transportation under subpart B, a blanket certificate authorizing firm and interruptible sales for resale.<sup>3</sup> The Commission required that all firm and interruptible sales services be provided as

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<sup>1</sup>Order No. 636, 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, FERC. Stats. & Regs. ¶ 30,939 (1992), order on reh'g, Order No. 636-A, FERC. Stats. & Regs. ¶ 30,950 (1992), order on reh'g, Order No. 636-B, 61 FERC. ¶ 61,272 (1992), aff'd in part, rev'd in part, *United Distribution. Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996), cert. denied, 137 L. Ed. 2d 845, 117 S. Ct. 1723, 117 S. Ct. 1724 (1997), on remand, Order No. 636-C, 78 FERC. ¶ 61,186 (1997), order on reh'g, Order No. 636-D, 83 FERC ¶ 61,210 (1998).

<sup>2</sup>Regulations Governing Blanket Marketer Sales Certificates, FERC Stats. & Regs. ¶ 30,957 (1992), order on reh'g and clarification, 62 FERC ¶ 61,239 (1993).

<sup>3</sup>18 CFR § 284.281-287 (2002).

unbundled services under the blanket sales certificate. The Commission found that this form of regulation would enable the pipelines to compete directly with other gas sellers on the same terms at prices determined in a competitive market. The unbundled sales services were also afforded pregranted abandonment.

4. In Order No. 636, the Commission authorized pipelines to make unbundled sales at market-based rates because it concluded that, after unbundling, sellers of short-term or long-term firm gas supplies (whether they be pipelines or other sellers) will not have market power over the sale of natural gas. The Commission's determination was also based on Congress' express finding that a competitive market exists for gas at the wellhead and in the field. The Commission indicated that it was instituting light-handed regulation, relying upon market forces at the wellhead or in the field to constrain unbundled pipeline sales for resale gas prices within the Natural Gas Act's "just and reasonable" standard. In addition, the requirement that pipelines provide open access transportation from the wellhead to the market also permitted the Commission to exercise light-handed regulation over jurisdictional gas sales. Finally, the Commission stated that it would be regulating the pipeline sales in the same manner as it had done for sales for resale by marketers.

5. The Commission also determined that a pipeline as a gas merchant would be the functional equivalent of a pipeline's marketing affiliate. The Commission concluded that

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Order No. 497's<sup>4</sup> standards of conduct would apply to the relationship between the pipeline transportation function and its merchant function. Accordingly, the regulations issuing pipelines blanket sales certificates included standards of conduct and reporting requirements. The purpose of imposing Order No. 497's requirements was to ensure that the pipeline did not favor itself as a merchant over other gas suppliers in performing its transportation function.

6. In Order No. 547, as part of the industry restructuring begun by Order No. 636, the Commission issued blanket certificates to all persons who are not interstate pipelines authorizing them to make jurisdictional gas sales for resale at negotiated rates with pregranted abandonment.<sup>5</sup> The blanket certificates were issued by operation of the rule

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<sup>4</sup>Inquiry Into Alleged Anticompetitive Practices Related to Marketing Affiliates of Interstate Pipelines, Order No. 497 , 53 FR 22139 (June 14, 1988), FERC Statutes and Regulations, Regulation Preambles 1986-1990 ¶ 30,820 (1988), order on rehearing, Order No. 497-A , 54 FR 52781 (Dec. 22, 1989), FERC Statutes and Regulations, Regulation Preambles 1986-1990 ¶ 30,868 (1989), order extending sunset date, Order No. 497-B , 55 FR 53291 (Dec. 28, 1990), FERC Statutes and Regulations, Regulation Preambles 1986-1990 ¶ 30,908 (1990), order extending sunset date and amending final rule, Order No. 497-C , 57 FR 9 (Jan.2, 1992), FERC Statutes and Regulations ¶ 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. Federal Energy Regulatory Commission*, 969 F.2d 1187 (D.C. Cir. 1992), order on remand, Order No. 497-D , 57 FR 58978 (Dec. 14, 1992), FERC Statutes and Regulations ¶ 30,958 (1992), order on reh'g and extending sunset date, Order No. 497-E , 59 F.R. 243 (Jan.4, 1994), FERC Statutes and Regulations ¶ 30,987 (Dec. 23, 1994), order on reh'g, Order No. 497-F , 59 FR 15336 (Apr. 1, 1994), 66 FERC ¶ 61,347 (1994).

<sup>5</sup>18 CFR 284.401-402 (2002).

itself and there was no requirement for persons to file applications seeking such authorization. The Commission determined that the competitive gas commodity market would lead all gas suppliers to charge rates that are sensitive to the gas sales market and cognizant of the variety of options available to gas purchasers. The Commission further stated that, in a competitive market, the basis for the rate to be negotiated between a willing buyer and seller is a commercial, not regulatory, matter. The requirement that pipelines provide open access transportation from the wellhead to the market also permitted the Commission to exercise light-handed regulation over jurisdictional gas sales. The Commission also determined that marketing certificates issued by the final rule are of a limited jurisdiction. The Commission held that the holders of marketing certificates are not subject to any other regulation under the Natural Gas Act jurisdiction of the Commission by virtue of transactions under the certificates.

### **III. EVENTS IN WESTERN ENERGY MARKETS IN 2000**

7. In March 2003, in Docket No. PA02-2-000, the Commission Staff concluded its Fact Finding Investigation of Potential Manipulation of Electric and Gas Prices and issued a Final Report on Price Manipulation in Western Markets (Final Report). A key conclusion of the Final Report is that markets for natural gas and electricity in California are inextricably linked, and that dysfunctions in each fed off one another during the California energy crisis. Staff found that spot gas prices rose to extraordinary levels, facilitating the unprecedented price increase in the electricity market. The Final Report

found that dysfunctions in the natural gas market appear to stem, at least in part, from efforts to manipulate price indices compiled by trade publications. The Final Report stated that reporting of false data and wash trading are examples of efforts to manipulate published price indices.

8. While the Final Report contained numerous recommendations which will not be discussed here, the Staff did recommend that Sections 284.284 and 284.402 of the Commission's regulations be amended to provide explicit guidelines or prohibitions for trading natural gas under Commission blanket certificates. The specific recommendations include: (1) conditioning natural gas companies' blanket certificates on providing accurate and honest information to entities that publish price indices; (2) conditioning blanket certificates on retaining all relevant data for three years for reconstruction of price indices; (3) establishing rules banning any form of prearranged wash trading; and (4) prohibiting the reporting of trades between affiliates to industry indices.

#### **IV. THE COMMISSION'S PROPOSAL**

##### **A. Introduction**

9. Over the past decade, the combination of wellhead decontrol mandated by Congress, open access transportation and the unbundling of pipeline gas sales from transportation increased efficiency and competition both in the gas commodity market and the transportation market. The Commission's open access and unbundling initiatives

were supplemented by the actions of state regulators who also saw the need to begin to open local distribution company (LDC) systems by allowing large industrial and commercial customers to purchase their own gas and transport that gas both on the interstate pipeline and on the LDC's facilities. As a result of the Commission and state open access and unbundling efforts, more efficient and competitive markets developed that would reduce overall gas prices to customers.

10. The Commission's NGA jurisdiction to regulate the prices charged by sellers of natural gas has been substantially narrowed by the Natural Gas Policy Act of 1978 (NGPA) and Congress' subsequent enactment of the Natural Gas Wellhead Decontrol Act of 1989. The end result of these statutory provisions is that the only sales of natural gas that the Commission currently has jurisdiction to regulate are sales for resale of domestic gas by pipelines, local distribution companies (LDCs), or their affiliates so long as they do not produce the gas that they sell.<sup>66</sup> The Commission believes that reliance on competition for gas sales within its jurisdiction has been successful. It has been shown that the wellhead deregulation and reliance on competition in the natural gas industry has provided substantial economic benefits, including among other things, "[l]ower national energy costs to consumers by over \$600 billion as compared to continuation of tight

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<sup>66</sup>See, Reporting of Natural Gas Sales to the California Market, 96 FERC ¶ 61,119 at 61,463, reh'g, 97 FERC ¶ 61,029 (2001), and San Diego Gas and Electric Company, et al., 101 FERC ¶ 61,161 at P 10 (2002).

regulations."<sup>7</sup> However, the Commission believes that, in light of Staff's determinations in the Final Report, it is the Commission's responsibility to ensure the integrity of the gas sales market that remains within the Commission's jurisdiction. Accordingly, pursuant to the Commission's authority under section 7 of the Natural Gas Act, the Commission proposes to revise section 284.288 of its regulations, which is currently reserved, to require that pipelines providing unbundled sales service adhere to a code of conduct when making gas sales. The Commission also proposes to add a new section 284.403 to Part 284, Subpart L to require persons holding blanket marketing certificates under section 284.402 to adhere to a code of conduct when making gas sales.<sup>8</sup>

### **B. Proposed Code of Conduct**

11. As a general matter, the Commission will prohibit pipelines making unbundled gas sales and persons making sales for resale in interstate commerce from engaging in actions or transactions without a legitimate business purpose that manipulate or attempt to manipulate market prices, market conditions, or market rules for natural gas or that result in prices that do not reflect the legitimate forces of supply and demand. The prohibited actions or transactions include but are not limited to pre-arranged offsetting

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<sup>7</sup>Center for the Advancement of Energy Markets, California Here We Come: The Lessons Learned from Natural Gas Deregulation by Dr. Rodney Lemon (August 2001).

<sup>8</sup>Section 284.5 of the Commission's regulations also states that "[t]he Commission may prospectively, by rule or order, impose such further terms and conditions as it deems appropriate on transactions authorized by this part."

trades of the same product among the same parties, which involve no economic risk, and no net change in beneficial ownership (sometimes called "wash trades") and collusion with another party for the purpose of creating market prices at levels differing from those set by market forces. The Commission considers a legitimate business purpose to be an action consistent with appropriate behavior in a competitive market which is taken to further a firm's business objectives without engaging in manipulative, illegal, or otherwise anti-competitive acts. Engaging in manipulation, for example, in order to maximize profits is not a legitimate business purpose.

12. The Final Report found that wash trading adversely affected the California energy markets. A wash trade is a prearranged pair of trades of the same product between the same parties or an affiliate of a party, involving no economic risk and no net change in beneficial ownership between the parties or any affiliate. Such transactions do not appear to serve any legitimate business purpose. The Staff found that wash trading damages the integrity of the market because it can, among other things, create false liquidity, send false price signals, increase trading revenue figures, and adversely affect index prices reported for a market.

13. The Commission will require that blanket sales certificate holders provide complete, accurate and factual information when reporting transactions to publishers of gas price indices. The blanket sales certificate holder must notify the Commission of whether it engages in such reporting. The basis for this condition is the Final Report's

finding that the process for reporting natural gas prices indices was fundamentally flawed. Staff found that gas traders had the ability and incentive to manipulate published prices because natural gas was the fuel input for generators that set the price for electricity in California. Further, the Commission could not independently verify price indices and there did not appear to be a systematic, reliable verification process employed by publishers of natural gas price indices. The Commission finds that accurate price indices are necessary in order to have a properly functioning competitive gas market.

14. In addition, the Commission is considering various options for addressing concerns regarding the validity of price indices. On April 24, 2002, we convened a public conference in Docket No. AD03-7-000, together with the Commodity Futures Trading Commission (CFTC), to consider natural gas price formation issues, including the development of alternative index formation models. At that conference and from comments submitted thereafter, we have received valuable input helping us refine the options available. We are hopeful that the process begun on April 24th will lead to a solution. To that end, we have conducted a follow-up conference, also with CFTC participation, for both natural gas and electricity indices at which we further explored the options presented and attempted to move toward a consensus solution.

15. While we have indicated herein that we are considering requiring jurisdictional entities to report transactions to an entity responsible for index creation, we note that our efforts toward resolution of this issue will be in Docket No. AD03-7-000. Proposed

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Sections 284.288(a)(1) and 284.403(a)(1) state that pipelines and blanket marketing certificate holders will be required to adhere to other standards or requirements as the Commission may order. Based upon our review of the record developed in Docket No. AD03-7-000, we may issue such an order to be implemented at the same time as the rules set forth herein.

16. The Commission will require blanket sales certificate holders to retain all relevant data for three years for reconstruction of price indices. This condition is also related to the Staff's findings that natural gas price indices were manipulated. During its investigation Staff found that there were significant barriers to the verification of natural gas price indices due, in large part, to the fact that many gas traders did not retain business records of their transactions for any significant length of time. Requiring pipelines and other jurisdictional gas sellers to maintain such records should promote transparent markets and either reduce or eliminate manipulation of gas price indices.

17. The Commission will also prohibit blanket sales certificate holders from reporting any transactions between affiliates to industry indices. The Final Report determined, as with wash trades, that there are certain types of transactions between affiliates that do not appear to have any legitimate business purpose. For example, the Final Report identified certain transactions between Enron affiliates that were completed at prices different from the true market and involved no net gain or loss to Enron as a whole. Staff found that transactions between affiliates were designed to give the impression of volatility or to

affect average prices reported through market indices. Arms length transactions, on the other hand, provide useful price information to the broader market and provide a firm foundation for buyers and sellers.

### **C. Jurisdictional and Procedural Issues**

18. The Commission is concerned with the effect of the proposed regulations on the natural gas market. Since the Commission's NGA jurisdiction to regulate the prices charged by sellers of natural gas has been substantially narrowed, the Commission seeks comment on whether application of the code of conduct to only part of the natural gas market will have any adverse effects on the natural gas market. For example, could jurisdictional sellers of natural gas restructure their businesses so as to avoid adherence to the code of conduct, could blanket certificate holders face a competitive disadvantage due to compliance with the code of conduct, or could there be any negative impact on natural gas prices?

19. Sections 284.288(b) and 284.403(b) require that pipelines and blanket marketing certificate holders notify the Commission whether or not they engage in reporting transactions to publishers of gas indices. In order to comply with this requirement, pipelines and blanket marketing certificate holders must submit a filing with the Commission within 30 days after the effective date of the rule indicating whether or not they are engaging in such reporting. Any person who does not submit a filing with the Commission and continues to make gas sales would be making them without

Commission authority and would be subject to the Commission taking remedial action.

#### **D. Remedies**

20. The Commission proposes that violation of the code of conduct may result in the disgorgement of unjust profits, suspension or revocation of the blanket sales certificate or other appropriate non-monetary remedies. The Commission seeks comment on this issue.

21. The Commission also proposes a time limit in which a person may file a complaint against a blanket sales certificate holder for violation of the code of conduct. A person will be required to file a complaint against the certificate holder no later than 60 days after the end of the calendar quarter in which the alleged violation occurred, unless that person could not have known of the alleged violation, in which case the 60-day time limit will run from the discovery of the alleged violation. The Commission believes this properly balances the interests of persons who may have been adversely affected by violations of the code of conduct against the needs of blanket sales certificate holders for finality in their gas sales transactions. The 60-day time limit would not apply to the any action or investigation initiated by the Commission or its Staff.

#### **V. INFORMATION COLLECTION STATEMENT**

22. The proposed rule would require jurisdictional gas sellers to retain certain records for three years and also require them to notify the Commission whether or not they engage in the reporting of natural gas sales transactions to publishers of gas indices. The collection of information contained in this proposed rule has been submitted to the Office of Management and Budget (OMB) for review under the Section 3507(d) of the Paperwork Reduction Act of 1995.<sup>9</sup> OMB's regulations require OMB to approve certain information collection requirements imposed by agency rule.<sup>10</sup> The Commission identifies the information provided for under this rule as FERC-549.

23. Comments are solicited on the need for this information, whether the information will have practical utility, the accuracy of the provided burden estimates, ways to enhance the quality, utility, and clarity of the information to be collected, and any suggested methods for minimizing respondents' burden, including the use of automated information techniques. The burden estimates for complying with this proposed rule are as follows:

Data Collection	Number of Respondents	Number of Responses	Hours Per Response	Total Annual Hours
FERC-549				
<i>(Reporting)</i>	222	222	1	222

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<sup>9</sup>44 U.S.C. § 3507(d).

<sup>10</sup> 5 C.F.R. § 1320.11.

(Recordkeeping )	222	222	2	444
Totals			3	666

Total annual hours for Collection (reporting + recordkeeping)= 666.

*Information Collection Costs:* The Commission seeks comments on the cost to comply with these requirements. It has projected the average annualized cost of all respondents to be: Annualized Capital Startup Costs:  $666 \div 2080 \times \$117,041 = \$37,475$ . This is a one time cost for the implementation of the proposed requirements.

24. OMB's regulations require it to approve certain information collection requirements imposed by agency rule. The Commission is submitting notification of this proposed rule to OMB.

*Title:* FERC-549, Gas Pipeline Rates: Natural Gas Policy Act, Section 311

Transactions.

*Action:* Proposed Data Collection

*OMB Control No.* 1902-0086.

25. Respondents will not be penalized for failure to respond to the collection of information unless the collection of information displays a valid OMB control number or the Commission has provided justification as to why the control number should not be displayed.

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*Respondents:* Businesses or other for profit.

*Frequency of Responses:* On occasion.

*Necessity of Information:* The proposed rule would revise the Commission's regulations to require that pipelines who provide unbundled sales service or persons holding blanket marketing certificates adhere to a code of conduct when making gas sales. In addition, the Commission will require blanket sales certificate holders to maintain certain data for a period of three years. The addition of the codes of conduct, retention of data and standards for accuracy are efforts by the Commission to ensure the integrity of the natural gas market that remains within its jurisdiction.

*Internal review:* The Commission has reviewed the requirements pertaining to blanket sales certificates and has determined the proposed revisions are necessary to ensure the integrity of the gas sales market that remains within its jurisdiction. These requirements conform to the Commission's plan for efficient information collection, communication, and management within the natural gas industry. The Commission has assured itself, by means of internal review, that there is specific, objective support for the burden estimates associated with the information requirements.

26. Interested persons may obtain information on the information requirements by contacting the following: Federal Energy Regulatory Commission, 888 First Street, NE, Washington, D.C. 20426 [Attention: Michael Miller, Office of the Executive Director, Phone (202)502-8415, fax: (202)273-0873, e-mail: [michael.miller@ferc.gov](mailto:michael.miller@ferc.gov)].

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27. For submitting comments concerning the collection of information(s) and the associated burden estimate(s), please send your comments to the contact listed above and to the Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, D.C. 20503, [Attention: Desk Officer for the Federal Energy Regulatory Commission, phone: (202)395-7856, fax: (202)395-7285.

## **VI. ENVIRONMENTAL ANALYSIS**

28. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.<sup>11</sup> The Commission has categorically excluded certain actions from these requirements as not having a significant effect on the human environment.<sup>12</sup> The actions proposed to be taken here fall within categorical exclusions in the Commission's regulations for rules that are clarifying, corrective, or procedural, for information gathering, analysis, and dissemination, and for sales, exchange, and transportation of natural gas that requires no construction of facilities.<sup>13</sup> Therefore, an environmental assessment is unnecessary and has not been prepared in this rulemaking.

## **VII. REGULATORY FLEXIBILITY ACT CERTIFICATION**

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<sup>11</sup>Order No. 486, Regulations Implementing the National Environmental Policy Act, 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs. Preambles 1986-1990 ¶ 30,783 (1987).

<sup>12</sup>18 CFR 380.4.

<sup>13</sup>See 18 CFR 380.4(a)(2)(ii), 380.4(a)(5), 380.4(a)(27).

29. The Regulatory Flexibility Act of 1980 (RFA)<sup>14</sup> generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. The Commission is not required to make such analyses if a rule would not have such an effect.<sup>15</sup>

30. The Commission does not believe that this rule would have such an impact on small entities. Most of the entities required to comply with the proposed regulations would be pipelines, LDCs or their affiliates who do not meet the RFA's definition of a small entity whether or not they are under the Commission's jurisdiction.<sup>16</sup> It is likely that any small entities selling natural gas would be making gas sales that are no longer subject to the Commission's jurisdiction. Therefore, the Commission certifies that this rule will not have a significant economic impact on a substantial number of small entities. **VIII. COMMENT PROCEDURES**

31. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due 30 days from publication in the Federal Register. Comments must refer to Docket No. RM03-10-000 and must include the commenter's name, the organization they represent, if

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<sup>14</sup>5 U.S.C. 601-612.

<sup>15</sup>5 U.S.C. 605(b).

<sup>16</sup>5 U.S.C. 601(3).

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applicable, and their address in their comments. Comments may be filed either in electronic or paper format.

32. Comments may be filed electronically via the eFiling link on the Commission's web site at <http://www.ferc.gov>. The Commission accepts most standard word processing formats and commenters may attach additional files with supporting information in certain other file formats. Commenters filing electronically do not need to make a paper filing. Commenters that are not able to file comments electronically must send an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street N.E., Washington, DC, 20426.

33. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

## **IX. DOCUMENT AVAILABILITY**

34. In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (<http://www.ferc.gov>) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, N.E., Room 2A, Washington, DC 20426.

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35. From FERC's Home Page on the Internet, this information is available in the Federal Energy Regulatory Records Information System (FERRIS). The full text of this document is available on FERRIS in PDF and WordPerfect format for viewing, printing, and/or downloading. To access this document in FERRIS, type the docket number excluding the last three digits of this document in the docket number field.

36. For assistance with FERRIS, the FERRIS helpline can be reached at 1-866-208-3676, TTY (202) 502-8659, or at [FERCOnLineSupport@ferc.gov](mailto:FERCOnLineSupport@ferc.gov).

List of subjects in 18 CFR Part 284

37. Continental shelf; Incorporation by reference; Natural gas; Reporting and recordkeeping requirements.

By direction of the Commission. Commissioner Massey concurred in part  
with a separate statement attached.  
Commissioner Brownell concurred with  
a separate statement attached.

Magalie R. Salas,  
Secretary.

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In consideration of the foregoing, the Commission proposes to amend Part 284, Chapter I, Title 18, Code of Federal Regulations, as follows.

**PART 284 - - CERTAIN SALES AND TRANSPORTATION OF NATURAL GAS UNDER THE NATURAL GAS POLICY ACT OF 1978 AND RELATED AUTHORITIES**

1. The authority citation for Part 284 continues to read as follows:

Authority: 15 U.S.C. 717-717w, 3301-3432; 42 U.S.C. 7101-7532; 43 U.S.C.1331-1356.

2. Section 284.288 is added to read as follows:

**§ 284.288 Code of conduct for unbundled sales service.**

(a) A pipeline that provides unbundled natural gas sales service under § 284.284 is prohibited from engaging in actions or transactions without a legitimate business purpose that manipulate or attempt to manipulate market prices, market conditions, or market rules for natural gas or that result in prices that do not reflect the legitimate forces of supply and demand. Prohibited actions and transactions include but are not limited to:

(1) Pre-arranged offsetting trades of the same product among the same parties, which involve no economic risk, and no net change in beneficial ownership (sometimes called "wash trades"); and

(2) Collusion with another party for the purpose of creating market prices at levels differing from those set by market forces.

(b) To the extent a pipeline that provides unbundled natural gas sales service under § 284.284 engages in reporting of transactions to publishers of gas price indices, the pipeline shall provide complete, accurate and factual information to any such publisher. The pipeline shall notify the Commission of whether it engages in such reporting for all sales. In addition, the pipeline shall adhere to such other standards and requirements for price reporting as the Commission may order;

(c) A pipeline that provides unbundled natural gas sales service under § 284.284 must retain all relevant data and information necessary for the reconstruction of price indices for three years;

(d) A pipeline that provides unbundled natural gas sales service under § 284.284 is prohibited from reporting any natural gas sales transactions between the pipeline and its affiliates to industry indices.

(e) Violation of the preceding paragraphs may result in disgorgement of unjust profits, suspension or revocation of a pipeline's blanket certificate under § 284.284 or other appropriate non-monetary remedies.

(f) Any person filing a complaint against a pipeline for violation of paragraphs (a) through (d) must do so no later than 60 days after the end of the calendar

quarter in which the alleged violation occurred unless that person could not have known of the alleged violation, in which case the 60-day time limit will run from the discovery of the alleged violation.

3. The second sentence of paragraph (a) of § 284.402 is removed.
4. Section 284.403 is added to read as follows:

**§ 284.403 Code of conduct for persons holding blanket marketing certificates.**

(a) Any person making natural gas sales for resale in interstate commerce pursuant to § 284.402 is prohibited from engaging in actions or transactions without a legitimate business purpose that manipulate or attempt to manipulate market prices, market conditions, or market rules for natural gas or that result in prices that do not reflect the legitimate forces of supply and demand. Prohibited actions and transactions include but are not limited to:

- (1) Pre-arranged offsetting trades of the same product among the same parties, which involve no economic risk, and no net change in beneficial ownership (sometimes called "wash trades"); and
- (2) Collusion with another party for the purpose of creating market prices at levels differing from those set by market forces.

(b) To the extent a blanket marketing certificate holder engages in reporting of transactions to publishers of gas price indices, the blanket certificate holder shall provide complete, accurate and factual information to any such publisher. The blanket marketing certificate holder shall notify the Commission of whether it engages in such reporting for all sales. In addition, the blanket marketing certificate holder shall adhere to such other standards and requirements for price reporting as the Commission may order;

(c) A blanket marketing certificate holder must retain all relevant data and information necessary for the reconstruction of price indices for three years;

(d) A blanket marketing certificate holder is prohibited from reporting any natural gas sales transactions between the blanket marketing certificate holder and its affiliates to industry indices.

(e) Violation of the preceding paragraphs may result in disgorgement of unjust profits, suspension or revocation of a persons's blanket certificate under § 284.402 or other appropriate non-monetary remedies.

(f) Any person filing a complaint against a blanket marketing certificate holder for violation of paragraphs (a) through (d) must do so no later than 60 days after the end of the calendar quarter in which the alleged violation occurred unless that person could not have known of the alleged violation, in which case the 60-day time limit will run from the discovery of the alleged violation.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Amendments to Blanket Sales Certificates

Docket No. RM03-10-000

(Issued June 26, 2003)

MASSEY, Commissioner, concurring in part:

I wholeheartedly support conditions to all market-based tariffs that declare manipulation off limits. Such outrageous behavior has cast a pall over the promise of energy markets and has brought some companies to dire financial straits. These tariff conditions should deter bad behavior in the future. If they fail to do so, then at least the Commission will have industry wide legal tools to provide appropriate remedies. I commend Chairman Wood's strong leadership in developing this proposal.

I am writing separately to express my concern with one aspect of today's proposal. I would not limit the monetary penalty for tariff violations to disgorgement of unjust profits. Market manipulation can raise the market prices paid by all market participants and collected by all sellers. The Natural Gas Act requires that all rates and charges be just and reasonable. Where the market has been manipulated so as to affect the market price, that price is not just and reasonable and is therefore unlawful. Simply requiring that bad actors disgorge their individual profits does not make the market whole because all sellers received the unlawful price caused by the manipulation. The narrow remedy of profit disgorgement is not an adequate remedy for the adverse effect of the bad behavior on the market price, and may not be an adequate deterrent to future behavior. The appropriate remedy may be that the manipulating seller makes the market whole.<sup>17</sup> Unfortunately, today's order appears to take this remedy off of the table. I would prefer to tailor the remedy to the circumstances of each case. I encourage comments on this issue.

For these reasons, I concur in part with today's order.

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William L. Massey  
Commissioner

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<sup>17</sup>The Commission has accepted the make the market whole remedy as part of a settlement for withholding generation from the California PX market. See 102 FERC ¶ 61,108 (2003).

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BROWNELL, Commissioner, concurring:

Today we issue a Notice of Proposed Rulemaking (NOPR) to amend the blanket certificates for unbundled gas sales service held by persons making sales for resale at negotiated rates in interstate commerce to require that sellers adhere to a code of conduct. The stated purpose of the proposed revisions is to ensure the integrity of the gas market that remains within the Commission's jurisdiction. Importantly, the NOPR attempts to balance three goals:

- effective remedies on behalf of customers in the event anti-competitive behavior or other market abuses occur;
- clearly delineated "rules of the road" to persons making sales for resale at negotiated rates in interstate commerce, at the same time, not impairing the Commission's ability to provide remedies for market abuses whose precise form and form can not be envisioned today; and
- reasonable bounds within which conditions on market conduct will be implemented so as not to create unlimited regulatory uncertainty for individual market participants or harm to the marketplace in general.

I appreciate the need to balance these goals but still have some fundamental concerns about the proposal, particularly Sections 284.288 (a) and 284.403 (a). Scarcity pricing is a market response to a supply and demand imbalance. What constitutes legitimate forces of supply and demand and what defines scarcity pricing? I also fear that as the precise definition of manipulation develops over time we will end up with overly proscriptive "rules of the road" that will dampen innovative, legitimate business tools. Finally, I am concerned the proposed regulations could lead to the segmentation of the as commodity market. The only sales of natural gas that the Commission currently has jurisdiction to regulate are sales for resale of domestic gas by pipelines, local distribution companies, or their affiliates so long as they do not produce the gas that they sell. Could blanket certificate holders face a competitive disadvantage due to compliance with the

code of conduct, or could there be any negative impact on natural gas prices? I ask for your comment on whether application of the code of conduct to only part of the natural gas market will have any adverse effects on the natural gas market.

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Nora Mead Brownell  
Commissioner