

**SUPPORTING STATEMENT FOR
FERC-592, Marketing Affiliates of Interstate Pipelines, Standards of Conduct for
Transmission Providers and
FERC-717, Standards for Business Practices and Communication Protocols
for Public Utilities, as proposed in Docket No. RM07-1-000
Regarding Standards of Conduct for Transmission Providers
(Notice of Proposed Rulemaking issued March 21, 2008)**

The Federal Energy Regulatory Commission (Commission) requests the Office of Management and Budget (OMB) to review and extend its approval of **FERC-592, Marketing Affiliates of Interstate Pipelines, Standards of Conduct for Transmission Providers (FERC-592)** and **FERC-717, Standards for Business Practices and Communication Protocols for Public Utilities** both are existing information collections, regarding revisions to requirements contained in Part 358 of the Commission's regulations. **FERC-592 (OMB Control NO. 1902-0157)** is approved through December 31, 2009. **FERC-717 (OMB Control No. 1902-0173)** is currently approved through November 30, 2010.

The subject data collections will be affected because the Commission proposes in a Notice of Proposed Rulemaking (NOPR), RM07-1-000 "**Standards of Conduct for Transmission Providers**", to revise its Standards of Conduct for transmission providers to make them clearer and to refocus the rules on the areas where there is the greatest potential for affiliate abuse. By doing so, FERC will make compliance less elusive and facilitate Commission enforcement. The Commission also proposes to conform the Standards to the decision of the U.S. Court of Appeals for the D.C. Circuit in National Fuel Gas Supply Corporation v. FERC, 468 F.3d 831 (D.C. Cir. 2006). On January 18, 2007, FERC issued a Notice of Proposed Rulemaking (initial NOPR), and received both initial and reply comments from interested persons. After giving consideration to these comments and FERC's own experience in enforcing the Standards, the Commission believes it to be necessary and appropriate to modify the approach proposed in the initial NOPR. The Commission is therefore issuing a new NOPR, and invites comments in response to the regulations proposed in the subsequent NOPR.

We estimate that the changes proposed in the NOPR are minimal and will result in off-setting changes to the annual reporting burden. Therefore, the burden estimates for the information collections as related to this NOPR will remain the same as currently reported on OMB's inventory. (For further discussion see item 12 of this submission.)

Background

FERC first adopted Standards of Conduct in 1987, in Order No. 497. These initial Standards prohibited interstate natural gas pipelines from giving their marketing affiliates or wholesale merchant functions undue preference over non-affiliated customers. Citing demonstrated record abuses, the U.S. Court of Appeals for the D.C. Circuit upheld these Standards in 1992.¹ The Commission adopted similar Standards for the electric industry in 1996, in Order No. 889, prohibiting public utilities from giving undue preference to their marketing affiliates or wholesale merchant functions. Both the electric and gas Standards sought to deter undue preference by:

- (i) separating a transmission provider's employees engaged in transmission services from those engaged in its marketing services, and
- (ii) requiring that all transmission customers, affiliated and non-affiliated, be treated on a non-discriminatory basis.

Changes in both the electric and gas industries, in particular the unbundling of sales from transportation in the gas industry and the increase in the number of power marketers in the electric industry, led the Commission in 2003 to issue Order No. 2004, which broadened the Standards to include a new category of affiliate, the Energy Affiliate.² The new Standards were made applicable to both the electric and gas industries, and provided that the transmission employees of a transmission provider³ must function independently not only from the company's marketing affiliates but from its Energy Affiliates as well, and that transmission providers may not treat either their Energy Affiliates or their marketing affiliates on a preferential basis. Order No. 2004 also imposed requirements to publicly post information concerning a transmission provider's Energy Affiliates.

On appeal by members of the natural gas industry, the U.S. Court of Appeals for the D.C. Circuit overturned the Standards as applicable to gas transmission providers, on the grounds that the evidence of abuse by Energy Affiliates cited by the Commission was not in the record.⁴ The court noted that the dissenting Commissioners in Order No. 2004

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

2 The new Standards defined an Energy Affiliate as an affiliate of a Transmission Provider that (1) engages in or is involved in transmission transactions in U.S. energy or transmission markets; or (2) manages or controls transmission capacity of a Transmission Provider in U.S. energy or transmission markets; or (3) buys, sells, trades or administers natural gas or electric energy in U.S. energy or transmission markets; or (4) engages in financial transactions relating to the sale or transmission of natural gas or electric energy in U.S. energy or transmission markets. 18 CFR 358.3(d). Certain categories of entities were excluded from this definition in following subsections of the regulations.

3 A Transmission Provider was defined as (1) any public utility that owns, operates or controls facilities used for transmission of electric energy in interstate commerce; or (2) any interstate natural gas pipeline that transports gas for others pursuant to subpart A or part 157 or subparts B or G of part 284 of the same chapter of the regulations. 18 CFR 358.3(a).

4 National Fuel at 841.

had expressed the concern that the Order would diminish industry efficiencies without advancing the FERC policy of preventing unduly discriminatory behavior.⁵

The Commission issued an Interim Rule on January 9, 2007,⁶ and set about developing new Standards that would cure the defects identified by the D.C. Circuit in National Fuel. On January 18, 2007, the Commission issued its initial NOPR,⁷ requesting comment on whether the concept of Energy Affiliates should be retained for the electric industry, proposing the creation of two new categories of employees denominated as Competitive Solicitation Employees and Planning Employees, carrying over the Interim Rule's new definition of marketing to cover asset managers, and making numerous other proposals. The Commission received thousands of pages of both initial and reply comments from some 95 individuals, companies, and organizations which are listed in Appendix A of the current NOPR.

FERC-592

In 1987 when the gas pipeline standards of conduct were issued in Order No. 497, the natural gas industry had witnessed a rapid growth of marketing affiliates and the Commission was concerned that pipelines were giving their marketing affiliates preferential treatment. As a result, the Commission issued certain rules intended for marketing or brokering affiliates. The Standards of Conduct provide, in general, that pipelines and their marketing affiliates must function independently of each other. The Commission reserved the right to impose structural remedies, such as divorcement or divestiture, in specific cases where the circumstances demonstrate they are required.

In Order No. 637, the Commission expanded its affiliate regulations to provide more information to permit monitoring and self-policing of affiliate transactions. The Commission required those pipelines with marketing affiliates post certain information to prevent interstate natural gas pipelines from providing preferential treatment concerning their affiliates on their Internet web sites.⁸ Posting of this information serves

⁵ Id. at 838.

⁶ Standards of Conduct for Transmission Providers, Order No. 690, 72 FR 2427 (Jan. 19, 2007); FERC Stats. & Regs. ¶ 31,237 (Jan. 9, 2007) (Interim Rule); clarified by, Standards of Conduct for Transmission Providers, Order No. 690-A, 72 FR 14235 (Mar. 27, 2007); FERC Stats. & Regs. ¶ 31,243 (2007) (Order on Clarification and Rehearing).

⁷ Standards of Conduct for Transmission Providers, 72 FR 3958 (Jan. 29, 2007), FERC Stats. & Regs. ¶ 32,611 (2007) (initial NOPR).

⁸ The information to be posted includes a list of names of operating personnel and facilities shared by the interstate pipeline and its marketing affiliate, organizational charts showing the organizational structure of parent corporation, business units, job descriptions and organizational chain of command.

to deter undue discrimination and preference. These requirements apply only to pipelines that conduct transportation transactions with their marketing or brokering affiliates.

Currently, the gas standards of conduct exempt producers that sell from their own production, gatherers that sell from their own gathering facilities and local distribution companies (LDCs) that make on-system sales.

FERC-717

By its Final Rule issued April 24, 1996, in Docket No. RM95-9-000, the Commission proposed to adopt certain standards/information requirements for Open Access Same-Time Information System (OASIS) to be maintained by Public Utilities. More specifically, the Commission proposed to add Part 37 of Title 18, Code of Federal regulations (CFR). The Standards of Conduct were designed to prevent employees of a public utility (or any of its affiliates) engaged in marketing functions from preferential access to OASIS-related information or from engaging in unduly discriminatory business practices. Companies were required to separate their transmission operations/reliability functions from their marketing/merchant functions and prevent system operators from providing merchant employees and employees of affiliates with transmission-related information not available to all customers at the same time through public posting on the OASIS.

In Order No. 676, RM05-5-000 "**Standards of Business Practices and Communication Protocols for Public Utilities**", issued April 25, 2006, the Commission incorporated by reference and placed into operation, standards developed by the North American Energy Standards Board's (NAESB's) Wholesale Electric Quadrant (WEQ). These standards cover Open Access Same-Time Information Systems (OASIS) business practice standards, including the posting requirements for Order No. 2003 generator interconnection agreements and procedures; OASIS Standards and Communication Protocols and Data Dictionary; and business practice standards for Coordinate Interchange, Area Control Error (ACE) Equation Special Cases, Manual Time Error Correction, and Inadvertent Interchange Payback.

The incorporation of these standards by reference into the Commission's regulations is intended to benefit wholesale electric customers by streamlining utility business practices and transactional processes and OASIS procedures and by adopting a formal ongoing process for reviewing and upgrading the Commission's OASIS standards and other electric business industry business practices. These practices and procedures would benefit from the implementation of generic industry standards. In order to incorporate the electric business practices and generic industry standards, the

Commission changed the name of FERC-717 from the requirements that pertained to Open Access Same-Time Information Systems and standards of conduct.

RM01-10 Final Rule (November 25, 2003) (Order No. 2004)

On November 25, 2003, the Commission issued a Final Rule where it replaced its existing rules under Parts 37 and 161 with comparable rules at Part 358. Under the requirements at Parts 37 and 161, Transmission Providers must post specific information about their marketing affiliates or wholesale merchant functions on their respective OASIS nodes or Internet websites. The Final Rule required Transmission Providers to also post the same information on their OASIS or Internet websites with respect to their Energy Affiliates.

Transmission Providers continue to have economic incentives to show undue preferences toward their Energy Affiliates. The Commission adopted these new rules to close loopholes in existing rules and to give Transmission Providers specific guidance on how to eliminate undue discrimination and undue preferences in the provision of interstate transmission services, consistent with the directions of the NGA and the FPA. The Commission believed the revised standards of conduct would ensure that Transmission Providers apply the standards of conduct to require a separation of the transmission function from all sales functions, including bundled retail sales and a restriction on preferential access to transmission information for the bundled sales function. Specifically the final rule implemented the following:

- used the same standards of conduct requirements for the interstate natural gas pipelines and public utility transmission providers;
- adopted the “no conduit” rule for implementing information disclosure prohibitions (as used by public utility transmission providers), which was more flexible than the “automatic imputation rule” (used by interstate natural gas pipeline transmission providers);
- prohibited Transmission Providers from sharing employees and information with its Energy Affiliates, including affiliated asset managers, and trading and financial affiliates;
- prohibited the sharing of employees and information across industries (e.g. between a natural gas pipeline and an affiliate generator); and
- required mandatory training for employees and the designation of a Chief Compliance Officer.

The Final Rule retained the existing exemption from Order No. 497 for affiliated local distribution companies and the existing exemption from Order

No. 889 for the bundled retail sales function. However, the Final Rule eliminated the existing exemption in Order No. 497 for affiliated producers, gatherers, processors, intrastate pipelines and Hinshaw pipelines.

RM07-1-000 NOPR (March 21, 2008)

The Commission is now proposing to reform its Standards of Conduct for Transmission Providers. The primary purpose of the proposed reforms is to strengthen the Standards by making them clearer and by refocusing the rules on the areas where there is the greatest potential for affiliate abuse. By doing so, the Commission will make compliance less elusive and subjective for regulated entities, and facilitate enforcement of the Standards by the Commission. The Commission also proposes to reform its regulations to comply with the U.S. Court of Appeals for the D.C. Circuit decision in National Fuel Gas Supply Corp. v. FERC, 468 F.3d 831 (D.C. Cir. 2006).

As noted above, the Commission issued a NOPR on January 18, 2007 (initial NOPR) to modify the Standards. The primary purpose of the initial NOPR was to remedy the defects identified by the D.C. Circuit in National Fuel, particularly the court's rejection of the Standards' treatment of Energy Affiliates of natural gas pipelines. The Commission also sought to remedy other specific flaws in the Standards, such as by removing impediments to integrated resource planning. In proposing these reforms FERC did not, however, undertake a broader review of the Standards to determine whether they were continuing to prevent affiliate abuse in the manner most likely to foster compliance and enhance enforcement. FERC now believes that such a broader review is necessary. The Commission therefore proposes further reforms in this the subsequent NOPR and seeks comment on them from all interested persons.

In consideration of the comments to the initial NOPR, coupled with the Commission' own experience in administering the Standards, as well as the comments received at its recent enforcement conference,⁹ the Commission is persuaded to modify the approach advanced in the initial NOPR.

A. JUSTIFICATION

1. CIRCUMSTANCES THAT MAKE THE COLLECTION OF INFORMATION NECESSARY

FERC-592

⁹ Conference on Enforcement Policy, Docket No. AD07-13-000 (Nov. 16, 2007) (enforcement conference).

The Commission has the regulatory responsibility under Section 4 of the Natural Gas Act to ensure that pipeline rates are just and reasonable and not unduly discriminatory. Just and reasonable rates and services need to achieve two principal objectives. They should promote competitive and efficient markets, while mitigating market power and preventing undue discrimination, especially for the Commission's "prime constituency, captive customers vulnerable to pipelines' market power."¹⁰ In short, the Commission's regulatory policy must seek to reconcile the objectives of fostering an efficient market that provide good alternatives to as many shippers as possible while at the same time creating a regulatory framework that is fair and protects captive customers without good alternatives.

The reporting and recordkeeping requirements apply only to those interstate natural gas pipelines involved in transactions with affiliated marketing or brokering companies (expanded in the Final Rule to include energy affiliates). The filing of the pipelines' procedures, as required in Section 250.16(b), enables the Commission to ensure compliance with the nondiscriminatory requirement of Order No. 636. Blanket certificates for transportation, natural gas sales, and storage service issued under Section 7(c) of the NGA also prohibit undue discrimination.

The FERC-592 data on transactions involving interstate pipelines and their affiliates are required to carry out the Commission's policies in accordance with the general authority in Sections 4, 5, 7, 8, 10, 14, 16, and 20 of the Natural Gas Act (NGA) (15 U.S.C. 717-717w)

FERC-717 In its Final Rule Order No. 888: "Promoting Wholesale Competition through Open Access Nondiscriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities" issued on April 24, 1996, (Docket No. RM95-8/RM94-7), the Commission required that all public utilities that own, control or operate facilities used for transmitting electric energy in interstate commerce to have on file open access nondiscriminatory transmission tariffs that contain minimum terms and conditions of nondiscriminatory service.

In addition, the Commission required public utilities to establish OASIS sites to provide transmission customers with equal and timely access to information about transmission and ancillary services provided in the tariffs. The Commission does not believe that open-access nondiscriminatory transmission services can be completely realized until it removes real-world obstacles that prevent transmission customers from competing effectively with the Transmission Provider. One of the obstacles is unequal access to transmission information. The Commission believes that transmission

¹⁰ United Distribution Companies v. FERC, 88 F.3d 1105, 1123 (D.C. Cir. 1996).

customers must have simultaneous access to the same information available to the Transmission Provider if truly nondiscriminatory transmission services are to be a reality.

The FERC-717 data and communications standards on OASIS are required to carry out the Commission's policies in accordance with the general authority in Sections 309 and 311, of the Federal Power Act of 1935 (FPA) (16 U.S.C. 825h) (Attachment E) and 16 U.S.C. 825j) (Attachment F).

This revised NOPR proposes to combine the best elements of the Standards adopted in Order Nos. 497 and 889 with those adopted by the Commission in Order No. 2004.¹¹ Order Nos. 497¹² and 889¹³ established a functional separation between transmission and merchant personnel for natural gas and electric transmission providers that was relatively clear and that worked well for many years. Order No. 2004 altered this approach in three main ways:

- (i) first, to expand the scope of the Standards to include Energy Affiliates,
- (ii) second, to adopt a corporate separation approach to accommodate the addition of Energy Affiliates, and
- (iii) third, to adopt a single set of standards applicable to both natural gas and electric industries.

The National Fuel court rejected the first reform as applied to the natural gas industry and, by doing so undercut the need for the second reform. The court did not

11 Standards of Conduct for Transmission Providers, Order No. 2004, FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,155 (2003), order on reh'g, Order No. 2004-A, FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,161 (2004), order on reh'g, Order No. 2004-B, FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,166 (2004), order on reh'g, Order No. 2004-C, FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,172 (2004), order on reh'g, Order No. 2004-D, 110 FERC ¶ 61,320 (2005), vacated and remanded as it applies to natural gas pipelines sub nom. Nat'l Fuel Gas Supply Corporation v. FERC, 468 F.3d 831 (D.C. Cir. 2006); Standards of Conduct for Transmission Providers, Order No. 690, 72 Fed. Reg. 2,427 (Jan 19, 2007), FERC Stats. & Regs. ¶ 31,237, order on reh'g, Order No. 690-A, 72 Fed. Reg. 14235 (Mar. 27, 2007), FERC Stats. & Regs. ¶ 31,243 (2007); *see also Standards of Conduct for Transmission Providers*, Notice of Proposed Rulemaking, 72 Fed. Reg. 3,958 (Jan. 29, 2007), FERC Stats. & Regs. ¶ 32,611 (2007)

12 Inquiry into Alleged Anticompetitive Practices Related to Marketing Affiliates of Interstate Pipelines, Order No. 497, 53 FR 22139 (1988), FERC Stats. & Regs., Regulations Preambles 1986-1990 ¶ 30,820 (1988); Order No. 497-A, order on reh'g, 54 FR 52781 (1989), FERC Stats & Regs., Regulations Preambles 1986-1990 ¶ 30,868 (1989); Order No. 497-B, order extending sunset date, 55 FR 53291 (1990), FERC Stats. & Regs., Regulations Preambles 1986-1990 ¶ 30,908 (1990); Order No. 497-C, order extending sunset date, 57 FR 9 (1992), FERC Stats. & Regs., Regulations Preambles 1991-1996 ¶ 30,934 (1991), reh'g denied, 57 FR 5815 (1992), 58 FERC ¶ 61,139 (1992); aff'd in part and remanded in part sub nom. Tenneco Gas v. FERC, 969 F.2d 1187 (D.C. Cir. 1992) (collectively, Order No. 497).

13 Open Access Same-Time Information System (Formerly Real-Time Information Network) and Standards of Conduct, Order No. 889, 61 FR 21737 (May 10, 1996), FERC Stats. & Regs., Regulations Preambles Jan. 1991-June 1996 ¶ 31,035 (Apr. 24, 1996); Order No. 889-A, order on reh'g, 62 FR 12484 (Mar. 14, 1997), FERC Stats. & Regs., Regulations Preambles July 1996-December 2000 ¶ 31,049 (Mar. 4, 1997); Order No. 889-B, reh'g denied, 62 FR 64715 (Dec. 9, 1997), 81 FERC ¶ 61,253 (Nov. 25, 1997) (collectively, Order No. 889).

upset the third reason for reform and the Commission continues to believe there is no reason why separate standards should apply to each industry, although the Commission's proposed regulations do take into account differences between the industries in discrete areas.

Nevertheless, the Commission believes this single set of standards should more closely resemble the functional approach that was adopted in Order Nos. 497 and 889. FERC's experience with implementing and enforcing the Standards, as well as the record of this proceeding, demonstrates that this approach is the one most likely to foster compliance and strengthen enforcement of the Standards. The "corporate separation" adopted by Order No. 2004 has not proven workable and was adopted to facilitate the regulation of Energy Affiliates,¹⁴ a step that is no longer appropriate given the decision in National Fuel.

In addition to combining the best elements of Orders 497, 889 and 2004, the Commission also, proposes to simplify and streamline the Standards to facilitate compliance and enhance enforcement. With the Commission's new civil penalty authority under the Energy Policy Act of 2005¹⁵, it is mindful of the fact that its regulations must be as clear as possible, as participants in the enforcement conference repeatedly noted. The Commission also proposes to strengthen enforcement of the Standards by proposing additional transparency to aid in the detection of affiliate abuse. Although the Commission believes many of the existing elements of the Standards should be retained, the reforms that are being proposed, together with the simplification and clarification the Commission believes to be imperative, necessitate reissuing the entire part 358 of the Code of Federal Regulations as a stand-alone document.

2. HOW, BY WHOM AND FOR WHAT PURPOSE IS THE INFORMATION TO BE USED AND THE CONSEQUENCES OF NOT COLLECTING THE INFORMATION

FERC-592 The information maintained and provided by the respondents is used by the Commission to monitor the pipeline's transportation, sales, and storage activities for its marketing affiliate to deter undue discrimination by pipeline companies in favor of their marketing affiliates. The information is also used by non-affiliated shippers or others (such as state commissions) to determine whether they have been harmed by affiliate preference and, in some cases, to prepare evidence for proceedings following the filing of a complaint.

FERC-717 These requirements apply to all Public Utilities owning and/or

14 Order No. 2004 at P 92.

15 Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594(2005).

controlling facilities used for the transmission of electricity in interstate commerce. These procedures enable the Commission to ensure compliance with the functional unbundling established in the Commission's Open Access rulemaking.

The Commission uses the information to monitor the networks to ensure that potential purchasers of transmission services obtain the services on a non-discriminatory basis. The collection of this information is necessary to meet the legal requirements, namely the statutory obligations under section 205 and 206 of the FPA, to prevent unduly discriminatory practices in transmission access. Failure to issue these requirements would mean the Commission is not meeting its statutory obligations and permitting discrimination in interstate transmission services provided by the public utilities.

The purpose of this revised NOPR is to strengthen the Standards by making the Commission's rules clearer and refocusing them on the areas where there is the greatest potential for affiliate abuse. In so doing, the Commission will facilitate compliance by regulated entities and enhance Commission enforcement. FERC proposes to accomplish this objective by as noted above, combining the best elements of Order Nos. 497 and 889, on the one hand, and Order No. 2004, on the other. In particular, FERC proposes to return to the approach of separating, by function, the transmission personnel from the marketing personnel that was adopted in Order Nos. 497 and 889 and worked well for many years, while also retaining a single set of standards for both natural gas and electric industries, as envisioned by Order No. 2004. The Commission also proposes to further clarify and streamline the Standards to enhance compliance and enforcement of its rules, and to increase transparency in the area of transmission/affiliate interactions to aid in the detection of any undue discrimination.

3. DESCRIBE ANY CONSIDERATION OF THE USE OF IMPROVED INFORMATION TECHNOLOGY TO REDUCE BURDEN AND THE TECHNICAL OR LEGAL OBSTACLES TO REDUCING BURDEN

In both FERC-592 and FERC-717, the Commission has shown a commitment to the use of information technology. For FERC-592 requirements, the Commission in Order No. 637 as noted above, requires pipelines to post certain affiliate information on the Internet and widely available to the public. In FERC-717 the Commission's requirement for the use of OASIS to provide transmission service information to the public, demonstrates the use of information technology to reduce the burden. With a single Internet connection, transmission customers are able to access information from any utility as well as be able to display information.

As noted in other Commission submissions, on November 15, 2007, it issued a Final Rule, RM07-16-000, Order No. 703, "Filing via the Internet" 73 Fed. Reg. 65659 (November 23, 2007) revising its regulations for implementing the next version of its system for filing documents via the Internet, eFiling 7.0. Order No. 703 allows the

option of filing all documents in Commission proceedings through the eFiling interface except for specified exceptions, and of utilizing online forms to allow “document less” interventions in all filings and quick comments in P (Hydropower Project), PF (Pre-Filing NEPA activities for proposed gas pipelines), and CP (Certificates for Interstate Natural Gas Pipelines) proceedings.

Order No. 703 amended the Commission’s regulations¹⁶ to provide that all documents filed with the Commission may be submitted through the eFiling interface except for documents specified by the Secretary. The changes implemented in that Final Rule means that categories such as oversized documents and most confidential documents will be accepted via eFiling. However, at this time, there are principal exceptions, and they are tariffs, tariff revisions and rate change applications; some forms;¹⁷ and documents that are subject to protective orders.

Order No. 703 became effective on December 24, 2007 and the implementation of eFiling 7.0 occurred on March 3, 2008. In addition, the Secretary of the Commission will make announcements of the implementation of the upgrade and will also inform the public of post filing instructions.

In addition, the Commission has issued instructions specifying acceptable file formats for filings submitted on CD-ROM, DVD and other electronic media. These can be found at <http://www.ferc.gov/help/submission-guide/electronic-media.asp>. In addition, in some cases Commission staff has issued instructions applying to specific types of filings. Where there are no specifications for a particular type of filing, users must follow the Secretary’s instructions. At this time, the eFiling system will accept documents in their native formats. This will include both text or word processing documents, and other more specialized documents such as spreadsheets and maps. It will also accept text documents in searchable formats, including scanned documents that have been saved in searchable form. This same list will serve as the list of acceptable formats for eFiling 7.0. Submitters will be able to choose a suitable format from that list unless they are instructed otherwise in specific instances by regulation or by direction from Commission staff. Audio and video files will be accepted only in waveform audio format (.wav) for audio content and either audio-video interleave (.avi) or quicktime (.mov) files for video content, except where submitters are specifically instructed otherwise.

The Commission intends, as far as practicable, to continue decreasing its reliance on paper documents and to continue to upgrade eFiling capabilities in furtherance of the

16 Rule 2003(c) of the Commission’s Rules of Practice and Procedure, 18 CFR 385.2003(c).

17 The following continue to be submitted through eForms: FERC Form No.1, FERC Form No. 2, FERC Form No. 2-A, FERC Form No. 3-Q, FERC Form No. 6, FERC Form No. 6-Q, Form 60, Form 714, and Electric Quarterly Reports. FERC Form 1-F is currently not included in eForms, so it may be efiled. Open Access Transmission Tariff (OATT) filings may also be efiled.

Commission's responsibilities under the Government Paperwork Elimination Act.¹⁸ At this time, however, the Commission will not accept tariff filings through the eFiling system.

4. DESCRIBE EFFORTS TO IDENTIFY DUPLICATION AND SHOW SPECIFICALLY WHY ANY SIMILAR INFORMATION ALREADY AVAILABLE CANNOT BE USED OR MODIFIED FOR USE FOR THE PURPOSE(S) DESCRIBED IN INSTRUCTION NO. 2.

Commission filings and data requirements are periodically reviewed in conjunction with OMB clearance expiration dates. This includes a review of the Commission's regulations and data requirements to identify any duplication. Electric transmission information is not available from other sources and therefore, no use or other modification of the information can be made to perform oversight and review responsibilities under applicable legislation (e.g., Federal Power Act (FPA), Energy Policy Act of 1992 (EPAAct)).

One of the objectives of this NOPR is to consolidate the Commission's regulations with regard to standards of conduct. Both gas and electric standards of conduct rely on similar principles to prevent market power. The Commission proposes to consolidate the standards of conduct and apply them uniformly to all transmission providers and therefore reduce any overlap.

5. METHODS USED TO MINIMIZE BURDEN IN COLLECTION OF INFORMATION INVOLVING SMALL ENTITIES

No small businesses are impacted under FERC-592 reporting data requirements. The proposed additions and revisions to the Commission's regulations will impact the day-to-day operations of natural gas pipeline companies whose operational status would exceed the SIC standards for a "small business concern" as implemented under the Regulatory Fairness Act (RFA). Likewise for FERC-717, the Commission has reviewed the provisions of the RFA and found they would not be applicable to the public utilities that will be subject to the requirements of this Final Rule.

Because most transmission providers do not fall within the definition of "small entity,"¹⁹ Furthermore, small entities may seek a waiver of these requirements, and those small entities that have already received a waiver of the Standards would be unaffected by the requirements of this proposed rulemaking.

¹⁸ Pub. L. No. 105-277, § 1704, 112 Stat. 2681, 2681-750 (1998).

¹⁹ See 5 U.S.C. 601(3) and (6) (2000 and Supp. V 2005).

6. CONSEQUENCE TO FEDERAL PROGRAM IF COLLECTION WERE CONDUCTED LESS FREQUENTLY

It is not possible to collect the data less frequently. Only transmission providers owning, operating, and/or controlling facilities used for the transmission of electricity or the transportation of natural gas in interstate commerce are required to comply with the proposed Commission's requirements. The required information will impose the least possible burden for companies while collecting the information used in monitoring transmission service. In addition, the information will be available to others (including small distribution utilities, independent power producers, marketers, local distribution companies, shippers and state commissions).

If the data were not updated regularly, the Commission and Industry would be placed at a disadvantage by not having the most current data for competitive and regulatory purposes available. The Commission needs access to up-to-date information to monitor self-implementing activities of the transmission providers to ensure that transmission services are being provided in a nondiscriminatory manner.

7. EXPLAIN ANY SPECIAL CIRCUMSTANCES RELATING TO THE INFORMATION

All of the standards of conduct related data are to be displayed on OASIS or Internet web sites and be available for downloading. With the exception of the written information describing how the standards are being implemented, the remainder of the information will be posted.

8. DESCRIBE EFFORTS TO CONSULT OUTSIDE THE AGENCY: SUMMARIZE PUBLIC COMMENTS AND THE AGENCY'S RESPONSE TO THESE COMMENTS

Commission procedures require that rulemaking notices be published in the Federal Register, thereby allowing all electric utilities, natural gas pipeline companies, state commissions, Federal agencies, and other interested parties an opportunity to submit views, comments or suggestions concerning the proposal. These rulemaking procedures allow for public conferences to be held as required. Comments are due 45 days from publication in the **Federal Register**.

Soon after the adoption of the Energy Policy Act of 2005 (EPAAct 2005), the Commission heard significant concerns from the regulated community that the existing Standards contained so many ambiguities that they impeded compliance and left companies – including those with the best cultures of compliance – exposed to significant

civil penalties. The Commission responded to those concerns by holding a public technical conference in Phoenix, Arizona, attended by all of the Commissioners serving at the time. The consistent message from regulated entities at this conference was best captured by an energy attorney who stated that "there is no area [besides the Standards] where I practice law where there is a greater number of times I am asked the question and I don't have the answer, and that is a real problem when you are talking about corporate governance."²⁰

Nearly two years later, the Commission heard the same concerns at its enforcement conference in Washington, D.C. Several panelists expressed concern about the ambiguities in the Commission's Standards. These concerns were also supported in comments submitted on behalf of six industry trade groups, who placed the Standards at the top of their list of ambiguous rules that hinder compliance.²¹ As these six groups and another trade association emphasized, a "[l]ack of clarity sows confusion, creates unnecessary risk and chills legitimate market behavior because market participants are reticent to engage in certain types of transactions where the rules are unclear."²²

Commission's Response

The Commission agrees, and it has more than an adequate record to support the conclusion that the existing Standards are too complex to facilitate compliance or support our enforcement efforts. Since issuance of the NOPR in Order No. 2004, the Commission has held no less than four conferences devoted to explication and discussion of the Standards.²³ Of the ten requests for No Action Letters submitted to the Commission since 2005, seven have involved the Standards.²⁴ And FERC staff has received so many calls regarding the interpretation and application of the Standards that the Commission has posted on its public website a 30-page document entitled "Frequently Asked Questions about Order No. 2004." (<http://www.ferc.gov/legal/maj-ord-reg/land-docs/order2004/resources/faqs.pdf>)

20 Standards of Conduct Conference and Workshop (April 7, 2006), transcript at p. 61.

21 Comments at 20, submitted by The American Gas Association, Edison Electric Institute, Electric Power Supply Association, Independent Petroleum Association of America, Interstate Natural Gas Association of America, and Natural Gas Supply Association, Docket No. AD07-13-000 (Dec. 17, 2007).

22 White Paper at 6, submitted by The American Gas Association, Edison Electric Institute, Electric Power Supply Association, Independent Petroleum Association of America, Interstate Natural Gas Association of America, Natural Gas Supply Association and Process Gas Consumers Group, Docket No. AD07-13-000 (Nov. 14, 2007).

23 May 21, 2002 in Washington, DC; May 10, 2004 in Houston, Texas; May 6, 2005 in Chicago, Illinois; and April 7, 2006 in Scottsdale, Arizona.

24 No Action Letters can be sought for matters involving the Standards of Conduct, Codes of Conduct (now Affiliate Restrictions), Market Behavior Rules, and the Anti-Manipulation Rules.

The complexity and unworkability of the current Standards is also evident in the fact that since issuance of Order No. 2004, the Commission has received 107 requests for waiver from various aspects of the Standards, the vast majority of which have been granted. Interpretation of the Standards has thus consumed thousands of hours of staff time. It has also proven so elusive to the industry that it has engendered numerous conferences by law firms and trade associations, greatly outstripping comparable areas of Commission compliance in resources and money.

The complexity and over breadth of the current Standards has also made it more difficult for transmission providers to reasonably manage their business, an effect which the Commission never intended. As the court in Tenneco noted, vertical integration can produce efficiencies of operation, and advantages given to an affiliate are not improper if they do not amount to exercises of market power.²⁵ Unnecessarily balkanizing employees one from another and erecting barriers to the free flow of information can thwart perfectly legitimate efficiencies, a consequence which disadvantages not only the companies involved but ultimately consumers as well, in the form of higher rates. Executives of transmission providers can also be impeded in making necessary business decisions for fear they may transgress the Standards by assembling needed data or by meeting to discuss the merits of potential investments. This fear has been exacerbated by the Commission's civil penalty authority, granted by Congress in EPLA 2005. As indicated above, the regulated community has consistently argued that the Standards are too ambiguous to facilitate compliance, particularly in an era where significant civil penalties may attach to violations.

Therefore, in this NOPR the Commission takes the approach of structuring the Standards to establish per se rules that address the greatest prospect for undue preference. However, this streamlined approach does not diminish our ability to rectify and sanction, where necessary, instances of undue discrimination and preference.²⁶ The core prohibitions against undue preference are rooted in sections 205 and 206 of the FPA and sections 4 and 5 of the NGA,²⁷ and the Commission possesses the full panoply of statutory remedies to address violations of these statutes, whether or not they are specifically addressed in the per se regulations of the Standards. Since enforcement of both the Standards and the statutory prohibitions against undue discrimination and

²⁵ Tenneco at 1201.

²⁶ Whereas failure to comply with a per se rule of the Standards automatically establishes a sanctionable violation, an alleged violation of the Federal Power Act (FPA), 16 U.S.C. 824d-824e (2000) or the Natural Gas Act (NGA), 15 U.S.C. 717c-717d (2000) would require an investigation into both the facts and the surrounding circumstances to determine if, in fact, an undue discrimination occurred.

²⁷ Sections 205 and 206 of the FPA state that no public utility shall make or grant an undue preference with respect to any transmission or sale of electric energy subject to the Commission's jurisdiction. Similarly, sections 4 and 5 of the NGA state that no natural gas company shall make or grant an undue preference or advantage with respect to any transportation or sale of natural gas subject to the Commission's jurisdiction.

preference will be greatly assisted by transparency, the Commission also includes in the proposed Standards provisions to make apparent any instances of communication and undue preference between transmission function employees and marketing function employees. These provisions require either the public posting of information regarding such communications or the maintenance of contemporaneous records for review by the Commission.

9. EXPLAIN ANY PAYMENT OR GIFTS TO RESPONDENTS

There are no payments or gifts to respondents under any circumstance.

9. DESCRIBE ANY ASSURANCE OF CONFIDENTIALITY PROVIDED TO RESPONDENTS

All data filed is public information and, therefore, are not confidential. However, a company may request confidential treatment of some or all parts of the FERC-717 information requirement under the FOIA and FERC regulations at 18 CFR 388.112.

Each request for confidential treatment will be reviewed by the Commission on a case-by-case basis.

11. PROVIDE ADDITIONAL JUSTIFICATION FOR ANY QUESTIONS OF A SENSITIVE NATURE

There are no questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs and other matters that are commonly considered private in the reporting and recordkeeping requirements.

12. ESTIMATED BURDEN COLLECTION OF INFORMATION

The revisions to the Standards proposed in this issuance are modifications of already approved information collection procedures, and do not impose any significant additional information collection burden on industry participants. Many of the changes consist merely of the rewording of definitions and the reordering of the various information collection requirements. Some information collection requirements have been deleted, such as the posting of organizational charts. A requirement has been added concerning the maintenance of records regarding certain informational exchanges between transmission function employees and marketing function employees, as well as a requirement regarding the posting of contact information regarding the identification of the Chief Compliance Officer. Neither of these should impose a significant burden on the transmission providers. In fact, by proposing that the Standards will no longer govern

the relationship between transmission providers and their Energy Affiliates, the overall information collection burden will most likely decrease. The revisions to the Standards proposed in this issuance are modifications of already approved information collection procedures, and do not impose any significant additional information collection burden on industry participants.

The burden estimate includes the time required to implement the standards established in this rule, review the standards, search existing data sources, gather and maintain the data needed, and complete and review the information and file as appropriate with the Commission. Details of the burden estimates are shown in the following table:

DATA COLLECTION (FERC-592)

				CUR RENT
				IN
				NEW
	INVENTORY*	NOPR	OMB	INV.
Estimated Number of Respondents				85
				85
				85
Estimated number of responses/respondent/yr	1	1	1	
Estimated annual number of responses	232	232	232	
Estimated hours per information requirement	42.73	42.73	42.73	
Total estimated annual burden hours	9,913	9,913	9,913	
Estimated annual burden in OMB inventory	9,913			
Increase/decrease in burden hours	- 0 -			

*As of 3/25/08

DATA COLLECTION (FERC-717)

**CUR
RENT**

	INVENTORY	IN NOPR	OMB INV.	PROP POSED NEW
Estimated no. of Respondents	220	220	220	
Estimated no. of responses/respondent/yr				1
				1
Estimated annual no. of responses				1
				220
				220
Estimated hours per information requirement	980.43	980.43	980.43*	220
Total estimated annual burden hours			215,695	
			215,695	
Estimated annual burden in OMB inv.	215,695		215,695	
Increase/decrease in burden hours	- 0 -			
*rounded off.				

13. ESTIMATE OF TOTAL ANNUAL COST OF BURDEN TO RESPONDENTS

Annualized Capital/Startup Costs

The Commission's estimate for costs to comply with the NOPR remains unchanged from what we previously submitted to OMB. Any increase in costs would be an adjustment

based on inflation and from when Order No. 2004 was issued nearly 5 years ago. We believe as indicated in item 12 above, that the proposed standards will not impose significant information collection burden and may as noted above, result in a decline due to the fact that the proposed Standards will no longer govern the relationship between transmission providers and their Energy Affiliates.

14. ESTIMATED ANNUALIZED COST TO FEDERAL GOVERNMENT:

The estimated annualized cost to the Federal Government for FERC-592 and FERC-717 is as follows:

Data

Analysis

Estimated

**FERC
Data
Total
Cost
of Data**

Collection

Salary

Number

**Clearance
One
Year's
(FTEs)**

**x
Per**

**Year +
(FY
'08) =**

Operation

FERC-592

1.0

	\$126,384
	\$
	6,053
	\$132,437
FERC-717	4.0
	\$126,384
	\$
	6,053
	\$511,589
Total Cost	5.0
	\$126,384
	\$12,106
	\$644,026

The average cost per staff year reflects direct human resource's costs. These costs consist of direct labor and fringe benefit costs. The direct labor cost is that portion of staff salary that is charged to a collection of information activity. The fringe benefits cost consists of allowances and services provided to Government employees in addition to employee salaries. It is expressed as a percentage of the salary costs.

15. REASONS FOR CHANGES IN BURDEN INCLUDING THE NEED FOR ANY INCREASE

As reported in item #12, there are minimal changes in the annual reporting burden. It's the Commission's belief that if the proposed Standards are implemented and remove compliance requirements governing the relationship between transmission providers and

their Energy Affiliates, then the Commission projects that the overall information collection burden will likely decrease. The revisions to the Standards proposed in this issuance do not impose any significant additional information collection burden on industry participants.

16. TIME SCHEDULE FOR PUBLICATION OF DATA

This is not a collection of information for which results are planned to be published.

17. DISPLAY OF EXPIRATION DATE

It is not appropriate to display the expiration date for OMB approval of the information collected pursuant to Parts 37 and 358 in the Code of Federal Regulations. The information collected is not collected on a standard, preprinted form which would avail itself of this display. However, the Commission has printed the OMB Control number and a disclaimer that respondents will not be subject to a penalty if a valid OMB control number is not displayed on the Commission's publication OASIS Standards and Communication Protocols. This publication contains the standards of conduct and communication protocols that industry must follow. The proposed reporting requirements under FERC-592 are not filed on formatted/printed forms but rather based on posting requirements for Internet web sites.

18. EXCEPTIONS TO THE CERTIFICATION STATEMENT

The Commission does not use the information collected under FERC-592 or FERC-717 for statistical purposes.

B. Collections of Information Employing Statistical Methods

This is not a collection of information employing statistical methods.