



## I. COMMUNICATIONS

NGSA represents integrated and independent companies that produce and market domestic natural gas. Established in 1965, NGSA encourages the use of natural gas within a balanced national energy policy and promotes the benefits of competitive markets to ensure reliable and efficient transportation and delivery of natural gas and to increase the supply of natural gas to U.S. consumers.

Notices and communications concerning these comments should be addressed as follows:

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## II. EXECUTIVE SUMMARY

As stated in NGSA's initial and reply comments in this proceeding, NGSA believes that with minor modifications the proposed Standards of Conduct strike a fair balance between clearer regulations and safeguarding pipeline shippers. However, NGSA is concerned that various aspects of the Final Rule will impede the Commission's efforts to use its comprehensive statutory powers provided by the Natural Gas Act and the Energy Policy Act of 2005 to prohibit natural gas

companies from granting any undue preference.<sup>2</sup> In particular, NGSAs believes that the Commission failed to engage in reasoned decision-making by: (1) removing the discount posting requirements from the Standards of Conduct; (2) eliminating the requirement that transmission providers post tariff waivers for non-affiliates; and (3) eliminating all posting requirements with respect to exercises of discretion provided for in a pipeline's tariff.

Additionally, NGSAs requests that the Commission clarify (1) that a marketing function employee who believes that he may have received non-public transmission function information must notify the transmission provider regardless of how the information was disclosed, and (2) that if the transmission provider determines that the information disclosed to the marketing function employee was, in fact, a violation of the Standards of Conduct, the transmission provider must post the disclosed information.

## II. REQUEST FOR REHEARING

### A. SPECIFICATION OF ERRORS

Pursuant to Rule 713(c)(1), NGSAs respectfully submits that the Commission erred in the following respects:

1. The Commission erred when it removed the discount posting provisions from the Standards of Conduct.

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<sup>2</sup> See Natural Gas Act § 4(b), 15 U.S.C. § 717c(b) (preventing jurisdictional pipelines from "mak[ing] or grant[ing] any undue preference or advantage to any person or subject[ing] any person to any undue prejudice or disadvantage"); Energy Policy Act of 2005, Pub. L. No. 109-58 § 314, 119 Stat. 690-91 (2005) (codified at 15 U.S.C. § 717t-1).

2. The Commission erred when it eliminated the requirement of posting tariff waivers for non-affiliates.
3. The Commission erred when it eliminated all posting requirements with respect to exercises of discretion provided for in the pipeline's tariff.
4. The Commission erred when it failed to clarify (1) that a marketing function employee who believes that he may have received non-public transmission function information must notify the transmission provider regardless of how the information was disclosed, and (2) that where such disclosure is a violation of the Standards of Conduct, the transmission provider must post the disclosed information.

## **B. STATEMENT OF ISSUES**

Pursuant to Rule 713(c)(2), NGSAs identify the following issues for consideration on rehearing:

1. Whether the Commission failed to engage in reasoned decision-making when it removed the discount posting provisions from the Standards of Conduct.<sup>3</sup>

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<sup>3</sup> Orders issued by the Commission must be the product of reasoned decision-making and factual findings made by the Commission will be upheld if they are supported by substantial evidence. *See, e.g., Florida Mun. Power Agency v. FERC*, 315 F.3d 362, 365-66 (D.C. Cir. 2003); *Wisconsin Gas Co. v. FERC*, 770 F.2d 1144, 1156 (explaining that the "substantial evidence standard of section 19 [of the Natural Gas Act] applies to notice and comment rulemaking"). As noted by the courts, the "substantial evidence" standard for notice and comment rulemaking "is identical to the familiar arbitrary and capricious standard." *Wisconsin Gas*, 770 F.2d at 1156.

2. Whether the Commission failed to engage in reasoned decision-making when it eliminated the requirement of posting tariff waivers for non-affiliates.<sup>4</sup>
3. Whether the Commission failed to engage in reasoned decision-making when it eliminated all posting requirements with respect to exercises of discretion provided for in the pipeline's tariff.<sup>5</sup>
4. Whether the Commission failed to engage in reasoned decision-making when it failed to clarify (1) that a marketing function employee who receives non-public transmission function information must notify the transmission provider regardless of how the information was disclosed, and (2) that where such disclosure is a violation of the Standards of Conduct, the transmission provider must post the disclosed information.<sup>6</sup>

### III. ARGUMENT

#### A. **The Commission Erred by Removing the Discount Posting Provisions from the Standards of Conduct.**

When the Commission issued the NOPR on March 27, 2008, it proposed requiring transmission providers to post “[a]ny offer of a discount for transmission service...on the OASIS or Internet Web site contemporaneous with

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

the time that the offer is contractually binding.”<sup>7</sup> However, the Final Rule removes the discount posting requirements entirely from the Standards of Conduct based on the Commission’s “belie[f] [that] the posting requirements contained in [18 C.F.R. part 284] or orders are sufficient to fulfill the transparency goals of the Standards of Conduct.”

Although the Commission is correct that 18 C.F.R. § 284.13(b)(1)(iii) does require discount reporting, the Commission erred in finding that such reporting is sufficient to satisfy the transparency goals of the Standards of Conduct. In particular, the Commission acted unreasonably by failing to take notice of a key distinction between the timing of the posting required under 18 C.F.R. § 284.13(b)(1)(iii) and that required under the Standards of Conduct. Section 284.13 requires interstate pipelines to post the rate charged for each contract “no later than the first nomination under a transaction.”<sup>8</sup> In contrast, the proposed discount posting rules in the Standards of Conduct would have required a posting “contemporaneous with the time that the offer is contractually binding.”<sup>9</sup>

In Order No. 2004-A, the Commission denied a proposal to delay the posting requirements for discounts of precedent agreements until all of the terms and conditions are met “because the purpose of the timing of the posting

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<sup>7</sup> NOPR at p. 76.

<sup>8</sup> 18 C.F.R. § 284.13(b)(1)(iii).

<sup>9</sup> *Id.* (proposed Section 358.5(d)).

requirement is that it provides time for a non-affiliated competitor to negotiate a comparable discount.”<sup>10</sup> As the Commission recognized in Orders 2004 and 2004-A, the significance of posting discounts at the time that an offer becomes “contractually binding” is that doing so is necessary to enable other non-affiliates to have a chance to get the same deal. For example, in Order No. 2004, the Commission explained that the “contractually binding” language “balances the importance of equal and timely access to discount information with clarity.”<sup>11</sup> The Commission contrasted the requirement under § 161.3(h)(2), to post information within 24 hours of gas flow, which it described as being “too late to afford an unaffiliated competitor the opportunity to negotiate a comparable deal in today’s fast-paced markets.”<sup>12</sup>

Because the Commission departed from these precedents and otherwise failed to engage in reasoned decision-making by not taking account of the difference in the timing of posting under 18 C.F.R. § 284.13(b)(1)(iii) and the Standards of Conduct, the Commission should grant rehearing and adopt the discount posting provisions in the Standards of Conduct as proposed in the NOPR in order to retain the earlier timing.<sup>13</sup>

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<sup>10</sup> *Standards of Conduct for Transmission Providers*, Docket No. RM01-10-000, 107 FERC ¶ 61,032 (Apr. 16, 2004).

<sup>11</sup> *Standards of Conduct for Transmission Providers*, Docket No. RM01-10-000, 105 FERC ¶ 168 (Nov. 25, 2003).

<sup>12</sup> *Id.*

<sup>13</sup> Alternatively, the Commission could change Part 284 to conform to the earlier timing, but such a change would require a new rulemaking. As stated in our initial comments on the NOPR,

**B. The Commission Erred by Eliminating the Requirement of Posting Tariff Waivers for Non-Affiliates.**

The Commission also failed to engage in reasoned decision-making by eliminating the requirement of posting tariff waivers for non-affiliates, particularly in light of the fact that the pipelines did not even suggest that the Commission limit waiver posting requirements to affiliates.

In the NOPR, the Commission explained that “[t]he purpose of the discretionary waiver posting requirement is to enable transmission customers to determine whether they are similarly situated and potentially entitled to comparable treatment by the transmission provider.”<sup>14</sup> Accordingly, the Commission sought “suggestions on what type of requirement is appropriate to give similarly situated customers sufficient information to determine whether they are being treated in a non-discriminatory fashion with respect to a transmission provider’s discretionary activities.”<sup>15</sup> Though no commenters suggested that the Commission limit the posting of *wavers* to those in favor of an affiliate, the Commission chose to include such a limitation in the Final Rule

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NGSA reiterates here that the Commission should require pipelines to use a standardized posting format so that shippers can more readily review and assess this information. Each pipeline uses its own format and its own interpretation of what must be reported, often making it difficult for shippers to decipher the postings. It is extraordinarily difficult to understand the various formats and information provided in the postings. Therefore, NGSA once again urges the Commission to consider standardization of the postings of pipeline discount offers.

<sup>14</sup> NOPR at ¶ 27.

<sup>15</sup> *Id.* at ¶ 28.

to “reduce the administrative burden on the pipeline, while capturing any instances of potential discrimination.”<sup>16</sup>

The complete elimination of the requirement to post when a pipeline waives its filed tariff in favor of a non-affiliate shields such actions from disclosure, thereby making it impossible for pipeline shippers to determine whether they are being treated comparably and not in an unduly discriminatory manner. As NGSAs explained in its reply comments on the NOPR, discrimination can happen with shippers other than just affiliates: “postings help the Commission and pipeline shippers to have confidence that the pipeline is not providing preferential or favorable service to one or more selected shippers, irrespective of whether those shippers are a marketing affiliate.”<sup>17</sup>

The Commission’s stated concern regarding “what type of requirement is appropriate to give similarly situated customers sufficient information to determine whether they are being treated in a non-discriminatory fashion” is not intrinsically limited to just affiliated shippers – the concern applies equally well to all of a pipeline’s customers, affiliated or not. Accordingly, the Commission should grant rehearing and require that the waiver posting requirement apply to all waivers granted and not only those granted to an affiliate. The significance of this issue cannot be overstated, as the current rule allows pipelines

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<sup>16</sup> Final Rule at ¶ 215.

<sup>17</sup> *Standards of Conduct for Transmission Providers*, Docket No. RM01-10-000, “Reply Comments of the Natural Gas Association of America,” at p. 6 (filed June 25, 2008) (“NGSA Reply Comments”).

surreptitiously to operate outside of their tariffs. Thus, NGSa requests the following change to Section 358.7(i):

*(i) Posting of waivers. A transmission provider must post on its Internet website notice of each waiver of a tariff provision that it grants ~~in favor of an~~ affiliate, unless such waiver has been approved by the Commission.*

In explaining its determination that “a blanket requirement to post all waivers and exercises of discretion goes beyond what is needed to alert customers and others to possible acts of undue discrimination or preferences in favor of an affiliate,” the Commission notes that “such posting is in some cases redundant to the posting requirements set forth elsewhere in our regulations.”<sup>18</sup> However, the Commission did not identify the specific regulations that impose these “posting requirements.” Based on its review of the regulations, NGSa believes that the Commission may have been referring to the posting requirements imposed by 18 C.F.R. § 284.13, which generally requires Part 284 pipelines to post transactional information on their websites. However, after carefully reviewing these posting requirements, it does not appear that they require pipelines to post tariff waivers for a non-affiliate.

Section 284.13(b)(1)(viii) is seemingly the most relevant Part 284 provision to a requirement to post tariff waivers. That section requires an interstate pipeline to report “special details pertaining to a pipeline transportation contract,” including “all aspects in which the contract deviates from the

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<sup>18</sup> Final Rule at ¶ 214.

pipeline's tariff." However, NGSAs do not believe that this language is sufficiently clear to capture the requirement that pipelines post all tariff waivers that was rejected by the Final Rule, if indeed it requires posting of *any* tariff waivers. This section does not expressly refer to tariff waivers. Given the inadequacy of Section 284.13(b)(1)(viii), neither pipeline shippers nor the Commission will be able to uncover potential acts of discriminatory treatment. The Commission must restore the waiver posting requirement provided in the NOPR or it will have abdicated its responsibility to pipeline shippers.<sup>19</sup>

**C. The Commission Erred by Eliminating all Posting Requirements with Respect to Exercises of Discretion Provided for in the Pipeline's Tariff.**

In the Final Rule, the Commission determined that "transmission providers need not post exercises of discretion that are within the scope of a tariff provision, unless in any given instance such posting is required under any other of our regulations."<sup>20</sup> The Commission reasoned that "[s]uch acts are already permitted by the tariff, and therefore fall within the scope of matters which the Commission has approved," and that because "a transmission provider, in particular a pipeline, makes many of these judgment calls every day on an ongoing basis...recording all these matters would place a substantial

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<sup>19</sup> At a minimum, failure to clarify Section 284.13(b)(1)(viii) will create confusion and uncertainty as individual pipelines interpret the interacting reporting requirements differently. The Commission can eliminate this uncertainty by clarifying that this section requires the posting of all waivers granted by a pipeline.

<sup>20</sup> *Id.* at ¶ 216.

administrative burden on it.”<sup>21</sup> Neither of these justifications supports the elimination of *all* posting requirements for pipeline exercises of discretion.

First, the simple fact that certain acts are permitted under a pipeline’s tariff is not a sufficient reason to eliminate posting requirements. If it were, there would be no reason for the Commission to require posting of discounts because pipelines have discretion under their tariffs to discount their rates. However, notwithstanding that pipelines have discretion in their tariffs to discount their rates, the Commission still requires posting of all discounts because the discretion that the pipelines have to discount those rates can be offered in a discriminatory manner to any shipper (affiliated or non-affiliated) and all pipeline shippers need to be able to ensure that they are being treated fairly. In other words, discounting rates is an act of discretion that is nonetheless subject to posting because it allows others to monitor whether they are being treated similarly or not. There is no reason for the Commission to treat other acts of discretion differently.<sup>22</sup>

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<sup>21</sup> *Id.*

<sup>22</sup> The Commission in fact requires posting of all acts of discretion under a tariff by an electric utility transmission provider. See 18 C.F.R. § 37.6(g)(4) (“Logs detailing the circumstances and manner in which a Transmission Provider or Responsible Party exercised its discretion under *any terms of the tariff* shall be posted as described in § [358.7].” (emphasis added)). There is no reason why acts of discretion by natural gas transmission providers should be treated any differently.

Moreover, it is clear that exercises of discretion can be discriminatory. The Commission's own arguments from Order No. 2004 recognize this fact. For example, in Order No. 2004-B, the Commission explained that "INGAA's request not to post waiver logs with respect to services that have discretionary components [was] too broad" because the purpose of "allow[ing] non-affiliates to determine whether they have been treated in a non-discriminatory manner, would not be achieved under INGAA's service proposal."<sup>23</sup> The Commission explained further that "[t]he way in which a pipeline exercises its discretion in providing services is valuable information in assessing its compliance with the nondiscrimination requirements of the NGA."

To be clear, NGSAs do not advocate that the Commission require pipelines to post every discretionary act. Instead, in its reply comments to the NOPR, NGSAs proposed that the Commission adopt a rule of thumb whereby a pipeline would only need to post individual acts of discretion that are not generic in application, which are not available to all shippers and that cannot be denied when requested. This approach alerts other shippers when there is a shipper-specific request that is honored that is not available to others. In other words, only those instances where there is an opportunity for undue discrimination would be required to be posted.<sup>24</sup>

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<sup>23</sup> *Standards of Conduct for Transmission Providers*, Docket No. RM01-10-002, 108 FERC ¶ 61,118 (Aug. 2, 2004), at ¶ 99.

<sup>24</sup> See NGSAs Reply Comments at pp. 7-8:

In the Final Rule, the Commission failed to engage in reasoned decision-making by instead deciding that pipelines “need not post exercise of discretion that are within the scope of a tariff provision.” In the absence of a requirement to post non-generic acts of discretion, pipelines will be able to engage in potentially discriminatory acts of discretion that are immune from detection. Thus, NGSAA proposes that the Commission adopt a new Section 358.7 (j), as follows:

*(j) Posting of acts of discretion. A transmission provider must post on its Internet website notice of each act of discretion that it grants to relieve one or more shippers of a tariff requirement, unless such act has been approved by the Commission. An act of discretion need not be posted if it is generic in application, is available to a large number of shippers, and cannot be denied when requested. An act of discretion must be posted if it is not generic in application and is not applied upon every request of a shipper or is applied to a specific shipper. The posting must be made within one business day of the act of such discretion. The transmission provider must also maintain a log of the discretionary acts, and must make it available to the Commission upon request. The records must be kept for a period of five years from the date of each act of discretion.*

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A simple, workable rule of discretionary disclosure should be very straightforward. If the waiver is generic in application, is posted, is available to all shippers, and cannot be denied when requested, then the pipeline does not need to post each individual use of that waiver. However, if the waiver is not generic in application and is not applied upon every request of a shipper or is applied to a specific shipper, then that discretionary waiver should be posted. For example, a pipeline could post on its website a general posting that states, that “From today until Friday, all shippers in Zone 1 can exceed the tariff specified gas quality limits by 2%.” However, stating that “the pipeline will waive its gas quality tariff provisions when operationally feasible” is not sufficiently detailed to allow its customers to understand that there is a general offering.

Arguments that the posting of such acts of discretion would be vague, unnecessarily broad, and overly burdensome are unsupported and do not justify the loss of protection from discrimination that would occur without such public information. Pipelines already post a significant amount of discretionary acts on their EBBs, such as regional discounts or area operational limitations or temporary gas quality requirements. The number of non-generic discretionary acts which a pipeline provides in favor of a single shipper should inherently be a small number, and the additional posting of those few instances should not pose any material difficulty. In this instance, customer protection should without question trump any incremental posting effort.

**D. The Commission Erred by Failing to Clarify that (1) a Marketing Function Employee who Believes That He May Have Received Non-Public Transmission Function Information Must Notify the Transmission Provider Regardless of How Such Information Was Obtained and (2) the Transmission Provider Must Post any Disclosed Non-public Information.**

The Final Rule eliminates the proposal for transmission providers to post non-public information disclosed to a marketing affiliate by a third party. Specifically, although proposed section 358.6(a)(2) of the No Conduit Rule would have prohibited a marketing function employee from receiving non-public transmission function information from any source, and section 358.7(a) would have required the contemporaneous posting of any such disclosures, the

Commission eliminated the prohibition in proposed section 358.6(a)(2).<sup>25</sup> In so doing, the Commission cited “the difficulties in determining whether a marketing function employee may have willingly and knowingly received such information, or rather whether he inadvertently received it.”<sup>26</sup>

While it may be difficult for marketing function employees to determine how they received prohibited information, the Commission can still support the goal of transparency by clarifying (1) that a marketing function employee who believes that he may have received non-public transmission function information must notify the transmission provider, regardless of whether the disclosure was inadvertent or not, and (2) that if the transmission provider determines that the information disclosed to the marketing function employee was, in fact, a violation, it must post the disclosed information. Essentially, the Commission went from proposing to bar marketing function employees from receiving non-public transmission function information from any source, and requiring posting of such information if received, to a final rule that entirely eliminates both of these requirements. Accordingly, and in light of the difficulties of determining how a marketing function employee received information, NGSa recommends the above-stated middle ground.

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<sup>25</sup> Final Rule at ¶ 200.

<sup>26</sup> *Id.*

The discussion section of the Final Rule appears to support NGSAs' recommended approach, although that is not entirely clear in the regulatory text. For example, in paragraph 306 of the Final Rule, the Commission states that "[a]lthough we have deleted the prohibition against marketing function employees receiving transmission function information, due to the possibility such receipt could be inadvertent, it is expected that if someone attempted to pass such information to a marketing function employee, the marketing function employee would not only refuse it but would report the individual to the company's chief compliance officer or other appropriate individual."<sup>27</sup> In a similar vein, the Commission should clarify that the marketing function employee should notify the transmission provider of the possible disclosure whether it was inadvertent or not. Regardless of how a marketing function employee receives potentially prohibited information, if the information is in the employee's possession, the compliance objectives of the Final Rule require that the disclosure be reported to the transmission provider, so that the transmission provider may take the appropriate, requisite action.

Moreover, the Final Rule does not state whether the transmission provider must post the disclosed information. The Commission should clarify that the transmission provider does have an obligation to post all such information that it deems to be non-public, in order to maintain a level playing field.

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<sup>27</sup> Final Rule at ¶ 306.

Both of the requested clarifications are particularly important considering that the Commission refused to separate affiliates on the same trading floor contrary to NGSAs suggestion. Specifically, NGSAs had explained that the No Conduit rule cannot be fully relied upon when affiliated marketing function employees sit on the same trading floor with other marketing function employees who are exempt from the Standards of Conduct. Rather, it should be incumbent upon the marketing function employee to immediately alert his affiliated transmission provider when he becomes aware that he has received possible non-public transmission information. This appropriately places upon the Transmission Provider (i.e., the Chief Compliance Officer) the responsibility to determine the nature of the information reported by the marketing function employee, and to post all such information that is indeed determined to be non-public.

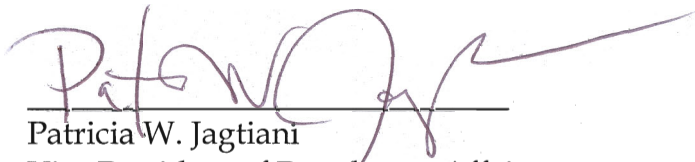
## V. CONCLUSION

NGSA seeks, in this request, to maintain the principles of transparency on which FERCs regulations and industry participants depend. The Commissions current regulatory approach places substantial reliance on pipeline customers to monitor the activities of pipeline companies and report any instances of violations of pipeline tariffs, regulations, undue discrimination or preference. However, customers cannot provide this monitoring and reporting function unless the Commission requires pipelines to post sufficient information

regarding their activities to allow detection of potentially unlawful conduct. Absent these essential pipeline postings, customers are left in the dark.

Therefore, to require adequate transparency, NGSА requests that the Commission clarify or modify the Final Rule to include the following requirements: (1) that a marketing function employee who believes that it may have received non-public transmission function information must notify the transmission provider whenever such information comes into their possession, and (2) that if the transmission provider determines that the information disclosed to the marketing function employee was, in fact, a violation, it must post the disclosed information. NGSА respectfully requests that the Commission grant rehearing and provide for clarification as detailed above.

Respectfully submitted,



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