

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Standards of Conduct for
Transmission Providers

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Docket No. RM07-1-000

COMMENTS OF THE NATURAL GAS SUPPLY ASSOCIATION

The Natural Gas Supply Association (“NGSA”) hereby submits its comments in the above captioned proceeding.¹

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:

Patricia W. Jagtiani
Vice President of Regulatory Affairs
Natural Gas Supply Association
805 15th Street, NW, Suite 510
Washington, DC 20005
(202) 326-9311
pjagtiani@ngsa.org

¹ *Standards of Conduct for Transmission Providers*, “Notice of Proposed Rulemaking,” Docket No. RM07-1-000, (Mar. 21, 2008) (“Standards of Conduct NOPR” or “NOPR”).

II. EXECUTIVE SUMMARY

With the Federal Energy Regulatory Commission's ("FERC" or "the Commission") willingness to use its comprehensive statutory powers to prohibit undue preferences, NGSA believes that the proposed Standards of Conduct strike the right balance between providing clearer rules and safeguarding pipeline shippers from possible acts of undue discrimination. NGSA recognizes the need for clearer Standards of Conduct and appreciates the necessity for the Commission to narrow the application of those rules following the court's decision in *National Fuel*.²

The Commission must continue its vigilant oversight of interactions between transmission providers and their affiliates, including not only those behaviors covered by the proposed Standards of Conduct but also any instances of improper affiliate preference prohibited by the Natural Gas Act ("NGA"). Section 4(b) of the NGA prohibits natural gas companies from granting any undue preference.³ This statutory authority forms the basis for the Commission's actions in promulgating Standards of Conduct to prevent pipelines from granting any undue preference to their marketing affiliates.⁴ The Commission's authority in this regard is necessarily broad to "protect consumers against exploitation at the hands of natural gas companies."⁵ Although the court in *National Fuel* concluded that the record did not support the expansion of the

² *National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831 (D.C. Cir. 2006) ("*National Fuel*").

³ 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.>").

⁴ See *Tenneco Gas v. FERC*, 969 F.2d 1187, 1197 (1992) ("*Tenneco*"); *National Fuel*, 468 F.3d at 861.

⁵ *Federal Power Comm'n v. Hope Gas Co.*, 320 U.S. 591, 610 (1944).

Standards promulgated by the Commission in Order No. 2004, *National Fuel* should not be read to prevent the Commission from punishing individual instances in which a pipeline grants a preference to *any* affiliate. In other words, the Standards of Conduct promulgated in the final rule should not be viewed as defining the only instances in which a pipeline can engage in affiliate abuse. In the NOPR, the Commission makes clear its intention to use its “full panoply of statutory remedies to address violations..., whether or not they are specifically addressed in the per se regulations of the Standards.”⁶

Additionally, NGSAs support the Commission’s use of its new enforcement authority to deter not only violations of the Standards of Conduct but also instances of undue preference not specifically prohibited by the Standards of Conduct. The Energy Policy Act of 2005 granted the Commission authority to assess civil penalties for violations of the NGA.⁷ In that regard, the Energy Policy Act filled an important gap in the Commission’s enforcement authority.⁸ NGSAs urge the Commission to vigilantly monitor natural gas companies’ compliance with the Standards of Conduct and to act expeditiously when there are signs of any undue preference or affiliate abuse.

Given the Commission’s willingness to exercise its authority under both the NGA and the Energy Policy Act, NGSAs see the rules proposed in the instant proceeding as a good balance between clearer regulations and safeguarding pipeline

⁶ NOPR at P 20.

⁷ Energy Policy Act of 2005, Pub. L. No. 109-58 § 314, 119 Stat. 690-91 (2005) (codified at 15 U.S.C. § 717t-1).

⁸ See, e.g., *Tenneco*, 969 F.2d at 1195 (noting that the NGA did not authorize the Commission to collect civil penalties).

shippers. NGSAs asks the Commission to further clarify the application of the proposed Standards of Conduct as described below:

- ***Transmission Function Employee and Marketing Function Employee Definitions.*** The Commission should clarify or modify the definitions of “transmission function employee” and “marketing function employee” to enable companies subject to the rules to differentiate between a “supervisor, officer or director” and an employee who is “actively and personally engaged” in transmission or marketing functions, making that employee a transmission function or marketing function employee. Also, the Commission should include the historical terminology “day to day” to allow the industry to seek guidance from precedent under the previous marketing affiliate regulations.
- ***Marketing Function Definition.*** To eliminate confusion in terms of the applicability of the Standards of Conduct, the Commission should craft a definition for gas marketing functions that is separate from its definition of electric marketing functions. The definition of a gas marketing function should be clarified to ensure that sales of interstate natural gas pipeline *capacity* are not considered marketing functions.
- ***Marketing Function Exemptions.*** The definition of marketing functions should be corrected to remove what appear to be inadvertent errors in the exemptions for an affiliated producer’s own production and gas transported in an affiliated gatherer’s or processor’s own facilities. Based on the discussion in the NOPR, the Commission intended to restore the historical producer, gatherer and processor exemptions, which were well-established exemptions that historically applied to sales by production, gathering and processing affiliates of natural gas pipelines and not to sales by the pipeline itself. Additionally, exemptions from the marketing function definition should also include gas purchases to conform the addition of gas purchases in the definition of marketing functions.
- ***No Conduit Rule.*** Absent public posting to all parties, the non-discrimination standards provided for in the Natural Gas Act should prevent, in most instances, non-affiliated third parties from having access to non-public information from transmission providers. Therefore, there are likely to be few instances in which third-parties are vulnerable to acting as conduit between transmission function and marketing function employees.
- ***Transmission Provider Postings.*** In order for pipeline shippers to be able to detect instances of undue discrimination, the Commission should require that pipeline discount offers as well as discretionary waivers be posted in a standardized format on a pipeline’s website.

III. COMMENTS OF NGSА ON THE STANDARDS OF CONDUCT NOPR

A. The Commission Should Include Examples in the Definitions of Transmission Function Employees and Marketing Function Employees to More Clearly Distinguish Supervisors, Officers and Directors.

In the NOPR, the Commission proposes to exclude from the definition of transmission function employees as well as marketing function employees “supervisors, officers and directors” who perform a planning function and spend only a de minimis amount of time engaged in transmission or marketing functions. Specifically, the NOPR proposes that a “supervisor, officer or director who is not *actively and personally* engaged in transmission functions”⁹ will not be considered a transmission or marketing function employee, although such individuals will be subject to the no conduit rule. Recognizing that individual company structures vary, the Commission declined to restrict this employee category, which is excluded from the transmission function employee or marketing function employee designation, to a list of job titles.

However, the proposed definition creates unnecessary ambiguity and uncertainty, due in part to its use of the phrase “actively and personally engaged” to describe the level of engagement in transmission functions required for an employee to be considered a transmission function employee. If the Commission retains the “actively and personally engaged” distinction, NGSА believes that industry participants will need more guidance and specificity on the nature of a “supervisor, officer or director” so that this definition can be more easily applied to employees.

⁹ NOPR at P 34 (emphasis added).

Absent more specificity, the “actively and personally engaged” definition will result in a large degree of uncertainty and speculation for companies when determining which employees are transmission function employees or marketing function employees.

Management level employees may not be responsible for physically signing a contract, yet they may be involved in the general approval or company endorsement of the agreement. For example, it is not unusual for companies to require management level employees to execute or approve contracts, and, depending on the size of the transaction, participate in the negotiation process at varying levels of engagement.

If a management level employee is considered a “transmission function employee” or a “marketing function employee” by virtue of this necessary oversight, the same problems recognized under Order No. 2004 will be present here. Legitimate integrated resource planning may be impeded and legitimate management efficiencies may be thwarted.¹⁰ It is, thus, essential for the Commission to more clearly define which employee actions represent personal and active engagement in transmission and marketing functions.

Also, there are employees that may have a minor role in the approval of a transaction but only with respect to certain non-transaction-related components. For instance, it is not unusual for an employee to examine a potential transaction to assess whether the credit provisions meet the company standards. Accountants may also have reasons to review and approve portions of a transaction. Thus, there are various support employees who must review and give their sign off on a particular transaction.

¹⁰ NOPR at PP 14, 19.

However, one would not expect these employees to be considered marketing function or transmission function employees.

Industry participants are exposed to unnecessary compliance risks without greater specificity and examples from the Commission regarding the applicability of the transmission function and marketing function definitions. Therefore, NGSAs requests clarification of the description of a “supervisor, officer or director” not considered a transmission function employee or marketing function employee, including descriptive examples of employee functions that the Commission would consider relevant to this category of employees.

B. To Further Distinguish Supervisors, Officers and Directors in the Definitions of Transmission and Marketing Function Employees, Historically Relied Upon Language Should be Reintroduced.

In addition to providing clarifying examples of employee functions, the Commission should alter its definition of “supervisor, officer or director” by incorporating language used in previous Standards of Conduct. The Commission has not previously used the terminology “actively and personally engaged” in its definitions to distinguish those employees involved in marketing or transmission functions from supervisors, officers and directors. Historically, under both the Order No. 2004 Standards and the prior pipeline marketing affiliate regulations, the Commission used the terms “day-to-day” to characterize the level of engagement an employee must have in transmission functions to be considered a transmission function

employee.¹¹ Because the Commission used that terminology previously, there is a body of orders that industry participants can look to for guidance. NGSAs, therefore, recommends that the Commission modify the definitions of “transmission function employee” and “marketing function employee” as follows:

(d) Marketing function employee means an employee, contractor, consultant or agent of a transmission provider or an affiliate of a transmission provider who actively or personally engages on a day-to-day basis in marketing functions. An officer, director or other supervisory employee is not considered to be a marketing function employee if he or she does not actively and personally engage on a day-to-day basis in marketing functions.

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¹¹ See, e.g., *Inquiry into Alleged Anticompetitive Practices Related to Marketing Affiliates of Interstate Pipelines and Ozark Gas Transmission System*, FERC Stats. & Regs. 1991-1996 ¶ 30,987 at 30,996 (1993) (“Order No. 497-E”) (emphasis added):

To provide further guidance, the Commission interprets "operating employee" to mean an individual who has *day-to-day* duties and responsibilities for planning, directing, organizing, or carrying out gas-related operations, including gas transportation, gas sales or gas marketing activities. Examples of operating employees include any member of the board of directors, officers, managers, supervisors, regulatory and technical personnel with duties involving *day-to-day* gas purchasing, marketing, sales, transportation, operations, dispatching, storage, or related activities.

Order No. 2004 replaced the term "operating employee" with the term "transmission function employee." Although these terms did not have identical definitions, both used the “day-to-day” formulation to characterize the duties and responsibilities of an employee engaged in transmission functions. A "transmission function employee" was defined as "an employee, contractor, consultant or agent of a transmission provider who conducts transmission system operations or reliability functions, including, but not limited to, those who are engaged in *day-to-day* duties and responsibilities for planning, directing organizing or carrying out transmission-related operations." See 18 C.F.R. §358.3 (j). Thus, the term "operating employee" also covered employees engaged in gas sales or marketing functions, whereas the term transmission function employee under Order No. 2004 was limited to transmission activities, not marketing. *Standards of Conduct for Transmission Providers*, FERC Stats. & Regs. ¶ 31,161, at P 130 (2004).

(i) *Transmission function employee means an employee, contractor, consultant or agent of a transmission provider or an affiliate of a transmission provider who actively or personally engages on a day-to-day basis in transmission functions. An officer, director or other supervisory employee is not considered to be a transmission function employee if he or she does not actively and personally engage on a day-to-day basis in transmission functions.*

By inserting the phrase “on a day-to-day basis” and clarifying that transmission providers and their affiliates can rely upon the Commission’s precedent under the previous Standards in applying these definitions, the Commission will help to limit some of the uncertainty and the consequent burden on the industry and the Commission itself. One stated goal in the NOPR is to establish Standards that are clear and workable, and, thus, less likely to generate the numerous clarification requests that resulted from the Order No. 2004 Standards. The proposed revisions to the definitions set forth above will promote clarity and workability, while at the same time providing for compliance with the independent functioning requirements and the Standards generally.

C. Greater Clarity Is Needed in Defining Marketing Functions.

1. The Commission Should Provide a Definition of Gas Marketing Functions, Separate from Power Marketing Functions.

The Commission has proposed that the Standards of Conduct apply to interstate natural gas pipelines that conduct transportation transactions with their marketing affiliates. Further, the proposed rules require that transmission function employees function independently of marketing function employees, and they provide a definition of what constitutes a “marketing function” in a combined definition for both gas and

power.¹² While NGSAs fully support the Commission's objective of consistency among the rules applied to both gas pipelines and electric utilities, combining both gas and power marketing functions in one definition will only lend itself to confusion for those who are trying to comply with the new rules.

The gas and power industries physically operate in much different ways, and the terms used to describe the operations in those industries vary greatly. For example, as written, one may interpret the proposed marketing function definition to mean that there is such a thing as "virtual gas supply or demand," but, unlike the power side, "virtual gas" is not a term used for anything in the natural gas industry. Likewise, "financial transmission rights" apply to the sale of electricity, not natural gas. As detailed more fully in the section below, it could also appear that selling gas capacity is now being considered a marketing function. Moreover, each exemption provided for under the marketing function definition is only applicable to the gas side. Therefore, to avoid any unnecessary confusion, NGSAs request that the Commission use two

¹² Section 358.3 (c) states provides the following gas and power definition. Marketing functions means the sale for resale in interstate commerce, or the submission of offers or bids to buy or sell natural gas or electric energy or capacity, demand response, virtual electric or gas supply or demand, or financial transmission rights in interstate commerce, subject to the following exemptions:

- (1) Bundled retail sales, including sales of electric energy made by providers of last resort (POLRs),
- (2) Incidental purchases or sales of natural gas to operate interstate natural gas pipeline transmission facilities,
- (3) Sales of natural gas solely from the transmission provider's own production,
- (4) Sales of natural gas solely from the transmission provider's own gathering or processing facilities, and
- (5) Sales by an intrastate natural gas pipeline or local distribution company making an on-system sale.

separate definitions – one to define the gas marketing function and one to define the electric marketing function. As a stand-alone definition, the gas marketing function would read as shown below:

Gas Marketing functions means the sale for resale in interstate commerce, or the submission of offers or bids to buy or sell natural gas ~~or electric energy or capacity, demand response, virtual electric or gas supply or demand, or financial transmission rights~~ in interstate commerce.

As discussed in more detail below, since the gas marketing definition will now include “offers or bids to buy” natural gas, the Commission must provide parity by also including gas purchase exemptions in addition to exemptions for gas sales in proposed Section 358.3(c).

2. The Commission Should Clarify the Definition of Marketing Functions to Make Certain that Sales of Natural Gas Transportation Capacity Are Not Included.

Of particular concern to gas industry participants, as currently written, the inclusion of the phrase “offers or bids to buy or sell natural gas or electric energy or capacity” in the definition of marketing functions could be interpreted to apply to both electric transmission and gas transportation capacity. Historically, the interstate pipeline marketing affiliate regulations defined marketing as the “first sale” of natural gas.¹³ In

¹³ Prior to issuance of Order No. 2004, the Standards of Conduct regulations applicable to interstate pipelines at 18 C.F.R. §161.2(c) defined “Marketing” or “Brokering” to mean:

(1) A first sale of natural gas as that term is defined in §270.203 of this chapter, or a sale of natural gas in interstate commerce for resale by a seller that is not an interstate pipeline (2) An off-system sale by an intrastate natural gas pipeline or a sale under section 311(b) of the

contrast, participation in natural gas transportation capacity markets in and of itself has not been regarded as marketing.

Inclusion of pipeline capacity sales or capacity release transactions in the definition of “marketing” would conflict with the intent of the proposed regulations as set forth in the NOPR. The Commission stated that its revised approach “resolves the question of whether asset managers should be subject to the Standards,” because, as revised, the definition of “marketing function employees” reaches “only those employees of an asset manager ... who may be directly engaged in wholesale marketing.”¹⁴ Wholesale marketing clearly refers to the sale of the gas commodity for resale. It does not encompass capacity transactions.

As stated earlier, the problem can be corrected by simply separating the definition of gas marketing functions from the definition of electric marketing functions as proposed above. Alternatively, the Commission should clarify that it was not its intent to include natural gas capacity transactions in this definition. Absent this clarification, employees of pipeline affiliates who are within the scope of the marketing function employee definition may now include those employees participating in the secondary natural gas transportation market, those purchasing gas for use in midstream processing, or even sellers of primary pipeline capacity. To the extent that this was the Commission’s intent, we urge the Commission to reconsider this expansion of the definition of gas marketing. In view of (1) the extensive regulations governing capacity marketing and

Natural Gas Policy Act as codified in §284.142 of this chapter; or (3) An off-system sale by a local distribution company or a sale under §284.224 of this chapter.

¹⁴ NOPR at PP 39-40.

capacity release, including the NAESB timelines and procedures and the transactional reporting requirements, and (2) the lack of any basis in the record for such an expansion, the Commission should clarify that pipeline capacity marketing and capacity release activities are not included within the definition of Marketing functions.

D. Natural Gas Purchases Should be Included in the Marketing Function Exemptions to Conform With the Addition of Purchases Proposed in the Marketing Function Definition.

NGSA does not oppose the Commission's proposal to expand the definition of gas marketing functions to include "offers or bids to buy or sell natural gas." However, if buying natural gas will now be considered an activity under the marketing function definition, the exemptions to the marketing function definition should also reflect purchases in addition to sales of natural gas. Since there are no "bundled purchases" made by providers of last resort, the first exemption does not require a change. The second exemption for interstate natural gas pipelines already provides for exemptions of "incidental purchases and sales." However, exemptions three through five only refer to sales and should be modified to conform to the new marketing function definition by adding exemptions for purchases. Revised regulatory text is provided in Section E below.

E. The Commission Erred in Adding the Phrase 'Transmission Provider' to the Long-Standing Production, Gathering and Processing Exemptions Provided for in the Marketing Functions Definition.

The proposed regulations as set forth in the NOPR would exempt five categories of transactions from the definition of marketing functions:

- (1) Bundled retail sales, including sales of electric energy made by providers of last resort (POLRs),
- (2) Incidental purchases or sales of natural gas to operate interstate natural gas pipeline transmission facilities,
- (3) Sales of natural gas solely from the *transmission provider's* own production,
- (4) Sales of natural gas solely from the *transmission provider's* own gathering or processing facilities, and
- (5) Sales by an intrastate natural gas pipeline or local distribution company making an on-system sale.¹⁵

Order No. 497 included three of these exemptions, numbered 2-4 above, in recognition that incidental sales and sales solely for one's own business needs should not constitute a marketing function for LDCs, interstate pipelines, producers, gatherers or processors that would trigger the Standards of Conduct. Order No. 2004 expanded the application of the Standards of Conduct Rules and eliminated these exemptions for affiliates of transmission providers. However, in light of *National Fuel*, the Commission has proposed to reinstitute these exemptions.

The Commission has now substituted the term "transmission provider's" for "seller's" in the third and fourth exemptions, which appears to now translate into unneeded exemptions for pipelines, as opposed to their affiliates that own production, gathering and processing. The second exemption allows pipelines to make incidental sales to balance their systems without triggering the marketing functions distinction. Therefore, no additional exemptions for pipelines are needed.

Given that interstate pipelines are unbundled, and, except in rare situations, do not participate in production, gathering or processing activities, NGSAs believe that the Commission inadvertently included the phrase "transmission provider" in the

¹⁵ § 358.3(c) (emphasis added).

exemptions “(3) Sales of natural gas solely from the transmission provider’s own production, (4) Sales of natural gas solely from the transmission provider’s own gathering or processing facilities.” NGSAs, therefore, requests that the Commission correct this inclusion and reiterate “seller’s” in lieu of “transmission provider’s” in the third and fourth exemptions in the final rule. With the proposed addition of exemptions for purchases, as proposed in the section above, the exemptions would then read as follows:

*(1) Bundled retail sales, including sales of electric energy made by providers of last resort (POLRs), (2) Incidental purchases or sales of natural gas to operate interstate natural gas pipeline transmission facilities. (3) Sales or purchases of natural gas solely from the ~~transmission provider’s~~ seller’s own production, (4) Sales or purchases of natural gas solely from the ~~transmission provider’s~~ seller’s own gathering or processing facilities, and (5) Sales or purchases by an intrastate natural gas pipeline or local distribution company making an on-system sale.*¹⁶

F. In Most Instances, Non-Affiliated Third Parties Should Not Have the Ability to Receive Prohibited Information From Transmission Providers.

Section 358.6(a)(2) of the NOPR states that, under the no conduit rule, marketing function employees of a transmission provider “are prohibited from receiving non-public transmission function information *from any source*.”¹⁷ NGSAs recognizes that precluding the sharing of information by an outside third party to a pipeline’s marketing affiliate may prove difficult or not practicable in some instances. However, sharing privileged transmission function information with a third party, to a large degree, should already be precluded under the broader non-discrimination principles

¹⁶ § 358.3(c).

¹⁷ 358.6(a)(2) emphasis added.

provided for in the NGA as well as the non-discrimination requirements included in Section 358.4 of the proposed standards.

Regardless of whether a third-party is acting as a conduit or not, third parties should not be receiving privileged transmission function commercial information from a regulated interstate pipeline that is not also shared with all other parties via a posting on the pipeline's EBB. In the few instances where there is a necessity to share non-public information with a third party (e.g. joint project development planning), that information and related discussions should be covered by upfront confidentiality agreements. Such agreements typically contain provisions against the sharing of information with others including any pipeline affiliate's marketing function employees. Otherwise, there should be no occasion in which a third party should be privy to pipeline information in which it would put itself, and therefore the pipeline, in the vulnerable situation of relating non-public information as a conduit to the marketing function employees of an affiliate of the pipeline.

G. The Commission Should Standardize Pipeline Discount Postings and Discretionary Waivers to Eliminate the Ad Hoc Nature and Incongruence among Various Pipeline Postings.

In the NOPR, FERC proposes to retain the existing requirement that any offer of a discount must be posted on the transmission provider's Internet website. NGSAs support retention of this requirement as well as the requirement that specific information must be included in those postings as provided for in Sections 358.4 (b) (1) through (7). However, NGSAs urge the Commission to require that pipelines use a

standardized format for its postings so that shippers can more readily review and assess this information.

Since pipelines have discretion regarding the format used to display the information regarding a discount, 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. For shippers that must monitor postings on multiple pipelines, it is extraordinarily difficult to understand the various formats and information provided in the postings. In fact, there are many instances where the information provided is so difficult to interpret that it virtually makes the discount posting useless to shippers. The multiple formats used by pipelines only increases the amount of confusion. Therefore, NGSAs urges the Commission to consider standardization of the postings of pipeline discount offers.

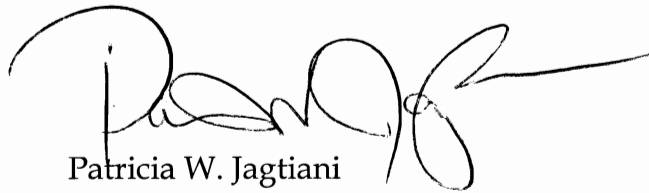
In a similar vein, while NGSAs is pleased that the Commission retained the Order No. 2004 requirement that transmission providers post discretionary waivers on their website, we believe the Commission should also consider establishing a standard format for disclosing and posting discretionary waivers. Absent a list of the information required for posting, it is left to the pipeline to determine what it finds as sufficient information to post as relevant. However, shippers often need to understand more of the parameters to determine if they have been unjustly discriminated against. Therefore, NGSAs requests that the Commission require a standard format for posting the content of discretionary waivers on a pipeline's website that includes, but is not

limited to, the shipper name, the receipt and delivery point(s), duration of waiver, rate associated with waiver, and whether there are recall rights.

IV. CONCLUSION

The Commission's willingness to use its authority under the NGA and the Energy Policy Act to protect consumers from affiliate abuse in combination with the proposed Standards of Conduct will constitute effective preventive measures. If the Commission provides the clarifications to the proposed regulations as described above, NGSA believes that, on balance, the proposed rules provide the industry with clearer rules and adequately safeguard pipeline shippers from the potential for undue discrimination.

Respectfully submitted,



Patricia W. Jagtiani
Vice President of Regulatory Affairs
Natural Gas Supply Association
805 15th Street, NW, Suite 510
Washington, DC 20005
(202) 326-9311
pjagtiani@ngsa.org