



## New FERC Penalty Authority Magnifies Importance Of Proposed Standards Of Conduct

With FERC waiting in the wings with heavy new penalty authority, its new proposed rule on standards of conduct (SoC) casts a very long shadow. The proposal, which has been significantly revised since a federal court tossed out FERC's Order 2004 in 2006, got a mostly positive reception from all natural gas industry players, who want some certainty from the agency on what is permissible with regards to communications between transmission and marketing personnel in the same gas pipeline transportation company.

That clarity is very important given the new civil penalty authority granted FERC by the 2005 Energy Policy Act, which allows fines up to \$1 million a day. FERC has begun to deploy that new authority in a very big way, most significantly in its recent enforcement case—having to do with price manipulation, not standards of conduct—where the agency proposed a whopping \$107 million penalty against Energy Transfer Partners, L.P. and a \$15,500,000 penalty against Oasis Pipeline, L.P.

Tamara Young-Allen, a FERC spokeswoman, states that the \$107 million penalty is the first time the commission has proposed the maximum civil penalties allowed under the 2005 law. So it is, in essence, the biggest fine ever proposed by FERC.

Joan Dreskin, INGAA's general counsel, explains that the new fine authority makes it critically important that pipelines understand what is required under any new SoC rules. "In order to be held responsible, the rules must be clear," she emphasizes. "The numbers can get high very quickly."

The FERC's March 2008 proposed SoC rule has a four-year history. It started with the commission's Order 2004 which was rejected in 2006 by the United States Court of Appeals for the District of Columbia in 2006 in *National Fuel Gas Supply Corp. v. FERC*. There, the court objected to FERC extending its existing standards of conduct (established in 1988 in Order 497) to the non-marketing affiliates of natural gas transmission companies. Moreover, though the court did not object, interstate transmission companies had protested Order 2004's use of a "corporate" separation approach (focusing on the primary business function of an entire division or corporation) to distinguish between transmission and marketing employees. That was a reversal of the "functional" separation test since Order 497.

In January 2007, FERC took an initial

attempt at responding to the court's and industry's concerns. But the proposed rule it issued then was universally panned, forcing FERC to toss it in the trash and start from scratch. FERC issued a much more comprehensive and thoughtful reform of its Order 2004 on March 21, 2008. That new proposed rule returns to the narrower concept of prohibiting confidential communications between "affiliates" – ditching Order 2004's expansion of the prohibition to "non-energy affiliates" – and also returns to a "functional" definition of transmission and marketing employees. That functional distinction would be backed up by three core standards elements: the independent functioning rule, the no-conduit rule and the transparency rule.

Iroquois Pipeline Operating Company, for example, argues FERC is making a subtle, unadvertised change in its definition of "affiliate" beyond where it was set in Order 497. That change – done without much fanfare in an effort, apparently, to conform the affiliate definition for gas and electric transmission companies – would pose a big problem for companies like Iroquois with complicated ownership structures. Iroquois' current partners are affiliates of TransCanada PipeLines Limited, Dominion Resources, KeySpan Corporation, New Jersey Resources and Energy East Corp.

The American Gas Association is seeking a laundry list of modifications and clarifications. In that vein, it calls the FERC's proposed definition of marketing functions "ambiguous and in need of clarification." One of its concerns is whether the commission intends to include the sale or purchase of pipeline transportation or storage capacity within the definition of "marketing function." That would force every pipeline to separate its transmission operators from those employees that market its own capacity. As a result, every affiliated LDC would have marketing function employees that purchase transportation capacity and who would be prevented from communicating with the transmission system operators of its affiliated pipeline – "the very people from whom the LDC needs to purchase transportation and storage services," according to the AGA comments.

### INGAA Calls Posting Of "No Notice" Services A "Fishing Expedition"

Debate continues to rage on with regard to FERC's stated intention to force interstate and major non-interstate pipelines – a new

category meant to exempt some intrastate – to post daily information regarding their capacity, scheduled flow volumes, and actual flow volumes at major points and main-line segments. More than six months after FERC first issued the proposed rule last December, the question now seems to be not whether the daily flows are posted, but how they are posted.

The rulemaking is all about improving gas market transparency. Major advocates include Calpine Corp., the American Public Gas Association and BENTEK Energy, LLC. BENTEK furnishes energy market fundamental data to 140 of the U.S.'s most active natural gas market participants including marketers, producers, financial institutions, hedge funds, end users, local utilities and power generators.

INGAA has been fighting daily posting doggedly. The battle lines are apparently getting sharper after a technical conference held in April. INGAA is arguing that proponents are on a "fishing expedition," and have not shown how daily data would improve transparency.

But Sarah G. Novosel, senior vice president at Calpine, says the daily flow data will allow market participants and regulators alike to review how accurately the scheduled volumes reflect the actual volumes associated with activities in the real-time market. Such data is especially critical in times of constraints caused by unplanned events or outages.

But BENTEK has been the biggest irritant for interstate pipelines. It continues to press its case that gas transmission companies should expand what it agrees is an already "excellent" set of data they publish on their electronic bulletin boards to include what is generally referred to as "No-Notice" services. No-Notice services typically allow for unscheduled natural gas flows to meet unexpected demands and there is no formal nomination process. Since the gas is not scheduled, it is not included in the Operational Capacity Reports published on each pipeline's Electronic Bulletin Board.

BENTEK admits that having actual flow information will add complexity. It will include volumes that are associated with line pack, maintenance, balancing and other tangential issues, a point made by INGAA, which strongly opposes publishing "No Notice" volumes. But BENTEK is countering that "savvy market analysts will be able to sort out the data, turning it into useful information." ■