

FERC Expands Employees Subject to Standards of Conduct

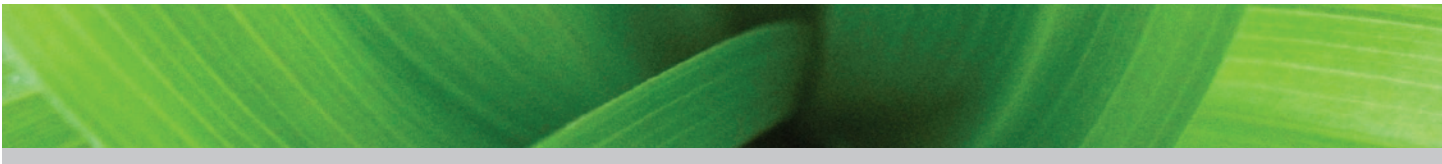
In an October, 15, 2009 order that purported to be a routine clarification order, the Federal Energy Regulatory Commission (“FERC”) made two important policy changes that will affect Standards of Conduct compliance at electric utilities. *Standards of Conduct for Transmission Providers*, 129 FERC ¶ 61,043 (2009).

First, FERC expanded its definition of “marketing function” to include legal counsel who intermittently draft non-price terms and conditions of marketing umbrella agreements. In Order No. 717, FERC had stated that “if an attorney is rendering legal advice, he may consult with both transmission function employees and marketing function employees” subject to the No-Conduit Rule. In an about face, FERC has abandoned this long-held policy, now finding that attorneys working in their traditional roles are employees “who actively and personally engage on a day-to-day basis in the sale for resale (or the submission of offers to sell) in interstate commerce of electric energy or capacity, demand response, virtual transmission, or financial or physical transmission rights.” In proceeding down this path, FERC is effectively precluding counsel from working with both merchant function and transmission function employees under certain circumstances.

Second, FERC altered how it will classify employees involved in the preparation of long-range planning functions. In Order No. 717, FERC addressed Idaho Power Company’s request “that long-range planning functions such as integrated resource planning and preparation of system impact studies not be considered transmission functions.” FERC agreed that these activities were not transmission functions. Without any discussion, FERC now takes the position that “transmission function employee” includes those “responsible for performing system impact studies...as this type of employee is planning, directing, organizing or carrying out the day-to-day transmission operations.” This determination was made without any time horizon distinctions. Although FERC has previously stated that it did not intend to interfere with legitimate planning activities, Order No. 717-A significantly undercuts the clarity FERC had previously provided regarding the Standards of Conduct exemption afforded long-term planning.

In addition to these new pronouncements, FERC clarified a number of other aspects of Order No. 717, and held, *inter alia*, that:

- An electric utility employee who balances load with energy or generating capacity is not considered a “transmission function employee” unless the employee’s other duties are encompassed by the definition of transmission function employee.
- A “marketing function employee” does not include an employee of an affiliate that does not engage in transmission transactions on the affiliated transmission provider’s transmission system.
- Any sale of transmission service under an open access transmission tariff or other agreement is considered a transmission function, while any resale or reassignment of such service is considered a marketing function.



- Employees only involved in preparing requests for financial transmission rights and auction revenue rights allocations are not “marketing function employees.”
- Joint meetings with transmission and marketing function employees are permissible, so long as non-public transmission information is not disclosed. Examples of permissible joint meetings include those to discuss RTO/ ISO issues; to address regulatory and compliance functions; and to provide disaster/outage preparedness training.
- Records of non-public information shared with marketing function employees in order to maintain or restore operation of the transmission system need not be made publicly available. Records must be maintained only for Commission review and there is no process in place that allows for a third-party to review those records.
- Transmission providers are not required to post the names of transmission function employees on the Internet.
- A “functional unit” of a transmission provider that performs marketing functions is not required to keep its books separately from those of the transmission provider.
- Certain types of information about a company’s own generation, load and generation dispatch are not subject to the recordation requirement when shared with a marketing function employee.
- Not all generation dispatch and reliability information is non-public transmission information.
- Public utilities are not required to comply with the NAESB Business Practice Standards incorporated by reference in the Standards of Conduct rule until such time as the Commission issues a new standard conforming the rules.

FERC declined to clarify that an employee of an electric utility purchasing and selling natural gas for generation is not a “marketing function employee” of the electric public utility, saying that adequate support had not been provided for the broad exemption sought.

FOR ADDITIONAL INFORMATION

Van Ness Feldman counsels clients on a full range of federal regulatory compliance issues affecting electric utilities. For additional information on Order No. 717-A or for assistance on Standards of Conduct issues, please contact Cheryl Feik Ryan (202-298-1845), Gary Bachman (202-298-1880), or Malcolm McLellan (206-623-9372), or any other member of our Electricity Practice Group.

A separate Van Ness issue alert titled “FERC Clarifies the Affiliate Standards of Conduct for Natural Gas Pipelines in Most Respects” addresses the impact of Order No. 717-A on the natural gas industry.

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