

## FERC Clarifies the Affiliate Standards of Conduct for Natural Gas Pipelines in Most Respects

On October 15, 2009, the Federal Energy Regulatory Commission (FERC) issued Order No. 717-A addressing numerous requests for rehearing of the Standards of Conduct for Transmission Providers applicable to interstate natural gas pipelines regulated under the Natural Gas Act (NGA) and public utilities regulated under the Federal Power Act (FPA). For natural gas pipelines, Order No. 717-A reaffirms and clarifies the Standards of Conduct adopted in Order No. 717 in several key respects, but raises other questions about activities that may be considered to be “marketing function” or “transmission function” activities. A separate Van Ness Feldman Issue Alert entitled “FERC Expands Employees Subject to Standards of Conduct” addresses the impact of Order No. 717-A on the electric industry.

### BACKGROUND

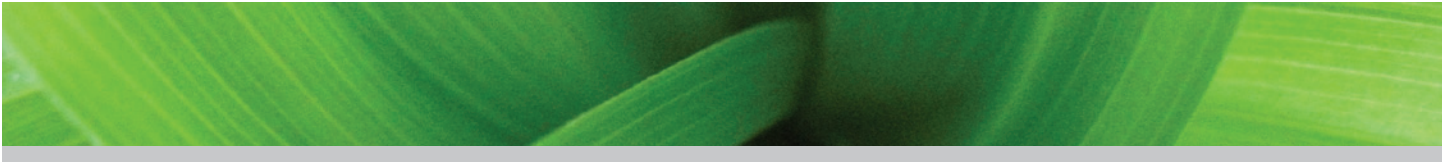
The Standards of Conduct are intended to prevent interstate natural gas pipelines from providing their affiliates preferential access to transmission (*i.e.* transportation) service or to non-public transmission information. The current Standards of Conduct, adopted in 2008, embody three key principles: an independent functioning rule, which requires that transmission function employees operate separately from merchant function employees; a no-conduit rule that prohibits the disclosure of non-public information about a pipeline’s transmission system or about customers to marketing function employees of either the pipeline or an affiliate; and a transparency rule, which requires that pipelines publically post on the internet certain information that enables FERC and interested parties to monitor compliance (see October 21, 2008 Issue Alert “FERC Issues Revised Standards of Conduct for Transmission Providers”).

### ORDER NO. 717-A

Order No. 717-A reaffirms many key aspects of the Standards of Conduct adopted in Order No. 717 and makes numerous clarifications regarding the Standards’ application and scope for natural gas pipelines. Order No. 717-A also raises questions for certain employees not involved pipeline operations on a day-to-day basis.

### KEY FINDINGS AND CLARIFICATIONS

*Role of Attorneys, and Finance and Regulatory Employees.* Employees in the legal, finance or regulatory division of a jurisdictional entity who intermittently draft non-price terms and conditions of marketing umbrella agreements are now considered “marketing function employees.” This is a departure from Order No. 717’s finding that an attorney who renders legal advice may consult with both transmission function employees and marketing function employees, subject to the No-Conduit Rule. While the Commission stated that it would consider waiver requests, it now appears that attorneys working in their traditional roles in contract drafting



could be “actively and personally engaged on a day-to-day basis” in marketing function or transmission function activities. The rationale for this significant departure from Order No. 717 was not explained, and could effectively preclude counsel from working with transmission function employees under certain circumstances.

*LDC Offsystem Sales.* FERC clarified that a local distribution company (LDC) that conducts transmission transactions with an affiliated pipeline and makes off-system sales of gas that are transported on a non-affiliated pipeline is not subject to the Standards of Conduct. This clarification is consistent with applicability language adopted in Order No. 717 and FERC’s longstanding interpretation of the application of the Standards under Order No. 497.

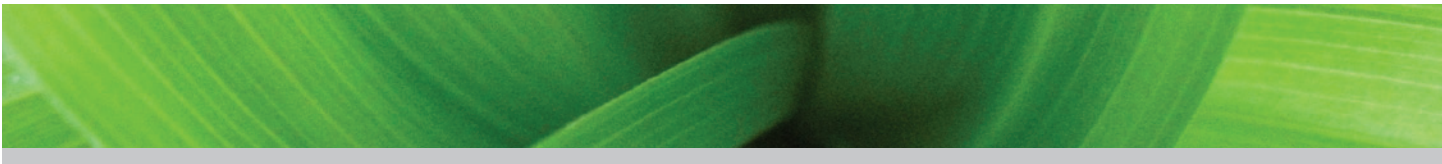
*Joint Meetings.* FERC clarified that transmission function and marketing function employees may engage in joint meetings as long as those meetings do not relate to transmission or marketing functions or result in the disclosure of non-public transmission information to marketing function employees. FERC emphasized, however, that the No Conduit Rule applies to these meetings.

*Transaction-Specific Exemption.* FERC clarified that the transaction-specific exemption to the Transparency Rule is not limited to communications concerning requests for transmission service. The exemption applies also to communications between a pipeline and marketing function employees related to transportation agreements, specific interconnections and new infrastructure needed for the specific request.

*Training.* FERC clarified that the requirement to train supervisory employees applies to supervisory employees who supervise other employees subject to the Standards of Conduct or who may come in contact with non-public transmission function information.

## OTHER CLARIFICATIONS

- Employees of an affiliate who perform marketing activities are not marketing function employees of a pipeline unless the affiliate conducts transmission transactions with the affiliated pipeline.
- Natural gas purchases are not “marketing” activities because FERC does not have statutory authority to regulate these transactions under the NGA.
- FERC clarified that the exemption from marketing is not limited to on-system sales of only LDCs, but extends also to on-system sales of intrastate and Hinshaw pipelines. In other words, if these entities make off-system gas sales, they are engaged in marketing functions. FERC clarified also that the exemption applies to the on-system sales of LDCs operating under § 7(f) of the NGA.
- The exemption for gas sales from a seller’s own production or gathering and processing facilities includes sales of gas of other interest owners in the same well if the producer has contractual authority to sell the gas. The exemption also applies to foreign-sourced LNG if the seller owns the gas before it enters a pipeline’s facilities and is the only gas the pipeline is transporting.
- Marketing does not include assigning gas supply under an asset management agreement, unless the releasing shipper retains authority to conduct sales for resale or to control the asset manager’s transactions.



- Marketing activities do not include incidental purchases or sales of natural gas, including de minimus off-system sales, made to remain in balance under a pipeline's tariff.
- Transmission providers are not required to post non-public transmission function information that is disclosed to non-marketing function employees.
- Transmission providers are not required to post discounts, acts of discretion, names of marketing function or transmission function employees, or waivers granted to non-affiliates.
- The recording requirement applies if transmission function and marketing function employees exchange non-public information pertaining to either compliance with reliability standards *or* information necessary to maintain or restore operations.
- Pipelines are not required to comply with the NAESB Business Practice Standards incorporated by reference in the Standards of Conduct rule until FERC issues a new standard conforming the rules.

### IMPLICATIONS OF ORDER NO. 717-A

While Order No. 717-A reaffirms and clarifies the Standards of Conduct in several significant respects that are welcomed by the natural gas industry, the order creates uncertainty with respect to the role of legal, finance, and regulatory personnel in negotiating contracts for pipelines and affiliates. This issue is particularly important for corporations with shared services companies.

#### FOR ADDITIONAL INFORMATION

Van Ness Feldman represents natural gas pipelines and electric utilities before FERC on Standards of Conduct policy, and counsels clients on a full range of Standards of Conduct compliance matters. For additional information on the final rule or for assistance on Standards of Conduct issues, please contact Susan Olenchuk, Paul Korman, or any other member of our Natural Gas Practice Group.

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