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UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Market-Based Rates For Wholesale Sales Of Electric Energy, Capacity And Ancillary Services By Public Utilities	)))))	**RM04-7-___**

Amended Request for Clarification

Members of the Compliance Working Group[1] hereby submit this amended request for clarification regarding which employees can be "shared" for purposes of compliance with the Commission's Affiliate Restrictions adopted under Order No. 697.[2] The original request, submitted on March 9, 2009, has been supplemented and restated to provide further information and support, as requested by the Commission Staff.

Introduction

The question presented arises because of an unintended inconsistency in the treatment of shared employees under the two major rulemakings – Order Nos. 697 and

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1 The Compliance Working Group is described below. The members of the Compliance Working Group taking part in this filing are: Allegheny Energy, Inc., American Electric Power Company, Inc., Cleco Corporation, Consumers Energy Company, Dominion Resources, Inc., Duke Energy Corporation, Edison International, El Paso Electric Company, Energy East Corp., Entergy Corporation, Exelon Corporation, FirstEnergy Corp., FPL Group, Inc., Pacific Gas and Electric Co., Progress Energy, Inc., Public Service Enterprise Group Incorporated, and Westar Energy, Inc.

2 *Mkt.-Based Rates for Wholesale Sales of Elec. Energy, Capacity and Ancillary Servs. by Pub. Utils.*, Order No. 697, FERC Stats. & Regs. ¶ 31,252 ("Order No. 697"), *order clarifying final rule*, 121 FERC ¶ 61,260 (2007), *order on reh'g and clarification*, Order No. 697-A, FERC Stats. & Regs ¶ 31,268, ("Order No. 697-A"), *order on reh'g and clarification*, 124 FERC ¶ 61,055, *order on reh'g and clarification*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008) ("Order No. 697-B").

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717[3] – that impose restrictions on employee interactions and communications. Order No. 697 sought to ensure consistency between the two rules by holding that shared employees, for purposes of its Affiliate Restrictions, would be the *same* as later defined by the Standards of Conduct. However, an inconsistency later arose because Order No. 717 ultimately revised the Standards of Conduct by *eliminating* the concept of shared employees altogether.[4] This was not because sharing was no longer allowed, but, to the contrary, because the Standards of Conduct had been simplified to such an extent that an exhaustive list of shared employees was no longer necessary.

This disconnect has created a compliance conundrum that should be remedied. There is now a "void" or "null set" in the Affiliate Restrictions because Order No. 697 defines shared employees with reference to a later rulemaking, Order No. 717, that eliminates that term altogether. This not only renders compliance difficult for regulated companies, like the Compliance Working Group, who take compliance very seriously, but also frustrates the Commission's enforcement function because there is essentially no law to apply on this issue.

The Commission can remedy this situation, and achieve its original objective of making both rules consistent, by adopting the requested clarification. Specifically, we request that the Commission interpret the Affiliate Restrictions to permit sharing of employees who are not "transmission function employees" or "marketing function employees" – the same sharing that is now permitted under the Standards of Conduct.

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[3] *Standards of Conduct for Transmission Providers*, Order No. 717, FERC Stats. & Regs. ¶ 31,280 (2008) ("Order No. 717"), *order on reh'g and clarification*, Order No. 717-A, 129 FERC ¶ 61,043 (2009).

[4] Order No. 717 at PP 128-129.

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This interpretation is consistent with the purpose of Order Nos. 697 and 717, will facilitate compliance by regulated companies, and enhance enforcement by the Commission. In addition, as was the case with Order No. 717, this interpretation would not eliminate the residual protection afforded by the rule against undue discrimination.

The Amended Request for Clarification is organized as follows. Section I describes the Compliance Working Group. Section II provides background on the evolution of the Affiliate Restrictions in Order No. 697 and Standards of Conduct in Order No. 717 and why there is now an inconsistency in this area. Section III explains why the relief sought here is consistent with the intent behind both rules, will facilitate compliance and does not pose undue risks to captive ratepayers.

I. The Compliance Working Group

The Compliance Working Group consists of 27 energy companies representing a broad cross-section of the industry, including integrated electric businesses, merchant generators, marketing and trading businesses, and natural gas distributors. Collectively, these companies operate in every region of the country and participate in all forms of electric and natural gas markets. The group came together in mid-2008 to develop a model FERC compliance program guide. That document, consisting of approximately 375 pages of original material,[5] is now complete after six months of intensive work by member companies. During the course of preparing the model compliance program

[5] The document presents compliance guidelines for companies to consider in light of their own unique circumstances. As the Commission has said, "each case is unique and no one size fits all" when it comes to putting together a compliance program, *Enforcement of Statutes, Regulations and Orders; Revised Policy Statement on Enforcement*, 123 FERC ¶ 61,156 at P 59 (2008), and "there is no one template or approach for a good compliance program." *Compliance with Statutes, Regulations, and Orders; Policy Statement on Compliance*, 125 FERC ¶ 61,058 at P 10 (2008).

guide, group members debated the issue presented here, and came to the conclusion that clarification is needed to promote compliance.

II. Background

The issue presented here implicates two elements of the Affiliate Restrictions that were adopted by Order No. 697 – the "separation of functions" requirement[6] and the "information sharing" restriction.[7] Under the separation of functions requirement, employees of market-regulated power sales affiliates[8] must operate separately, to the maximum extent practical, from employees of affiliated franchised utilities with captive customers.[9] The information sharing restriction prohibits a franchised public utility with captive customers from sharing market information with a market-regulated power sales affiliate if the sharing could be used to the detriment of captive customers, unless simultaneously disclosed to the public. Thus, both rules apply on their faces at the

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[6] 18 C.F.R. § 35.39(c).

[7] 18 C.F.R. § 35.39(d). The interpretive issue does not bear on the categories of affiliate restrictions that apply purely on a corporate basis, namely the restrictions on affiliate sales of power, 18 C.F.R. § 35.39(b), affiliate sales of non-power goods and services, 18 C.F.R. § 35.39(e), and affiliate brokering, 18 C.F.R. § 35.39(f).

[8] A "market-regulated power sales affiliate" is "any power seller affiliate other than a franchised public utility, including a power marketer, exempt wholesale generator, qualifying facility or other power seller affiliate, whose power sales are regulated in whole or in part on a market-rate basis." 18 C.F.R. §§ 35.43(a)(4) & 35.36(a)(7).

[9] A "franchised public utility" is "a public utility with a franchised service obligation under state law." 18 C.F.R. §§ 35.43(a)(3) & 35.36(a)(5). Subsequent references in this document to "franchised public utilities" will assume that such utilities have captive customers, as the interpretive issue that arises here only arises when the rules apply, i.e., when the utilities have captive customers.

corporate level, *i.e.*, between all employees of affiliated companies, based on what the companies do.

However, there are exceptions to the separation of functions requirement for certain categories of employees who are "permitted" to be shared, often referred to in short-hand as "shared employees." Specifically,

> Franchised public utilities with captive customers are permitted to share support employees, and field and maintenance employees with their market-regulated power sales affiliates. Franchised public utilities with captive customers are also permitted to share senior officers and boards of directors with their market-regulated power sales affiliates; provided, however, that the shared officers and boards of directors must not participate in directing, organizing or executing generation or market functions.[10]

Similarly, such "[p]ermissibly shared support employees, field and maintenance employees and senior officers and boards of directors . . . may have access" to market information.[11] In Order No. 697, the Commission declined a request to provide a "non-exhaustive list of examples of permissible shared support employees."[12] Instead, the Commission "clarif[ied] that the types of permissibly shared support employees under the *standards of conduct* are the types of permissibly shared support employees that *will be* allowed under the affiliate restrictions in § 35.39(c)(2)(c)."[13]

As this quotation indicates, Order No. 697 recognized that the Standards of Conduct would be modified in the future. At the time Order No. 697 was issued, the

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[10] 18 C.F.R. § 35.39(c)(2)(ii).

[11] 18 C.F.R. § 35.39(d)(2).

[12] Order No. 697 at P 564.

[13] *Id.* (emphasis added).

Court of Appeals in *National Fuel Gas Supply Corp. v. FERC*[14] had struck down portions of the Standards of Conduct and the Commission was in the process of adopting new regulations to comply with the *National Fuel* decision. The intent of Order No. 697, as reflected in the above passage, was to ensure that the Affiliate Restrictions would be *consistent* with the subsequent treatment of shared employees in the revised Standards of Conduct. However, the Commission could not have foreseen at that time that the revised Standards of Conduct would eliminate the concept of shared employees altogether. This occurred because, although the prior Standards of Conduct were organized based along corporate form, with carve-outs for certain categories of shared employees, Order No. 717 streamlined the rule in a way that eliminated the need for a specific category of shared employees:

> As discussed in the NOPR, the substitution of the employee functional approach for the corporate separation approach renders continuation of the concept of "shared employees" unnecessary. Since only those individuals who engage in transmission or marketing functions now fall within the scope of the Independent Functioning Rule, support personnel of the type formerly included in the concept of shared employees, and who do not meet those definitions, do not. Therefore, there is no need to further exempt them under the outmoded rubric of shared employees.[15]

The Commission declined to address the impact of this finding on the parallel issue arising under Order No. 697 because the problem was "beyond the scope" of the Order No. 717 rulemaking.[16]

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[14] 468 F.3d 831 (D.C. Cir. 2006).

[15] Order No. 717 at P 129.

[16] *See id.* at P 130 ("We decline to amend prior orders that mention shared employees; guidance from prior orders will be applicable or not depending on whether those orders address concepts that survive the revisions made in this

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III. Argument

We explain below why the clarification requested will (i) ensure consistency between the Affiliate Restrictions and Standards of Conduct, (ii) enhance compliance and strengthen enforcement, (iii) is consistent with the purposes of the Affiliate Restrictions, and (iv) will not detract from the residual protections provided by the rule against undue preference.

A. The Requested Interpretation Ensures Consistency Between the Affiliate Restrictions and Standards of Conduct

The objective of Order No. 697 on the issue presented here was to ensure consistency in the treatment of shared employees as between the Affiliate Restrictions and the Standards of Conduct.[17] Our request for clarification fulfills this objective by aligning the treatment of shared employees under Order No. 697 with the approach taken in Order No. 717. In Order No. 717, the Commission held that any employees who are not "marketing function employees" or "transmission function employees" can be shared. To ensure consistency between the Affiliate Restrictions and Standards of Conduct, and thereby fulfill the original objective of Order No. 697, the Commission should clarify that any employees who are not market function employees or transmission function employees can be "permissibly shared" under Order No. 697.

Final Rule."); *id.* at PP 314-315 (denying as "beyond the scope of this Final Rule" a request to "extend[] the use of the employee functional approach to the Code of Conduct/affiliate restrictions promulgated by Order No. 697 and set forth in 18 CFR § 35.39 of the Commission's regulations.") (footnote omitted).

[17] Order No. 697 at P 564 (holding that "the types of permissibly shared support employees under the *standards of conduct* are the types of permissibly shared support employees that *will be* allowed under the affiliate restrictions in § 35.39(c)(2)(c).") (emphasis added).

The regulatory text accompanying Order No. 697 enumerates three categories of shared employees: "support employees," "field and maintenance employees," and "senior officers and boards of directors." The Commission has the discretion, as indicated in Order No. 697, to interpret these terms in the manner requested and thus no amendment to the regulatory text is required. In this regard, we note that the Commission found in Order No. 697-B – which was issued after Order No. 717 was issued – that risk management employees could be shared employees, and that no amendment to the regulatory text was necessary to make this interpretation.[18] The same should be true with respect to the broader interpretation we request here.[19]

We also wish to be clear that this interpretation would, as is the case under Order No. 717, define the entire universe of permissibly shared employees, not just "support" employees. Thus, our requested clarification extends to the other two categories of employees that are identified in the regulatory text as permissibly shared, *i.e.*, field and maintenance employees, and officers and directors. All of the arguments presented herein (e.g., regarding the need for consistency between the two rules and to enhance compliance and enforcement) apply to all classifications of employees that can be shared.

B. The Requested Clarification Will Enhance Compliance and Strengthen Enforcement

This clarification will not only ensure consistency, but enhance compliance and strengthen enforcement as well. When Order No. 697 was adopted the Commission was still considering the remand of the Standards of Conduct by the *National Fuel* decision.

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[18] *See* Order No. 697-B at P 59.

[19] *See* Order No. 697 at P 564 (listing, as examples of support employees, not only administrative support workers such as human resources, travel, and information technology, but also employees with other roles, such as lawyers and accountants).

The D.C. Circuit in *National Fuel* criticized and vacated the old Standards of Conduct because they sought to remedy potential abuses for which there was no actual record of abuse. After lengthy deliberations and a second Notice of Proposed Rulemaking, the Commission determined that the Standards of Conduct had become too unwieldy to enforce and therefore adopted significant structural changes to them. Specifically, the Commission found that:

> the corporate separation approach had proven difficult to implement, as evidenced by the scores of waiver requests submitted to the Commission, and impeded legitimate integrated resource planning and competitive solicitations, as reflected in the concerns raised by the electric industry in particular and also by state commissions. The Commission also found that the existing Standards are too complex to facilitate compliance or support enforcement efforts, and have had the unintended effect of making it more difficult for transmission providers to reasonably manage their businesses.[20]

The Commission therefore eliminated the corporate separation approach in favor of a functional approach and found "these reforms, by making the Standards clearer and by refocusing them on the areas where there is the greatest potential for affiliate abuse, will make compliance less elusive and subjective for regulated entities, and will facilitate enforcement of the Standards by the Commission."[21]

The same concerns will arise under the Affiliate Restrictions unless the Commission adopts the clarification requested here. First, the failure to adopt the clear separation envisioned by Order No. 717 will necessarily embroil the Commission in making numerous findings on various employee classifications – *e.g.*, whether accountants, lawyers, plant operators, linemen, customer representatives, financial

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[20] Order No. 717 at P 9.

[21] *Id.* at P 2.

experts, materials procurement personnel and a myriad of other employee classifications can be shared. Not only are these classifications difficult to make in the abstract, but the functions of employees within these classifications can differ from company to company. This process of creating long lists of "shared" employees by rule and then entertaining countless waiver requests from companies to address their unique circumstances was found by Order No. 717 "too complex to facilitate compliance or support enforcement."[22]

Second, this problem is compounded by the fact that, not only would the Affiliate Restrictions be "too complex" standing alone, but they would conflict with the Standards of Conduct. The Affiliate Restrictions and Standards of Conduct are difficult enough for the average employee to comprehend, but it becomes even more difficult to train employees on two sets of conflicting rules. For example, consider the plight of an employee working for a regulated utility who, under the Standards of Conduct, can provide support to both transmission and generation functions (including affiliates) because he is neither a transmission function employee nor marketing function employee. However, if this employee is not on the "list" of shared employees under the Affiliate Restrictions, he cannot interact with market regulated affiliates for purposes of compliance with Order No. 697. Thus, in training this employee, it must be explained to him that he can provide a support function for purposes of compliance with the Standards of Conduct, but cannot provide that same function for purposes of compliance with the Affiliate Restrictions. This is no simple thing to explain to an employee who does not understand FERC and cannot comprehend how his job description and performance

[22] *Id.* at P 9.

criteria can be fulfilled by "supporting" the entire company in some instances but not others.

Granting our request would eliminate this problem and thereby facilitate compliance by allowing a single system of employee classification that is uniform across both sets of rules. The goal of establishing a uniform system of classification is to allow companies to tell employees which interactions are allowed and which are prohibited, without requiring the employee to make a determination of which set of rules applies. This should greatly enhance understanding, and hence, compliance. Without the interpretation requested here, such simplified application of these complex rules would be difficult or impossible.

In addition to this generic problem, there are specific situations that create heightened complications that go well beyond training. One common example arises because of the patchwork of retail restructuring and traditional regulation that exists across the country, meaning that many companies operate in both regulated and restructured states and, as such, their previously integrated generation fleet is now owned by both franchised utilities and marketing affiliates. (And, in some cases, a single plant is jointly owned and hence split between franchised utilities and marketing affiliates.) This fleet of generation is typically operated and maintained by the same workforce of support employees as before retail restructuring. Under the Standards of Conduct, these employees can be shared because they do not perform transmission functions or engage in wholesale power sales. However, there is no clear answer under the Affiliate Restrictions. On the one hand, the Affiliate Restrictions authorize the sharing of field and

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maintenance employees.[23] On the other hand, an audit conducted under the predecessor to the Affiliate Restrictions (previously called the "Code of Conduct") found that "outage scheduling personnel" could not be shared.[24]

Facing this dilemma, a conservative company might chose to segregate its operation and maintenance function into two categories: (i) plant managers who, under the *Florida Power* audit finding, might be deemed involved in "outage scheduling," and (ii) other plant employees supporting these managers who might not be so classified. This creates a situation where hundreds of plant employees can be shared but report to managers who *cannot* be shared and hence are "walled off" from each other, which, in turn, creates numerous compliance problems and inefficiencies that raise costs to ratepayers.

For example, during an outage cycle, the nonregulated plant manager cannot know where his field and maintenance employees are at any given time because that knowledge might reveal which regulated plant was out at given time, thereby conveying "market information" to him. This problem then cascades into other areas by, for example, creating the need for employees' timesheets to be altered to mask where the employee was spending his time during the month. Otherwise, the plant manager would learn this information in the exercise of his normal supervisory function. For the same reason, an entire range of other data – e.g., concerning budgets, generating statistics, station dispatch cost reporting, historical performance and outage data – must be segregated so as not to be shared.

[23] *See* 18 C.F.R. § 35.39(c)(2)(ii).

[24] *See Florida Power Corp.*, 111 FERC ¶ 61,243 (2005) (attaching audit report that notes, in discussion at page 18, about sharing outage scheduling personnel).

This divisions of the workforce also creates problems for enhancing reliability. The definition of "market information" in 18 C.F.R. § 35.36(a)(8) includes "generator outages" and "historic generator volumes," thereby posing the risk that coordination among plant managers on lessons learned from prior outages or incidents could transfer information that cannot be shared. This undermines, rather than enhances, the reliability of the electric grid.

These problems can be alleviated if the clarification requested here is granted. Plant managers who do not engage in the sale of power would not be marketing function employees under the Standards of Conduct.[25] Accordingly, under the requested interpretation, they could be shared to coordinate the support for outages and thereby avoid the myriad of problems highlighted above. This would benefit ratepayers by avoiding the unnecessary costs and delays associated with the procedures enumerated above

Some may argue that allowing coordination among plant management might allow for affiliate abuse, but this is not the case. Although the timing of an outage is commercially sensitive, there are two distinct inputs into outage planning. One is the commercial input – i.e., when should the plant be online to support sales, and when can it be offline. This input is provided by marketing employees, since they are the ones whose

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[25] Under the new standards of conduct a "[m]arketing function employee" is "an employee, contractor, consultant or agent of a transmission provider or of an affiliate of a transmission provider who actively and personally engages on a day-to-day basis in marketing functions." 18 C.F.R. § 358.3(d). "Marketing functions" are, "in the case of public utilities and their affiliates, the sale for resale in interstate commerce, or the submission of offers to sell in interstate commerce, of electric energy or capacity, demand response, virtual transactions, or financial or physical transmission rights, all as subject to an exclusion for bundled retail sales, including sales of electric energy made by providers of last resort (POLRs) acting in their POLR capacity[.]" *Id.* § 358.3(c).

sales are being supported. The second input is practical in nature – i.e., when are the personnel and materials available. To our knowledge, most (if not all) plant managers fall into this second category, as do the vast majority (and perhaps all) of generating plant personnel. But regardless, anyone who is conducting a marketing function for a marketing affiliate (including a plant manager) is prohibited from receiving market information from the franchised utility, including outage schedules. So companies will be faced with a choice to adopt one approach or the other, but either way the purpose of the rule will be served.

Finally, we respectfully submit that, for many of the same reasons, the foregoing example is as problematic for the Commission's enforcement function as it is from a compliance perspective. There is no clear basis for making distinctions in an enforcement context between plant managers, middle managers, or any other employee supporting the operation and maintenance of the generation fleet. Although such a distinction was made in the *Florida Power* audit report, statements in an uncontested audit report do not create binding law. They may put the industry on notice of Staff's position in an enforcement context, but, without actual law to apply, the Commission's enforcement function is undermined, not enhanced. This is one of the fundamental reasons the Commission streamlined the Standards of Conduct – to aid its enforcement function by making the rules clearer.

C. The Requested Interpretation Fulfills The Objectives of The Affiliate Restrictions

"[T]he purpose of the affiliate restrictions is to ensure that captive customers of a franchised public utility are adequately protected from any harm that may arise from

affiliate dealings."[26] The affiliate restrictions provide a "safeguard against affiliate abuse by protecting against the possible diversion of benefits or profits from franchised public utilities (i.e., traditional public utilities with captive ratepayers) to an affiliated entity for the benefit of shareholders."[27] Under the interpretation we request, a franchised public utility with captive ratepayers could not share transmission function employees[28] or marketing function employees with a market-regulated power sales affiliate, and no one (under the no-conduit rule[29]) could share the franchised utility's market information with the marketing function employees or transmission function employees of a market-regulated power sales affiliate.[30]

These protections are sufficient to prevent the customer harms the rules seek to prevent. Absent the separation of functions requirement, a person engaged in marketing functions theoretically could harm a franchised utility's captive customers by causing the franchised utility to enter into a transaction that benefits the position of a market-

[26] Order No. 697-A at P 241.

[27] *Market-Based Rates for Wholesale Sales of Elec. Energy, Capacity, and Ancillary Servs. By Pub. Utils.*, Docket No. RM04-7-000, Notice of Proposed Rulemaking at P 120 (issued May 19, 2006) (referring to the pre-affiliate restrictions "codes of conduct").

[28] Under the new standards of conduct, a "[t]ransmission function employee" is "an employee, contractor, consultant or agent of a transmission provider who actively and personally engages on a day-to-day basis in transmission functions." 18 C.F.R. § 358.3(i). "Transmission functions" are "the planning, directing, organizing or carrying out of day-to-day transmission operations, including the granting and denying of transmission service requests." 18 C.F.R. § 358.3(h).

[29] 18 C.F.R. § 35.39(g).

[30] While it is unlikely that most market-regulated power sales affiliates would have transmission function employees, it is possible. For example, a company with market-based rates that did not have a franchised service territory could own or operate merchant transmission.

regulated power sale affiliate.[31] Similarly, absent the information sharing requirement, a marketing function employee for the franchised utility could, in theory, give a "hot tip" on a prospective transaction to the market-regulated power sales affiliate.[32] The potential for harmful conduct by a transmission function employee is the basis, of course, for the standards of conduct. However, to our knowledge there is no evidence of employees *outside* these two groups acting in a way that is consistent with the no-conduit rule, and yet harmful to captive customers. Thus, there is no need to extend protections other than the no-conduit rule beyond transmission function employees and marketing function employees.

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[31] *See, e.g.*, *Heartland Energy Servs., Inc.*, 68 FERC ¶ 61,223 at 62,062 (1994). ("Affiliate abuse takes place when the affiliated public utility and the affiliated power marketer transact in ways that result in a transfer of benefits from the affiliated public utility (and its ratepayers) to the affiliated power marketer (and its shareholders). For example, a customer may need firm power and may agree to purchase nonfirm power from an affiliated power marketer at above market rates because the affiliated public utility agrees to sell back up service to the same customer at a preferentially low rate. While the customer may pay a reasonable rate overall for the two services, which when combined meet the customer's need for firm power, the affiliated utility has diverted profits to the affiliated power marketer.").

[32] *See, e.g.*, *id.* ("The Commission is concerned about two types of transactions that can be preempted by affiliate abuse, to the detriment of the affiliated public utility's native load ratepayers. First, if an affiliated power marketer purchases power that otherwise would have been purchased by the affiliated public utility, the affiliated power marketer receives the benefit that would have otherwise gone to the affiliated public utility's ratepayers. It is very difficult to prove in a rate case that a public utility did not aggressively seek opportunities to purchase cheaper power for its ratepayers; therefore, it is unlikely that the Commission can rely solely on prudence inquiries in the rate case process to police this type of potential abuse. A second concern is that the affiliated public utility will fail to compete as a seller of power in order to benefit the affiliated marketer. This can result in the affiliated power marketer being able to sell at a higher rate.").

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D. The Rule Against Undue Preference Will Continue to Protect Captive Customers in Other Situations

By streamlining the Standards of Conduct to enhance compliance and enforcement, Order No. 717 did not eliminate the residual protections provided the prohibition on undue preference.[33] Rather, the Commission held as follows:

> Some commenters request the Commission to declare that the Standards occupy the field with respect to the area of undue preferences, and that matters not specifically covered by the Standards may not be found to be violations of the undue preferences prohibition in the FPA or the NGA. This we decline to do. There are potentially an infinite number of ways undue preferences might arise, and the Standards are not intended to be exhaustive. It is possible that an entity might embark on a course of conduct not contemplated by the Standards, which could be found upon investigation to constitute a violation of the statutory undue preference prohibitions. In such case, the entity's compliance with the Standards in other aspects would not serve as a defense.").[34]

The same caveat should apply to the Affiliate Restrictions if the requested relief is granted. Indeed, as the Commission held in Order No. 697-A, "we remind all market-based rate sellers that the FPA prohibits any seller from providing an undue preference to an affiliate or any other seller."[35] Our proposed interpretation does not, and could not, affect this statutory backstop. Rather, the Affiliate Restrictions are, and should remain, prophylactic rules and, as such, their costs should be weighed against their effectiveness in preventing harm that likely would occur in the absence of the rules.[36] Our proposed

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[33] *See* FPA sections 205 and 206, 16 U.S.C. §§ 824d-824e.

[34] Order No. 717 at P 294

[35] Order 697-A at P 242.

[36] *See Nat'l Fuel Gas Supply Corp.*, 468 F.3d at 844; *see also InterCoast Power Mktg. Co.*, 68 FERC ¶ 61,248 at 62,133 (1994) (stating, with respect to codes of conduct: "The possibility of affiliate abuse raises a difficult issue. While we must guard against affiliate abuse, we also do not want to burden affiliated power marketers with excessive, unnecessary regulatory requirements."); *Inquiry Into*

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interpretation strikes the appropriate balance, because it directly addresses the vast majority of circumstances in which harm could arise, and because companies are on notice that whether the rules apply or not, they must not provide any undue preference.

IV. Conclusion

For the reasons stated here, we respectfully request that the Commission interpret the Affiliate Restrictions involving functional separation and information sharing to apply to employees that are not "marketing function employees" or "transmission function employees" under the Standards of Conduct.

Respectfully Submitted,

/s/

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Alleged Anticompetitive Practices Related to Mktg. Affiliates of Interstate Pipelines, Order No. 497, FERC Stats. & Regs. ¶ 30,820 (1988), *order on reh'g*, Order No. 497-A, FERC Stats. & Regs. ¶ 30,868 at 31,589 (1989), *aff'd*, *Tenneco Gas v. FERC*, 969 F.2d 1187 (D.C. Cir. 1992) (stating, with respect to the Order No. 497 gas standards of conduct: "In determining the appropriate action to take, the Commission sought to fashion a rule that would prevent these abuses with the least regulatory infringement necessary.").

Document Content(s)

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