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Employee Function Replaces Corporate Separation as Cornerstone of FERC's New Standards of Conduct

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The Federal Energy Regulatory Commission adopted revised Standards of Conduct (Standards of Conduct) for Transmission Providers "• both natural gas pipelines and electric transmission systems "• in its October 16 Order No. 717. The single largest change from earlier SC is replacement of corporate separation requirement adopted in 2003 with an "employee functional approach"� that dates back to the original 1988 natural gas Standards of Conduct and the 1996 electric transmission Standards of Conduct. Order No. 717 will take effect 30 days after publication in the Federal Register, likely sometime in late November. In order to prevent preferential access to natural gas pipelines and electric transmission systems, the Standards of Conduct originally separated employees engaged in transmission from others engaged in natural gas or electricity marketing and required them to operate independently of each other. In response to the unbundling of gas sales and transportation and the proliferation of electric power marketers, FERC in 2003 changed the Standards of Conduct to require a corporate separation of transmission employees not only from those in marketing, but also from employees broadly and ambiguously characterized as "energy affiliates." The found these changes difficult to implement and an obstacle to both competitive procurement and integrated resource planning. The natural gas industry sought judicial review, and a court invalidated the 2003 Standards of Conduct revisions on "energy affiliates" as to the natural gas industry. Order No. 717 responds to the natural gas and power industries' complaints and the court's decision by jettisoning the "energy affiliate" concept and reverting to separation of employees by transmission and marketing function and no longer requiring corporate separation. In regard to merchant employees, FERC clarified that designation comprises only employees involved in natural gas or electricity sales. The Standards of Conduct do not apply to purchases and should therefore have not adverse effect on competitive procurement. And as to transmission employees, the Standards of Conduct apply only to employees involved in the day-to-day operation of pipelines or electric transmission systems; they do not apply to planning activities and therefore should not be a limitation on integrated resource planning, which has a long history in the electric power industry. In addition to the adoption of the employee functional approach and the elimination of the concept of "energy affiliates,"� Order No. 717 also made a variety of other clarifications to its Standards of Conduct regulations in response to industry comments. FERC's hope is that the narrowing of the scope of its Standards of Conduct regulations will facilitate compliance. For that reason, the new Standards of Conduct is likely to take center stage in future FERC enforcement actions.