

129 FERC ¶ 61,123  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 358

(Docket No. RM07-1-002; Order No. 717-B)

(Issued November 16, 2009)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Order on Rehearing and Clarification.

SUMMARY: The Federal Energy Regulatory Commission (Commission) issued Order No. 717-A to make even clearer the Standards of Conduct as implemented by Order No. 717. This order addresses requests for rehearing and clarification concerning paragraph 80 of Order No. 717-A and whether an employee who is not making business decisions about contract non-price terms and conditions is considered a “marketing function employee.”

EFFECTIVE DATE: This rule will become effective November 23, 2009.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

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Before Commissioners: Jon Wellinghoff, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
and Philip D. Moeller.

Standards of Conduct for Transmission Providers

Docket No. RM07-1-002

ORDER NO. 717-B

ORDER ON REHEARING AND CLARIFICATION

(Issued November 16, 2009)

**I. Introduction**

1. On October 16, 2008, the Commission issued Order No. 717 amending the Standards of Conduct for Transmission Providers (the Standards of Conduct or the Standards) to make them clearer and to refocus the rules on the areas where there is the greatest potential for abuse.<sup>1</sup> On October 15, 2009, the Commission issued Order No. 717-A to address requests for rehearing and clarification of Order No. 717, largely affirming the reforms adopted in Order No. 717.<sup>2</sup> In this order, the Commission grants limited rehearing and clarification to address certain specific matters petitioners raised regarding one of the Commission's determinations in Order No. 717-A.

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<sup>1</sup> Standards of Conduct for Transmission Providers, Order No. 717, 73 FR 63796 (Oct. 27, 2008), FERC Stats. & Regs. ¶ 31,280 (2008) ("Order No. 717").

<sup>2</sup> Standards of Conduct for Transmission Providers, Order No. 717-A, 74 FR 54463 (Oct. 22, 2009), FERC Stats. & Regs. ¶ 31,297 (2009) ("Order No. 717-A").

## II. Discussion

### Independent Functioning Rule: Marketing Function Employees

2. In paragraph 80 of Order No. 717-A, the Commission stated the following:

The Commission clarifies that an employee in the legal, finance or regulatory division of a jurisdictional entity, whose intermittent day-to-day duties include the drafting and redrafting of non-price terms and conditions of, or exemptions to, umbrella agreements is a “marketing function employee.” “Marketing functions” are not limited to only price terms and conditions of a contract, because non-price terms and conditions of a contract could contain information that an affiliate could use to its advantage. For example, delivery or hub locations in a contract are non-price terms that could be used to favor an affiliate. In addition, negotiated terms and conditions could affect the substantive rights of the parties. For this reason, we decline to make a generic finding to limit “marketing functions” to only price terms and conditions, but will consider waiver requests concerning an employee whose intermittent duties involve drafting non-price terms and conditions.<sup>3</sup>

### Requests for Rehearing and Clarification

3. Several parties have requested expedited clarification regarding paragraph 80 of Order No. 717-A.<sup>4</sup> Specifically, EEI and Western Utilities request that the Commission clarify that legal, finance, and regulatory personnel can be shared between an entity’s

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<sup>3</sup> Order No. 717-A at P 80.

<sup>4</sup> Edison Electric Institute (EEI) Oct. 30, 2009 Request for Clarification at 7; The Western Utilities Compliance Group (Western Utilities) Nov. 2, 2009 Request for Clarification at 6; Otter Tail Power Company (Otter Tail) Nov. 10, 2009 Request for Clarification at 1; Central Vermont Public Service Corporation (Central Vermont) Nov. 12, 2009 Request for Clarification at 1.

transmission and marketing function units.<sup>5</sup> Similarly, Otter Tail and Central Vermont seek clarification that lawyers, finance, and regulatory personnel may continue to provide support to marketing function employees, including drafting and redrafting contract non-price terms, without being classified as marketing function employees.<sup>6</sup>

4. EEI also requests clarification that paragraph 80 in Order No. 717-A was “intended to convey that making business decisions about non-price terms and conditions can be a marketing function if the other ‘marketing function’ criteria are met.”<sup>7</sup>

5. If the Commission does not grant these requested clarifications prior to Order No. 717-A taking effect, EEI, Western Utilities, Otter Tail, and Central Vermont request that the Commission change the effective date of paragraph 80 until 90 days after the Commission issues an order addressing the merits of the issue.

#### **Commission Determination**

6. The Commission clarifies that the language in paragraph 80 of Order No. 717-A was overly broad. The Commission further clarifies that we intended to state in paragraph 80 of Order No. 717-A that an employee making business decisions about non-price terms and conditions can be considered a “marketing function employee” because that employee is actively and personally engaged in marketing functions. However, an

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<sup>5</sup> EEI at 7; Western Utilities at 6.

<sup>6</sup> Otter Tail at 1; Central Vermont at 1.

<sup>7</sup> EEI at 7-8.

employee who simply drafts or redrafts a contract, including non-price terms and conditions, without making business decisions is not a “marketing function employee.” In making our findings in paragraph 80 in Order No. 717-A, the Commission did not intend to depart from the finding in paragraph 131 in Order No. 717 that employees are not subject to the Independent Functioning Rule if they do not perform transmission functions or marketing functions or to depart from the following examples in P 131:

[I]f an attorney is rendering legal advice, he may consult with both transmission function employees and marketing function employees. Likewise, a risk management employee may develop risk guidelines for both transmission function employees and marketing function employees. And regulatory personnel may present before regulatory bodies filings that cover both transmission and marketing issues. Of course, all such employees would remain subject to the No Conduit Rule, and are prohibited from transmitting transmission function information to marketing function employees.<sup>8</sup>

7. In light of the above clarification to paragraph 80 of Order No. 717-A, we will deny the petitioners’ request to extend the compliance date with respect to paragraph 80.

### **III. Document Availability**

8. In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (<http://www.ferc.gov>) and in FERC's Public Reference Room during normal business

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<sup>8</sup> Order No. 717 at P 131.

hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, N.E., Room 2A, Washington D.C. 20426.

9. From FERC's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

10. User assistance is available for eLibrary and the FERC's website during normal business hours from FERC Online Support at 202-502-6652 (toll free at 1-866-208-3676) or email at [ferconlinesupport@ferc.gov](mailto:ferconlinesupport@ferc.gov), or the Public Reference Room at (202) 502-8371, TTY (202)502-8659. E-mail the Public Reference Room at [public.referenceroom@ferc.gov](mailto:public.referenceroom@ferc.gov).

#### **IV. Effective Date**

11. Changes to Order No. 717-A adopted in this order on rehearing and clarification are effective November 23, 2009.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.