

may share transmission function employees and information with other public utility Transmission Providers. Nor does it appear that communications between FERC-regulated gas Transmission Providers and FERC-regulated public utility Transmission Providers is a problem for the same reason. Moreover, the focus of the standards of conduct is to prevent transmission market power from extending to other products or services, so Transmission Provider to Transmission Provider communications should not violate the purpose of the rule. The definition of energy affiliates, therefore, is clarified to exclude affiliated Transmission Providers. Many commenters expressed support for the language proposed in the Major Issues Analysis, and we will adopt it.

4. Holding or Service Companies

52. Several commenters, including INGAA, Dominion, EEI, NiSource, and Williams, argued that the definition of Energy Affiliates could be construed to include service or holding companies because the definition includes affiliates that engage in financial transactions related to the transmission of natural gas or electricity. The commenters argued that this could limit the ability of senior officers and directors of the holding or service companies to exercise their fiduciary duties for their subsidiaries.

53. As discussed in the Major Issues Analysis, holding and service companies typically do not participate in the energy or transmission markets, and if they do not participate in those markets, they would not be considered Energy Affiliates. As discussed above, affiliates engaged in financial transactions that concern energy or natural gas commodity or transmission markets will be considered Energy Affiliates. Therefore, the Major Issues Analysis recommended that the Commission adopt a definition of Energy Affiliate that excludes holding or service companies that do not engage in and are not involved in energy or natural gas commodity or transmission transactions. The Major Issues Analysis also recommended that the Commission prohibit any affiliate, including holding companies or others exempt from the standards of conduct, from acting as a conduit for improperly sharing information.

54. Supplemental comments in response to the language proposed by the Major Issues Analysis were generally supportive of the holding company exception, including those filed by DTE, Gulf South, National Grid, and PacifiCorp and PSE&G. However, several commenters expressed concern

that the revision recommended in the Major Issues Analysis was insufficient. They claimed that, even with the narrowing proposed in the Major Issues Analysis, they could not comply with the standards of conduct and the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley Act), which requires senior corporate executives to be fully informed about the financial conditions of their corporations and their subsidiaries.³⁰ As noted by various commenters, including EEI and Duke, a parent company with an electric utility or gas distribution system as an operating division would not qualify for the exception proposed by the Major Issues Analysis. They claimed that separating the management or forming a holding company would require corporate reorganization, could be costly, and might trigger the restrictive requirements of the Public Utility Holding Company Act (PUHCA).³¹

55. For example, Duke argued that complying with the Final Rule and the Sarbanes-Oxley Act would be difficult because the Duke Power Division of Duke Energy, which engages in transmission and wholesale and bundled electric sales, would be considered an Energy Affiliate of its interstate natural gas pipeline subsidiaries, and the pipeline subsidiaries would be prohibited from sharing information with the senior management of its Energy Affiliate/parent company, Duke Energy.

56. The Major Issues Analysis specifically excluded holding and service companies, but did not mention "parent companies." Duke encouraged the Commission to extend the holding company exemption to apply to parent companies that may not fall within the legal definition of "holding company," as set forth by PUHCA. NGSA, APGA and IPAA all support Duke's proposal to the extent that the parent companies are not involved in energy transactions. The Commission is adopting this recommendation and will include "parent" companies that are not involved in energy or transmission transactions in the "holding company" exception from the definition of Energy Affiliate.

57. Several commenters were also concerned about Transmission Providers with service corporation subsidiaries that employ virtually all corporate employees, including those who do work for Transmission Providers and Energy Affiliates. The

Commission clarifies that if a Transmission Provider utilizes a service corporation or other subsidiary as the mechanism for employment, all the employees assigned, dedicated or working on behalf of a particular entity, e.g., a Transmission Provider or Energy Affiliate, are subject to the standards of conduct requirements as if they were directly employed by the Transmission Provider or Energy Affiliate.

58. In addition, in follow-up comments, National Grid encouraged the Commission to clarify that the holding company exclusion extends to companies engaged or involved in markets not related to energy, power or transmission. The Commission so clarifies.

5. Foreign Affiliates

59. Thirteen commenters, including INGAA, six interstate natural gas pipelines, EEI, five public utility Transmission Providers and Shell objected to the proposed definition of Energy Affiliates to the extent that it included foreign affiliates. They are concerned that Transmission Providers will be required to treat affiliates in Europe, South America and the Caribbean as Energy Affiliates. The Major Issues Analysis urged the Commission to exclude foreign affiliates and revised the draft regulatory text accordingly. Virtually all follow-up comments supported the staff's proposal.

60. The Commission sees no reason to be concerned about the possibility that a Transmission Provider will extend its market power by giving foreign affiliates undue preferences where the foreign affiliates do not participate in energy markets in the United States. The Final Rule clarifies that the definition of Energy Affiliates excludes foreign affiliates that do not participate in the United States (U.S.) energy or transmission markets.

61. In addition, where a foreign affiliate has an ownership interest in a jurisdictional Transmission Provider, that affiliate is, by virtue of its ownership interest, participating in the U.S. energy or transmission markets. For example, a joint venture U.S.-Canadian pipeline would have to treat as Energy Affiliates its Canadian affiliates that buy, sell or trade natural gas or electric energy or engage in or are involved in transmission transactions in U.S. energy markets.

62. On a slightly different note, several pipelines including Alliance, Maritimes and Northeast Pipeline, as well as Duke Energy, Canadian Association of Petroleum Producers and the Alberta Department of Energy,

³⁰ See Section 302 of the Sarbanes-Oxley Act, Pub. L. 107-204, Sec. 9, 116 Stat. 745, 777 (2002).

³¹ Public Utility Holding Company Act of 1935, 15 U.S.C. 79a *et seq.* (2000).