

programs.⁴² The Commission is also clarifying, however, that if a retail sales function employee engages in any wholesale sales, such as selling excess generation to a non-retail customer, the retail function will be treated as a wholesale merchant function. It is not appropriate for an entity that participates in the wholesale market to obtain an undue preference when competing with non-affiliates for transmission capacity.

79. Under the Final Rule, the definition of Marketing, Sales and Brokering includes: A sale for resale of natural gas or electric energy in interstate commerce. Sales and marketing employee or unit includes: (1) any interstate natural gas pipeline's sales operating unit, to the extent provided in § 284.286 of this chapter, and (2) a public utility Transmission Provider's energy sales unit, unless such unit engages solely in bundled retail sales. If a retail sales unit engages in any wholesale sales, the separation of functions requirement will apply.

iv. Definition of a Transmission Function Employee

80. Although the NOPR did not provide a definition for the term "Transmission Function employee," many commenters, including Duke, urged the Commission to adopt a definition to provide additional clarity to the regulations. Following the May 21 Conference, several commenters provided draft regulatory text. In response to the comments, the Commission will add a definition for the term "Transmission Function" to the Final Rule, as follows:

Transmission Function employee means an employee, contractor, consultant or agent of a Transmission Provider who conducts transmission system operations or reliability functions, including, but not limited to, those who are engaged in day-to-day duties and responsibilities for planning, directing, organizing or carrying out transmission-related operations.

v. Definition of a Reseller

81. The NOPR defined a "reseller" as any transmission customer who offers to sell transmission capacity it has purchased. As noted by Duke, Carolina Power and Light, FPA and several other commenters, the definition of "reseller" was used in the NOPR, but was not used in the rest of the regulatory text. They request that the term be deleted. The Commission agrees and is deleting the term from the Final Rule.

D. Independent Functioning—§ 358.4

82. The NOPR proposed § 358.4, as follows:

(a) Separation of functions.

(1) Except in emergency circumstances affecting system reliability, the transmission function employees of the Transmission Provider must function independently of the Transmission Provider's marketing or sales employees and its energy affiliates' employees.

(2) Notwithstanding any other provisions in this section, in emergency circumstances affecting system reliability, Transmission Providers may take whatever steps are necessary to keep the system in operation. Transmission Providers must report to the Commission and post on the OASIS or Internet website, as applicable, each emergency that resulted in any deviation from the standards of conduct, within 24 hours of such deviation.

(3) The Transmission Provider is prohibited from permitting its sales and marketing employees or employees of its energy affiliates from: (i) conducting transmission system operations or reliability functions; and (ii) having access to the system control center or similar facilities used for transmission operations or reliability functions that differs in any way from the access available to other transmission customers.

83. Several commenters proposed an alternative "functional approach," while others focused on implementation of the proposed independent functioning requirement, including: (1) Sharing of senior management between Transmission Providers and their Marketing and Energy Affiliates (corporate governance); (2) sharing of non-transmission support employees between Transmission Providers and Marketing and Energy Affiliates; (3) sharing of field and maintenance employees between Transmission Providers and Marketing and Energy Affiliates; (4) allowing Transmission Provider employees to engage in operational or cash-out sales.

84. In response to the NOPR, commenters focused on whether certain types of non-transmission function employees could be shared between Transmission Providers and their Energy and Marketing Affiliates. The Major Issues Analysis recommended that the Commission adopt the language proposed in the NOPR, with some clarifications to permit the sharing of "support-type" employees. During the May 21 Conference and in follow-up comments, several entities made recommendations regarding an alternative approach.

85. As discussed in more detail below, the Commission is adopting the independent functioning requirement with the modifications discussed below.

The independent functioning requirement in the Final Rule is as follows:

(a) Separation of functions.

(1) Except in emergency circumstances affecting system reliability, the transmission function employees of the Transmission Provider must function independently of the Transmission Provider's Marketing or Energy Affiliates' employees.

(2) Notwithstanding any other provisions in this section, in emergency circumstances affecting system reliability, a Transmission Provider may take whatever steps are necessary to keep the system in operation. Transmission Providers must report to the Commission and post on the OASIS or Internet website, as applicable, each emergency that resulted in any deviation from the standards of conduct, within 24 hours of such deviation.

(3) The Transmission Provider is prohibited from permitting Marketing or Energy Affiliates' employees from: (i) conducting transmission system operations or reliability functions; and (ii) having access to the system control center or similar facilities used for transmission operations or reliability functions that differs in any way from the access available to other transmission customers.

(4) Transmission Providers are permitted to share support employees and field and maintenance employees with their Marketing and Energy Affiliates.

i. Background and History of Independent Functioning Requirement

86. The principle underlying proposed § 358.4 is that when employees engaged in transmission services function independently, there are significantly fewer opportunities to give unduly preferential treatment to affiliates engaged or involved in commodity transactions or other business activities that compete with non-affiliated customers of the Transmission Providers. Section 358.4(a) combines the separation of functions requirements of current §§ 161.3(g)⁴³ and 37.4(a)(1) and (2), ensures that the transmission function employees of the Transmission Provider function independently of the Transmission Provider's sales and marketing employees and employees of the Energy Affiliates. Like the separation of functions requirement in current § 37.4(a)(1) and (2), employees engaged in transmission functions would be required to function

⁴³ 43 Under Standard G, 18 CFR 161.3(g) (2003), to the maximum extent practicable, a pipeline's operating employees and the operating employees of its marketing affiliate must function independently of each other. In Order No. 497-E, the Commission defined operating employees as, in part, those who are engaged in day-to-day duties and responsibilities for planning, directing, organizing or carrying out gas-related operations, including gas transportation, gas sales or gas marketing activities. Order No. 497-E at 30,996.

⁴² American Electric Power Service Corporation, 81 FERC ¶ 61,332 (1997).