

independently; but, in the event of emergencies affecting system reliability, may take whatever steps are necessary to keep the transmission systems in operation, including, if needed, using affiliates' employees.

87. Currently, under § 37.4(a)(2), if the transmission function of a public utility Transmission Provider utilizes the services of a wholesale merchant function employee during an emergency circumstance affecting system reliability, the public utility Transmission Provider posts each such event on its OASIS and reports it to the Commission in an "EY" docket within 24 hours of a deviation. The Final Rule holds interstate natural gas pipeline Transmission Providers to the same requirement under proposed § 358.4(a). Since 1998, the Commission has received as few as eight and as many as 18 reports of emergency circumstances necessitating deviations from the separation of functions requirement per year.

ii. Energy Affiliate Function or Commercial Function

88. The NOPR proposed to govern the relationship between the Transmission Provider and all of its Energy Affiliates. This approach recognizes that the Commission has jurisdiction over the Transmission Provider and is exercising that jurisdiction by governing the behavior of the Transmission Provider to ensure that it does not provide any Energy Affiliate with any undue preferences. Thus, this approach, which focuses on the corporate entities (*e.g.*, the Transmission Provider) and its employees, restricts the behavior and communications between the regulated Transmission Provider and its Energy Affiliates (Energy Affiliate Approach). The Commission uses this approach in the existing standards of conduct, *i.e.*, the standards of conduct govern the relationship between the interstate natural gas pipeline and its Marketing Affiliates and the public utility Transmission Provider and its wholesale merchant function and affiliated power marketer(s).

89. The majority of commenters supported the Energy Affiliate approach.⁴⁴ The Energy Affiliate approach recognizes some of the efficiencies of vertical integration by permitting sharing of certain "support" type functions and service.

90. As an alternative, several commenters proposed the "functional approach." Under a functional

approach, the standards of conduct would govern the relationship between the "transmission functions" of a Transmission Provider and its Energy Affiliates and the "commercial functions"⁴⁵ or the "energy functions"⁴⁶ of the Transmission Provider and its Energy Affiliates (Commercial Function Approach). In a Commercial Function approach, the transmission function of a pipeline and the transmission function(s) of its affiliated LDCs, affiliated intrastate pipelines and other affiliates with transmission services would be able to share employees and communications with each other, and the sales function of a pipeline and the sales functions of any of its affiliates would be able to share employees and communications with each other. But the sales and transmission functions would be prohibited from sharing employees and information with each other. The functional approach prohibits the Transmission Provider's "transmission function" from sharing employees or information with the "commercial" or "energy" function of the energy affiliates, but permits the sharing of employees and information with other "non-commercial" functions of the Energy Affiliates.

91. The functional approach was the subject of much discussion at the May 21 Conference, and 13 commenters supported the functional approach in their supplemental comments.⁴⁷ NASUCA opposed the commercial function approach. Many of the trade associations that submitted comments on specific aspects of the NOPR were silent on the type of approach that should be used. Some of the proponents of the functional approach, including Portland, argue that the Commission's approach in the NOPR represents a departure from the requirements of Order No. 889.

92. The Commission has carefully considered the comments and alternative proposals for structuring the Final Rule and is adopting the Energy Affiliate approach. With respect to the Energy Affiliate approach, the regulated Transmission Provider is responsible for

ensuring separation of functions and compliance with information disclosure prohibitions between itself and its Energy Affiliates. Under the Commercial Function approach, the responsibility for ensuring compliance would be shared by the transmission function of the Transmission Provider and the non-jurisdictional transmission functions of the unregulated Energy Affiliates. The Commission does not believe that such shared responsibility is workable. The Commission is concerned that it would not be able to enforce compliance with the standards of conduct based on a commercial function approach.

93. The advocates of the Commercial Function approach argued that Transmission Providers would be permitted to share more "support-type" employees than they would under the Energy Affiliate approach. While it may be less costly for some companies to implement the Commercial Function approach, particularly for those companies that are already structured on a functional basis, such as Dominion and Cinergy, the Commission is concerned that it does not have the jurisdiction to direct unregulated Energy Affiliates on how to structure their functions, operations and communications.

94. The Energy Affiliate approach has worked successfully in the past and avoids concerns whether FERC has jurisdiction to direct an unregulated Energy Affiliate on how to structure its functions, operations and communications.

iii. Sharing of Non-Transmission Functions

95. Forty-six commenters, including interstate natural gas pipelines, public utility Transmission Providers, AGA, Cleco Power, EEI, First Energy, INGAA, NGA and Industrials, were very concerned because the NOPR was silent on whether the Commission would implement the independent functioning requirement consistent with the case law that has developed under the current standards of conduct. Several commenters, including INGAA, asked that the Commission specify which "support employees" and "field personnel" can be shared between the Transmission Provider and its Energy Affiliates. Several commenters, including Cinergy and LG&E, requested that the Commission codify the proposed exception that allows the sharing of field and maintenance employees or identify the types of employees who would qualify as non-operating, *e.g.*, legal, accounting, human resources, and information technology.

⁴⁴ However, not all commenters supported the breadth of the definition of Energy Affiliates, *i.e.*, expanding it beyond marketing affiliates.

⁴⁵ Dominion proposed defining commercial function employees as those who engage in certain day-to-day activities such as transmission transactions, buy, sell or trade gas or energy or manage or control transmission capacity.

⁴⁶ Entergy proposed defining energy function employees as those who engage in purchases for resale, sale, or trade of natural gas or electric energy, but does not capture those that "control" capacity, but do not "hold" it (asset managers).

⁴⁷ AEP, Cinergy, Duke (partially), Dominion, Entergy, EEI (partially), FPL, Keyspan, National Grid, PG&E, Portland General Electric, Ohio Commission and Xcel.