

### III. Order

In light of the foregoing, the Commodity Futures Trading Commission (the "Commission") has determined to issue the following Order, pursuant to its authority under the provisions of the Commodity Exchange Act, 7 U.S.C. 1 *et seq.*, and in compliance with the Anti-Deficiency Act, 31 U.S.C. 1341 and 1342.

*It is hereby ordered* that, in the event of a lapse in appropriations (also referred to as "shutdown") commencing at 12:01 a.m. on April 9, 2011, the Commission will commence operating according to the procedures set forth in this Order:

1. *Tolling and Extension of Certain Procedural Time Limits.* The Commission will not officially receive or process any filings, or review any matters for Commission approval or action to the extent that the matters are not directly related to the protection of property or market surveillance. This applies to rule, rule amendment and contract certifications, except for emergency rules certified pursuant to regulation 40.6(a)(2); rules, rule amendments and contracts voluntarily submitted for Commission approval or review; requests for contract market designation and derivatives clearing organization and derivatives trade execution facilities registration; and other requests for Commission approval or other action. Specifically, the time limits for Commission action shall be tolled for §§ 1.47 and 1.48 of the Commission's regulations, and parts 36, 37, 38, 39, 40 and 41. Tolling also applies to requests and appeals submitted under §§ 145.7 and 145.9 of the Commission's regulations, and requests submitted under § 140.99.

The time for officially receiving, processing, or reviewing any new matters under these provisions of the Commission's regulations shall be tolled until the Commission is able to resume full operations. For matters that are pending under these provisions when a lapse in appropriations occurs, all applicable time deadlines for Commission action will be tolled until the Commission is able to resume full operations.

This tolling and extension of time limits also shall apply to certain procedural rules associated with Commission adjudicatory actions, in particular the time-limited procedural rules under parts 3, 9, 10, 12, and 171. For matters that are currently pending before the Commission under any of these parts, all applicable time deadlines for Commission action will be tolled until the shutdown is no longer

in effect. Moreover, all time deadlines for filings by a party in an adjudicative proceeding that arise during a shutdown period will be extended until one business day after the Commission resumes its full operations. The filing of replies to any filing delayed by a lapse in appropriations will have its reply period extended for the same number of days.

2. *Procedures and Time Limits Not Extended or Tolled.* The Commission will continue to receive and process filings required of a registered entity or intermediary under certain Commission regulations, specifically under §§ 1.10, 1.12, 1.17, 1.32, 1.65, 30.7, and 40.6(a)(2), or any emergency notification to the Commission that may be required by any rule of a registered entity that has been approved by or self-certified to the Commission. Paragraph 1 also shall not apply to filings under parts 15, 16, 17, 18, 19, and 21 of the Commission's regulations.

3. *Extension of Open Comment Periods on Proposed Regulation and Other Matters that may be Subject to a Request for Comment by the Commission.* Any comment period for a proposed rulemaking or other matter that may be subject to a request for comment by the Commission that terminates during the shutdown shall be extended until one business day after the Commission resumes its full operations after a shutdown.

Issued in Washington, DC, on April 8, 2011, by the Commission.

**David A. Stawick,**

*Secretary of the Commission.*

[FR Doc. 2011-9031 Filed 4-13-11; 8:45 am]

**BILLING CODE 6351-01-P**

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

#### 18 CFR Part 358

[Docket No. RM07-1-003; Order No. 717-D]

#### Standards of Conduct for Transmission Providers

**AGENCY:** Federal Energy Regulatory Commission, DOE.

**ACTION:** Order on rehearing and clarification.

**SUMMARY:** The Federal Energy Regulatory Commission (Commission) issued Order No. 717-A to address requests for rehearing and make clearer the Standards of Conduct as implemented by Order No. 717. The

Commission issued Order No. 717-B to address expedited 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." Order No. 717-C addressed requests for rehearing and clarification concerning Order No. 717-A. This order addresses an additional request for rehearing and clarification concerning Order No. 717-C.

**DATES:** *Effective Date:* This rule will become effective May 16, 2011.

**FOR FURTHER INFORMATION CONTACT:** Susan Miller, Office of the General Counsel—Energy Markets, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. (202) 502-8977.

**SUPPLEMENTARY INFORMATION:**

Before Commissioners: Jon Wellinghoff, Chairman; Marc Spitzer, Philip D. Moeller, John R. Norris, and Cheryl A. LaFleur.  
Issued April 8, 2011.

### 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> On November 16, 2009, the Commission issued Order No. 717-B to address expedited 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."<sup>3</sup> On April 16, 2010 the

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

<sup>3</sup> *Standards of Conduct for Transmission Providers*, Order No. 717-B, 74 FR 60153 (Nov. 20, 2009), 129 FERC ¶ 61,123 (2009) (Order No. 717-B). On October 30, 2009, Edison Electric Institute (EEI) filed a request for expedited clarification of a single issue addressed in Order No. 717-A. The Commission determined that it should address this issue expeditiously even though the time allowed under the regulations for filing rehearing requests had not yet expired. For this reason, the Commission issued Order No. 717-B on November 16, 2009, in which it addressed a single clarification request of EEI, Western Utilities, Otter Tail and

Commission issued Order No. 717-C to provide additional clarification concerning matters petitioners raised regarding the Commission's determinations in Order No. 717-A.<sup>4</sup> In this order, the Commission addresses an additional request for rehearing and clarification concerning Order No. 717-C.

## II. Discussion

2. In paragraph 16 of Order No. 717-C, the Commission clarified that "a system impact study performed pursuant to a request for energy resource interconnection service or network resource interconnection service is similar to long-range planning and therefore not a transmission function, because the focus of such a study is to determine the impact of the proposed interconnection on the safety and reliability of the transmission provider's transmission system, but without conveying a right to transmission service".<sup>5</sup> As a result, the Commission concluded that the performance of a system impact study in the context of evaluating an energy resource interconnection service and network resource interconnection service is not a transmission function.

3. The Transmission Access Policy Study Group (TAPS) requests rehearing and clarification of one aspect of Order No. 717-C. Specifically, TAPS requests that the Commission grant rehearing to hold that employees who perform system impact studies (or other studies) in connection with interconnection service requests are transmission function employees. TAPS argues that the consequence of a finding that "performance of a system impact study in the context of evaluating an energy resource interconnection service and network resource interconnection service is not a transmission function" is that the studies may be performed by the Transmission Provider's "merchant-function" personnel.

4. TAPS further argues that the Commission created an inconsistency with its regulatory text when it clarified in Order No. 717-C that the performance of a system impact study in the context of evaluating an energy resource interconnection service and network resource interconnection service is not a transmission function. Specifically, TAPS cites 18 CFR

358.3(h), which defines "transmission functions" as "the planning, directing, organizing or carrying out of day-to-day transmission operations, including the granting and denying of transmission service requests." TAPS then argues that because 18 CFR 358.3(f) defines "transmission" as "the interconnection with jurisdictional transmission facilities," employees who perform studies that identify upgrades needed for interconnection, or who otherwise help to determine the terms on which interconnection may occur, perform a transmission function.

5. Alternatively, TAPS requests that the Commission clarify that system study information be treated like other planning information, which the Commission requires transmission providers to make available on a non-discriminatory basis to all interested transmission customers. TAPS is concerned that if "merchant-function" personnel are permitted to conduct interconnection-related studies and have access to customer information, "merchant-function" personnel would obtain undue competitive advantages over any other transmission customer.

6. TAPS further requests clarification of paragraph 17 of Order No. 717-C to make clear that where an employee performs system impact studies in response to transmission service requests, the employee's designation as a transmission-function employee does not turn on the duration of the requested transmission service.

### *Commission Determination*

7. We deny TAPS' request that we classify employees who perform system impact studies in connection with interconnection service requests as transmission function employees.<sup>6</sup> Whether an employee performing a system impact study is a transmission function employee depends upon the purpose for which that study is being performed. The key factor in determining whether the employee is performing a transmission function in conducting the system impact study is

whether the performance of that study implicates the day-to-day operation of the transmission system. Thus, an employee performing system impact studies that do not implicate the day-to-day operations of the transmission system would not be a transmission function<sup>7</sup> employee, even in those instances where the system impact study pertains to interconnection.

8. In Order No. 717-C, we found that a system impact study performed pursuant to a request for energy resource interconnection service or network resource interconnection service is similar to long-range planning and therefore not a transmission function because it does not involve the conveyance of a right to transmission service. Contrary to the argument raised by TAPS, our focus in reaching this determination was not based on a distinction between transmission and interconnection. Our conclusion was based upon our finding that these types of system impact studies are analogous to transmission long range planning studies, and that neither type of study implicates day-to-day transmission operations.<sup>8</sup> The performance of a system impact study is not a transmission function so long as the performance of this system impact study is not carried out as part of day-to-day transmission operations, including the granting or denying of transmission service.<sup>9</sup>

9. TAPS is also incorrect that the Commission's clarification in Order No. 717-C concerning the performance of system impact studies created an inconsistency with its regulatory text. The definition of "transmission functions" includes "the planning, directing, organizing or carrying out of day-to-day transmission operations, including the granting and denying of transmission service requests."<sup>10</sup> "Transmission" is defined to include "the interconnection with jurisdictional transmission facilities."<sup>11</sup> Thus, the definition of transmission functions includes the planning, directing, organizing or carrying out of day-to-day interconnection operations with jurisdictional transmission facilities. Because of the limiting phrase "day-to-day transmission operations," TAPS is incorrect in its conclusion that "transmission functions" always include

Central Vermont. All other timely requests for rehearing, i.e. those filed by November 16, 2009, were addressed in Order No. 717-C.

<sup>4</sup> *Standards of Conduct for Transmission Providers*, Order No. 717-C, 75 FR 20909 (Apr. 22, 2010), 131 FERC ¶ 61,045 (2010) (Order No. 717-C).

<sup>5</sup> *Id.* P. 16.

<sup>6</sup> In a footnote, TAPS contends that employees who perform facility studies and feasibility studies in response to requests for interconnection service should be transmission function employees. TAPS, Motion for Rehearing at p. 3-4 n.4. TAPS concedes that Order No. 717-C does not address the performance of these types of studies. Given that TAPS failed to proffer this argument during previous stages of the process and that Order No. 717-C does not address this issue, TAPS cannot raise this argument at this juncture in the proceeding. See, e.g., *PJM Interconnection, LLC*, 126 FERC ¶ 61,030, at P 15 & n.10 (2009) (A request for rehearing of a new issue is outside the proper scope of the rehearing). See also, *Wholesale Competition in Regions with Organized Electric Markets*, 129 FERC ¶ 61,252, at P 9 & n.18 (2009).

<sup>7</sup> 18 CFR 358.3(h).

<sup>8</sup> See Order No. 717-C, 131 FERC ¶ 61,045 at P 11-17. See also Order No. 717, FERC Stats. & Regs. ¶ 31,280 at P 146-147.

<sup>9</sup> Order No. 717-C, 131 FERC ¶ 61,045 at P 17.

<sup>10</sup> 18 CFR 358.3(h).

<sup>11</sup> 18 CFR 358.3(f).

interconnection-related system impact studies.

10. Similarly, we deny TAPS's request that the information from system impact studies be made available on a non-discriminatory basis to all interested transmission customers. TAPS erroneously assumes that the Commission determined that system impact studies (or other studies) performed in response to interconnection requests are planning activities that may be conducted by marketing function employees. Marketing function employees may not perform system impact studies (or other studies) in response to interconnection requests since the studies would involve the use and analysis of non-public transmission information. As we stated in Order No. 717, planning personnel who do not qualify as marketing function employees may discuss information with transmission function employees.<sup>12</sup> However, we reiterated that the No Conduit Rule applied in this situation, stating that if transmission employees share transmission function information with planning personnel, the planning personnel may not pass such information on to marketing function employees. The clear implication of these statements is that while planning studies may be conducted by personnel who are not transmission function employees, marketing function employees may not participate in the preparation of studies which involve the use and analysis of non-public transmission information.<sup>13</sup>

11. We grant TAPS's clarification request that when an employee performs a system impact study in response to a transmission service request, that employee is a transmission function employee regardless of the duration of the requested transmission service. This clarification is consistent with our previous conclusion that the designation of an employee as a transmission function employee does not depend upon the duration of the requested transmission service.<sup>14</sup>

### III. Document Availability

12. In addition to publishing the full text of this document in the **Federal**

<sup>12</sup> Order No. 717, FERC Stats. & Regs. ¶ 31,280 at P 151.

<sup>13</sup> Order No. 717 specifically recognized that there are employees who are neither transmission function employees nor marketing function employees. See, e.g., Order No. 717, FERC Stats. & Regs. ¶ 31,280 at P 174 ("Transmission function employees are no longer barred from interacting with all the employees of a marketing or energy affiliate (only marketing function employees)").

<sup>14</sup> See *Standards of Conduct for Transmission Providers*, Order No. 717-A, 74 FR 54463 (Oct. 22, 2009), FERC Stats. & Regs. ¶ 31,297, at P 27 (2009).

**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 hours (8:30 a.m. to 5 p.m. Eastern time) at 888 First Street, NE., Room 2A, Washington, DC 20426.

13. 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.

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### IV. Effective Date

15. Changes to Order No. 717-C adopted in this order on rehearing and clarification are effective May 16, 2011.

By the Commission.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2011-9059 Filed 4-13-11; 8:45 am]

**BILLING CODE 6717-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

#### 21 CFR Part 878

[Docket No. FDA-2011-N-0188]

#### Medical Devices; General and Plastic Surgery Devices; Classification of the Low Level Laser System for Aesthetic Use

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is classifying the low level laser system for aesthetic use into class II (special controls). The special control(s) that will apply to the device is entitled "Class II Special Controls Guidance Document: Low Level Laser System for Aesthetic Use." The Agency is classifying the device

into class II (special controls) in order to provide a reasonable assurance of safety and effectiveness of the device. Elsewhere in this issue of the **Federal Register**, FDA is announcing the availability of a guidance document that will serve as the special control for this device type.

**DATES:** This rule is effective May 16, 2011. The classification was effective on August 24, 2010.

**FOR FURTHER INFORMATION CONTACT:** Richard Felten, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 1436, Silver Spring, MD 20993-0002, 301-796-6392.

#### SUPPLEMENTARY INFORMATION:

#### I. What is the background of this rulemaking?

In accordance with section 513(f)(1) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 360c(f)(1)), devices that were not in commercial distribution before May 28, 1976 (the date of enactment of the Medical Device Amendments of 1976), generally referred to as postamendments devices, are classified automatically by statute into class III without any FDA rulemaking process. These devices remain in class III and require premarket approval, unless and until the device is classified or reclassified into class I or II, or FDA issues an order finding the device to be substantially equivalent, in accordance with section 513(i) of the FD&C Act, to a predicate device that does not require premarket approval. The Agency determines whether new devices are substantially equivalent to predicate devices by means of premarket notification procedures in section 510(k) of the FD&C Act (21 U.S.C. 360(k)) and 21 CFR part 807 of the regulations.

Section 513(f)(2) of the FD&C Act provides that any person who submits a premarket notification under section 510(k) of the FD&C Act for a device that has not previously been classified may, within 30 days after receiving an order classifying the device into class III under section 513(f)(1) of the FD&C Act, request FDA to classify the device under the criteria set forth in section 513(a)(1) of the FD&C Act. FDA will, within 60 days of receiving this request, classify the device by written order. This classification will be the initial classification of the device. Within 30 days after the issuance of an order classifying the device, FDA must publish a notice in the **Federal Register** announcing this classification.

In accordance with section 513(f)(1) of the FD&C Act, FDA issued an order on