UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Standard of Conduct for Transmission Providers	Docket No. RM07-1-000

COMMENTS OF TRANSMISSION ACCESS POLICY STUDY GROUP

The Transmission Access Policy Study Group ("TAPS") appreciates the opportunity to comment on the Notice of Proposed Rulemaking ("NOPR"), and urges the Commission to modify the proposed rule.[1] Specifically, TAPS urges the Commission to: (a) adopt the proposed exceptions for "planning" and "competitive solicitation" employees if modified so that they neither undermine the joint regional planning process required by Order No. 890,[2] discriminate against network transmission customers who need access to the same types of information as Transmission Providers' resource planners and competitive solicitation employees[3] in order to plan, evaluate, and acquire resources required to serve the customers' load reliably and economically, nor preclude Transmission Providers from planning and acquiring resources for wholesale requirements and bundled retail load on a total-load basis; (b) retain the requirement that electric Transmission Providers be functionally separated from most (though not all) "Energy Affiliates;" and (c) eliminate or at least avoid broadening the exception

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[1] Notice of Proposed Rulemaking, *Standards of Conduct for Transmission Providers*, 72 Fed. Reg. 3958 (proposed Jan. 29, 2007) ("NOPR"), IV F.E.R.C. Stat. & Regs. ¶ 32,611 (to be codified at 18 C.F.R. Part 358).

[2] *Preventing Undue Discrimination and Preferences in Transmission Service*, Order No. 890, 71 Fed. Reg. 12,226 (Mar. 15, 2007), III F.E.R.C. Stat. & Regs. ¶ 31,241 (to be codified at 18 C.F.R. Parts 35 and 37).

[3] For ease of reference, unless the context requires otherwise, references in these comments to resource planning should be interpreted to refer inclusively to competitive solicitations.

permitting electric Transmission Providers to share non-public information with bundled retail merchant personnel.

I. EXECUTIVE SUMMARY

TAPS recognizes the Commission's need to respond to the issues raised by the court in *National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831 (D.C. Cir. 2006) ("*National Fuel*"). However, as the Commission recognizes, the NOPR goes much further than was required. For example, although the court limited its action to the application of Order Nos. 2004 *et seq*.[4] to natural gas transmission providers, the NOPR proposes to revise the standards of conduct as applied to electric transmission providers as well. Further, although *National Fuel* acknowledged that the Commission might justify the remanded standards of conduct (as to natural gas transmission providers) based on transmission providers' inherent incentives to discriminate in favor of their affiliates, the NOPR purports to require the submission of "evidence" of practices that have been prohibited since 2003. The NOPR also proposes to establish new categories of permissibly shared employees.

TAPS supports measures needed to promote efficient, non-discriminatory integrated resource planning by all load serving entities for their wholesale and retail loads. TAPS supports the proposed creation of new categories for "planning" and "competitive solicitation" employees if modified to facilitate integrated resource planning

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[4] *Standards of Conduct for Transmission Providers*, Order No. 2004, 68 Fed. Reg. 69,134 (Dec. 11, 2003), [2001-2005 Reg. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,155, *order on reh'g*, Order No. 2004-A, 69 Fed. Reg. 23,562 (Apr. 29, 2004), [2001-2005 Reg. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,161, *order on reh'g*, Order No. 2004-B, 69 Fed. Reg. 48,371 (Aug. 10, 2004), [2001-2005 Reg. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,166, *order on reh'g*, Order No. 2004-C, 70 Fed. Reg. 284 (Jan. 4, 2005), [2001-2005 Reg. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,172, *order on reh'g*, Order No. 2004-D, 110 F.E.R.C. ¶ 61,320 (2005), *vacated in part sub nom. Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831 (D.C. Cir. 2006).

on a non-discriminatory basis. However, the Commission must take care not to create the worst of all worlds, in which jurisdictional Transmission Providers share non-public transmission information internally when planning for bundled retail load, but standards of conduct provide an excuse for the Transmission Provider to (a) deny network customers access on a comparable, informal basis to the non-public transmission information those customers need to efficiently plan resources and evaluate purchases to serve their loads dependent on the Transmission Provider's transmission system, (b) foreclose network transmission customers' resource planning personnel from obtaining access to the information disclosed to the Transmission Provider's resource planning personnel, thus undermining the joint regional planning process established by Order No. 890; and (c) avoid planning comparably for the power and transmission needs of the Transmission Provider's full or partial wholesale requirements load. TAPS urges the Commission to shape its planning-related standards of conduct requirements to ensure that network transmission customers can plan and conduct solicitations for their resource needs on a basis comparable to their Transmission Providers, and can fully participate in a robust joint regional planning efforts (without incurring unnecessary or unrealistic standards of conduct burdens), and that Transmission Providers may plan (both generation and transmission) for full or partial requirements sales to wholesale load in the same manner in which they plan for bundled retail load (*i.e.*, plan for wholesale and retail load on a total-load basis).

TAPS also urges the Commission not to undo much of the progress that has been made toward achieving non-discriminatory transmission service and establishing competitive markets for energy, capacity, financial transmission rights, and ancillary

services (among other electricity-related products) by unduly relaxing the standards applied to "Energy Affiliates" of electric Transmission Providers. While TAPS acknowledges that it may be permissible to relax the standards as applied to specific types of "Energy Affiliates," TAPS opposes allowing electric Transmission Providers to share non-public transmission information on a discriminatory basis with most "Energy Affiliates." Such sharing would provide those affiliates — against whom TAPS members compete in various electricity-related markets — an undue competitive advantage not permitted by the Federal Power Act ("FPA"). The prohibition against sharing non-public transmission information with affiliates buying and selling electricity-related products remains a critical tool ensuring that public utility Transmission Providers do not use their ownership of jurisdictional transmission facilities to unduly advantage their affiliates' positions in competitive markets.

Finally, in light of the proposal to revise the Order No. 2004 standards that apply to electric Transmission Providers, the Commission should revisit Order No. 2004's determination to allow electric Transmission Providers to share non-public transmission and customer information with merchant employees making sales to bundled retail load. The Supreme Court has laid to rest any doubts about the Commission's jurisdiction to apply the standards to a Transmission Provider's relationship with its bundled retail merchant employees, thus eliminating the only basis ever offered for the exception. Because the exception permits substantial undue discrimination and competitive harm to transmission customers, the Commission should eliminate it — at least as to employees making purchases for bundled retail load — and thus ensure that Transmission Providers' bundled retail merchant employees will not have preferential access to non-public

transmission and customer information.[5] At minimum, if the Commission does not narrow or eliminate the bundled retail load exception, it should avoid expanding it by applying it to a broader range of relationships between an electric Transmission Provider and its affiliates.

II. COMMENTS

A. The "Planning" and "Competitive Solicitation" Exceptions Must Be Modified to Avoid Creating or Perpetuating Undue Discrimination Between Transmission Providers and Network Transmission and Wholesale Requirements Customers

1. Background, General Comments, and Alternative Approach

Notwithstanding TAPS's general support for maintaining standards of conduct requirements, TAPS acknowledges that it is important to facilitate integrated resource planning of generation, transmission, and demand-side resources, as well as competitive solicitation of least-cost resources to meet identified needs. TAPS commends the Commission for taking steps to do so. However, the Commission must find ways to facilitate integrated resource planning ("IRP") and competitive solicitation that do not create or exacerbate undue discrimination between Transmission Providers and their network transmission or wholesale requirements customers. TAPS submits that the proposed exceptions miss that mark.

As explained below, the proposed exceptions allow Transmission Providers' transmission-function employees and its resource planning and competitive solicitation

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[5] TAPS members (including, in the case of joint action agencies, *their* members) compete at retail with Transmission Providers' bundled retail merchant functions even in states without "retail competition." Even in such states, TAPS members compete with Transmission Providers' bundled retail merchant functions for industrial customers, for load at the edges of franchise territories, and for potentially municipalizing systems. In addition, TAPS members compete with Transmission Providers' bundled retail merchant functions for access to scarce transmission and generating resources.

employees to share non-public information, bi-directionally, for both transmission planning and resource planning purposes, in ways that will exacerbate undue discrimination between Transmission Providers and their network transmission and wholesale requirements customers. Absent the measures discussed below, network transmission customers could be harmed in two ways by adoption of the exceptions as proposed. First, the exceptions may perpetuate separate, non-public transmission planning processes internal to the Transmission Provider, which bypass Order No. 890's joint, regional planning process and rob it of its vitality. Second, the exceptions provide a Transmission Provider's resource planners and competitive solicitation employees with access to non-public transmission information that is unavailable to the network transmission customers' corresponding employees when they plan and conduct schedules to acquire resources to serve load dependent on the Transmission Provider's grid. In addition, limitation of the proposed exceptions to bundled retail load would harm wholesale requirements customers by preventing Transmission Providers from conducting transmission and resource planning for both wholesale requirements customers and bundled retail load on a non-discriminatory, total-load basis.

To address these important concerns, the Commission should modify the NOPR to: (a) ensure that network transmission customers, who have the same need for coherent planning, can obtain the same types of non-public transmission information as are available to the Transmission Provider's resources planning and competitive solicitation employees; (b) to avoid undermining Order No. 890's joint, regional planning process, require that all information shared by a Transmission Provider with its own planning and competitive-solicitation employees also be shared contemporaneously with network

transmission customers (provided that the customers establish procedures defining which employees/consultants may receive such information and prohibiting those employees from sharing the information with wholesale merchant personnel); (c) emphasize that integrated resource planning for full and partial wholesale requirements customers served under either market-based or cost-based rates must be performed on a non-discriminatory basis comparable to the planning that occurs for bundled retail load; and (d) expand the exemption to encompass all integrated resource planning (whether or not state-mandated, and for wholesale as well as bundled retail load).

a) As proposed, the exceptions for state-mandated IRP would undermine the joint regional planning required by Order No. 890

In Order No. 890 (at P 435), the Commission found it necessary, "[i]n order to limit the opportunities for undue discrimination … and to ensure that comparable transmission service is provided by all public utility transmission providers," to direct public utilities to establish "coordinated, open, and transparent transmission planning on both a local and regional level." Order No. 890-compliant, joint regional planning processes must satisfy nine planning principles: coordination, openness, transparency, information exchange, comparability, dispute resolution, regional participation, congestion studies, and cost allocation. *Id.* at PP 426, 444. The purpose of the first principle, coordination, "is to eliminate the potential for undue discrimination in planning by opening appropriate lines of communication between transmission providers, their transmission-providing neighbors, affected state authorities, customers, and other stakeholders." *Id.* at P 452.

At the same time that Order No. 890 seeks to level the playing field by assuring that transmission planning information is shared and that transmission planning is performed on a non-discriminatory basis, the NOPR threatens to relegate the Order No. 890 planning process to side-show status while the *real* transmission planning occurs in newly authorized, informal processes in which a Transmission Provider's transmission and resource planners can communicate privately, without disclosure to or the presence of other load-serving entities that are equally dependent on the grid. Specifically, the NOPR proposes to relax the standards of conduct in order to permit public utility Transmission Providers to share non-public transmission information with their own planning employees conducting state-mandated, integrated resource planning for bundled retail load, NOPR at PP 42-44, and with employees engaged in competitive solicitations to obtain energy, capacity, or ancillary services to serve bundled retail load pursuant to an integrated resource plan, *id.* at P 54. TAPS is concerned that giving Transmission Providers' resource planners and competitive solicitation employees preferential access to transmission-function employees will result in transmission expansion plans that disproportionately reflect the Transmission Providers' own needs, compared to that of its network customers.

b) As proposed, the exceptions would discriminate against network transmission customers engaged in resource planning and competitive solicitation

Moreover, the proposed exception results in undue discrimination in favor of a Transmission Provider's own resource planning and competitive solicitation compared to that of its network transmission customers. For network customers dependent on the Transmission Provider's grid and attempting to plan or acquire new generation or secure

power purchases, obtaining information about and planning for the delivery of such resources to load is often the most challenging part of the process. Such customers must rely on OATT processes to obtain transmission information when they engage in competitive solicitations or consider constructing new generation resources. Network customers limited to those processes frequently find it necessary to submit multiple requests for transmission service and/or interconnection service in order to obtain the necessary information regarding transmission availability and to maintain the required flexibility to pick among the generation options being considered. In contrast, under the proposed exceptions, the Transmission Provider's transmission-function employees and retail resource planners and competitive solicitation employees could interact freely, outside the OATT processes and OASIS, providing the resource planners and competitive solicitation employees with preferential access to information about the Transmission Provider's system. Indeed, the competitive implications of this discrimination would be especially plain if Transmission Providers and network transmission customers are competing to purchase from the same suppliers or considering participation in the same generating units or sites.

The proposed exception also discriminates in another way against transmission customers that are non-jurisdictional transmission owners. Non-jurisdictional transmission owners are less likely than public utilities to be subject to state-*mandated* integrated resource planning requirements. Because the proposed exception is limited to planning and competitive solicitation pursuant to state-mandated IRP requirements, non-jurisdictional transmission owners are less likely to be able to take advantage of the exception than are jurisdictional Transmission Providers. Thus, the contours of the

proposed exception would enable greater information sharing among jurisdictional Transmission Provider employees than may be permitted among the employees of non-jurisdictional transmission owners that are subject to the standards through reciprocity.

Expanding the proposed exemption to require Transmission Providers to provide transmission dependent utilities' ("TDUs'") resource planners and competitive solicitation employees a comparable ability to request and obtain, through the same informal processes used by the Transmission Provider, non-public transmission information that the network customer can use to assess its resource and purchase options is necessary to satisfy the Commission's obligations under new FPA Section 217(b)(4), 16 U.S.C. § 824*q*(b)(4). Specifically, FPA Section 217(b)(4) requires the Commission to "facilitate[] the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities" and to enable them to secure long-term transmission rights for their long-term power-supply arrangements. Significantly, Section 217 makes no distinction among load-serving entities ("LSEs") — the mandate applies equally whether they are Transmission Providers or TDUs. To adopt a standard of conduct exemption that facilitates integrated planning and competitive solicitation assessments by transmission-*owning* LSEs, while leaving TDUs to a less flexible, more time-consuming process, would violate Congress's mandate, as well as the FPA's prohibition against undue discrimination.

In short, although TAPS supports facilitating integrated resource planning and procurement of least-cost resources, TAPS is gravely concerned that the proposed revisions to the standards of conduct will reopen substantial opportunities for undue discrimination. Transmission Providers serving bundled retail load compete with

network transmission customers for wholesale purchases, as well as wholesale and retail sales, acquisition of generating resources, and securing sites on which to develop new generation. Each is trying to secure the lowest-cost and most reliable resources with which to serve its customers. If Transmission Providers are permitted to plan and conduct competitive solicitation for bundled retail load on an integrated, least-cost basis, using non-public information, Order No. 890's joint regional planning process will become an afterthought[6] and network transmission customers, who lack access to same types of non-public transmission information that a Transmission Provider may use when planning and acquiring *its* resources, will not be able to compete. Undue discrimination will be institutionalized, not eradicated, and the notion of preventing undue discrimination through functional unbundling and use of an OATT will be rendered a sham.

c) The NOPR unreasonably forecloses integrated resource planning for Transmission Providers' wholesale requirements customers and joint integrated resource planning by Transmission Providers and network transmission customers

Although they are intended "[t]o ensure that an undue preference is not given to marketing or energy affiliates," NOPR at P 43, the state-mandate requirement and limitation to bundled retail load are more likely to exacerbate than to eliminate opportunities for undue discrimination. Limiting permitted information sharing to

[6] Rendering Order No. 890's joint regional planning process peripheral to a Transmission Provider's real planning activities, conducted in private based on preferential access to non-public transmission information, would not only frustrate the purpose of joint regional planning but, also, undercut the basis for other aspects of Order No. 890. *See Notice of Proposed Rulemaking, Preventing Undue Discrimination and Preference in Transmission Service*, 71 Fed. Reg. 32,636, 32,689 (proposed June 6, 2006), IV F.E.R.C. Stat. & Regs. ¶ 32,603, P 359 & n.337 (to be codified at 18 C.F.R. pts. 35 and 37) (noting link between roll-over right restrictions and transmission planning and expansion), *corrected*, 71 Fed. Reg. 37,109 (June 29, 2006), *reply comment period extended,* 71 Fed. Reg. 39,251 (July 12, 2006).

integrated resource planning for bundled retail load appears to preclude Transmission Providers from conducting integrated resource planning for full or partial requirements customers in a manner comparable to that in which it plans for bundled retail load. Transmission Providers should plan (both generation and transmission) for their retail and wholesale requirements customers (whether cost-based or market-based) on a total system basis.[7] They should not be permitted (much less required) to plan and acquire resources separately for wholesale requirements customers on a disfavored basis, with less information. Wholesale full or partial requirements customers generally *want* the Transmission Provider to plan and acquire resources to meet its requirements on a least-cost, integrated resource basis: A number of wholesale requirements contracts expressly *require* the Transmission Provider to plan for the wholesale load represented by the contract on exactly the same basis as the Transmission Provider plans for bundled retail load.

In many areas, a Transmission Provider's wholesale requirements customers compete with it for retail sales. A rule that not only fails to require, but actually precludes, a Transmission Provider from planning for wholesale requirements customers and bundled retail load on a non-discriminatory basis disadvantages the wholesale customer and provides an excuse for undue discrimination. The Commission should not countenance, much less require, such discrimination between a Transmission Provider's bundled retail load and its wholesale requirements customers.

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[7] Indeed, such planning has long been assumed in the Commission's practices for setting cost-based rates for wholesale power customers.

Limiting permitted information sharing to integrated resource planning for bundled retail load also appears to foreclose unreasonably the possibility of *joint* integrated resource planning among Transmission Providers and network transmission customers. For the same reasons that integrated resource planning and joint, regional transmission planning are each considered beneficial to the development and efficient use of the transmission grid, the next step — joint, regional integrated resource planning — is even more beneficial and ought to be promoted, not prohibited.

d) TAPS's Proposed Approach

To prevent undue discrimination and promote efficient development and use of the transmission grid, the Commission should modify the NOPR to: (a) ensure that network transmission customers have access, through the same informal mechanisms available to the Transmission Provider, to the same types of information that the Transmission Provider's resource planning and competitive solicitation employees use when planning and acquiring resources with which to serve bundled retail load; (b) require that all information shared by a Transmission Provider with its own planning and competitive-solicitation employees be shared contemporaneously with its network transmission customers (provided that such customers adopt procedures to identify the employees who can receive such information and prevent them from sharing non-public transmission information with wholesale merchant function employees); (c) expand the exemption to encompass all integrated resource planning (whether or not state-mandated, and for wholesale as well as bundled retail load); and (d) emphasize that integrated resource planning for full and partial wholesale requirements customers, as well as bundled retail load, must be performed on a non-discriminatory total-load basis.

Further, TAPS notes that the best way to facilitate efficient and effective planning by all LSEs would be to make more information publicly available. TAPS endorses the finding (Order No. 890 at P 476) that "Transmission [P]roviders should make as much transmission planning information publicly available as possible, consistent with protecting the confidentiality of customer information." Concerns about undue competitive advantage arise only when information is restricted, not when it is publicly available. The Commission should encourage simultaneous public disclosure of transmission information (subject to appropriate limitations on Critical Energy Infrastructure Information) to the greatest extent possible, both because it is efficient and maximizes all users' abilities to plan and use the grid and because it "alleviate[s] … Standards of Conduct concerns" by eliminating the opportunities for undue discrimination to which those standards are addressed. *Id.*

Finally, as TAPS recommended in its recent request for rehearing of Order No. 890, the Commission should leave existing Standards of Conduct waivers in place and adopt mechanisms to assure that all transmission customers — both small transmission owners and non-transmission-owning TDUs — can meaningfully participate in joint regional planning. Specifically, any entity should be able to receive non-public information made available as part of the regional planning process if it establishes procedures defining which employees/consultants may receive confidential transmission and planning information, and prohibiting such employees/consultants from sharing that information with the entity's wholesale merchant personnel (other than planning and competitive solicitation employees, assuming an even-handed version of the NOPR's exception is adopted). Such a requirement, if narrowly tailored to address the specific

problem posed by non-public transmission planning information, can reduce barriers to broad participation in planning, assure that needed transmission planning and long-range resource planning skills can be brought to the planning process, and adequately protect non-public planning information without requiring disruptive and costly restructuring where the Commission has determined that it would otherwise be unnecessary.

2. Responses to Specific Questions

The NOPR poses a number of specific questions with respect to the proposed exceptions for planning and competitive solicitation employees. TAPS responds as follows:

> a) "[W]hether or not the proposal to limit the new categories of planning employees and competitive solicitation employees to perform their functions only for bundled retail load is necessary to prevent undue discrimination" (NOPR at P 37)

TAPS appreciates the apparent motivation for limiting the exemption for planning and competitive solicitation employees to those engaged in those activities solely for bundled retail load: to prevent Transmission Providers from having an undue competitive advantage in competition for wholesale sales. NOPR at P 45 ("By this limitation, the Commission seeks to ensure that the benefits of this proposal accrue to a public utility in service of its retail customers and not to benefit a utility in competition with other wholesale market participants.") However, limiting the exception to bundled retail load is problematic for several reasons, as explained above. First, limiting permitted information sharing to integrated resource planning for bundled retail load is unreasonable because Transmission Providers should plan generation and transmission for bundled retail and wholesale requirements customers on a non-discriminatory, total

system basis. Second, limiting permitted information sharing to integrated resource planning for bundled retail load may foreclose the possibility of integrated resource planning on a joint, regional basis among Transmission Providers and network transmission customers.

Planning and competitive solicitation are different in this respect from sales and marketing. The existing standards of conduct preclude the sharing of non-public transmission information with marketing personnel, except in the narrow case in which a marketing department has been structured so that it engages *solely* in sales to bundled retail load.[8] 18 C.F.R. § 358.3(e). Putting aside whether the sales/marketing exception for bundled retail sales is appropriate,[9] it is entirely appropriate to prohibit Transmission Providers from sharing non-public transmission information with wholesale marketing employees but to permit them to share such information with employees engaged in integrated resource planning and competitive solicitation to meet the needs of existing wholesale loads (provided that the information is also made available to network transmission customers and that such customers can also request and receive similar non-public information needed to plan and acquire resources meeting *their* needs). Standards of conduct that prevent a Transmission Provider from planning and acquiring resources for bundled retail and wholesale load on a total system basis harms existing wholesale requirements customers and impairs retail competition. In contrast, a Transmission

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[8] The NOPR is ambiguous as to whether the exception for planning and competitive solicitation employees is so circumscribed. *Compare* NOPR at P 46 ("[I]f the integrated resource planning *involves* bundled retail load and is the result of a state mandate, the planning and the employees conducting it are not subject to all of the usual restrictions of the standards of conduct…") (emphasis added) *with id.* at P 45 ("This limitation cabins the work of planning employees to work on bundled retail load obligations and, thereby, precludes them from working on a public utility's other load obligations, such as wholesale load obligations arising from contract.").

Provider's inability to *market* its generation to potential wholesale customers on the same basis as it does to bundled retail customers does not harm existing wholesale customers.

Planning (and competitive solicitation) is also different from marketing in another respect. Undue advantages in marketing manifest themselves in discrete transactions, which are frequently (though not always) relatively short-term in nature. In contrast, undue advantages in integrated resource planning and competitive solicitation can have repercussions that last for decades because they become embedded in power system infrastructure and long-term investment decisions. Given the long-term consequences resulting from integrated resource planning decisions, it is especially important that network transmission customers have access to the same types of non-public transmission information as the Transmission Provider uses to plan and acquire *its* resources; that any non-public transmission information used by the Transmission Provider's resource planners and competitive solicitation employees in planning and acquiring resources for bundled retail load be disclosed to entities participating in the Order No. 890 joint regional planning process; and that fully informed resource planning and acquisition decisions can be made by and on behalf of both wholesale requirements customers and bundled retail load.[10]

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[9] See Part II.C.1 below.

[10] TAPS stresses that the "by" cannot be dropped from this "by and on behalf of" formulation. While TAPS believes that public utilities should be permitted to (indeed, required to) plan for its wholesale load on the same basis as its bundled retail load, the prohibition against undue discrimination covers both transmission customers that purchase power from the Transmission Provider and those that do not. Both sets of transmission customers must be permitted to supply their loads on the same basis as the Transmission Provider plans its system for bundled retail load.

b) State-Mandated IRP Requirement

The NOPR (at P 44) also seeks comment on the proposed limitation of the planning and competitive solicitation exceptions to state-mandated integrated-resource planning. This limitation is problematic in situations where a Transmission Provider is subject to state-mandated IRP requirements (and thus eligible for the exception) but some or all of its load-serving transmission *customers* (including non-jurisdictional transmission owners) are not subject to those requirements. It is also problematic where Transmission Providers in one state are subject to state-mandated IRP requirements (and thus eligible for the exception) but Transmission Providers and non-jurisdictional transmission owners in adjacent states within the same geographic market are not subject to such requirements and not eligible for the exception. Because the ability to share non-public transmission information with planning and competitive solicitation employees is likely to produce significant competitive advantages over the long term, the state-mandate requirement will arbitrarily favor some Transmission Providers over their customer/competitors, non-jurisdictional transmission owners subject to reciprocity-based standards of conduct, and other Transmission Providers. TAPS recommends that the state-mandate requirement be eliminated, so long as the exceptions are modified as discussed above to ensure that network transmission and wholesale requirements customers may engage in and/or benefit from integrated resource planning on a non-discriminatory basis.

c) Whether planning employees need access to nonpublic customer information in addition to non-public transmission information

The NOPR asks (at P 41) whether planning employees need access to non-public "customer information" in addition to non-public "transmission information." TAPS believes that non-public "customer information" should be made available to Transmission Providers' planning and competitive solicitation employees *only* if such information is also made available to network customers' planning and competitive solicitation employees and such employees may ask for and receive similar information as needed to plan, evaluate and acquire its own resources (subject to a no-conduit prohibition against sharing the information with wholesale merchant personnel). Otherwise, preferential access to such information could give the Transmission Provider an undue competitive advantage. For example, a Transmission Provider considering where to site generation would have more information about competing projects (and resulting resource constraints and price competition) than would be available to transmission customers seeking to site generation in that area or elsewhere.

d) Whether planning employees should be permitted to plan for Provider of Last Resort (POLR) load, grandfathered wholesale requirements contracts, and wholesale full requirements load

The NOPR seeks comments on (at P 47) "whether planning employees should be restricted to planning for bundled retail load or whether they should also be permitted to plan for Provider of Last Resort (POLR) load, grandfathered wholesale requirements contracts, and wholesale full requirements load." As discussed above, it is unduly discriminatory to permit Transmission Providers to plan for bundled retail load on the basis of non-public transmission information without planning for wholesale

requirements load on the same basis and making any non-public information needed to plan and acquire resources for network customers' load (as well as information used by the Transmission Provider) available to network transmission customers' planning and competitive solicitation employees. TAPS objects to Transmission Providers' preferential sharing of information with its own employees but not that of at least its network transmission customers, but would not object to non-discriminatory sharing of information, as recommended above, with employees planning for POLR load.

e) Whether the exception for integrated resource planning should be limited to IRP processes including evaluation of third-party resources

The NOPR notes (at P 49) that the Commission is "concerned that planning employees not be used in a manner that unduly discriminates against non-affiliated wholesale suppliers." To address this concern, the Commission proposes to limit the integrated resource planning exception to instances in which the IRP process includes evaluation of third-party resources (*id.* at P 50) and seeks comment on that limitation (*id.* at P 51). Limiting the definition of integrated resource planning in this manner does not eliminate the undue discrimination (described above) between bundled retail load and other load serving entities that are dependent on the Transmission Provider's transmission system.[11] Such discrimination against transmission dependent load-serving entities was the paradigmatic problem to which Order Nos. 888 and 889 were

[11] If a state-mandated IRP process provides for consideration of third party resources, the Transmission Provider will be able to share non-public transmission information with its planning and competitive solicitation employees, while TDUs competing to purchase from potentially the same resources will be limited to use of OATT processes for the transmission component of their resource planning and competitive solicitations.

addressed.[12] Adoption of the exceptions as proposed would remedy undue discrimination against third-party suppliers, while leaving undue discrimination against transmission-dependent LSEs unaddressed.

In contrast, the solution that TAPS has recommended — permitting sharing of non-public information with a Transmission Provider's planning and competitive solicitation employees only if that information and other non-public information that network customers need to plan and acquire resources for their load is made available to corresponding employees of at least its network transmission customers — would facilitate development of joint, regional IRP processes that involve consideration of third-party resources, without impairing competition between Transmission Providers and transmission-dependent utilities.

f) Whether the "planning" and "competitive solicitation" exceptions should be maintained separately or combined

The Commission asks (NOPR at P 60) "whether, instead of having separate categories for planning employees and for competitive solicitation employees, it should establish one category to include both sets of employees." In TAPS's view, the issues surrounding the proposed exceptions for "planning" and "competitive solicitation" employees are largely parallel, and TAPS has responded to those issues together above. As with "planning" employees, any sharing of non-public information with a Transmission Provider's "competitive solicitation" employees should be permitted only if such information and similar information that may be needed by a network transmission customer is made available contemporaneously to the competitive solicitation employees

[12] *See*, *e.g.*, Appendix C to Order No. 888.

of at least the Transmission Provider's network customers. If the NOPR is modified to ensure that non-public information will only be shared on a non-discriminatory basis, TAPS does not object to combining the two categories into a single exception. Otherwise, the separate categories should be maintained.

B. The Commission Should Continue to Require Separation of Electric Transmission Providers and Most "Energy Affiliates"

1. Standards of Conduct Regarding "Energy Affiliates," Especially as to Electric Transmission Providers, Can Be Retained Without Additional Record Evidence

National Fuel remanded Order No. 2004 *et seq.* — as applied to natural gas transmission providers (468 F.3d at 845) — because those orders purported to rely on both a "theoretical" threat and record evidence of pipelines' harmful sharing of non-public transmission information with "Energy Affiliates" other than marketing affiliates. *Id.* at 839. The court vacated the orders as to natural gas pipelines because it found one of the Commission's two rationales to be unsupported. *Id.* ("[W]here FERC has relied on multiple rationales (and has not done so in the alternative), and we conclude that at least one of the rationales is deficient, we will ordinarily vacate the order unless we are certain that FERC would have adopted it even absent the flawed rationale."). Specifically, on reviewing the record, the court found "no evidence of a real problem with respect to pipelines' relationships with non-marketing [energy] affiliates." *Id.* at 841.

In response to *National Fuel*, the NOPR "seeks evidence regarding the scope of the rules" in both the electric and natural gas industries, including evidence regarding "application of the rules to energy affiliates." NOPR at P 2. The NOPR seeks such evidence not only as to natural gas transmission providers but, also, electric transmission providers:

> Commenters who believe that it is appropriate to retain the standards of conduct for the relationship between electric utility transmission providers and their energy affiliates should submit evidence to support continued application of the definition of energy affiliates to electric utility transmission providers.

Id. at P 14. The Commission evidently is asking for evidence of harm that has occurred or will occur without functional separation of Transmission Providers and Energy Affiliates.

TAPS submits that the directive to provide evidence supporting continued application of the standards of conduct is both impractical and unnecessary to respond to *National Fuel*. It is impractical because the sharing of non-public information with Energy Affiliates was prohibited in late 2003. Given that sharing of information with Energy Affiliates has been prohibited for almost four years, there *should* be few recent examples of violations and of resulting harm. The absence of such evidence, especially from customers who have no way of knowing whether a Transmission Provider has violated Order No. 2004, cannot be construed as a sign that restrictions may be relaxed without consequence. On the contrary, if those restrictions are relaxed, Transmission Providers can be expected to act on their inherent incentives to use the informational and other advantages of transmission ownership to benefit affiliates competing in electricity-related markets.

National Fuel did not require the marshalling of evidence of violations to support continued application of the standards of conduct — particularly not with respect to electric transmission providers.[13] On the contrary, *National Fuel* left Order Nos. 2004 *et*

[13] As noted, the court vacated Order Nos. 2004 *et seq.* only "as applied to natural gas pipelines," 468 F.3d at 845, and carefully limited its discussion of the issues to that context, *see id.* at 834, 838.

seq. untouched with respect to electric Transmission Providers, and any *Commission* decision to change course from Order Nos. 2004 with respect to electric Transmission Providers would have to be explained (*see Greater Boston Tel. Corp. v. FCC,* 444 F.2d 841, 852 (D.C. Cir. 1971)) and shown to be consistent with the Commission's obligation to prevent undue discrimination. As *National Fuel* held with respect to the Natural Gas Act ("NGA"), which is identical to the Federal Power Act ("FPA") in relevant part, the "fundamental purpose" of the statutes that the Commission administers is "to protect … gas consumers from the monopoly power of" transmission providers. *See* 468 F.3d at 833. The Commission also "has a duty to prevent undue discrimination in the rates, terms, and conditions of public utility transmission service."[14]

As explained below, electric transmission providers have strong, inherent incentives to use non-public information acquired through their ownership and operation of transmission facilities to provide undue advantages to "Energy Affiliates" competing in a wide variety of electricity-related markets. *National Fuel* "express[ed] no view … whether a theoretical threat alone," without an evidentiary record of abuse, "would be sufficient to justify an order extending the Standards to non-marketing affiliates."[15] However, the Commission frequently has acted to prevent undue discrimination flowing from such inherent incentives — and the courts have affirmed those actions — without requiring an evidentiary record of abuse. *See Associated Gas Distributors v. FERC* , 824 F.2d 981, 1008 (D.C. Cir. 1987) ("Agencies do not need to conduct experiments in order

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[14] Order No. 890 at P 425.

[15] 468 F.3d at 844. The court's use of the phrase "non-marketing affiliates" suggests that the court may have mistakenly believed that "Marketing Affiliates" are the only Transmission Provider affiliates that compete in energy-related markets.

to rely on the prediction that an unsupported stone will fall.")[16] "[W]hile the Commission cannot rely solely on 'unsupported or abstract allegations,' the agency is also not required to make 'specific findings,' so long as the agency's factual determinations are reasonable." *TAPS v. FERC*, 225 F.3d 667, 683 (D.C. Cir. 2000) (upholding open access requirements "premised not on individualized findings of discrimination by specific transmission providers, but on FERC's identification of a fundamental systemic problem in the industry."), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

In those cases, the Commission found that "the inherent characteristics of monopolists make it *inevitable* that they will act in their own self-interest to the detriment of others" by attempting to transfer the advantages of transmission ownership to affiliated companies competing in related markets.[17] *National Fuel* itself recognized that, "[a]s natural monopolies, pipelines if unregulated would possess the ability to engage in monopolistic pricing for transportation services and discriminate against unaffiliated

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[16] *See also* Order No. 890 at P 41 ("We disagree with commenters who assert that the Commission is relying on unsubstantiated allegations of discriminatory conduct to justify OATT reform. The courts have made clear that the Commission need not make specific factual findings of discrimination in order to promulgate a generic rule to eliminate undue discrimination. In AGD, the court explained that the promulgation of generic rate criteria involves the determination of policy goals and the selection of the means to achieve them and that courts do not insist on empirical data for every proposition upon which the selection depends.") (footnote omitted).

[17] *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmission Utilities*, Order No. 888, 61 Fed. Reg. 21,539, 21,567 (May 10, 1996) [1991-1996 Reg. Preambles] F.E.R.C. Stat. & Regs. ¶ 61,036, at 31,682, *clarified*, 76 F.E.R.C. ¶ 61,009 (1996), *modified*, Order No. 888-A, 62 Fed. Reg. 12,274, 12,295 (Mar. 14, 1997),]1996-2000 Reg. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,048 at 30,210 ("[D]iscriminatory behavior clearly is in the economic self-interest of a monopoly transmission owner facing the markedly increased competitive pressures that are driving today's electric utility industry."), *order on reh'g*, Order No. 888-B, 62 Fed. Reg. 64,688 (Dec. 9, 1997), 81 F.E.R.C. ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 F.E.R.C. ¶ 61,046 (1998), *aff'd in part and remanded in part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

entities that seek to transport gas." 468 F.3d at 834. Similarly, electric transmission providers possess the incentive and ability to provide an undue advantage to affiliates competing in *other* energy-related markets by sharing non-public transmission information with them on a discriminatory basis.[18]

National Fuel allowed that the Commission may be able to justify the standards of conduct that were vacated as to natural gas pipelines, even without a factual record, if it can "explain how the potential danger of improper communications between pipelines and their non-marketing affiliates … justifies such costly prophylactic rules." 468 F.3d at 844. Although no such demonstration was required as to electric transmission providers, as to which the court left Order No. 2004's standards in place, TAPS shows below why the "danger of improper communications" between public utility transmission providers and "Energy Affiliates" — and both the reality and perception of undue discrimination[19] — justifies retaining those standards.

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[18] *Tenneco Gas v. FERC*, 969 F.2d 1187 (D.C. Cir. 1992), on which *National Fuel* relied in holding that FERC could regulate the relationship between pipelines and affiliates only if "adequately justified," upheld the Commission's adoption of standards of conduct prohibiting the sharing of non-public *transportation* information with pipelines' "marketing affiliates." "[P]ipelines, FERC reasonably concluded, should not be able to prefer their affiliates with information the pipelines obtain from their preferred market position." 969 F.2d at 1199. It remanded standards addressing the sharing of "sales and marketing information" *not* derived from the transportation function:

> FERC concedes that pipelines do not now have market power over the marketing or sale of natural gas, and that at least some marketing and sales information does not come from pipelines' current market power over transportation. *See* Order 497-A at 31,596. Accordingly, the extension of the contemporaneous disclosure requirement to marketing or sales information requires *independent* justification.

Id. (emphasis added). In other words, the independent "adequate justification" was needed because the sale and marketing information being shared did *not* derive from the pipelines' monopoly transportation function.

[19] *See Regional Transmission Organizations*, Order No. 2000, 65 Fed. Reg. 809, 824 (Jan. 6, 2000) [1996-2000 Reg. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,089, at 31,015 ("[P]erceptions of undue discrimination can also impede the development of efficient and competitive electric markets."), *order on reh'g*, Order No. 2000-A, 65 Fed. Reg. 12,088 (Mar. 8, 2000), [1996-2000 Reg. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,092, *appeal dismissed sub nom. Pub. Util. Dist. No. 1 v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

TAPS acknowledges that it may be safe to relax the standards with respect to the relationship between electric transmission providers and certain other types of "Energy Affiliates," such as "affiliated gas entities" (NOPR at P 14), but urges the Commission to retain restrictions for electric Transmission Providers as to most categories of Energy Affiliates. The existing definition of "marketing, sales or brokering," which focuses on sales for resale of natural gas and electric energy, does not capture the full range of products with respect to which Transmission Providers and their affiliates compete with — and would have an undue advantage over — their transmission customers. That is particularly true as nation's electric markets develop towards "Day Two" structures that increasingly blend physical and financial products and services. Thus, TAPS urges the Commission to retain the separation between electric Transmission Providers and affiliates that are engaged in either physical or financial transactions related to the purchase or sale of electric energy (including capacity) or transmission.

2. The Commission Should Not Eliminate the Concept of "Energy Affiliates" from the Standards of Conduct Applied to Electric Transmission Providers

If the Commission eliminates the concept of "Energy Affiliates" from the standards of conduct applied to electric Transmission Providers, those standards will once again be limited to restricting the flow of information between Transmission Providers and its employees or Affiliates engaged in "marketing, sales or brokering." As modified in the NOPR, the definition of "marketing, sales or brokering" is:

> a sale for resale of natural gas or electric energy in interstate commerce in U.S. energy or transmission markets. Marketing also includes managing or controlling transmission capacity of a third-party as an asset manager or agent.

> (1) A sales and marketing employee or unit includes:
>
> (i) An interstate natural gas pipeline's sales operating unit, to the extent provided in § 284.286 of this chapter, and
>
> (ii) A public utility Transmission Provider's energy sales unit, unless such unit engages solely in bundled retail sales.
>
> (2) Marketing or sales does not include incidental purchases or sales of natural gas to operate interstate natural gas pipeline transmission facilities.

NOPR at P 22. This focus only on "sales for resale of natural gas or electric energy" is far too narrow to capture the full range of electricity-related products with respect to which electric Transmission Providers and their customers compete in today's energy markets. Indeed, many of the product markets in which Transmission Providers' Energy Affiliates and transmission customers now compete were nascent or did not exist prior to the adoption of Order No. 2004.

A paradigmatic example of new products for which Transmission Providers' Energy Affiliates and transmission customers compete, and with respect to which Transmission Providers could gain undue competitive advantages through non-public transmission information, are short-term and long-term financial transmission rights ("FTRs"). In markets that use locational marginal pricing ("LMP"), transmission congestion is managed through redispatch of generation, and congestion costs are allocated based on differences in LMPs at different locations on the grid. In order to enable market participants to hedge their exposure to congestion costs, the ISOs and RTOs operating such markets established short-term (one year or less) FTRs. Generally, short-term FTRs are auctioned and the auction revenues are allocated (via "auction revenue rights" or "ARRs") to load-serving entities. In some markets, ARRs can be

converted directly to FTRs. FTRs can be purchased in the auction by any market participant for any purpose, including financial speculation, but does not fall within the definition of "marketing, sales or brokering," which is limited to sales for resale of "natural gas or electric energy." 18 C.F.R. § 358.3(e).

In August 2005, Congress directed the Commission to require transmission organizations to ensure that firm transmission rights or their financial equivalents are available on a long-term basis. Pursuant to that directive in new FPA Section 217, the Commission issued Order No. 681,[20] which required "Transmission Organizations" to develop long-term financial transmission rights ("LFTRs") enabling load-serving entities with long-term power supply arrangements to hedge their exposure to congestion costs over the terms of those arrangements (or, at minimum, for a ten year period). Compliance filings responding to Order No. 681 are now pending before the Commission.

Allocation methods for FTRs and proposed allocation methods for LFTRs vary, but Transmission Providers[21] and their affiliates would have an undue competitive advantage in obtaining them if Transmission Providers are permitted to share non-public transmission information with their employees and affiliates who obtain those products. FTRs and LFTRs are obligations, not options, and can either produce a revenue stream or require the holder to make payments, depending on the direction of congestion on the

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[20] *Long-Term Firm Transmission Rights in Organized Electricity Markets*, Order No. 681, 71 Fed. Reg. 43,564 (Aug. 1, 2006), III F.E.R.C. Stat. & Regs. ¶ 31,226 (to be codified at 18 C.F.R. Part 42), *corrected*, 71 F.E.R.C. ¶ 61,201 (Nov. 16, 2006), *on reh'g*, Order No 681-A, 71 Fed. Reg. 98,440 (Nov. 27, 2006), 117 F.E.R.C. ¶ 61,201 (2006).

[21] In the RTO context, for standards of conduct purposes, the term "Transmission Provider" refers to the RTO and its jurisdictional transmission-owning members.

relevant transmission path. The value of an FTR and LFTR to its holder depends on the direction and magnitude of congestion over the relevant transmission path, which in turn depends on transmission system topology, outages, and usage patterns. Further, to the extent that auctions are used to allocate FTRs and LFTRs, the auction prices to be paid for those products are dependent on the market's *expectations* of the direction and magnitude of congestion, based on the market's knowledge of transmission system topology, outages, and usage patterns.

Allowing Transmission Providers and their affiliates to use non-public information about changes in transmission system topology, outages, and usage patterns when competing to obtain FTRs and LFTRs gives them a significant, undue competitive advantage. Transmission Providers and their affiliates would be uniquely situated to identify and obtain high-value FTRs and LFTRs that other market participants, who lack the same information about the transmission system, cannot readily identify.[22]

Nor are FTRs and LFTRs the only kinds of financial products with respect to which Transmission Providers and transmission customers compete. Market participants in LMP-based markets are permitted not only to buy and sell "electric energy." They also are permitted to engage in "virtual" transactions through the submission of "inc" or

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[22] For example, in SMD NOPR Appendix E, at 19-20, the Commission discussed an investigation that revealed that Exelon subsidiaries "may have shared information that gave the marketing subsidiary an informational advantage in its bidding for Fixed Transmission Rights (FTRs) in the monthly FTR auctions." *Notice of Proposed Rulemaking, Remedying Undue Discrimination Through Open Access Transmission Service and Standard Electricity Market Design*, 67 Fed. Reg. 55,451, 55,468 (Aug. 29, 2002), [1999-2003 Reg. Preambles] F.E.R.C. Stat. & Regs. ¶ 32,563 (2002) ("SMD NOPR"). The Commission observed that "[t]his problem is generic to electricity markets with transmission rights" and that "[t]he rights established under Standard Market Design … are susceptible under some conditions to manipulation by transmission owners and their affiliates." *Id*., Appendix E at 20. The Commission also explained that "access to better or more transmission and other related information" may enable the vertically integrated transmission service provider to make more use of such strategies, and to obtain more of an advantage, than any other transmission system user. *Id.* at PP 45-46.

"dec" bids. These transactions are purely financial in nature and open to all market participants. One need not have generation to sell or load to serve in order to participate in them. Although the transactions are "virtual," they nonetheless have real-world financial consequences and effects, including altering day-ahead dispatch patterns and either creating or reducing congestion compared to the dispatch pattern that would exist without them and thus affecting the value of FTRs.

Such virtual transactions are not clearly encompassed within the proposed definition of "marketing, sales or brokering," so eliminating the "Energy Affiliate" provisions from the standards of conduct would allow Transmission Providers and their affiliates to use non-public transmission and customer information to formulate virtual trading strategies. In that case, Transmission Providers and their affiliates would have an undue competitive advantage in virtual trading because their ownership and operation of monopoly transmission facilities would give them unique knowledge regarding transmission system topology, outages, and usage patterns. That information would enable them to predict locations and times at which it will be profitable to submit virtual bids or offers. Stated differently, transmission outages and short-term usage patterns may create local market power that, absent standards of conduct, the Transmission Provider and affiliates may be able to identify and exploit with virtual transactions.[23] This loophole would severely undermine the credibility of the independently-administered markets the Commission has worked hare to establish. Order No. 2000 at 31,017.

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[23] Non-public transmission and customers information could even enable Transmission Providers and their affiliates to determine the times and locations at which the submission of virtual bids or offers would create or eliminate congestion in ways that would benefit their FTR/LFTR holdings.

3. Specific "Energy Affiliates"

The NOPR states (at P 15) that "[m]aking the standards of conduct inapplicable to electric utility transmission providers and their energy affiliates would affect the relationship between a transmission provider and the following types of non-marketing energy affiliates (except as otherwise noted):"

> a. affiliated asset managers;
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> b. affiliated transmission customers that do not make sales for resale;
>
> c. affiliated gas entities, e.g., affiliated producers, gatherers, affiliated gas Local Distribution Companies (LDCs) and affiliated pipelines;
>
> d. affiliated financial institutions that do not engage in physical transactions but only financial transactions;
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> e. affiliated entities that aggregate and re-sell transmission capacity without making sales for resale of energy;
>
> f. affiliated electric LDCs;
>
> g. affiliated electronic trading platforms; and
>
> h. affiliated entities that buy, trade or administer electric energy.

TAPS believes that the currently required separation should be maintained between electric Transmission Providers and most (but not all) of these types of Energy Affiliates.

a) Affiliated asset managers

The NOPR proposes to remove as an "Energy Affiliate," but add to the definition of marketing, sales or brokering, those entities that "manage or control transmission capacity, such as asset managers or agents." NOPR at P 21. The NOPR explains that "[f]requently, asset managers and agents are involved extensively in transmission transactions, they stand in the shoes of the transmission customer and act as

nominating/balancing agent, and have access to all the transmission customer's transmission information." *Id.* The Commission concludes that "[i]t would likely be unduly discriminatory to permit a transmission provider to inform its affiliated asset manager about an upcoming curtailment or outage, unless all other non-affiliated asset managers or transmission customers have comparable access to that information." *Id.* at P 22.

TAPS agrees with this assessment and supports continuing to require separation between electric Transmission Providers and asset managers. As explained in Part C.2 below, however, TAPS is concerned that the migration of provisions relating to asset managers from the "Energy Affiliate" context to the definition of "marketing, sales, or brokering" could arguably introduce an "asset management for bundled retail load" exception that did not previously exist. Consequently, the Commission should either retain the "asset manager" category of Energy Affiliates, or otherwise make clear that marketing "includes managing or controlling transmission capacity of a third-party as an asset manager or agent," regardless of whether the asset manager is engaged in wholesale or bundled retail sales.

b) Affiliated transmission customers that do not make sales for resale, affiliated electric LDCs, and affiliated financial institutions that do not engage in physical transactions, but only financial transactions.

For the reason described above with respect to asset managers, the Commission should continue to require separation of electric Transmission Providers from affiliated transmission customers, regardless of whether that affiliate makes sales for resale. The Commission explained that asset managers "[f]requently … stand in the shoes of the transmission customer." NOPR at P 21. It would be anomalous to find it "unduly

discriminatory to permit a transmission provider to inform its affiliated asset manager about an upcoming curtailment or outage" (*id.* at P 22) but to permit the sharing of such information with its affiliates in the same position as an asset manager.

Moreover, as discussed above, the Commission should require continued separation of electric Transmission Providers from affiliated transmission customers, affiliated electric LDCs, and affiliated financial institutions that do not engage in physical transactions, because those entities frequently compete with *un*affiliated transmission customers *regardless* of whether the affiliated entities make sales for resale. For example, affiliated transmission customers and affiliated electric LDCs serving bundled retail load compete with unaffiliated transmission customers for scarce transmission capacity and for reliable, low-cost power resources. Allowing affiliated transmission customers and affiliates electric LDCs preferential access to non-public transmission and customer information would give such affiliates an undue competitive advantage vis-à-vis unaffiliated customers. Also, affiliated transmission customers, LDCs and financial institutions compete with unaffiliated transmission customers in electricity-related financial markets (including FTR markets and virtual trading in day-ahead markets). Allowing the Transmission Provider's affiliates to have preferential access to non-public information gives them an undue competitive advantage over unaffiliated customers in identifying and capturing valuable financial transmission rights and virtual trading profit opportunities.

c) Affiliated gas entities, *e.g.*, affiliated producers, affiliated gatherers, affiliated gas Local Distribution Companies (LDCs), and affiliated intrastate pipelines

TAPS agrees that it may not be necessary to continue to require electric Transmission Providers' transmission functions to be separated from affiliated producers, affiliated gatherers, affiliated gas Local Distribution Companies (LDCs), and affiliated intrastate pipelines.

d) Affiliated entities that aggregate and re-sell transmission capacity without making sales for resale of energy

Although the Commission wishes to "foster the development of a more robust secondary market for transmission capacity" (Order No. 890 at P 808), the NOPR would undermine the hoped-for development of such a market by tipping the competitive scales and by giving affiliated resellers an undue competitive advantage over unaffiliated resellers. If the separation is eliminated, Transmission Providers could provide affiliated resellers with preferential access to transmission information (for instance, information about upcoming outages or restorations of service), which would give them undue advantages in acquiring capacity at low prices and reselling it when that capacity becomes more valuable. Giving affiliated resellers such a competitive advantage would be especially pernicious in light of Order No. 890's lifting of the price cap as to transmission resold by a Transmission Provider's merchant function or affiliates as well as unaffiliated customers. *Id.* at P 809.

e) Affiliated electronic trading platforms

TAPS does not understand the impetus for the proposal to eliminate this aspect of the existing standards of conduct. What non-public transmission information does the operator of an electronic trading platform need in order to operate the platform? If the

non-public transmission information is to be used in order to allow the affiliated operator or another affiliate to take advantageous *positions* in the relevant market, then the need for separation is clear. For example, if the affiliated trading platform is a one-to-many platform, the operator of the platform can be viewed as a market participant that may receive an undue competitive advantage through receipt of non-public transmission information.

f) Affiliated entities that buy, trade or administer electric energy

As noted in the NOPR (at P 15 & n.31), there is substantial overlap between this category of Energy Affiliates and an electric Transmission Provider's Marketing Affiliates. However, the definition of "marketing, sales or brokering" excludes the Transmission Provider's energy sales units engaged solely in bundled retail sales. Unaffiliated load-serving entities compete with a Transmission Provider's bundled retail sales units to purchase low-cost resources whose output can be delivered reliably and without incurring significant congestion costs. Allowing Transmission Providers to share non-public transmission information with affiliated entities engaged in buying, trading or administering electric energy, including for bundled retail load, would provide those entities with an undue competitive advantage over unaffiliated customers, severely undermining non-discriminatory open access and the competitive markets that the Commission has attempted to foster.

C. The Commission Should Reconsider Order 2004's Exception for Sales to And Purchases For Bundled Retail Load And, At Minimum, Should Avoid Broadening the Exception

The NOPR proposes to maintain Order No. 2004's exception from the standards of conduct permitting Transmission Providers to share non-public transmission and

customer information with marketing personnel and affiliates engaged in sales solely to bundled retail load. In addition, by shifting certain prohibitions (*e.g.* regarding sharing of information with asset managers) from the "Energy Affiliate" regulatory text to the "marketing, sales or brokering" definition, the NOPR may expand the exception by making those prohibitions subject to the bundled retail load exception as well. The Commission should take this opportunity to eliminate the exception permitting Transmission Providers to share non-public transmission and customer information with its bundled retail merchant function. Specifically, the Commission should prohibit Transmission Providers from sharing non-public transmission and customer information with employees engaged in wholesale purchases for bundled retail load. If the Commission nonetheless retains the existing bundled retail load exception despite the arguments set forth below, it should at least avoid expanding it by making additional prohibitions (such as the prohibition against sharing non-public transmission information with affiliated asset managers) subject to the exception.

1. The Commission Should Eliminate the Exception Permitting the Sharing of Non-Public Transmission and Customer Information with Bundled Retail Merchant Functions

The Commission has repeatedly recognized the opportunities for undue discrimination and anticompetitive consequences that result from the bundled-retail load loophole, and the Supreme Court has repudiated the unduly narrow jurisdictional interpretation that caused the Commission to create that loophole in the first place. Yet, in Order No. 2004, despite having proposed to eliminate it, the Commission retained the exception notwithstanding the erosion of the foundation on which it was based. The

Commission should take this opportunity to eliminate the exception for bundled retail merchant employees.

In the Order No. 889 rulemaking,[24] the Commission recognized that informational advantages given to the Transmission Provider's merchant functions for wholesale sales or purchases for bundled retail load violate the Federal Power Act's prohibition of undue discrimination and constitute a serious barrier to effective wholesale competition. As explained in the Order No. 889 NOPR:

> We do not believe that open access non-discriminatory transmission services can be completely realized until we remove real-world obstacles that prevent transmission customers from competing effectively with the Transmission Provider. One of these obstacles is unequal access to transmission information. In the Commission's view, transmission customers must have simultaneous access to the same information available to the Transmission Provider if truly non-discriminatory transmission services are to be a reality.

Order No. 889 NOPR at 66,185. Order No. 889 likewise found (at 31,588, emphasis added) that "[o]pen access non-discriminatory transmission service requires that information about the transmission system must be made available to *all* transmission customers at the same time." Order No. 889 thus required the separation of transmission-function employees from employees engaged in either "sale[s] for resale" or the

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[24] *E.g.*, *Real-Time Information Networks and Standards of Conduct*, Notice of Proposed Rulemaking, 60 Fed. Reg. 66,182 (Dec. 21, 1995), [1988-1998 Reg. Preambles] F.E.R.C. Stat. & Regs. ¶ 32,516 ("Order No. 889 NOPR"); *Open Access Same-Time Information System (Formerly Real-Time Information Network) and Standards of Conduct*, Order No. 889, 61 Fed. Reg. 21,737 (May 10, 1996), [1991-1996 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,035 at 31,588 (1996) ("Open access non-discriminatory transmission service requires that information about the transmission system must be made available to all transmission customers at the same time."), *order on reh'g*, Order No. 889-A, 62 Fed. Reg. 12,484 (Mar. 14, 1997), [1996-2000 Reg. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,049 (Mar. 4, 1997), *reh'g denied*, Order No. 889-B, 62 Fed. Reg. 64,715 (1997), [1996-2000 Reg. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,253 (1997)

"purchase for resale" of electric energy in interstate commerce.[25] Nonetheless, in Order No. 889-A, the Commission decided not to require the separation of transmission functions from merchant functions exclusively serving bundled retail load because it then believed it lacked the jurisdiction to require such separation.[26]

The Order No. 2004 NOPR again proposed to eliminate the bundled retail load exception,[27] and Order No. 2004 rejected the false jurisdictional limitation (see P 78) had been based. *New York v. FERC*, 535 U.S. 1 (2002) laid to rest any claims that the Commission lacked jurisdiction over the transmission component of bundled retail sales. *Id.* at 27 (noting that FERC may "regulate bundled retail transmissions" if necessary to eliminate undue discrimination).[28] Moreover, the Commission recognized that requiring Transmission Providers to separate transmission-function employees from those making sales to (and especially wholesale purchases for) bundled retail load is not tantamount to exercising jurisdiction over the bundled retail transaction, but is simply exerting jurisdiction over public utilities' use and dissemination of information acquired through jurisdictional activities, including the operation of jurisdictional transmission assets.[29]

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[25] Order No. 889 NOPR, 60 Fed. Reg. at 66,199 (defining "Wholesale Merchant Function" to mean " the sale for resale, or purchase for resale, of electric energy in interstate commerce.").

[26] Order No. 889-A at 30,552 ("[W]hen a utility uses its own transmission system to transmit purchased power to retail load customers we have no jurisdiction over the transmission that is included in the bundled sale of power to the retail native load."); *see also* Order No. 888-A at 30,217 ("In a situation in which a transmission provider purchases power on behalf of its retail native load customers, the Commission does not have jurisdiction over the transmission of the purchased power to the bundled retail customers insofar as the transmission takes place over such transmission provider's facilities.").

[27] The Order No. 2004 NOPR would have required separation of transmission-function employees from "an electric transmission provider's sales unit, *including* those employees that engage in wholesale merchant sales *or bundled retail sales*." *See* Order No. 2004 at P 73.

[28] *See also* SMD NOPR, 67 Fed. Reg. at 55,468 (noting the Supreme Court's "conclu[sion] that the Commission had jurisdiction over transmission used for bundled retail sales of electric energy in interstate commerce.").

[29] The Commission has an affirmative obligation to consider the anticompetitive consequences of

Order No. 2004 at P 78 (explaining that the Commission has "ample authority to regulate the behavior of the public utility that owns, operates or controls transmission in interstate commerce…"). However, despite repudiating the only reason previously given for not requiring the separation of transmission-function employees from bundled retail merchant employees, Order No. 2004 refrained from requiring it as the NOPR had proposed.

The Commission should require such separation now. The bundled retail exception allows transmission providers to use the transmission system to serve bundled load in ways that harm wholesale competitors and favor the transmission provider's retail merchant function. Under that exception, employees in sales units engaged solely in bundled retail sales may "[c]onduct transmission system operations [and] reliability functions," and have "access to the system control center or similar facilities … that differs … from the access available to other transmission customers." 18 C.F.R. § 358.4(a)(3). They are permitted preferential access to information about the Transmission Provider's transmission system, including ATC, price, curtailments, storage, ancillary services, balancing, maintenance activity, and expansion plans, *id*. § 358.5(a), (b)(1), and may be made privy to information "acquired from nonaffiliated transmission customers or potential nonaffiliated transmission customers, or developed in

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jurisdictional activities, *FTC v. Conway Corp*., 426 U.S. 271, 274 (1976), and in doing so the Commission must take non-jurisdictional activities into account as part of the "factual context," *id*. at 280. Moreover, FPA Section 206(a) empowers (indeed requires) the Commission to review and to "fix" rules, practices, or contracts "affecting" jurisdictional rates, even though such rules, practices, or contracts are not themselves jurisdictional. 426 U.S.. at 281. For these reasons and others, courts regularly hold that the Commission may regulate jurisdictional activities in ways that have secondary impacts on non-jurisdictional service by public utilities. *See Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966, 969-70 (1986).

the course of responding to requests for transmission or ancillary service." *Id.* § 385.5(b)(2).

As a result of these loopholes, vertically integrated Transmission Providers may inflict substantial competitive harm upon competitors:

- Retail merchant-function employees may obtain advance knowledge that transmission capacity on certain paths will be restricted, and may use that knowledge to make wholesale purchases with suppliers on other paths at rates more favorable than will be available to others when the ATC information is later posted on OASIS;
- In LMP-based markets, retail merchant employees may use advanced knowledge of transmission outages in order to obtain FTRs at more favorable prices than will later prevail once the outage is announced;
- In non-LMP areas, retail merchant employees may use advanced knowledge of outages to reserve transmission capacity remaining on other paths and effectively prevent competing load-serving entities within the constrained area from reaching other suppliers;
- Retail merchant employees may similarly use advance information as to when transmission lines will be returned to service to get a jump on competitors in reserving transmission, making wholesale purchases at favorable prices and, in LMP-based markets, in buying or selling FTRs; and
- Retail merchant employees can also obtain sensitive information about their competitors' transactions and can use that data — such as requests for additional transmission capacity to serve new customers — to attempt to cherry-pick attractive opportunities or to block their competitors' plans in other ways, *e.g.*, by locking up necessary transmission or dispatching generation in ways that create congestion.

Such actions by employees in bundled retail sales units produce anticompetitive effects in both wholesale and retail markets, by lowering Transmission Providers' power supply costs and raising their rivals' costs or preventing competitors from taking advantage of sales opportunities.

These are not hypothetical possibilities. The Commission has encountered them already. For example, in April 2001, the City of Corona, California, announced that it was creating a municipally-owned electric utility, which would provide an alternative to

Southern California Edison's ("SCE's") retail service. *City of Corona, California v. Southern California Edison Co.*, 104 F.E.R.C. ¶ 61,086, at P 2 (2003). Among the customers Corona intended to serve was the Golden Cheese Company of America. *Id.* Corona filed an interconnection request and application for a wholesale distribution access tariff with SCE. SCE's transmission personnel shared "many details" from Corona's application with two retail employees from SCE's Customer Service Business Unit, which handled SCE's large retail customers. *Id.* at PP 8, 11. The Commission found that the sharing of this information gave SCE's retail merchant employees "preferential access to transmission information." *Id.* at P 12. According to Corona, SCE's retail merchant employees used that information to help SCE compete with Corona for Golden Cheese's business. *Id.* at P 3. Nevertheless, the Commission dismissed Corona's complaint because the standards of conduct did not prohibit the preferential sharing of information with retail merchant employees. *Id.* at PP 6, 12.

In short, the bundled retail load exception cripples the Commission's ability to ensure the non-discriminatory transmission access that is an essential predicate for reliance on competitive generation markets to ensure just and reasonable wholesale rates. This impairment is critical, because "[e]fficient and competitive markets will develop only if market participants have confidence that the system is administered fairly," and the "[l]ack of market confidence resulting from the perception of discrimination … has real-world consequences," impairing both competitive markets and reliability. Order No. 2000 at 31,017. As the Commission has found:

- "[T]here is a reluctance on the part of market participants to share operational real-time and planning data with transmission providers because of the suspicion that they could be providing an advantage to their

affiliated marketing groups, and this can, in turn, impair the reliability of the nation's electric systems," *id*.; and

- "The perception that a transmission provider's power sales are more reliable may provide subtle competitive advantages in wholesale markets, *e.g.*, purchasers may favor sales by the transmission provider or its affiliate, expecting greater transmission service reliability," *id*.

The potential for such problems will only increase "unless the market can be made structurally efficient and transparent with respect to information, and equitable in its treatment of competing participants." *Id*.

To advance its pro-competition policies, the Commission must promulgate standards of conduct that ensure the non-discriminatory transmission service that constitutes the indispensable foundation for these policies. The Commission should take this opportunity to correct past errors and should require the separation of transmission function personnel from all merchant personnel, eliminating the exemption for sales units that engage solely in bundled retail sales. Specifically, the Commission should provide that "sales and marketing" includes "a public utility Transmission Provider's energy sales unit," striking the phrase "unless such unit engages solely in bundled retail sales." Alternatively, the Commission could adopt the language proposed in Order No. 2004 NOPR (66 Fed. Reg. at 50,927), providing that "sales and marketing" includes "an electric transmission provider's sales unit, including those employees that engage in wholesale merchant sales or bundled retail sales."

At minimum, the Commission should adopt the formulation initially established by Order No. 889 (before the Commission retreated on unfounded jurisdictional grounds) and require the separation of transmission-function personnel from employees that make *either* sales *or purchases* in the wholesale market. Although the Order No. 889 formulation would not completely eliminate opportunities for undue discrimination in

favor of bundled retail load, it would address the most egregious situations in which Transmission Providers competing with transmission customers for transmission reservations and resources with which to serve bundled retail load can obtain competitive advantages from the use of non-public transmission and customer information.

2. At Minimum, the Commission Should Avoid Expanding the Bundled Retail Load Exception

As noted above, the NOPR proposes to shift the locus of the standards of conduct restrictions applicable to asset managers from its current location in the "Energy Affiliate" regulatory text to the definition of "marketing, sales, or brokering." This proposed change arguably expands the reach of the bundled retail load exception. Before, an electric Transmission Provider could not share non-public transmission or customer information with an affiliated asset manager. NOPR at P 15. Because that relationship was covered by the "Energy Affiliate" text, it did not matter whether the underlying asset was being used to make wholesale or bundled retail sales. Under the NOPR, arguably, electric Transmission Providers would be free to share non-public information with affiliated asset managers so long as the underlying asset was used solely to make bundled retail sales.

The Commission should not expand the breadth of the bundled retail load exception from the standards of conduct. Thus, the Commission should either retain the "asset manager" category of Energy Affiliates, or otherwise make clear that marketing "includes managing or controlling transmission capacity of a third-party as an asset manager or agent," regardless of whether the asset manager is engaged in wholesale or bundled retail sales.

III. INTERESTS OF TAPS/COMMUNICATIONS

TAPS is an informal association of transmission-dependent utilities in more than 30 states, promoting open and non-discriminatory transmission access.[30] As entities entirely or predominantly dependent on transmission facilities owned and controlled by others, TAPS members are acutely aware of the needs to prevent undue discrimination in the provision of transmission service and to facilitate robust, regional integrated resource planning for transmission providers and customers alike.[31]

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[30] TAPS is chaired by Roy Thilly, CEO of Wisconsin Public Power Inc. Current members of the TAPS Executive Committee include, in addition to WPPI, representatives of: American Municipal Power-Ohio; Blue Ridge Power Agency; Clarksdale, Mississippi; ElectriCities of North Carolina, Inc.; Florida Municipal Power Agency; Geneva, Illinois; Illinois Municipal Electric Agency; Indiana Municipal Power Agency; Madison Gas & Electric Co.; Missouri River Energy Services; Municipal Energy Agency of Nebraska; Northern California Power Agency; Oklahoma Municipal Power Authority; Southern Minnesota Municipal Power Agency; and Vermont Public Power Supply Authority.

[31] TAPS has commented on nearly all major rulemakings and policy inquiries involving the electricity industry over the past decade.

IV. CONCLUSION

WHEREFORE, the Commission should modify the proposed exceptions for "planning" and "competitive solicitation" employees, retain the required separation between electric Transmission Providers and most "Energy Affiliates," and eliminate the exception from functional separation for merchant employees engaged in sales solely to bundled retail load, as stated above.

Respectfully submitted,

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