UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

REPLY COMMENTS OF TRANSMISSION ACCESS POLICY STUDY GROUP

As permitted by the Commission's February 28, 2007, "Notice Extending Comment and Reply Comment Period," the Transmission Access Policy Study Group ("TAPS") hereby replies to certain comments — primarily, those of the Edison Electric Institute[1] — that were filed in response to the January 29, 2007 "Notice of Proposed Rulemaking" ("NOPR")[2] in this docket. TAPS's initial comments on the NOPR were filed on March 30, 2007.[3] The industry response to the NOPR has been extensive: more than eighty sets of initial comments have been filed, some of which are lengthy. Of necessity, TAPS's reply comments must be highly selective and focus only on a few discrete issues. To the extent not specifically addressed herein, TAPS's position remains as stated in it its initial comments.

I. SUMMARY OF TAPS REPLY COMMENTS

TAPS agrees with EEI that the standards of conduct "rules are not clear today" and that it is a "top priority … to make the rules easier to understand and apply." EEI

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[1] Comments of the Edison Electric Institute, *Standards of Conduct for Transmission Providers*, Docket No. RM07-1-000 (Mar. 30, 2007) ("EEI Comments").

[2] 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), *comment period extended*, 72 Fed. Reg. 10,433 (Mar. 8, 2007).

[3] Comments of Transmission Access Policy Study Group, *Standards of Conduct for Transmission Providers*, Docket No. RM07-1-000 (Mar. 30, 2007) ("TAPS Comments").

Comments at 2. TAPS also supports modification of the standards of conduct to facilitate efficient, *non-discriminatory* integrated resource planning and joint, regional transmission planning. However, the pursuit of regulatory clarity and the efficiencies of vertical integration must not (and may not) trump statutory principles of non-discrimination or the development of truly competitive markets based on level playing fields. TAPS urges the Commission to adopt *only* those standards of conduct revisions that are consistent with ensuring that the owners and operators of monopoly transmission facilities cannot derive undue competitive advantages from them or from the non-public information they obtain as owners and operators of monopoly systems.

With this as backdrop, TAPS replies that:

- TAPS would not be opposed in principle to EEI's suggestion that the Commission replace what it calls Order No. 2004's "corporate-functional" unbundling approach with an "employee-functional" unbundling approach that spans the relationship between Transmission Providers and their affiliates, *provided* that the "marketing" concept is simultaneously expanded. However, adopting that change *without* simultaneously expanding the concept of "marketing" would open huge loopholes in the rules. Transmission Providers could provide undue advantages to affiliates competing for numerous electricity-related products that are presently outside the scope of "marketing, sales or brokering," as defined in the regulations, but within the scope of "Energy Affiliate" activities.
- Thus, any movement away from the "Energy Affiliate" concept in favor of an affiliate-spanning employee-functional approach must be accompanied by expansion of the "marketing, sales or brokering" concept. The Commission must protect against undue competitive advantages derived from transmission ownership or operation in all of the electricity-related markets in which Transmission Providers (and their affiliates) compete with transmission customers. "Marketing, sales or brokering" should be expanded to include, at minimum, either the sale for resale, the purchase of, or the submission of bids or offers for: (a) electric energy (both physical and virtual), (b) generating capacity, (c) sites for location of new generation capacity, (d) transmission capacity and/or reservations, (e) financial transmission rights, (f) ancillary services, and (g) any other electricity-related product (including financial products) that exists or may be developed.

- The Commission should not expand the exception for permissibly-shared officers and directors as requested by EEI. If it does expand the exception, the Commission should require Transmission Providers to post on OASIS documents and information describing the contours of the exception and specifying the nature of any non-public transmission information to which a shared officer and director has access and any transmission-function or "marketing, sales or brokering" (or "Energy Affiliate") activities in which the shared officer or director is involved.
- The Commission should not expand the exceptions for permissibly-shared lawyers and risk-management employees.
- As stated in TAPS's initial comments (and not repeated herein), the Commission should adopt the proposed exceptions for integrated resource planning and competitive solicitation employees, but *only* if those exceptions are modified as stated in TAPS's initial comments as necessary to ensure that: (1) Transmission Providers plan and acquire resources for their wholesale requirements load and bundled retail load on a non-discriminatory basis, and (2) network transmission customers have the same level of access to the same types of non-public transmission information in order to plan and acquire resources for their loads.
- The Commission should not expand the proposed competitive solicitation employee exception, as requested by EEI, unless, as set forth above, network transmission customer employees that perform the same tasks may obtain the same kind of non-public transmission information as the Transmission Provider's (or its affiliates') competitive solicitation employees.

II. IF THE COMMISSION ELIMINATES THE "ENERGY AFFILIATE" CONCEPT, IT MUST EXPAND THE DEFINITION OF "MARKETING, SALES, OR BROKERING"

In *National Fuel*,[4] the D.C. Circuit remanded Order Nos. 2004 *et al.*,[5] as applied to natural gas pipelines, insofar as those orders required the pipelines to be separated

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[4] *National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831 (D.C. Cir. 2006).

[5] *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. Stats. & Regs. ¶ 31,155 (to be codified at 18 C.F.R. pts. 37, 161, 250, 284 and 358), *order on reh'g*, Order No. 2004-A, 69 Fed. Reg. 23,562 (Apr. 29, 2004), [2001-2005 Reg. Preambles] F.E.R.C. Stats. & 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. Stats. & 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. Stats. & Regs. ¶ 31,172, *order on reh'g*, Order No. 2004-D, 110 F.E.R.C. ¶ 61,320 (2005), *vacated in part*, *Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831 (D.C. Cir. 2006).

from their "Energy Affiliates." Although the court specifically left Order Nos. 2004 *et al.* in place as applied to electric transmission providers, *id.* at 845, the NOPR requested comment on whether it should continue to require that electric transmission providers be separated from their "Energy Affiliates." NOPR at P 14. TAPS's initial comments urged the Commission to retain the prohibition with respect to most (but not all) categories of Energy Affiliates. *See generally* TAPS Comments at 27-36. TAPS acknowledged that it "may not be necessary to continue to require … separat[ion] from affiliated producers, affiliated gatherers, affiliated gas Local Distribution Companies (LDCs), and affiliated intrastate pipelines." *Id.* at 35. Otherwise, however, TAPS urged the Commission to retain the required separation of electric Transmission Providers from Energy Affiliates, as a necessary adjunct to the separation from employees and affiliates engaged in "marketing, sales or brokering." The adjunct continues to be required, TAPS explained (at 28), because the existing definition of "marketing, sales or brokering," focusing 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 markets.

EEI's initial comments urge the Commission to "eliminate the 'Energy Affiliate' category" from the standards of conduct and to abandon what it calls Order No. 2004's "corporate-functional approach," which requires a Transmission Provider to separate from an entire Energy Affiliate corporation and not just the specific employees engaged in merchant activities. *See* EEI Comments at 6-7. Instead, EEI urges the Commission to adopt an "employee-functional approach," which "appl[ies] directly to employees based upon the functions they perform, rather than the functions of other employees in their

company (or division)." *Id.* at 19. In essence, EEI's approach would require the separation of a Transmission Provider's transmission-function employees from its own "marketing, sales or brokering" employees and those of its affiliates. *See id.* at 20 ("Both the corporate-functional approach and the employee-functional approach require an evaluation of employee function to determine how the rules apply. EEI has no quibble with this and indeed thinks it is proper.") However, EEI's approach would eliminate the currently required separation of a Transmission Provider's transmission-function employees and an Energy Affiliate's other employees (*i.e.*, those who do not engage in "marketing, sales or brokering").

TAPS opposes EEI's proposal to abandon the required separation of Transmission Providers and Energy Affiliates while maintaining the present, narrow definition of "marketing, sales or brokering." However, TAPS would not object to replacing the corporate-functional approach with an employee-functional approach *if* (and only if) the set of employees to be separated from the transmission function were properly defined to include employees engaged in either the acquisition or sale of any of the electricity-related products or services with respect to which Transmission Providers and their affiliates compete with transmission customers.

TAPS supported retaining most categories of "Energy Affiliates" not because there was anything talismanic about the types of affiliates involved but, rather, because such companies frequently compete with transmission customers *in ways that are not captured by the existing definition of "marketing, sales or brokering."* As noted in TAPS's initial comments (at 27):

> 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."

The current definition of "marketing, sales or brokering" is limited to "sale[s] for resale of natural gas or electric energy in interstate commerce in U.S. energy or transmission markets," which the NOPR would expand to include "managing or controlling transmission capacity of a third-party as an asset manager or agent." *Id.*, quoting NOPR at P 22.

TAPS explained that this definition was "far too narrow" because it omitted many of the electricity-related products and markets in which Transmission Providers and their affiliates compete with transmission customers. Transmission Providers and their affiliates compete with transmission customers not just in the *sale* for resale of electric energy (and capacity), but also in the *acquisition* of power supply resources, which are then used fungibly and untraceably both to serve load and to make off-system sales. Transmission Providers and their affiliates compete with transmission customers for favorable purchased power arrangements, as well as for opportunities to site and develop or participate in the development of new generation. They compete for the transmission capacity needed to deliver their resources to their load or, if they have secured excess transmission capacity, for opportunities to resell that capacity. And they compete to purchase or sell ancillary services.

Moreover, because of the proliferation of "virtual" and "financial" electricity-related products and markets, transmission customers find themselves competing with Transmission Providers and their affiliates in markets that did not exist or that were nascent when the existing definition of "marketing, sales or brokering" was drafted. A

Transmission Provider (or affiliate) employee with non-public transmission information may be able to benefit his employer or harm a competitor by submitting virtual supply or demand bids to create or alleviate congestion at particular times and locations. Similarly, a Transmission Provider or affiliate employee armed with non-public transmission information will have an undue advantage when bidding in auctions for short- or long-term financial transmission rights, including those that are acquired purely for financial purposes and not to hedge the congestion cost of delivering resources to load. Likewise, a Transmission Provider or affiliate employee with non-public transmission information may take positions in electricity-related financial and/or commodity markets that affect or are affected by physical electric markets.

The purpose of the standards of conduct is to prevent Transmission Providers from using their ownership or operation of monopoly transmission facilities — and the non-public information they acquire in that role — to gain undue competitive advantages over transmission customers. To achieve that end, the standards must require separation of transmission function employees from *all* Transmission Provider (and affiliate) employees performing functions that involve competition with transmission customers. At minimum, the standards must require separation of transmission function employees from employees engaged in *either* the sale for resale, the purchase of, or the submission of bids or offers[6] for: (a) electric energy (both physical and virtual), (b) generating capacity, (c) sites for location of new generation capacity, (d) transmission capacity

[6] In bid-based markets, the act of bidding is the competitively-significant event and the submission of bids or offers to buy or sell electricity-related products should be considered a merchant activity regardless of whether any of those bids or offers results in an actual sale or purchase. Moreover, to avoid any ambiguity, the Commission should clarify that the submission of "virtual" supply and demand bids is a merchant activity even though such bids may not involve the purchase or sale of physical electric energy.

and/or reservations, (e) financial transmission rights, (f) ancillary services, and (g) any other electricity-related product (including financial products) that exists or may be developed.

If the Commission adopts EEI's proposed change to an employee-functional approach, it should modify EEI's proposed regulatory text for Section 358.3(e) to provide that:

> (e) Marketing, sales or brokering means the purchase or sale for resale ~~of electric energy~~ in interstate commerce in U.S. energy or transmission markets of, or the submission in such markets of bids or offers to buy or sell, electric energy, capacity, "virtual" supply or demand, sites for location of new generation capacity, transmission capacity or reservations, financial transmission rights, ancillary services, or any other electricity-related product (including financial products) that exists or may be developed. Marketing also includes making transmission reservations, or scheduling transmission, by an employee of the Transmission Provider or an Affiliate acting pursuant to an agency relationship, in connection with Marketing, Sales or Brokering activities.

III. THE COMMISSION SHOULD NOT EXPAND THE EXCEPTION FOR PERMISSIBLY-SHARED OFFICERS AND DIRECTORS

EEI also asks the Commission to expand the existing exception permitting transmission and merchant functions to "share" senior officers and directors. The standards of conduct provide — and EEI admits that they should provide — for officers and directors to be considered transmission function or merchant function employees (regardless of their job title) if they engage in "day-do-day" activities warranting such a label. *See* EEI Comments at 27 (quoting NOPR at P 24) and 33 & n.25 (acknowledging the propriety of continuing that treatment). However, EEI complains that Commission case law — including case law preceding Order No. 2004 —

"subjected officers to the rule even for approving or executing a single contract when required to do so by corporate bylaws." EEI Comments at 29. EEI also complains that Order Nos. 2004 *et al.* "not only retained this treatment, but expanded it to include less than day-to-day involvement in transmission planning." *Id.* at 30.

EEI proposes to roll back that treatment:

> EEI proposes a safe harbor under which officers and directors would be permitted to be shared if they approve or execute power sales, or approve transmission planning, or undertake other important activities such as making decisions on mergers and acquisitions or positions to take in litigation, only when the Parent Board, or the CEO acting pursuant to authority delegated by the Parent Board, requires them to do so, based upon their reasonable business judgment as to acceptable risk levels, formed in the course of discharging their fiduciary obligations…. The Parent Board and CEO would not be permitted to use this process to give access to transmission information to officers (or directors of subsidiary companies) who are engaged in Marketing or Transmission Functions on a day-to-day basis.

EEI Comments at 33 (footnote omitted). EEI further proposes that there be "a rebuttable presumption that the delegations of authority established by the Parent Board or CEO are reasonable under these criteria." *Id.*

TAPS opposes EEI's proposal. The premise underlying EEI's request — that certain transactions are of sufficient magnitude and importance to require high-level officer or director sign-off — demonstrates why Transmission Providers and their affiliates should *not* be permitted to enter into those transactions (or refrain from entering into them) based upon non-public transmission or customer information that is unavailable to the Transmission Provider's (or affiliate's) counter-party. Such "occasional," big-ticket transactions — such as long-term power supply arrangements

and major transmission projects — can have a tremendous impact on the relative competitive positions of transmission customers and Transmission Providers (and their affiliates). A Transmission Provider's (or affiliate's) knowledge of impending changes in transmission system topology, outages, or interconnection of new generating facilities would give it an unfair advantage in negotiating and deciding whether to approve or reject such long-term power supply arrangements.[7]

While TAPS is sympathetic to the difficulty of maintaining functional separation within *small* Transmission Provider organizations with few levels of corporate hierarchy — and encourages the Commission to consider exemption requests on a case-by-case basis where complete functional separation proves impractical[8] — in *most* cases it should be possible for public utilities to vest power-supply contract approval authority

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[7] For example, a Transmission Provider or affiliated seller may be able to lock in high prices before the announcement of transmission upgrades that would increase supplies to (and lower market prices in) the applicable market. Similarly, a Transmission Provider or affiliated seller armed with non-public knowledge about the transmission system can better predict transmission congestion trends and negotiate superior congestion-risk allocation provisions.

[8] EEI asks the Commission to "clarify its standard for granting exemptions from the Standards of Conduct to ensure that its Standards of Conduct regulations are applied only where they serve a regulatory purpose to prevent competitive harm." EEI Comments at 86. Specifically, EEI would revise the regulatory text of 18 C.F.R. § 358.1(d) to provide that "A Transmission Provider may demonstrate good cause [for an exemption] by, among other things, demonstrating that an exemption would not result in anticompetitive harm to U.S. natural gas or electric energy markets or provide an anticompetitive advantage to Marketing Employees in U.S. natural gas or electric energy markets." *Id.* at 90. EEI's proposed change should be rejected. The existing language of 18 C.F.R. § 358.1(d) should already allow the Commission to grant "good cause" exemptions where the exemption would not increase the opportunity for undue discrimination, *e.g.*, for a transmission owner that, while exceeding the 4 million MWh "small utility" mark, provides no third-party service on its transmission facilities. In contrast, by narrowing the focus to hard-to-prove showings of "anticompetitive harm," EEI's proposal would invite large transmission providers to bog the Commission down in case-by-case petitions to chip away at application of the standards of conducts and the effectiveness of the functional unbundling required by Orders 888 and 889. The Commission should not endanger the non-discrimination transmission service on which its competitive markets rest in this manner. *See* Regional Transmission Organizations, Order No. 2000, 65 Fed. Reg. 809, 824 (Jan. 6, 2000) [1996-2000 Regs. 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 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,092, *appeal dismissed for want of standing sub nom. Pub. Util. Dist. No. 1 v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

in a reasonably high-level officer or director who neither has nor needs access to non-public information from the Transmission Provider's transmission function. TAPS urges the Commission to continue to require such separation except where an individual Transmission Provider demonstrates, on the basis of a particularized factual record, that it is impractical.

At minimum, if the Commission does consider expanding the exception for permissibly-shared officers and directors, it should adopt requirements ensuring that the scope and application of the exception will be transparent and will not be abused. For example, Transmission Providers (and affiliates) taking advantage of the newly-expanded exception should be required to post on OASIS documents that: (a) identify by name and title the specific officers and directors taking advantage of the exception, (b) identify and describe the delegations of authority pursuant to which the officer or director is acting, (c) define the categories of transactions requiring approval by that officer or director, and (d) maintain a contemporaneous log of the "occasional" transmission-function and/or merchant-function activities undertaken by that officer or director (*i.e.*, the activities that, but for the expanded exception, would have rendered that officer or director a transmission function and/or merchant function employee).

The Commission should also make clear that any permitted sharing of officers and directors is not a "safe harbor" and does not allow shared officers to use non-public information gleaned through transmission-function activities to obtain a competitive advantage for the Transmission Provider or its affiliates. The Commission should explain that it will monitor the postings described above, audit Transmission Providers' implementation of the exception for permissibly-shared officers and directors, and initiate

enforcement proceedings upon complaint or on the Commission's own motion if abuses are discovered. Transmission Providers should understand that the expanded exception for permissibly-shared officers and directors is a "yellow light," not a "green light," and that they must proceed with caution.

IV. THE COMMISSION SHOULD NOT EXPAND THE EXCEPTIONS FOR PERMISSIBLY-SHARED LAWYERS AND RISK-MANAGEMENT EMPLOYEES

EEI requests (at 46) that the "rules regarding lawyers should be clarified on a single narrow point." EEI supports (and TAPS is not now arguing to narrow) the existing rules establishing that "lawyers who are providing legal or regulatory advice or advocating in their traditional roles can be shared, … as may lawyers who negotiate contracts pursuant to the instructions of business decision-makers."[9] However, EEI states that ambiguity arises when a lawyer provides advice that results in another employee declining to enter into a transaction:

> For example, a lawyer may be called upon to provide advice as to whether a request for transmission service is lawful under the open access transmission tariff …. The same sort of scenario could arise in the context of a lawyer's service to a Marketing Affiliate. For example, a lawyer could advise a Marketing Affiliate business decision-maker not to enter into a transaction on the ground that the transaction would be unlawful under the Commission's anti-market manipulation rules.

EEI Comments at 46. EEI requests clarification that "provision of legal or regulatory advice within a lawyer's traditional role will not, of itself, cause a lawyer to become

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[9] EEI Comments at 46 (citation omitted). EEI acknowledges that "to the extent that [lawyers] conduct transmission functions, or are involved in planning, directing or organizing transmission functions, the lawyers' status as 'lawyers' does not exempt them from also being Transmission Function Employees." *Id.*, quoting Order No. 2004-B at P 74. EEI also agrees more broadly that "merely labeling someone under a particular job title does not qualify them to be shared." *Id.*

ineligible to be shared, even if that advice has the effect of directing an action or non-action." *Id.* at 46-47.

TAPS cautions against attempting to craft any bright-line rules in this area. The problem, as EEI acknowledges elsewhere, is that the provision of "legal or regulatory" advice is not always cut and dried. The rules are frequently ambiguous and leave significant room for interpretation. In such "grey areas," it may be extremely difficult to distinguish "legal or regulatory advice" from "business advice." Indeed, a lawyer's legal interpretation of ambiguous rules can be colored by his or her knowledge of a company's business interests. Determining the role that a given lawyer is actually performing in particular cases is a highly fact-specific inquiry, as the case law regarding application of attorney-client privilege (cited in footnote 50 of EEI's comments) demonstrates.

As noted above, the Commission has already stated that "lawyers may provide legal or regulatory advice in their traditional roles without becoming" transmission function or merchant function employees, but has explained that the "lawyer" label will not shield activities beyond the provision of legal or regulatory advice in traditional roles. Order No. 2004-B at P 74. The Commission should maintain the exception for permissibly-shared lawyers as it is, and should leave further interpretation and application of this rule to case-by-case development on specific factual records.

EEI also asks (on the basis of consistency with the rules for natural gas transmission providers) that electric Transmission Providers (and their affiliates) be permitted to share risk-management employees between transmission and merchant functions. *See* EEI Comments at 50. However, in the event that the Commission retains

the restriction (as TAPS believes it should), EEI "requests that the Commission change a limited facet of the rule." *Id.* at 50-51. According to EEI:

> The discussion of the risk management exception in Order No. 2004-A suggests that risk managers that evaluate credit risk of potential transmission customers under the OATT are engaging in transmission functions, because such an evaluation may result in denial of service.

EEI Comments at 51.

EEI asserts that, because shared risk-management employees cannot engage in marketing or "Energy Affiliate" activities, the only reason for the above restriction is to "provide[] a structural reinforcement of the no-conduit rule." *Id.* EEI claims that this structural reinforcement should be abandoned because it is not needed and because "[f]ew if any companies have large enough transmission operations to justify a separate risk management organization for assessing counter-party credit risk for transmission customers." *Id.* at 52.

However, EEI has not explained why the existing rules (absent the requested clarification) would require a separate "risk management organization for assessing counter-party credit risk for transmission customers." On the contrary, Order No. 2004-A allows shared risk-management employees to:

> (1) manage corporate-wide business risk exposure of the corporation and/or its affiliates; (2) evaluate business risk exposure for third parties on an aggregate basis; (3) manage overall corporate investment for the entire corporation; (4) approve expansion projects; and (5) establish spending, trading and capital authorities for each business unit.

Order No. 2004-A at P 153. Shared risk-management employees can then communicate such aggregate or business-function-wide thresholds to the transmission function and merchant functions respectively. EEI has not shown why one or more transmission

function employees could not be assigned the responsibility of applying those thresholds and policies to individual transmission customer applications. EEI has not demonstrated why that task must be performed by shared risk-management employees.

V. THE PLANNING AND COMPETITIVE SOLICITATION EXCEPTIONS SHOULD BE ADOPTED AND EXPANDED ONLY IF MODIFIED TO ENSURE NON-DISCRIMINATORY TREATMENT OF WHOLESALE REQUIREMENTS AND NETWORK TRANSMISSION CUSTOMERS

TAPS's initial comments supported the proposed exceptions for integrated resource planning and competitive solicitation employees, but *only* if modified to ensure (a) that Transmission Providers plan for and acquire resources for both wholesale requirements customers and bundled retail load on a non-discriminatory basis, and (b) that network transmission customers have the same level of access to the same types of non-public transmission information from the Transmission Provider that the network customer needs in order to plan and acquire resources for *its* load. EEI supports the integrated resource planning and competitive solicitation exceptions, and its comments reinforce a number of the points made in TAPS's initial comments.

For example, EEI's discussion at pages 60-64 demonstrates why allowing a Transmission Provider to have informal access to non-public transmission information, while a network customer is restricted to formal transmission requests and OASIS information, would be unduly discriminatory and harmful. As EEI points out:

> [T]he leading hallmark of IRP … is its ability to simultaneously consider and compare a variety of alternative resource options, including detailed evaluations of transmission alternatives and transmission costs or savings associated with generation or demand-side management alternatives.

> Such analysis cannot be conducted efficiently based only on information posted on OASIS.
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> * * *
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> The process for designating network resources under the OATT is also poorly suited for IRP. Like the OATT's generator interconnection process, the process for requesting network resource service under the OATT is an inflexible process that requires detailed studies that must be handled in queue order.

EEI Comments at 60, 62 (footnote omitted). It would be unduly discriminatory to free Transmission Providers from these limitations while leaving network transmission customers subject to them.

EEI also acknowledges that Transmission Providers can and should plan and acquire generation resources for wholesale requirements customers and bundled retail load on a non-discriminatory basis:

> The restriction to planning for bundled retail load is also illogical and effectively unworkable. *See* Oppel Aff. at 12-13. Companies have a legitimate need to plan for all of their native load, including POLR load and wholesale requirements load. Unlike merchant transactions, which typically involve block amounts of megawatts with given characteristics for a given time period, bundled retail, POLR, and wholesale requirements load will fluctuate based on demand. All three are planned for based on having adequate resources to meet projected peak load, with an adequate reserve margin to address contingencies. All three are planned for based upon having a mix of owned and/or contracted base load, intermediate and peaking resources to efficiently meet varying load levels. And all three are planned for factoring in considerations such as whether demand response can be used to shave peaks, and whether some portion of load should be served by renewables. In short, all three are – or should be – planned for in the same manner.

Id. at 66.

TAPS supports changes to the proposed integrated resource planning and competitive solicitation employee exceptions that are necessary to make them more useful for *all* entities that need to plan and acquire resources to serve load. However, it is crucial that the Commission ensure that any such expansions are extended even-handedly to meet the needs of Transmission Providers and network transmission customers alike.

Consequently, TAPS supports the expansion proposed at page 76 of EEI's comments — urging the Commission to allow competitive solicitation employees to "engage in procurement from third-parties through direct bilateral negotiation" — *if* (*and only if*) network transmission customer employees engaged in the same activities are given the same level of access to non-public information possessed by the Transmission Provider as is available to the Transmission Provider's own competitive solicitation employees.

VI. CONCLUSION

WHEREFORE, the Commission should adopt standards of conduct consistent with the positions set forth in TAPS's initial and reply comments.

Respectfully submitted,

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