

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

Standards of Conduct for Transmission  
Providers

Docket No. RM07-1-000

**REQUEST FOR CLARIFICATION OR REHEARING  
OF THE TRANSMISSION ACCESS POLICY STUDY  
GROUP**

Pursuant to Section 313(a) of the Federal Power Act (“FPA”), 16 U.S.C. § 8251(a), and Rules 212 and 713 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. §§ 385.212, 385.713, the Transmission Access Policy Study Group (“TAPS”) requests rehearing or clarification of Order No. 717-A.<sup>1</sup> TAPS requests that the Commission clarify, as we believe to have been the Commission’s intent, that a Generation and Transmission cooperative’s (“G&T Coop’s”) sales to its distribution cooperative members (and, by extension, a municipal joint action agency’s [“JAA’s”] sales to its municipal distribution utility members), although technically wholesale, are analogous to a vertically integrated utility’s retail sales function and should be treated the same for purposes of applying the standards of conduct, to the extent those standards otherwise apply.<sup>2</sup> Alternatively, TAPS seeks rehearing of the Commission’s failure to

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<sup>1</sup> Order No. 717-A, Standards of Conduct for Transmission Providers, 74 Fed. Reg. 54,463 (Oct. 22, 2009), 129 F.E.R.C. ¶ 61,043 (2009).

<sup>2</sup> Section 201(f) of the Federal Power Act, 16 U.S.C. § 824(f), provides that “No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.” Consequently, Order No. 717 does not impose standards of conduct requirements directly upon such entities. The standards of conduct apply to such entities, if at all, only by way of the reciprocity conditions included in public utilities’ open access transmission tariffs.

treat G&T Coops and JAAs that are virtually vertically integrated with their member distribution utilities by long-term contract comparably to the way it treats vertically integrated public utility transmission providers.

## **I. STATEMENT OF ISSUES AND SPECIFICATION OF ERRORS**

1. The Commission should clarify that, for standards of conduct purposes, it intends to treat G&T Coops' and JAAs' sales to member distribution utilities (which are technically wholesale sales) as analogous to vertically integrated utilities' sales to retail load and, consequently, that it will not treat G&T Coops' and JAAs' employees involved in making sales to member distribution utilities as "marketing function" employees for purposes of the standards of conduct.
2. Alternatively, if the Commission does not so clarify, it should grant rehearing. G&T Coop and JAA employees making sales to member distribution utilities are engaged in the same activities, for the same purposes, as employees of vertically integrated utilities who make sales to retail load. To treat G&T Coops' and JAAs' employees differently than vertically integrated public utilities' employees, simply because of differences in corporate form, would be to create undue discrimination where Order Nos. 888 and 889 and subsequent standards of conduct orders intended to eliminate it. *E.g.*, 16 U.S.C. §§ 824d, 824e; Order No. 889-A, 62 Fed. Reg. 12,484, 12,485 (Mar. 14, 1997), [1996-2000 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,049, at 30,548 (purpose of standards of conduct is to eliminate undue discrimination based on unequal information access), *reh'g denied*, Order No. 889-B, 62 Fed. Reg. 64,715 (Dec. 9, 1997), 81 F.E.R.C. ¶ 61,253, *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); Order No. 717-A, PP 37-39 (permitting public utility employees engaged in bundled retail sales or unbundled sales as provider of last resort unrestricted access to transmission information). It also would be arbitrary, capricious, and a failure to engage in reasoned decision-making. *E.g.*, *Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 834 (D.C. Cir. 2006).
3. It is similarly arbitrary, capricious, and a failure to engage in reasoned decision-making to refrain from classifying public utilities' bundled retail sales employees as "marketing function" employees, because of perceived jurisdictional limitations or a decision not to assert jurisdiction, while simultaneously applying that classification to employees performing analogous functions for non-jurisdictional, Section 201(f) entities. 16 U.S.C. § 824(f); *New York v. FERC*, 535 U.S. 1, 19-20, 23 (2002); *Nat'l Fuel Gas Supply Corp.*, 468 F.3d at 834.

## II. ARGUMENT

In their request for rehearing or clarification of Order No. 717, TDU Systems asked the Commission to clarify that generation and transmission cooperative employees engaged in making sales to their members would not be subject to the standards (and need not be separated from transmission functions) solely because of those sales. TDU Systems argued that:

G&Ts exist for the purpose of providing power supplies to their member distribution cooperatives, usually on a full-requirements basis, at cost. They serve their member loads by generating power and by purchasing wholesale power from third parties.

Request for Clarification or Rehearing of the Transmission Dependent Utility Systems, *Standards of Conduct for Transmission Providers*, Docket No. RM07-1-000, at 2 (Nov. 17, 2008) (“TDU Systems Rehearing”). TDU Systems observed that, under Order No. 2004, the G&T Coops’ employees engaged in purchasing power for sales to members were subject to the standards of conduct by virtue of those purchases but that, under Order No. 717, that is no longer the case. Therefore, the TDU Systems asked the Commission to clarify that those employees’ involvement in sales to members would not subject them to the standards. TDU Systems argued that:

G&Ts are virtually integrated with their members through long-term, full-requirements contracts. Pursuant to these contracts, G&Ts must meet all of the power supply requirements of their members, prepare system-wide load forecasts, coordinate and plan resources, and perform a number of related functions. In short, the G&T’s role with respect [to] its member load is nearly identical to that of a vertically integrated investor-owned utility’s role with respect to its retail load. The employees of investor-owned utilities who are responsible for serving retail load have full access to the range of generation and transmission information necessary to perform this function efficiently.

G&T employees who administer sales to members should be afforded the same access.

*Id.* at 3. The same is true in situations where JAAs manage power supply arrangements for their member municipal distribution utilities or aggregate those power supply functions and make cost-based sales to the member distribution utilities to fulfill their power supply needs.

Order No. 717-A recounts the TDU Systems' arguments at paragraph 32 and responds to them at paragraph 40. Paragraph 40 states:

Finally, as TDUS requests, we clarify that if an employee of a generation and transmission cooperative simply serves retail load and does not engage in activities included in the "marketing functions" definition in § 358.3, then this employee is not a "marketing function employee."

Unfortunately, while paragraph 40 grants clarification "as TDUS requests," the remainder of the sentence creates an ambiguity. Specifically, G&T Coop employees making sales to members are not, technically, "serv[ing] retail load." *Id.* Rather, as TDU Systems explained, the G&T Coop's role with respect to wholesale sales to its distribution cooperatives "is *nearly identical* to that of a vertically integrated investor-owned utility's role with respect to its retail load." TDU Systems Rehearing at 3 (emphasis added). Because G&T Coops are engaged in functions virtually identical to serving retail load, but are not technically serving retail load, there is a disconnect between what TDU Systems asked for on clarification (which the Commission seems to have intended to provide) and what the Order says. TAPS requests that the Commission eliminate this ambiguity and further clarify that G&T Coop and JAA employees engaged in sales to member distribution utilities are engaged in activities analogous to serving retail load and are not "marketing function" employees.

This issue is important to a number of TAPS members who are joint action agencies seeking to abide by the Commission's standards of conduct to satisfy reciprocity requirements. A municipal joint action agency is similar to a G&T in having a "virtually vertically integrated" structure in that it is effectively vertically integrated with its member distribution utilities by long term contract. A municipal joint action agency supplies its municipal distribution members through long-term contracts that typically support the bonds used to finance the JAA's transmission and generation resources. The functions provided for its members are similarly analogous to the functions vertically integrated utilities provide for their retail customers.

The Commission has determined that standards of conduct should not require separation of transmission-function employees from employees engaged in bundled retail sales, *see* Order No. 717-A, P 37, or from employees engaged in unbundled retail sales pursuant to a public utility's role as default supplier, *id.* PP 38-39. The Commission's discussion of those determinations, which immediately precede Order No. 717-A's response to TDU Systems' clarification request, demonstrate why the Commission should further clarify its response to TDU Systems as requested herein. First and as noted above, the activities undertaken by G&T Coop and JAA employees engaged in sales to member distribution utilities are virtually identical to those undertaken by vertically integrated utilities' employees engaged in bundled retail sales or unbundled provider of last resort ("POLR") sales. Thus, to the extent the Commission has found insufficient risk of abuse to justify classifying those public utility employees as "marketing function" employees, the same determination should apply to G&T Coop and JAA employees engaged in analogous functions. To apply a more stringent standard of

conduct to JAAs and G&Ts, absent any evidence of a greater risk of abuse (which does not exist), would be unduly discriminatory and wholly unwarranted. Further, insofar as the exclusion of bundled retail sales employees from the “marketing function” is based on the Commission’s decision not to assert jurisdiction over the transmission component of such sales, there is an additional reason to provide the requested clarification with respect to JAAs and those cooperatives that are outside the Commission’s jurisdiction under FPA § 201(f). It would be strange indeed to exclude public utilities’ bundled retail sales employees from the “marketing function” on quasi-jurisdictional grounds involving the Commission’s decision not to assert jurisdiction it possesses, while simultaneously imposing (via reciprocity) greater restrictions on non-jurisdictional, Section 201(f) entities’ employees who are engaged in analogous functions.

TAPS therefore asks that the Commission clarify that it intended to grant the clarification that TDU Systems sought: that employees of G&T Coops (or, TAPS adds, of JAAs) who engage in wholesale sales to member distribution utilities should not be considered to be performing a “marketing function” within the meaning of the standard of conduct rules. Alternatively, the Commission should grant rehearing to ensure comparable treatment of vertically integrated transmission providers serving retail customers and virtually vertically integrated G&Ts and JAAs engaged in analogous activities on behalf of their member distribution utilities.

Respectfully submitted,

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November 16, 2009