

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Market-Based Rates for Wholesales Of
Electric Energy, Capacity and
Ancillary Services By Public Utilities

RM04-7-007

**REPLY OF THE TRANSMISSION ACCESS POLICY
STUDY GROUP TO THE COMPLIANCE WORKING
GROUP'S REPLY COMMENTS**

Pursuant to Rule 213 of the Commission's Rules of Practice and Procedure¹, the Transmission Access Policy Study Group² ("TAPS") files these brief reply comments in response to the December 10, 2009 Reply Comments of the Compliance Working Group ("CWG Reply"), and asks that the Commission accept them. The CWG "request that the Commission interpret the [MBR] Affiliate Restrictions to permit the sharing of employees who are not 'marketing function employees' or 'transmission function employees' under the Standards of Conduct." CWG Reply at 6. The CWG requested relief would have the untoward result of permitting the sharing of employees who perform "marketing" activities within the meaning the MBR Affiliate Restrictions.

¹ 18 C.F.R. §§ 385.213. While the Commission's Rules of Practice and Procedure generally do not permit answers to answers, see 18 C.F.R. § 385.213(a)(2), the Commission will make an exception "where an answer clarifies the issues or assists in creating a complete record." Idaho Power Co., 95 F.E.R.C. ¶ 61,482, at 62,717 (2001); accord Midwest Indep. Transmission Sys. Operator, Inc., 126 F.E.R.C. ¶ 61,144, at P 8 (2009)(accepting an answer to an answer "because it assisted [the Commission] in [its]decision-making process."); Me. Pub. Utils. Comm'n v. ISO New England Inc., 126 F.E.R.C. ¶ 61,090, at P 37 (same). Leave to answer should be permitted given the importance of the issue, and the need to address the apparent confusion arising from the similar phrases but very different concepts of "marketing function" under the transmission Standards of Conduct and "market information" under the MBR Affiliate Restrictions.

² TAPS is chaired by Roy Thilly, CEO of Wisconsin Public Power, Inc. ("WPPI"). 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; 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; and Southern Minnesota Municipal Power Agency.

The core shortcoming of the CWG approach is that the definition of “marketing function” under the transmission Standards of Conduct is quite specific, and much more narrow than the definition of marketing and market information under the MBR Affiliate Restrictions. Marketing function, under the Standards of Conduct, is defined to encompass only *sales*.

[I]n the case of public utilities and their affiliates, the sale for resale in interstate commerce, or the submission of offers to sell in interstate commerce, of electric energy or capacity, demand response, virtual transactions, or financial or physical transmission rights, all as subject to an exclusion for bundled retail sales, including sales of electric energy made by providers of last resort (POLRs) acting in their POLR capacity.

18 C.F.R. § 358.3(c)(1). Unlike the Standards of Conduct, which are intended to prevent the improper sharing of “marketing function information” and “transmission functioning information,” the affiliate restrictions are intended to prevent the improper sharing of “market information.” Market information is defined functionally, and expansively and includes information concerning *power purchase activities as well as sales activities*:

Therefore, we clarify that, as a general matter, the definition of “market information” includes information that, if shared between a franchised public utility and a market-regulated affiliate, may result in a detriment to the franchised public utility’s captive customers. Therefore, market information includes, but is not limited to, information concerning sales and purchases that will not be made such as in circumstances where parties have discussed a potential contract but no agreement has been reached.

Order 697, ¶ 593.³ See 18 C.F.R. § 35.36(a)(8) (definition of market information including illustrative and non-exhaustive examples).

Under the CWG proposal a franchised utility and an affiliated merchant seller could share an employee who was involved in “market” activities within the meaning of Order 697 and 18 C.F.R. § 35.36(a)(8). For example, a franchised utility and an affiliated merchant seller could share an employee who was involved in power purchasing, an activity which falls outside of the Standards of Conduct “merchant function” and “transmission function.” By coordinating power purchase activities the shared employee could seek to steer the benefit of a low cost power purchase to the marketing affiliate as opposed to, and at the expense of, the franchised utility, which is the very kind of result the MBR Affiliate Restrictions are intended to protect against. Cf. Order 697, ¶ 586 (similar example of impermissible coordination of power purchase bids). Because such an employee, under the CWG proposal would fall within the “shared employee” exception, there would be no literal violation of the core MBR affiliate independent functioning rule.

The Commission should deny the CWG’s amended request for clarification.

³ Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, Order No. 697, 72 Fed. Reg. 39,904 (July 20, 2007), [2006-2007 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,252 (“Order 697”), *clarified*, 72 Fed. Reg. 72,239 (Dec. 20, 2007), 121 F.E.R.C. ¶ 61,260 (2007), *on reh’g*, Order No. 697-A, 73 Fed. Reg. 25,832 (May 7, 2008), III F.E.R.C. Stat. & Regs. ¶ 31,268, *clarified*, 124 F.E.R.C. ¶ 61,055 (2008), *on reh’g*, Order No. 697-B, 73 Fed. Reg. 79,610 (Dec. 30, 2008), III F.E.R.C. Stat. & Regs. ¶ 31,285, *on reh’g and clarification*, Order No. 697-C, 74 Fed. Reg. 30,924 (June 29, 2009), III F.E.R.C. Stat. & Regs. ¶ 31,291, *corrected*, 128 F.E.R.C. ¶ 61,014 (2009), *petition for review filed sub nom. Mont. Consumer Counsel v. FERC*, No. 08-71827 (9th Cir. filed May 1, 2008).

Respectfully submitted,

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