

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

Standards of Conduct for Transmission  
Providers

Docket No. RM07-1-003

**MOTION FOR CLARIFICATION AND REQUEST  
FOR REHEARING OF TRANSMISSION ACCESS  
POLICY STUDY GROUP**

Pursuant to 16 U.S.C. § 825*l* and 18 C.F.R. §§ 385.212 and 385.713, the Transmission Access Policy Study Group (“TAPS”) moves for clarification and rehearing of Order No. 717-C.<sup>1</sup> TAPS urges the Commission to grant rehearing to hold that employees who perform system impact studies or other studies in response to requests for energy resource interconnection service or network resource interconnection service—and who thereby (a) determine the conditions on which other entities may interconnect with the transmission system and (b) receive non-public transmission system or transmission customer information—are transmission-function employees. Alternatively, if such studies will be treated as long-range planning activities that may be performed by a transmission provider’s merchant-function employees, the Commission should clarify that all transmission customers will have non-discriminatory access to the information, data, and models used in such studies. TAPS also asks the Commission to clarify that Order No. 717-C’s discussion of employees who perform system impact studies was not intended to introduce a distinction—which Order No. 717-A rejected—based on the

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<sup>1</sup> Order on Rehearing and Clarification, Standards of Conduct for Transmission Providers, Order No. 717-C, 75 Fed. Reg. 20,909 (Apr. 22, 2010), 131 F.E.R.C. ¶ 61,045 (2010) (“Order No. 717-C”).

duration of the transmission service being requested. In the alternative, TAPS seeks rehearing of this aspect of Order No. 717-C.

## I. STATEMENT OF ISSUES

This request for clarification and rehearing raises the following issues:

1. Whether employees who perform system impact studies, facility studies, or feasibility studies in response to requests for energy resource interconnection service or network resource interconnection service are transmission-function employees; *see* 16 U.S.C. §§ 824d, 824e; 18 C.F.R. §§ 358.3(f), (h); Order No. 2003,<sup>2</sup> PP 4, 7, 597; Order No. 2003-A, PP 559, 694, 698, 743; *PJM Interconnection L.L.C.*, 87 F.E.R.C. ¶ 61,299, at 62,199 (1999); *330 Fund I, L.P. v. New York Indep. Sys. Operator*, 126 F.E.R.C. ¶ 61,151, P 31 & n.57 (2009); *City of Corona, Cal. v. Southern Cal. Edison Co.*, 104 F.E.R.C. ¶ 61,086, PP 2, 12 (2003); Order No. 717,<sup>3</sup> P 152; and
2. Whether Order No. 717-C's treatment of employees who perform system impact studies introduced a distinction expressly rejected in Order No. 717-A that turns on the duration of the requested transmission service; *see* 16 U.S.C. §§ 824d, 824e; Order No. 717-A, P 27; Order No. 717, P 152; *See generally* pro forma OATT §§ 15, 17-20, 22, 29, and 32.

## II. SPECIFICATION OF ERRORS

The Commission should grant rehearing to correct the following errors:

1. To the extent that Order No. 717-C would allow merchant-function employees to perform system impact studies, facility studies, or feasibility studies in response to requests for energy resource interconnection service

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<sup>2</sup> Standardization of Generator Interconnection Agreements and Procedures, Order No. 2003, 68 Fed. Reg. 49,846 (Aug. 19, 2003), [2001–2005 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,146, *modified*, 68 Fed. Reg. 69,599 (Dec. 15, 2003) (“Order No. 2003”), *clarified*, 69 Fed. Reg. 2135 (Jan. 14, 2004), 106 F.E.R.C. ¶ 61,009 (2004), *order on reh’g*, Order No. 2003–A, 69 Fed. Reg. 15,932 (Mar. 26, 2004), [2001–2005 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,160 (“Order No. 2003–A”), *order on reh’g*, Order No. 2003–B, 70 Fed. Reg. 265 (Jan. 4, 2005), [2001–2005 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,171 (“Order No. 2003–B”), *order on reh’g*, Order No. 2003–C, 70 Fed. Reg. 37,661 (June 30, 2005), [2001–2005 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,190, *aff’d sub nom. NARUC v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007), *cert. denied*, 128 S. Ct. 1468 (2008).

<sup>3</sup> Standards of Conduct for Transmission Providers, Order No. 717, 73 Fed. Reg. 63,796 (Oct. 27, 2008), III F.E.R.C. Stat. & Regs. ¶ 31,280 (“Order No. 717”), *on reh’g*, Order No. 717-A, 74 Fed. Reg. 54,463 (Oct. 22, 2009), III F.E.R.C. Stat. & Regs. ¶ 31,297 (“Order No. 717-A”), *clarified*, Order No. 717-B, 74 Fed. Reg. 60,153 (Nov. 20, 2009), 129 F.E.R.C. ¶ 61,123 (2009), *on reh’g*, Order No. 717-C, 75 Fed. Reg. 20,909 (Apr. 22, 2010), 131 F.E.R.C. ¶ 61,045 (2010).

or network resource interconnection service—thus determining the conditions on which third parties may interconnect with the transmission system and obtaining non-public transmission and customer information—it is arbitrary, capricious, and otherwise contrary to law.

2. To the extent that Order No. 717-C adopts a distinction based on the duration of requested transmission service—deeming the transmission function to include employees who perform studies to determine whether short-term requests can be accommodated but to exclude employees who perform studies to determine the facility additions that might be needed to support service requested for a longer duration—the order is arbitrary, capricious, and otherwise contrary to law.

### **III. ARGUMENT**

#### **A. *Employees performing studies in response to interconnection requests should be deemed transmission-function employees.***

Order No. 717-C appears to draw a distinction between employees who perform system impact studies in response to transmission service requests and those who perform such studies in response to interconnection requests. Such a distinction would be contrary to the existing standards of conduct regulations, which define transmission service to include interconnection service, and to the underlying purpose of those regulations. It also would be contrary to the Commission's explanations of the relationship between interconnection service and transmission service, including (but not limited to) the fact that the Commission's decision to require standard interconnection procedures was rooted in its authority to eliminate opportunities for undue discrimination in transmission service. The Commission should grant rehearing to hold that employees who perform system impact studies (or other studies)<sup>4</sup> in connection with interconnection service requests are transmission function personnel.

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<sup>4</sup> Although Order No. 717-C discusses only the performance of system impact studies, the discussion herein applies equally to employees who perform facility studies and feasibility studies in response to requests for interconnection service. Employees performing each of those types of studies help to

In paragraph 13, the Commission explains that “in the context of an employee conducting a system impact study to determine whether a transmission system can support a transmission service request, such an employee’s act of performing a system impact study would necessarily classify that employee as a ‘transmission function employee.’” In holding that employees who perform system impact studies in response to transmission service requests are transmission-function employees, the Commission rejected the Edison Electric Institute’s argument that “‘it is the tests that determine whether transmission is available, not the testers.’” *Id.* P 15 (quoting EEI). As the Commission correctly observed (*id.*), EEI’s argument

ignores the fact that it is the knowledge that an employee obtains while conducting a system impact study in response to a transmission service request that could be used to favor an affiliate over its competition. For this reason, we find that a “tester” who grants and denies transmission service requests by disclosing the results of a test is engaging in “transmission functions” as defined in § 358.3(h).

Order No. 717-C appears to take a different tack with respect to employees who perform system impact studies in response to interconnection requests. Order No. 717-C holds (apparently in response to Avista)<sup>5</sup> that:

[A] system impact study performed pursuant to a request for energy resource interconnection service or network resource interconnection service is similar to long-range planning and therefore not a transmission function, because

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determine the rates, terms, and conditions on which an applicant will be permitted to interconnect its facilities with those of the transmission provider, and, in performing such studies, employees will gain non-public transmission information that could give the transmission provider an undue competitive advantage if those employees are also allowed to perform marketing functions. Consequently, such employees should be transmission function employees.

<sup>5</sup> *Id.* P 8 (recounting Avista’s argument that “studies related to interconnection requests, which identify interconnection facilities needed to interconnect a new generator as an energy resource or network resource, do not convey any rights to deliver electricity to any specific customer or point of delivery and do not implicate the day-to-day operation of the transmission system.”).

the focus of such a study is to determine the impact of the proposed interconnection on the safety and reliability of the transmission provider's transmission system, but without conveying a right to transmission service. Accordingly, we find that the performance of a system impact study in the context of evaluating an energy resource interconnection service and network resource interconnection service is not a transmission function.

*Id.* P 16 & n.20 (citing Order No. 2003 for the proposition that neither type of interconnection service constitutes a reservation of transmission capacity or conveys a right to such service). The consequence of finding that “performance of a system impact study in the context of evaluating [interconnection requests] is not a transmission function” (*id.*) is that such studies may be performed by the Transmission Provider's merchant-function personnel. That is inappropriate.

While employees who perform system impact studies or other studies exclusively in connection with interconnection requests do not necessarily decide thereby whether customers may obtain network or point-to-point transmission service, as such, Order No. 2003 and its progeny make clear that network resource interconnection service and network integration transmission service are closely related. Network Resource Interconnection Service allows an interconnection customer's generating facility “to be designated as a Network Resource, up to [its] full output, on the same basis as all other existing Network Resources interconnected to the Transmission Provider's Transmission System, and to be studied as a Network Resource on the assumption that such a designation will occur.” Order No. 2003-A, App. B, Standard Large Generator Interconnection Procedures § 3.2.2.1. As the Commission further explained:

Under Network Resource Interconnection Service, the Transmission Provider builds all the Network Upgrades needed to allow the Interconnection Customer to designate

the Generating Facility as a Network Resource and obtain Network Integration Transmission Service. Thus, once the Interconnection Customer has obtained Network Resource Interconnection Service, requests for Network Integration Transmission Service from the Generating Facility to points inside the Transmission Provider's Transmission System will not require additional Interconnection Studies or additional upgrades.

Order No. 2003-A, P 501; *see also* Order No. 2003-B, P 69 (“[T]he principal purpose of the service is to allow the Generating Facility to qualify for designation as a Network Resource by a Network Customer.”). Employees who perform system impact studies (or other studies) in connection with requests for network resource interconnection service thus go a long way toward determining the rates, terms, and conditions on which applicants for network integration transmission service will be able to obtain OATT service and designate their generating facilities as network resources.

Moreover, and in any event, Order No. 717-C's “clarification”—excluding from the transmission function employees who perform interconnection-related system impact studies—is inconsistent with both the existing regulatory text and Commission precedent. Under the Commission's standards of conduct regulations, “transmission functions” means “the planning, directing, organizing or carrying out of day-to-day transmission operations, including the granting and denying of transmission service requests,” 18 C.F.R. § 358.3(h), and “transmission” is defined to include “the interconnection with jurisdictional transmission facilities,” 18 C.F.R. § 358.3(f). Thus, under the express language of the Commission's own regulations, employees who perform studies that identify upgrades needed for interconnection, or who otherwise help to determine the terms on which interconnection may occur, perform a transmission function.

Order No. 717-C provides no reason for changing course; and the Commission may not amend its regulations *sub silentio* in response to a purported clarification request.

Order No. 717-C's exclusion of interconnection-related activities from the ambit of the transmission function for standards of conduct purposes also is inconsistent with the Commission's statements elsewhere regarding the relationship between interconnection and transmission. Pursuant to Order No. 2003, standard agreements and procedures for obtaining interconnection service are attachments to each jurisdictional transmission provider's open access transmission tariff. The Commission has explained repeatedly that provisions regarding interconnection service are integral components of the Commission's open access transmission regime and, indeed, of the OATT itself. In fact, when the Commission enacted standardized interconnection agreements and procedures, it derived its statutory authority to do so from the Federal Power Act's prohibition of undue discrimination and unjust or unreasonable rates with respect to *transmission* service.<sup>6</sup> In Order No. 2003-A (P 698), the Commission held unequivocally that "interconnection is an essential element of Transmission Service that is required to be provided under the OATT."<sup>7</sup>

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<sup>6</sup> Order No. 2003, P 7 (When the Commission required transmission providers to adopt standardized interconnection requirements in their OATTs, "[p]ursuant to its responsibility under Sections 205 and 206 of the Federal Power Act (FPA) to remedy undue discrimination," it found that such requirements were needed to "provide just and reasonable terms and conditions of transmission service.") (emphasis added); *see also id.* at P 4 ("The [Commission's] authority to require the addition of the Final Rule LGIA and Final Rule LGIP to the OATT derives from its findings of undue discrimination in the interstate electric transmission market that formed the basis for Order No. 888."); Order No. 2003-A, P 743 ("The Commission in Order No. 2003 acted under the same undue discrimination findings that formed the basis for Order No. 888.").

<sup>7</sup> *See also PJM Interconnection L.L.C.*, 87 F.E.R.C. ¶ 61,299, at 62,199 (1999) ("An appropriate interconnection agreement is simply an essential element of the transmission service provided under [an OATT]."). This hand-in-hand relationship between interconnection and transmission service makes sense, as interconnection service without transmission service is useless and vice versa.

Because new interconnected generation may compete with the Transmission Provider's merchant function, the Commission also has emphasized repeatedly the need for interconnection service to be available on a non-discriminatory basis.<sup>8</sup> But determining the upgrades to be required for interconnection service and the costs to be borne, at least initially, by the interconnection customer goes to the core of determining the rates, terms, and conditions of service to be obtained under a transmission provider's OATT. Allowing the transmission provider's merchant-function personnel to perform the studies that determine the terms on which other potential users of the Transmission Provider's transmission system can interconnect is therefore contrary to the Commission's regulations and policy.

Employees who perform system impact studies or other studies in connection with interconnection service requests also receive substantial non-public information about both the transmission system and the potential transmission customer's plans—"knowledge that . . . could be used to favor an affiliate over its competition." Order No. 717-C, P 15. The Commission has repeatedly recognized the potential for transmission providers to use confidential, interconnection-related information to give

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<sup>8</sup> See, e.g., Order No. 2003, P 597 ("Granting the Transmission Provider absolute discretion on what forms of security to allow would provide too great an opportunity to erect hurdles to new generation, by allowing it to act in an unduly discriminatory or preferential manner."); *id.* P 696 (A non-independent Transmission Provider "has an incentive to find that a disproportionate share of the costs of expansions needed to serve its own power customers is attributable to competing Interconnection Customers. The Commission would find any policy that creates opportunities for such discriminatory behavior to be unacceptable."); Order No. 2003-A, P 599 (noting that standardized interconnection procedures are "needed to prevent the Transmission Provider that has an incentive to discourage competitors from unduly discriminating against those competitors."); *id.* at P 694 ("In today's competitive power market environment, allowing a Transmission Provider that is also a competitor in the wholesale power market to delay competitive entry or to propose subjective and potentially discriminatory pricing policies is unacceptable.").



their merchant functions an undue competitive advantage.<sup>9</sup> Consequently, before Order No. 717-C, the Commission considered the performance of studies in connection with interconnection requests to be a transmission function, separated from merchant activities by standard of conduct requirements. For example, in upholding PJM's proposal to contract with its transmission owners to perform interconnection studies in the first instance, the Commission observed that "as a matter of course, these studies must be conducted by the TO's transmission function, which is subject to the Commission's Standards of Conduct."<sup>10</sup>

Order No. 717-C provides no reasoned basis for departing from the Commission's regulations and orders, which make clear that interconnection procedures are an integral component of service under an OATT, subject to the same risks of anti-competitive undue discrimination, and that determining the rates, terms, and conditions on which

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<sup>9</sup> *E.g.*, *330 Fund I, L.P. v. New York Indep. Sys. Operator*, 126 F.E.R.C. ¶ 61,151, P 31 & n.57 (2009) (noting that Order No. 2003's "interconnection procedures balance the need to provide for an open process with concern for keeping generator business plans confidential" and citing Order No. 2003 for the proposition that "transmission providers must maintain confidentiality of interconnection customer information, the disclosure of which could cause harm or prejudice"); *City of Corona, Cal. v. Southern Cal. Edison Co.*, 104 F.E.R.C. ¶ 61,086, PP 2, 12 (2003) (discussing Southern California Edison's sharing with retail merchant employees of information submitted by an applicant for interconnection and transmission service). The Commission also has observed more generally that "transmission *customer* information is a subset of transmission function information, as it is submitted in connection with a request for transmission service," Order No. 717, P 276 (emphasis added), and that transmission customer information requires the same standards of conduct protections against use by a transmission provider's merchant function as does non-public information about the transmission system. See *Exelon Corp.*, 123 F.E.R.C. ¶ 61,167, P 27 (2008) ("The standards of conduct are intended to foreclose affiliates' preferential access to non-public transmission or customer information."); *Alcoa Power Generating Inc.*, 108 F.E.R.C. ¶ 61,243, P 125 (2004) ("National Fuel has third-party customer information as well as information from interconnecting pipelines which, if shared with those engaged in Energy Affiliate activities, would confer undue preferences on Distribution."). There is no basis for treating confidential customer information obtained in connection with an interconnection request differently from the same kinds of information obtained in connection with a transmission service request.

<sup>10</sup> *PJM Interconnection*, *supra* n.7, at 62,199 n.21. Significantly, the Commission made this observation in 1999, under the pre-Order No. 2004, employee-functional approach to which Order No. 717 returned.

interconnection may occur is a transmission function subject to the standards of conduct. The Commission should therefore grant rehearing.

Alternatively, if the Commission holds that system impact studies (or other studies)<sup>11</sup> performed in response to interconnection requests are planning activities that may be conducted by merchant-function employees, the Commission should clarify that such information will be treated like other planning information, which the Commission requires transmission providers to make available on a non-discriminatory basis to all interested transmission customers. See Order No. 717, P 152 (“[A]s we stated in Order No. 890, the transmission provider must make available to any interested party the same data, information, and models it uses in the transmission planning process.”).<sup>12</sup>

***B. Whether an employee is a transmission-function employee should not turn on the duration of requested transmission service.***

The Commission also should clarify paragraph 17 of Order No. 717-C to make clear, as determined in Order No. 717-A (P 27), that where an employee performs system impact studies in response to transmission service requests, the employee’s designation as a transmission-function employee does not turn on the duration of the requested transmission service.

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<sup>11</sup> See *supra* n.4.

<sup>12</sup> The Commission already requires transmission providers to “provide all underlying assumptions and data files” to the interconnecting transmission customer, so that “the Interconnection Customer or its subcontractor can independently conduct Interconnection Studies.” Order No. 2003, P 83. That holding, which is necessary to allow Interconnection Customers to validate transmission providers’ studies, remains appropriate and should not be disturbed. The issue here is a different one: preventing transmission providers’ merchant function personnel from obtaining undue competitive advantages over any other transmission customer. If merchant function personnel are permitted to conduct interconnection-related studies and to have access to interconnection customer information, then to avoid undue discrimination such data must be made available to all interested transmission customers. If such dissemination is not permitted, then avoiding undue discrimination requires such studies to be performed by transmission-function personnel subject to the standards of conduct.

Paragraph 17 states that:

the performance of a system impact study that is not a part of day-to-day transmission operations and [that is] performed solely to determine the transmission system upgrades necessary to provide service is a part of long-range planning. Accordingly, we clarify that a system impact study performed solely to assess what, if any, additional costs may be incurred in order to provide transmission service is not a transmission function *so long as* the performance of this system impact study is not carried out as part of day-to-day transmission operations, including the granting or denying of transmission service.

Order No. 717-C, P 17. TAPS understands this paragraph—and particularly the “so long as” clause in the last sentence—to draw a distinction between system impact studies that are performed in connection with specific transmission service requests, which would be a transmission function (*see* Order No. 717-C, P 13),<sup>13</sup> and other, planning-type studies that are not performed in connection with the transmission provider’s evaluation of a specific transmission service request. As to the latter, employees performing such planning studies would not be transmission-function personnel, but, consistent with Order No. 717 (P 152), all interested parties would be afforded access to “the same data, information, and models [that the transmission provider] uses in the transmission planning process.”

Because of the potential ambiguity in paragraph 17,<sup>14</sup> TAPS asks the Commission to clarify that the performance of system impact studies (or other studies) as part of the

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<sup>13</sup> In paragraph 13, the Commission explained that the performance of system impact studies “to determine whether a transmission system can support a transmission service request ... would necessarily classify that employee as a ‘transmission function employee.’”

<sup>14</sup> TAPS was confused by paragraph 17’s reference to system impact studies “not carried out as part of day-to-day transmission operations, including the granting or denying of transmission service,” Order No. 717-C, P 17, as TAPS normally understands the phrase “system impact study” as a term of art referring to studies that are conducted in response to specific service requests.

evaluation of a transmission service request is a transmission function *regardless* of the duration of the service requested<sup>15</sup> and that paragraph 17 was intended to address planning-type studies that are not performed in connection with the evaluation of a specific transmission service request. TAPS submits that such a clarification is necessary in order to harmonize paragraph 17 with (a) paragraph 13 of Order No. 717-C (holding that a system impact study to determine whether a transmission system can support a transmission service request is a transmission function) and (b) paragraph 27 of Order No. 717-A, which expressly rejected distinctions based on the duration of the service requested. *See* Order No. 717-A, P 27 (“[P]ersonnel engaged in ‘granting or denying transmission service requests’ are transmission function employees regardless of the duration of service requested.”).

If the Commission does not clarify Order No. 717-C as requested, TAPS seeks rehearing. As TAPS explained in its request for rehearing or clarification of Order No. 717,<sup>16</sup> much of the pro forma OATT is dedicated to prescribing procedures to be used by the transmission provider in assessing applications for various types of open access transmission service, including the performance of system impact studies and others

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<sup>15</sup> TAPS is concerned because such a distinction could be read to have been implied in the Western Utilities clarification request to which paragraph 17 appears to respond. *See* Request for Clarification or, in the Alternative, Request for Rehearing of The Western Utilities, *Standards of Conduct for Transmission Providers*, Docket No. RM07-1-002, at 11 (filed Nov. 16, 2009) (available at eLibrary Accession No. 20091116-5101) (“In many instances, system impact studies have nothing to do with day-to-day operations of the transmission system (*i.e.*, granting or denying transmission requests), but are used to assess whether any additional costs may be incurred in order to provide the requested transmission service. Where such studies are required, they trigger the process for determining the modifications needed to provide the service at some future date. Studies related to service expected to take place at a future date, if at all, do not fall under the definition of Transmission Functions based on day-to-day operations.”).

<sup>16</sup> Petition for Rehearing or Clarification of Transmission Access Policy Study Group, *Standards of Conduct for Transmission Providers*, Docket No. RM07-1-000 (Nov. 17, 2008) (available at eLibrary Accession No. 20081117-5089).

studies in connection with requests for long-term service.<sup>17</sup> It would be anomalous if activities so central to administration of the OATT on a day-to-day basis were excluded from the transmission function simply because of the duration of the transmission service requested. The OATT makes no such distinction. Rather, the provisions requiring transmission customers to submit specific information in support of their applications for transmission service compel the transmission provider to “treat this information consistent with the standards of conduct contained in Part [358] of the Commission’s regulations.” *E.g.*, OATT §§ 17.2, 18.2, 29.2. These OATT provisions, promising standards of conduct treatment for information submitted in the course of applying for transmission service, make no distinction based on the duration of the service requested; nor should the standards of conduct status of the employees processing such applications (and conducting system impact or other studies in connection with them) turn on the duration of the service requested.

#### **IV. CONCLUSIONS**

For the foregoing reasons, the Commission should grant rehearing or clarify Order No. 717-C to hold that (1) employees who perform system impact studies (or other studies) in response to interconnection requests are transmission-function employees, and (2) the status of employees who perform system impact studies (or other studies) to

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<sup>17</sup> See generally pro forma OATT §§ 15 (Point-to-point “Service Availability”), 17 (“Procedures for Arranging Firm Point-To-Point Transmission Service”), 18 (“Procedures for Arranging Non-Firm Point-To-Point Transmission Service”), 19 (“Additional Study Procedures for Firm Point-To-Point Transmission Service Requests”), 20 (“Procedures if the Transmission Provider is Unable to Complete New Transmission Facilities for Firm Point-To-Point Transmission Service”), 22 (“Changes in Service Specifications”), 29 (“Initiating [Network Integration Transmission] Service”), and 32 (“Additional Study Procedures for Network Integration Transmission Service Requests”).

evaluate specific transmission service requests does not depend on the duration of the requested transmission service.

Respectfully submitted,

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