

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Market-Based Rate Affiliate Restrictions | Docket No. RM10-20-000

**COMMENTS OF THE TRANSMISSION ACCESS
POLICY STUDY GROUP**

The Transmission Access Policy Study Group (“TAPS”) submits the following comments in response to the April 15, 2010, Notice of Proposed Rulemaking (“NOPR”) in the above-captioned proceeding.¹ The NOPR is an outgrowth of the Compliance Working Group’s (“CWG”) request for guidance concerning the scope of permissibly shared employees under the Commission’s market-based rate affiliate restrictions.² In the NOPR (PP 6-7), and in a companion order, the Commission rejected CWG’s proposed reinterpretation of the current MBR protections against affiliate abuse “to permit sharing of employees who are not ‘transmission function employees’ or ‘marketing function employees’ under the standards of conduct.” CWG Request at 2. The Commission:

agree[d] with TAPS that [CWG] is asking the Commission to modify fundamentally the current market based rate affiliate restrictions.

Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, 131 FERC ¶ 61,021, P 44 (2010) (“MBR Affiliate Order”).

See also NOPR PP 6-7.

However, the Commission recognized that CWG had identified a legitimate compliance concern. “[B]ecause the Commission has eliminated the concept of shared

¹ Market-Based Rate Affiliate Restrictions, 75 Fed. Reg. 20,796 (proposed Apr. 21, 2010), FERC Stats. & Regs. ¶ 32,657 (2010).

² CWG Request for Clarification, Docket No. RM04-7-007 (Mar. 9, 2009), eLibrary No. 20090309-5160 (“CWG Request”).

employees under the Standards of Conduct” the Commission and affected utilities could no longer look to the transmission Standards of Conduct for guidance as to what employees could be shared under the MBR affiliate abuse restrictions. MBR Affiliate Order, P 23. The Commission agreed with TAPS that the answer to this problem was not to apply the new functional employee separation designed to prevent undue preferences relating to transmission (under the Standards of Conduct) but to instead provide an MBR affiliate “elucidation of permitted shared employees,” *id.*, and “do so by means of a separate, narrow, notice and comment rulemaking.” *Id.* P 26. This is exactly what the Commission has done.

TAPS supports the instant NOPR. In particular:

- The Commission should revise its regulations as proposed in the NOPR and resist anticipated requests to substantially undermine the MBR affiliate restrictions.
- To enable the Commission to protect against affiliate abuses as the industry evolves, the Commission should clarify that its proposed clarifications concerning the sharing of employees for purposes of the MBR affiliate restrictions are not an exhaustive listing of prohibited shared employees.

INTEREST OF TAPS AND COMMUNICATIONS

TAPS is an informal association of transmission-dependent utilities in more than 33 states, promoting open and non-discriminatory transmission access.³ TAPS members have a vital interest in the proper competitive functioning of wholesale power markets

³ TAPS is chaired by Roy Thilly, CEO of WPPI Energy. 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; Oklahoma Municipal Power Authority; Southern Minnesota Municipal Power Agency; and Vermont Public Power Supply Authority.

including the prevention of the exercise of market power in wholesale energy and capacity markets and abuse of utility affiliate relationships. TAPS members have long been concerned about structural changes in the electric industries that could adversely affect competition, rates or regulation, or could expose consumers to harm from unmitigated market power. TAPS has commented on nearly all major Commission rulemakings, including those pertaining to market-based rates and mergers. TAPS filed initial and response comments in opposition to CWG's proposal in Docket No. RM04-7-007.⁴ The Commission stated, in the MBR Affiliate Order (P 30), that "to provide guidance to the industry, and to address the concerns raised by TAPS concerning the potential for affiliate abuse under the Compliance Working Group's requested interpretation, [the Commission] will clarify which employees may not be shared under the market-based rate affiliate restrictions." These clarifications are set forth in the NOPR.

Communications regarding these proceedings should be directed to:

Roy Thilly, CEO
WPPI ENERGY
1425 Corporate Center Drive
Sun Prairie, Wisconsin 53590
Tel: (608) 837-2653
Fax: (608) 837-0274
E-mail: rthilly@wppienergy.org

Robert C. McDiarmid
Cynthia S. Bogorad
Peter J. Hopkins
SPIEGEL & MCDIARMID LLP
1333 New Hampshire Ave, NW
Washington, DC 20036
Tel: (202) 879-4000
Fax: (202) 393-2866
E-mail: robert.mcdiarmid@spiegelmc.com
cynthia.bogorad@spiegelmc.com
peter.hopkins@spiegelmc.com

⁴ Response of the Transmission Access Policy Study Group in Opposition to the Compliance Working Group's Amended Request for Clarification (Nov. 30, 2009), eLibrary No. 20091130-5088, and Reply Of The Transmission Access Policy Study Group To The Compliance Working Group's Reply Comments (Dec. 22, 2009), eLibrary No. 20091222-5094.

I. BACKGROUND

The NOPR explains the circumstances that led up to it and the MBR Affiliate Order.

Under the separation of functions requirement in the market-based rate affiliate restrictions, employees of market-regulated power sales affiliates must operate separately, to the maximum extent practical, from employees of affiliated franchised utilities with captive customers. Order No. 697 exempts certain categories of employees from this separation of functions requirement. Employees in these categories are permitted to be shared, and Order No. 697 gives examples of permissibly ‘shared employees’ that are drawn from Order No. 2004, which established the Standards of Conduct rules that were in effect at the time that Order No. 697 was issued. . . .

In its request for clarification, the Compliance Working Group asked the Commission to clarify which employees are permissibly ‘shared employees’ for purposes of the Commission’s market-based rate affiliate restrictions. Specifically, it suggests that the Commission should interpret these affiliate restrictions to permit sharing of employees who are neither ‘transmission function employees’ nor ‘marketing function employees’ under the Standards of Conduct. The Compliance Working Group stated that the issue arose because shared employees under the market-based rate affiliate restrictions are defined by reference to shared employees under the Order No. 2004-era Standards of Conduct, but as of the effective date of the Standards of Conduct Final Rule, November 26, 2008, the Standards of Conduct no longer use the concept of shared employees. The Compliance Working Group therefore claimed that this inconsistency poses a compliance conundrum that needs to be addressed in order to enable companies and their employees to understand, and comply with, the market-based rate affiliate restrictions.

NOPR PP 4-5 (footnotes omitted).

Arguing against the CWG’s proposal, TAPS demonstrated that safeguards specific to protecting against transmission abuses would not work to address the very different considerations that underlie the MBR affiliate abuse rules. MBR Affiliate

Order, P 29. In the MBR Affiliate Order, the Commission agreed with TAPS that the two affiliate restriction regimens, *i.e.*, the transmission Standards of Conduct and the MBR affiliate abuse restrictions, were different in scope and purpose (*id.*, PP 31, 33) and further agreed that its new transmission-specific approach to functional separation would not prevent MBR affiliate abuses. “[T]he Standards of Conduct definition of marketing function employee does not include certain employees who may not be shared under the market-based rate affiliate restrictions (for instance, employees that make economic dispatch decisions or that determine the timing of scheduled outages). *Id.*, P 38 (original emphasis).

Although the Commission rejected the CWG proposal, “in an effort to provide guidance to the industry to facilitate compliance with the market-based rate affiliate restrictions, [the Commission] identif[ied] certain employees who cannot be shared under the affiliate restrictions, but who nevertheless might not be ‘marketing function employees’ under the Standards of Conduct.” MBR Affiliate Order, P 39. The Commission provided clarifying guidance in its MBR Affiliate Order, while simultaneously proposing to codify that same guidance pursuant to the NOPR. *Compare* MBR Affiliate Order PP 39-43, *with* NOPR PP 8-12. Specifically, the Commission proposes modifying its regulations, 18 C.F.R. § 35.39(c)(2)(ii), to add:

Franchised public utilities with captive customers are prohibited from sharing employees that determine the timing of scheduled outages or that engage in economic dispatch, fuel procurement, or resource planning with their market-regulated power sales affiliates.

NOPR at 20,799, FERC Stats. & Regs. at 34,003. The Commission explained that its proposal was consistent with Order No. 697-A⁵ where it had held that “under the market-based rate affiliate restrictions, ‘shared employees may not be involved in decisions regarding the marketing or sale of electricity from the facilities, may not make economic dispatch decisions, and may not determine the timing of scheduled outages for facilities.’” *Id.* P 8 (quoting MBR Affiliate Order P 37 [citing Order No. 697-A, P 253]). The Commission also proposed to revise its regulations, 18 C.F.R. § 35.39(d)(1), to expressly provide that employees that determine the timing of scheduled outages or that engage in economic dispatch, fuel procurement, or resource planning may not have access to an affiliate franchised utility’s non-public market information. NOPR at 20,799, FERC Stats. & Regs. at 34,003.

II. COMMENTS

A. *The Commission Should Revise Its Regulations As Proposed In the NOPR.*

As discussed above, the NOPR proposes “to clarify that employees that determine the timing of scheduled outages or that engage in economic dispatch, fuel procurement, or resource planning may not be shared under the market-based rate affiliate restrictions.”

NOPR P 12. TAPS generally supports the NOPR, which correctly identified situations

⁵Market-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), FERC Stats. & Regs. ¶ 31,252 (2007), *clarified*, 72 Fed. Reg. 72,239 (Dec. 20, 2007), 121 FERC ¶ 61,260 (2007), *on reh'g*, Order No. 697-A, 73 Fed. Reg. 25,832 (May 7, 2008), FERC Stats. & Regs. ¶ 31,268 (2008), *clarified*, 124 FERC ¶ 61,055 (2008), *on reh'g*, Order No. 697-B, 73 Fed. Reg. 79,610 (Dec. 30, 2008), FERC Stats. & Regs. ¶ 31,285 (2008), *on reh'g and clarification*, Order No. 697-C, 74 Fed. Reg. 30,924 (June 29, 2009), FERC Stats. & Regs. ¶ 31,291 (2009), *corrected*, 128 FERC ¶ 61,014 (2009), *clarified*, Order No. 697-D, 75 Fed. Reg. 14,342 (Mar. 25, 2010), FERC Stats. & Regs. ¶ 31,305 (2010), *clarified*, 131 FERC ¶ 61,021 (2010), *reh'g granted*, Docket No. RM04-7-009 (June 8, 2010), eLibrary No. 20100608-3021, *petition for review filed sub nom. Mont. Consumer Counsel v. FERC*, No. 08-71827 (9th Cir. filed May 1, 2008).

where the sharing of employees between affiliated market-based rate power sellers and regulated distribution utilities could result in benefits to the MBR affiliate at the expense of the captive customers of the franchised public utility. The proposed regulations are well grounded in the Commission's experience and prior orders in policing abuses of market manipulation and affiliate abuse.

For example, the prohibition against sharing employees that make economic dispatch decisions and schedule outages is based on the findings of Order No. 697-A. NOPR P 8. The competitive harms of withholding are well-recognized. For example, the Commission's investigation of the California market meltdown and related regulatory proceedings shined a spotlight on the ability of an MBR power seller to manipulate market prices to its advantage and at the expense of power purchasers by means of generation withholding. The sharing of MBR affiliate and franchised utility employees that make economic dispatch and outage decisions creates an undue risk of collusion and harm to captive employees. Indeed, in its May 17, 2010, Motion for Stay⁶ (at 13) in related Docket No. RM04-7-007, EEI acknowledges that "prior restrictions and orders generally prevent the sharing of economic dispatch and outage schedulers (with exceptions for co-owned generation and other fact-specific situations)." TAPS does not object to case-by-case exceptions for co-owned generation where adequate safeguards are put in place to ensure that generation is not withheld for the benefit of the MBR power sales affiliate. *See, e.g., Cleco Power LLC*, 130 FERC ¶ 61,102 (2010) (Commission waiver permits sharing of employees for scheduling maintenance outages of units with

⁶ Edison Electric Institute Motion for Stay or Rescission and Request for Rehearing, Docket No. RM04-7-007 (May 17, 2010), eLibrary No. 20100518-5029 ("Motion for Stay").

shared common facilities, but requires maintenance of records to monitor compliance with prohibition against sharing of market information with affiliated marketing employees). But that exception reinforces the need to codify expressly that the general rule requiring the separation of market-regulated power sales affiliate and franchised public utility employees⁷ precludes the sharing of employees that engage in economic dispatch and scheduling outages.

With respect to resource planning, the NOPR explains that:

[i]f the franchised public utility and its market-regulated power sales affiliate are permitted to share employees that make strategic decisions about future generation supply, such as deciding when and/or where to build or acquire generating capacity, such strategic decision making by a shared employee could result in generation being built or acquired for the benefit of the market-regulated power sales affiliate, and at the expense of the captive customers of the franchised public utility.

NOPR P 9. This reasoning is sound. EEI in its Motion for Stay (at 13) acknowledges that existing Commission “restrictions and orders generally prevent the sharing of ... staff who make decisions as to new generation and energy supply resources.” *See also id.* at 9 (EEI “underst[ands] that ‘traditional’ resource planning employees who make direct resource planning decisions could not be shared under the Affiliate Restrictions”). EEI does not appear to take issue with this restriction, but advocates a continued permitted sharing of resource planning support personnel outside of personnel “who make ... strategic” acquisition decisions.

Under the Commission’s existing regulations, the resource planning functions for a franchised public utility with captive customers and its market regulated power sales

⁷ 18 C.F.R. § 35.39(c)(2)(i).

affiliates should be able to share employees involved in certain support functions – such as modeling, financial analysis, construction planning, and site acquisition – provided that the employees who make the strategic decisions about which resources to build or acquire and when, based on available identified alternatives, are not shared.

Motion for Stay at 17. The NOPR’s proposed codification clarifies that the “generation or market functions” that must be performed independently⁸ include resource planning (as EEI concedes), while preserving Commission policy permitting the sharing of “support” personnel.⁹ However, the Commission must make sure that in the resource planning context, the “support” personnel exception does not swallow the rule (*e.g.*, by allowing personnel who are involved in site acquisition decisions to be shared).¹⁰

Fundamentally, TAPS urges the Commission to proceed with a final rule consistent with the NOPR, and to resist proposals that, like the recently and correctly rejected CWG proposal, would undermine the purpose of the MBR affiliate restrictions that the NOPR proposes to codify. It may be easy to administer MBR affiliate restrictions based upon the required separation of marketing and transmission functions under the transmission Standards of Conduct, but it would not serve the important purposes of avoiding affiliate abuse in the MBR context. As the Commission has correctly found in the MBR Affiliate Order, CWG’s proposal would permit the sharing of employees that cannot properly be shared under the MBR affiliate restrictions, and the

⁸ *See, e.g.*, 18 C.F.R. § 35.39(c)(2)(ii) (restricting shared officers to those that do “not participate in directing, organizing or executing generation or market functions”); Order No. 697, P 565 (permitting sharing of maintenance personnel that are not involved in generation operation or planning).

⁹ 18 C.F.R. § 35.39(c)(2)(ii) (expressly permitting sharing of support personnel).

¹⁰ The Commission has recognized the role of site acquisition in erecting barriers that may facilitate the exercise of market power and has required reporting of certain site acquisitions as a change in status. *See* 18 C.F.R. §§ 35.37(e)(2), 35.42(a)(1) and Order No. 697-D, PP 12-14 (describing earlier orders) and PP

transmission-related Standards of Conduct are tailored to matters concerning transmission and not MBR affiliate concerns.

B. The Commission Should Find That Its Proposed Clarifications Concerning the Sharing of Employees for Purposes of the MBR Affiliate Restrictions Is Not An Exhaustive Listing of Prohibited Shared Employees.

As a general rule, the Commission's regulations mandate the separation of an MBR power sales affiliate and a franchised public utility and prohibit employee sharing.

To the maximum extent practical, the employees of a market-regulated power sales affiliate must operate separately from the employees of any affiliated franchised public utility with captive customers.

18 C.F.R. § 35.39(c)(2)(i).¹¹ Thus, the MBR affiliate restrictions are functional in scope and purpose, and should continue to reach and prohibit a sharing of employees that could result in the diversion of benefits to the MBR affiliate at the expense of the franchised utility. Consistent with that overarching directive, TAPS asks the Commission to state expressly that its proposed modification of 18 C.F.R. § 35.39(c)(2)(ii) is not an exhaustive listing of employees who cannot be shared between an MBR power sales affiliate and franchised utility with captive customers. The Commission should not risk and cut short this general protective principle by means of an exhaustive list that might fail to reach novel, un-contemplated situations where the sharing of employees would harm captive customers.

21-24 (clarifying scope of the requirement).

¹¹ This general rule is long-standing. See Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, 71 Fed. Reg. 33,120, 33,118 (June 7, 2006), FERC Stats. & Regs. ¶ 32,602, P 121 (2006), *reply comment period extended*, 71 Fed. Reg. 48,496 (Aug. 21, 2006) (NOPR leading up to Order No. 697 identifying this requirement as part of the standard code of conduct required of market-based rate sellers since 1999).

For example, recent concerns and uncertainties over the jurisdictional reach of this Commission and the CFTC have highlighted attention as to whether, what might otherwise appear to be financial instruments or transactions, are instead jurisdictional wholesale power transactions.¹² Given the breadth and flexibility of the Commission’s definition of “market information,”¹³ and the import of protecting captive ratepayers from the transfer of benefits to shareholders at the expense of ratepayers, the need to protect the captive customers from financial transactions (including purchases of FTRs) that could be structured to favor the MBR affiliate seller at the expense of captive ratepayers should not turn on whether the prohibition is easily captured in the NOPR’s specified list of prohibited shared employees.¹⁴

While the general rule, coupled with the NOPR’s proposed guidance, will likely go a long way towards clarifying the issue and eliminating uncertainty, to the extent an MBR power sales affiliate is unsure of the propriety of a proposed sharing of employees it can act proactively and seek Commission guidance. The benefit of specific guidance should not come at the expense of the general rule’s important objective of customer protection.

¹² See, e.g., *Amaranth Advisors L.L.C.*, 121 FERC ¶ 61,224, P 66 (2007).

¹³ See MBR Affiliate Order P 31, n.53. See also 18 C.F.R. § 35.36(a)(8) .

¹⁴ TAPS recognizes that Order No. 697-B (P 59) held that an MBR power sales affiliate and franchised utility can share risk management personnel subject to the information conduit prohibition. TAPS is concerned about fact specific situations where financial transactions are better described as resource planning or marketing activities that benefit the MBR affiliate at the expense of captive ratepayers and other market participants. Recently in *United States v. Keyspan Corp.*, Civ. Action No. 10-cv-1415 (WHP), Competitive Impact Statement (CIS) (S.D.N.Y. Feb. 23, 2010), available at <http://www.justice.gov/atr/cases/t255500/255578.pdf>, the Department of Justice identified a situation where a power seller was able to control wholesale electric market prices by means of a derivative swap. The potential for such mischief is magnified where a single individual can dictate the terms of swap involving an MBR affiliate power seller and a franchised utility.

CONCLUSION

If the Commission proceeds with its NOPR, as TAPS believes it should, the final rule should be consistent with TAPS' comments.

Respectfully submitted,

/s/ Cynthia S. Bogorad

Robert C. McDiarmid
Cynthia S. Bogorad
Peter J. Hopkins
SPIEGEL & McDIARMID LLP

Attorneys for

Transmission Access Policy Study Group

Law Offices of:
SPIEGEL & McDIARMID LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036
(202) 879-4000

June 21, 2010