UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

COMMENTS OF THE TRANSMISSION ACCESS POLICY STUDY GROUP

The Transmission Access Policy Study Group ("TAPS"),[1] an informal association of transmission-dependent utilities in more than 30 states, appreciates the opportunity to comment on the Notice of Proposed Rulemaking ("NOPR"),[2] and commends the Commission for its effort to rationalize what has been a confusing set of rules. The revised approach *could* have merit if properly structured and defined. However, as proposed, the new rule would *not* achieve the Commission's purpose of eliminating opportunities for undue discrimination arising from the ownership, operation, or control of jurisdictional transmission facilities. Specifically, the new proposal expands or creates a number of significant gaps in the protections against undue discrimination that the standards of conduct are intended to afford. TAPS urges the Commission to close these gaps by:

[1] TAPS is chaired by Roy Thilly, CEO of Wisconsin Public Power Inc. 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.; Massachusetts Municipal Wholesale Electric Company; Missouri River Energy Services; Municipal Energy Agency of Nebraska; Northern California Power Agency; and Southern Minnesota Municipal Power Agency.

[2] *Standards of Conduct for Transmission Providers*, 73 Fed. Reg. 16,228 (proposed Mar. 27, 2008), IV F.E.R.C. Stat. & Regs. ¶ 32,630 (to be codified at 18 C.F.R. pt. 358).

1. Ensuring that the standards of conduct regulations are not under-inclusive and do not rely on a much less efficient and effective process of case-by-case adjudication under statutory non-discrimination standards, which will either grant *de facto* immunity to conduct that was not addressed explicitly in the regulations or perpeturate the resource-draining uncertainty that the Commission is intending to eliminate by this NOPR;

2. Clarifying that the NOPR did not intend to exclude from "marketing" purchases of electricity or natural gas other than those occurring through the submission of a bid or offer, including wholesale purchases to support sales for resale that Order No. 889-B expressly defined as part of the wholesale marketing function;

3. Eliminating the exemption from "marketing" of purchases for bundled retail sales. At minimum, the Commission should refrain from expanding the bundled retail sales exception beyond its contours as framed in Order No. 889-B (*i.e.*, applicable only where the retail marketing function has been separated from the wholesale, so that employees are engaged "solely" in bundled retail sales). So that the integrity, transparency, and non-discriminatory access essential to RTO markets is not undermined, the Commission should also avoid extending the bundled retail sales exception to bids and offers (*e.g.*, for energy, financial transmission rights, or virtual electric supply or demand) on behalf of bundled retail load in organized RTO markets. Finally, the Commission should not extend the bundled retail sales exemption by applying it generically to sales made by providers of last resort;

4. Correcting the omission from "marketing" of physical transmission reservations and resales of transmission capacity, which omission vitiates Order No. 890's expressly stated, equal-access-to-information predicate for eliminating price caps on reassignment of transmisison capacity;

5. Clarifying that providing ancillary services pursuant to an OATT is a Transmission Function, but offering ancillary services competitively is a Marketing Function;

6. Clarifying that the proposed standards do not preclude Transmission Providers from providing—and, indeed, that they are obligated to provide—unaffiliated network customers' planning personnel with the same types of information as is made available to the resource planning personnel of the Transmission Provider and its affiliates, to facilitate the customer's own resource planning, and that Transmission Providers cannot use standards of conduct as an excuse to foreclose transmission customers from access to the transmission planning information necessary to permit their full participation in the regional joint planning process mandated by Order 890; and

7. Conforming the proposed regulation to state, as the NOPR provides, that information shared pursuant to the exceptions to the Independent Functioning Rule must be made only to the same extent that a Transmission Provider would

exchange information with similarly-situated marketing function employees of a non-affiliated entity.

I. BACKGROUND AND EXECUTIVE SUMMARY

TAPS has participated actively in the Commission's development and refinement of transmission provider standards of conduct since such standards were first adopted in Order No. 889.[3] TAPS believes that appropriately focused and enforced standards of conduct are essential to ensuring that public utilities do not use knowledge derived from their ownership, control, or operation of transmission facilities in order to provide undue preferences to themselves or their affiliates. *See* NOPR at P 20 & n.23.

The instant NOPR reflects a change in course. After the D.C. Circuit vacated and remanded a subset of the regulations promulgated by Order No. 2004, *National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831 (D.C. Cir. 2006) ("*National Fuel*"), the Commission issued a proposed rule[4] that would have limited the Order No. 2004 standards but retained their structure. The 2007 NOPR would have continued to focus on corporate-level relationships between a Transmission Provider and its affiliates, while eliminating restrictions on the relationships between Transmission Providers and a wide

[3] *Open Access Same-Time Information System (formerly Real-Time Information Networks) and Standards of Conduct*, Order No. 889, 61 Fed. Reg. 21,737 (May 10, 1996), [1991-1996 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,035 (to be codified at 18 C.F.R. pt. 37) ("Order No. 889"), *clarified*, 76 F.E.R.C. ¶ 61,009 (1996), *modified*, Order No. 889-A, 62 Fed. Reg. 12,484 (Mar. 14, 1997), [1996-2000 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,049 ("Order No. 889-A"), *reh'g denied*, Order No. 889-B, 62 Fed. Reg. 64,715 (Dec. 9, 1997), 81 F.E.R.C. ¶ 61,253 (1997) ("Order No. 889-B"), *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).

[4] *Standards of Conduct for Transmission Providers*, 72 Fed. Reg. 3958 (proposed Jan. 29, 2007), [2004-2007 Proposed Regs.] F.E.R.C. Stat. & Regs. ¶ 32,611 (to be codified at 18 C.F.R. pt. 358) ("2007 NOPR"), *comment period extended*, 72 Fed. Reg. 10,433 (Mar. 8, 2007) (revision proposed in response to invalidation of parts of Order No. 2004 *et al.* in *Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831 (D.C. Cir. 2006)).

range of affiliates encompassed within the term "Energy Affiliates." The Commission also proposed to create additional exceptions for particular types of employees, such as those engaged in integrated resource planning pursuant to a state mandate.

In response to the 2007 NOPR, a number of commenters urged the Commission to abandon Order No. 2004's focus on corporate-level relationships and to adopt an employee-functional approach to standards of conduct. Such commenters urged the Commission simply to define the prohibited employee-level interactions and to eliminate other restrictions.

TAPS' positions regarding the 2007 NOPR were guided by the need to ensure (a) that Transmission Providers may not derive undue preferences for themselves or their affiliates as a result of their ownership, operation or control of jurisdictional transmission facilities , and (b) that Transmission Providers and transmission customers *alike* have access to the information they need to engage in efficient resource planning and the Order No. 890 joint regional planning processes. TAPS therefore supported the integrated resource planning exception *provided* that transmission customers would be given equal access to the same kinds of information as would be available to the Transmission Provider's (or affiliate's) resource planning employees. TAPS also stated that it would *oppose* the proposed elimination of the "Energy Affiliate" concept (and commenters' proposed switch to an employee-functional approach) *unless* the definition of "marketing" were expanded to include other ways (besides sales for resale of electricity or natural gas in interstate commerce) in which Transmission Providers and their customers compete for sales or for the resources needed to make those sales.

Specifically, TAPS argued that the definition of "marketing" proposed by the Edison Electric Institute should be modified 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.

Reply Comments of Transmission Access Policy Study Group, *Standards of Conduct for Transmission Providers*, Docket No. RM07-1-000, at 8 (Apr. 30, 2007) (*available at* eLibrary Accession No. 20070430-5132) ("TAPS 2007 Reply Comments") (redlining the definition proposed in EEI's March 30, 2007 initial comments). TAPS also asked the Commission to reconsider, or at least to avoid broadening, Order No. 2004's bundled retail sales unit exemption.[5]

Instead of adopting the 2007 NOPR's proposed rule with modifications, the Commission issued a new proposed rule. The new rule would abandon Order No. 2004's corporate-functional approach, adopt an employee-functional approach, and expand the definition of marketing in *some*, but not all, of the ways necessary to prevent

[5] Comments of Transmission Access Policy Study Group, *Standards of Conduct for Transmission Providers*, Docket No. RM07-1-000, at 36-37 (Mar. 30, 2007) (*available at* eLibrary Accession No. 20070330-5179) ("TAPS 2007 Initial Comments").

Transmission Providers from providing themselves or their affiliates with undue preferences.

TAPS does not object to the Commission's proposed move away from Order No. 2004's corporate-functional approach—changes that should aid both compliance and enforcement. However, for its employee-functional approach to work and to provide the protection required by the statute, the proposed rule's definition of "marketing" needs to be modified. As proposed, the "marketing" definition creates significant gaps in the regulatory structure, which will allow Transmission Providers to exploit their knowledge of the transmission system in order to provide themselves and their affiliates with undue preferences. In some cases it expands existing gaps, such as the omission from "marketing" of sales to bundled retail load.[6] In other cases, the proposed rule would open new gaps. For example, the proposed rule appears to exempt from standards of conduct restrictions on employees engaged in making physical transmission reservations or resales of transmission capacity, a gap that is all the more problematic given the elimination, in Order No. 890 and 890-A, of price caps on resales of transmission capacity by Transmission Providers and their affiliates.

The Commission must close these gaps in order to fulfill its statutory mandate. As *National Fuel* held with respect to the Natural Gas Act ("NGA"), which is identical to the Federal Power Act ("FPA") in relevant part, the "fundamental purpose" of the statutes that the Commission administers is "to protect … gas consumers from the monopoly

[6] As a result of that omission, Transmission Providers may use non-public transmission information to identify and lock up valuable power supply resources, for the benefit of their bundled retail load, before such information becomes available to transmission customers with whom the Transmission Provider competes for retail load.

power of" transmission providers. 468 F.3d at 833. The Commission also "has a duty to prevent undue discrimination in the rates, terms, and conditions of public utility transmission service."[7] Electric transmission providers have strong, inherent incentives to use non-public transmission information to reap undue competitive advantages in a wide variety of electricity-related markets. Indeed, the Commission has found that "[t]he inherent characteristics of monopolists make it inevitable that they will act in their own self-interest to the detriment of others" by attempting to transfer the advantages of transmission ownership to affiliated companies competing in related markets.[8] The Commission frequently has acted to prevent undue discrimination flowing from such inherent incentives, and the Commission should do so here.[9]

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[7] *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 Fed. Reg. 12,266, 12,318 (Mar. 15, 2007), [2006-2007 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,241, P 425 (to be codified at 18 C.F.R. pts. 35, 37) ("Order No. 890"), *order on reh'g and clarification*, Order No. 890-A, 73 Fed. Reg. 2984 (Jan. 16, 2008), [2006-2007 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,261 ("Order No. 890-A"), *review docketed*, No. 08-1276 (4th Cir. filed Mar. 5, 2008).

[8] *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,539, 21,567 (May 10, 1996), [1991–1996 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,036, at 31,682 (to be codified at 18 C.F.R. pts. 35, 385), *clarified*, 76 F.E.R.C. ¶ 61,009 (1996), *modified*, Order No. 888-A, 62 Fed. Reg. 12,274 (Mar. 14, 1997), [1996–2000 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,048 at 30,210 ("[D]iscriminatory behavior clearly is in the economic self-interest of a monopoly transmission owner facing the markedly increased competitive pressures that are driving today's electric utility industry."), *order on reh'g*, Order No. 888-B, 62 Fed. Reg. 64,688 (Dec. 9, 1997), 81 F.E.R.C. ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 F.E.R.C. ¶ 61,046 (1998), *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).

[9] *See TAPS v. FERC*, 225 F.3d 667, 683 (D.C. Cir. 2000) (upholding open access requirements "premised not on individualized findings of discrimination by specific transmission providers, but on FERC's identification of a fundamental systemic problem in the industry."), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002); *Associated Gas Distributors v. FERC*, 824 F.2d 981, 1008 (D.C. Cir. 1987) ("Agencies do not need to conduct experiments in order to rely on the prediction that an unsupported stone will fall."); Order No. 890 at P 41 ("We disagree with commenters who assert that the Commission is relying on unsubstantiated allegations of discriminatory conduct to justify OATT reform. The courts have made clear that the Commission need not make specific factual findings of discrimination in order to promulgate a generic rule to eliminate undue discrimination. In *AGD*, the court explained that the promulgation of generic rate criteria involves the determination of policy goals and the selection of the means to achieve them and that courts do not insist on empirical data for every proposition upon which the selection

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II. COMMENTS

A. The Commission Should Strive to Make the Regulations as Complete As Possible and Should Clarify Their Intended Application

The proposed rule attempts to simplify the standards of conduct regulations in order to provide greater certainty and clarity to Transmission Providers and their customers regarding what behavior is permitted and what behavior is prohibited. The Commission reasons that providing such clarity will facilitate compliance and enforcement while removing the unnecessary uncertainty under which the industry currently operates. In order to streamline the standards, the new NOPR proposes "*per se* rules that address the greatest prospect for undue preference." NOPR at P 20. The NOPR explains that "failure to comply with a *per se* rule of the Standards [would] automatically establish[] a sanctionable violation." *Id.* at n.22.

However, the NOPR does not attempt to define the full scope of prohibited conduct. Rather, behavior not covered by a *per se* rule would be examined on a case-by-case basis to determine whether it violates the Federal Power Act or Natural Gas Act's prohibitions against undue discrimination. The Commission emphasizes that this "streamlined approach," of creating *per se* rules to cover (only) the clearest violations, "does not diminish our ability to rectify and sanction, where necessary, instances of undue discrimination and preference, … and the Commission possesses the full panoply of statutory remedies to address violations of these statutes, *whether or not* they are

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depends… .") (footnote omitted).

specifically addressed in the *per se* regulations of the Standards." NOPR at P 20 (emphasis added).

TAPS agrees that the Commission retains regulatory authority to address behavior not covered by whatever standards of conduct regulations the Commission ultimately promulgates. However, TAPS is very concerned that the Commission may fail to address important issues up front, which may ultimately defeat *both* the desire for certainty and the Commission's fulfillment of its statutory duties. Indeed, crafting the regulations too narrowly, in reliance upon case-by-case adjudication, may recreate just the confusion and black hole for Commission resources that the NOPR intends to eliminate.

TAPS is concerned that, if the Commission fails to address in a Final Rule the issues raised below, several things will happen. On one hand, despite admonitions to the contrary, many Transmission Providers, compliance officers, and employees will interpret the express prohibition of some behavior as implicit authorization of behavior that is not expressly prohibited. If that happens, the Commission's duty to prevent undue discrimination will already be frustrated, because the types of violations with which the standards of conduct are concerned—preferential sharing of transmission information with Transmission Provider or affiliate personnel that gives such personnel a competitive edge in transacting in FERC-regulated markets—is intrinsically a secretive activity that will be very difficult for transmission customers to detect and to bring to the Commission's attention. On the other hand, other Transmission Providers, compliance officers and employees, may take the Commission's admonitions more seriously, in which case they will be left in much the same position that they are in now: left in doubt as to what behavior is prohibited and what behavior is permitted.

Uncertainty can also provide the cover for Transmission Providers to use the standards of conduct as an excuse to limit in unduly discriminatory fashion the information available to transmission customers, *e.g.*, refusing (ostensibly in the name of avoiding discrimination among customers) to disclose transmission planning information to transmission customer's planning employees if it is not shared on the OASIS, while sharing the informing with planning employees of its merchant function and affiliates. Transmission providers have the opportunity and incentive to prefer their generation function not only by sharing transmission information, but also by foreclosing others from such access, thereby defeating important pro-competition, joint transmission planning, and reliability goals. *See* Part C below.

In short, while a certain amount of case-by-case adjudication at the margins may be inevitable, the Commission's authority to engage in such case-by-case adjudication should not be taken as a reason to fail to be as complete as possible in promulgating standards of conduct regulations. To achieve the Commission's stated objective of preventing undue discrimination and to ensure that other important goals, such as joint transmission planning and reliability, are not undermined, the Commission should more fully define the "marketing function" as discussed below. For example, transmission-function employees should not be permitted to share non-public transmission information with employees seeking to reserve point-to-transmission for resale at market-based rates or with employees submitting offers and bids for FTRs on behalf of bundled retail load sales. The Commission should also make clear that the standards of conduct provide no basis for failing to make available to transmission customers' non-"marketing function" employees (*e.g.*, their planning employees involved in the Order 890 joint planning

process) the kinds of information that are given to the Transmission Providers' (or affiliates') resource planning personnel.

B. The Commission Should Clarify and Expand the Definition of Marketing

The proposed rule defines "marketing functions" as:

> the sale for resale in interstate commerce, or the submission of offers or bids to buy or sell natural gas or electric energy or capacity, demand response, virtual electric or gas supply or demand, or financial transmission rights in interstate commerce, all as subject to certain exemptions.

NOPR at P 35; proposed 18 C.F.R. § 358.3(c). The Commission notes that "[t]his definition is a variant of a suggestion by TAPS." NOPR at P 35 n.53. While TAPS appreciates the proposed expansion of "marketing" to include a number of the activities that were formerly classified as "Energy Affiliate" functions, TAPS has significant concerns regarding certain omissions.

1. The Commission Should Clarify That The NOPR Did Not Intend To Exclude From "Marketing" Bilateral Purchases (*I.e.*, Purchases Made Without The Submission Of A Bid Or Offer)

In its 2007 NOPR Reply Comments (at 8), TAPS proposed that the definition of marketing be expanded to include *both* the "purchase or sale for resale" and "the submission … of bids or offers to buy or sell" various energy-related products.[10] The NOPR's proposed marketing definition is structured differently. There, marketing is

[10] TAPS proposed that "marketing" include the sale or purchase for resale, or the submission or bids or offers for "electric energy, capacity, 'virtual' supply or demand, sites for location of new generation capacity, transmission capacity or reservations, financial transmission rights, [and] ancillary services." The NOPR's express omission of certain of those energy-related products is discussed below. In this section, however, we address an unexplained (and apparently unintentional) omission resulting from the

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defined to include "the sale for resale in interstate commerce or the submission of offers or bids to buy or sell" a subset of the energy-related products identified by TAPS. NOPR at P 35; proposed 18 C.F.R. § 358.3(c). This definition appears to omit purchases other than those made through the "submission of offers or bids to buy or sell." NOPR at P 35; proposed 18 C.F.R. § 358.3(c).

The NOPR does not explain the Commission's reasons for dropping the reference to purchases other than those made through the submission of offer or bids. The omission may be unintentional, or the Commission may have reasoned that, in contract law terms, every purchase is preceded by an offer that must be accepted to create a binding agreement. However, TAPS is concerned that the omission could have greater meaning. Specifically, TAPS is concerned that the omission may be related to the Commission's continued exemption from marketing of bundled retail sales, *see* proposed 18 C.F.R. § 358.3(c)(1)—an ongoing gap in standards of conduct coverage that the Commission must close in order to ensure truly comparable, non-discriminatory transmission service. As explained below (*see* Section B.2), TAPS urges Commission to eliminate or narrow the standards of conduct exemption for bundled retail sales to ensure that *all* Transmission Provider activities in *wholesale* markets, including the purchase of electric energy, capacity, and physical or financial transmission rights and other energy-related products for bundled retail load, are covered by the standards.

If the exclusion from "marketing" of bilateral purchases of "natural gas or electric energy or capacity, demand response, virtual electric or gas supply or demand, or

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Commission's syntax.

financial transmission rights" (proposed 18 C.F.R. § 385.3(c)) was intended to effect the bundled retail sales exemption, that exclusion was unnecessary given the express bundled retail load exception. Importantly, however, the exclusion was also overbroad. Public utilities purchase energy, capacity, transmission capacity, etc., in connection with sales for *resale* as well as for serving bundled retail load.[11] In Order 889-B (at 64,719), the Commission expressly recognized that the "wholesale power marketing function" "includ[es] power purchase transactions made by the marketing function on behalf of wholesale native load." Although the proposed rule does not state that it is intending to cut back on Order No. 889-B's coverage, its reference to the submission of bids or offers is not sufficient to bring such purchases for sales for resale clearly within the ambit of the proposed definition. Indeed, even transmission-owning and operating public utilities[12] within the footprint of an organized, bid-based market may purchase products bilaterally, without submitting an offer or bid to do so. And, of course, public utility transmission providers operating *outside* the context of bid-based markets *must* purchase such products bilaterally (to the extent they are available), without the submission of "offers" or "bids" in the sense that those words are used in bid-based markets.

The imposition of standards of conduct restrictions upon employees making sales for resale is not sufficient to eliminate the undue discrimination and preference that results from allowing Transmission Providers to share preferential transmission information with employees (or affiliates' employees) making purchases in wholesale

[11] Even if the specific purchased products are not themselves resold, the purchases may free up other, fungible resources that may then be resold in interstate commerce.

[12] Transmission owners in an RTO typically continue to perform transmission operations (*e.g.*,

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markets to support such sales. Transmission Providers and their customers compete with each other directly for the acquisition of scarce power supply resources, transmission rights, and related products with which to serve their loads. The preferential use by Transmission Providers and their affiliates of non-public transmission information gives them an undue competitive advantage in acquiring such resources—an advantage that is not eliminated or addressed by imposing standards of conduct limitations only on employees engaged in sales for resales.

Thus, even if the Commission wishes to retain a bundled retail load exemption (over TAPS' objection),[13] the Commission should modify the proposed rule to ensure that "purchases" are included in the definition of "marketing," regardless of whether they are accomplished through the submission of a bid or offer. At minimum, the Commission must make clear the revised marketing function definition is intended to include bilateral purchases that would have been considered part of the wholesale marketing function under Order No. 889-B.

2. The Commission Should Eliminate The Exception For Bundled Retail Sales And, At Minimum, Should Avoid Expanding The Existing Exception

The NOPR proposes both to perpetuate the existing standards of conduct exception for "bundled retail sales" and to broaden it. More specifically, the NOPR proposes to permit transmission function employees to share non-public transmission and customer information with marketing function employees engaged in "[b]undled retail

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maintenance), and thus remain transmission providers for standards of conduct purposes.

[13] As discussed in the section that follows, any such retention should be more narrowly-drawn, consistent

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sales, including sales of electric energy made by providers of last resort (POLRs)." *See* proposed 18 C.F.R. § 358.3(c)(1). The Commission should take this opportunity to eliminate the bundled retail sales exception, at least insofar as it insulates the Transmission Provider's (or affiliate's) activity in the wholesale market to acquire resources, FTRs, and related products for bundled retail load. That exception needlessly perpetuates opportunities for undue discrimination, contrary to the Commission's statutory obligations. However, if the Commission does not eliminate the exception, it must at least avoid *expanding* it (a) to encompass employees who are not engaged "solely" in bundled retail sales, or (b) to include *un*bundled retail sales made as the "provider of last resort" in a retail competition jurisdiction.

a) The Commission Should Not Permit The Sharing Of Non-Public Transmission And Customer Information With Bundled Retail Merchant Functions

The Commission has repeatedly recognized the opportunities for undue discrimination and anticompetitive consequences that result from the bundled-retail load loophole, and the Supreme Court has repudiated the unduly narrow jurisdictional interpretation that caused the Commission to create that loophole in the first place. In the Order No. 2004 rulemaking, the Commission initially proposed to eliminate the exception but ultimately retained it despite the erosion of the foundation on which it had been based. The Commission should take this opportunity to eliminate the exception, at least insofar as it removes from the marketing function definition those Transmission

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with Orders 889-A and 889-B.

Provider (or affiliate) employees who participate in the *wholesale* market to acquire resources, FTRs, and related products with which to serve bundled retail load.

In the Order No. 889 rulemaking,[14] the Commission recognized that informational advantages given to the Transmission Provider's merchant functions for wholesale sales or purchases for bundled retail load violate the Federal Power Act's prohibition of undue discrimination and constitute a serious barrier to effective wholesale competition. As explained in the Order No. 889 NOPR:

> We do not believe that open access non-discriminatory transmission services can be completely realized until we remove real-world obstacles that prevent transmission customers from competing effectively with the Transmission Provider. One of these obstacles is unequal access to transmission information. In the Commission's view, transmission customers must have simultaneous access to the same information available to the Transmission Provider if truly non-discriminatory transmission services are to be a reality.

Order No. 889 NOPR at 66,185. Order No. 889 likewise found (at 21,739, emphasis added) that "[o]pen access non-discriminatory transmission service requires that information about the transmission system must be made available to *all* transmission customers at the same time." Order No. 889 thus required the separation of transmission-function employees from employees engaged in either "sale[s] for resale" or the "purchase" of electric energy in interstate commerce.[15] In Order No. 889-A, the

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[14] *E.g.*, *Real-Time Information Networks and Standards of Conduct, Notice of Proposed Rulemaking*, 60 Fed. Reg. 66,182 (Dec. 21, 1995), [1988-1998 Reg. Preambles] F.E.R.C. Stat. & Regs. ¶ 32,516 ("Order No. 889 NOPR"); Order No. 889 at 21,739 ("Open access non-discriminatory transmission service requires that information about the transmission system must be made available to all transmission customers at the same time.").

[15] Order No. 889 NOPR, 60 Fed. Reg. at 66,199 (defining "Wholesale Merchant Function" to mean "the sale for resale or purchase, of electric energy in interstate commerce.").

Commission did not require the separation of transmission functions from merchant functions exclusively serving bundled retail load, because it then believed it lacked the jurisdiction to require such separation, but the Commission did not repudiate its findings supporting the need for such separation.[16]

The Order No. 2004 NOPR again proposed to eliminate the bundled retail sales exception,[17] and Order No. 2004 rejected the false jurisdictional limitation (*see* P 78) on which it had been based. In *New York v. FERC*, 535 U.S. 1 (2002), the Supreme Court laid to rest any claims that the Commission lacked jurisdiction over the transmission component of bundled retail sales. *Id*. at 27 (noting that FERC may "regulate bundled retail transmissions" if necessary to eliminate undue discrimination).[18] Moreover, the Commission recognized that requiring Transmission Providers to separate transmission-function employees from those making sales to (and especially wholesale purchases for)

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[16] Order No. 889-A at 12,487 ("[W]hen a utility uses its own transmission system to transmit purchased power to retail load customers we have no jurisdiction over the transmission that is included in the bundled sale of power to the retail native load."); *see also* Order No. 888-A at 12,299 ("In a situation in which a transmission provider purchases power on behalf of its retail native load customers, the Commission does not have jurisdiction over the transmission of the purchased power to the bundled retail customers insofar as the transmission takes place over such transmission provider's facilities… .").

[17] The Order No. 2004 NOPR would have required separation of transmission-function employees from "an electric transmission provider's sales unit, including those employees that engage in wholesale merchant sales or bundled retail sales." *See Standards of Conduct for Transmission Providers*, Order No. 2004, 68 Fed. Reg. 69,134, 69,144 P 73 (Dec. 11, 2003), [2001-2005 Reg. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,155,P 73 (to be codified at 18 C.F.R. pts. 37, 161, 250, 284, 358) ("Order No. 2004"), *order on reh'g*, Order No. 2004-A, 69 Fed. Reg. 23,562 (Apr. 29, 2004), [2001-2005 Reg. Preambles] F.E.R.C. Stat. & 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. Stat. & 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. Stat. & 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)..

[18] *See also Remedying Undue Discrimination Through Open Access Transmission Service and Standard Electricity Market Design*, 67 Fed. Reg. 55,452, 55,468 (proposed Aug. 29, 2002), [1999-2003 Proposed Regs.] F.E.R.C. Stat. & Regs. ¶ 32,563, P 102 (to be codified at 18 C.F.R. pt. 35) (noting the Supreme Court's "conclu[sion] that the Commission had jurisdiction over transmission used for bundled retail sales of electric energy in interstate commerce.").

bundled retail load is *not* tantamount to exercising jurisdiction over the bundled retail transaction. It is simply exerting jurisdiction over public utilities' use and dissemination of information acquired through jurisdictional activities, including the operation of jurisdictional transmission assets.[19] Order No. 2004 at P 78 (explaining that the Commission has "ample authority to regulate the behavior of the public utility that owns, operates or controls transmission in interstate commerce… ."). However, despite repudiating the only reason previously given for not requiring the separation of transmission-function employees from bundled retail merchant employees, Order No. 2004 refrained from requiring it as the NOPR had proposed.

The Commission should require such separation now. The bundled retail exception allows transmission providers to use the transmission system to serve bundled load in ways that harm wholesale competitors and favor the transmission provider's retail merchant function. Under that exception, employees engaged (solely)[20] in bundled retail sales may "[c]onduct[] transmission system operations [and] reliability functions," and have "access to the system control center or similar facilities … that differs … from the access available to other transmission customers." 18 C.F.R. § 358.4(a)(3); *see also* proposed 18 C.F.R. § 358.5(c)(1). They are permitted preferential access to information

[19] The Commission has an affirmative obligation to consider the anticompetitive consequences of jurisdictional activities, *FPC v. Conway Corp*., 426 U.S. 271, 274 (1976), and in doing so the Commission must take non-jurisdictional activities into account as part of the "factual context," *id*. at 280. Moreover, FPA Section 206(a) empowers (indeed requires) the Commission to review and to "fix" rules, practices, or contracts "affecting" jurisdictional rates, even though such rules, practices, or contracts are not themselves jurisdictional. 426 U.S. at 281. For these reasons and others, courts regularly hold that the Commission may regulate jurisdictional activities in ways that have secondary impacts on non-jurisdictional service by public utilities. *See Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966, 969-70 (1986).

[20] As discussed below, the instant NOPR would *expand* the existing exception for bundled retail sales by deleting language that limits the permitted sharing of non-public transmission information to only those

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about the Transmission Provider's transmission system, including ATC, price, curtailments, storage, ancillary services, balancing, maintenance activity, and expansion plans, *id*. § 358.5(a), (b)(1), and may be made privy to information "acquired from non-affiliated transmission customers or potential non-affiliated transmission customers, or developed in the course of responding to requests for transmission or ancillary service." *Id*. § 358.5(b)(2); *see also* proposed 18 C.F.R. §§ 358.3(h), (j), and 358.6(a).

As a result of these loopholes, vertically integrated Transmission Providers may inflict substantial competitive harm upon competitors and on the competitive markets, both inside and outside RTOs, that Commission is trying so hard to foster:

- Retail merchant-function employees may obtain advance knowledge that transmission capacity on certain paths will be restricted, and may use that knowledge to make wholesale purchases with suppliers on other paths at rates more favorable than will be available to others when the ATC information is later posted on OASIS;
- In LMP-based markets, retail merchant employees may use advanced knowledge of transmission outages in order to obtain FTRs at more favorable prices than will later prevail once the outage is announced;
- In non-LMP areas, retail merchant employees may use advanced knowledge of outages to reserve transmission capacity remaining on other paths and effectively prevent competing load-serving entities within the constrained area from reaching other suppliers;
- Retail merchant employees may similarly use advance information as to when transmission lines will be returned to service to get a jump on competitors in reserving transmission, making wholesale purchases at favorable prices and, in LMP-based markets, in buying or selling FTRs; and
- Retail merchant employees can also obtain sensitive information about their competitors' transactions and can use that data—such as requests for additional transmission capacity to serve new customers—to attempt to cherry-pick attractive opportunities or to block their competitors' plans in

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employees who are engaged "solely" in bundled retail sales.

> other ways, *e.g.*, by locking up necessary transmission or dispatching generation in ways that create congestion.

Such actions by bundled retail sales employees produce anticompetitive effects in both wholesale and retail markets, by lowering Transmission Providers' power supply costs and raising their rivals' costs or preventing competitors from taking advantage of sales opportunities.

These are not hypothetical possibilities. The Commission has encountered them already. For example, in April 2001, the City of Corona, California, announced that it was creating a municipally-owned electric utility, which would provide an alternative to Southern California Edison's ("SCE's") retail service. *City of Corona v. S. Cal. Edison Co.*, 104 F.E.R.C. ¶ 61,086, P 2 (2003). Among the customers Corona intended to serve was the Golden Cheese Company of America. *Id.* Corona filed an interconnection request and application for a wholesale distribution access tariff with SCE. SCE's transmission personnel shared "many details" from Corona's application with two retail employees from SCE's Customer Service Business Unit, which handled SCE's large retail customers. *Id.* PP 8, 11. The Commission found that the sharing of this information gave SCE's retail merchant employees "preferential access to transmission information." *Id.* P 12. According to Corona, SCE's retail merchant employees used that information to help SCE compete with Corona for Golden Cheese's business. *Id.* P 3. Nevertheless, the Commission dismissed Corona's complaint because the standards of conduct did not prohibit the preferential sharing of information with retail merchant employees. *Id.* PP 6, 12.

In short, the bundled retail sales exception cripples the Commission's ability to ensure the non-discriminatory transmission access that is an essential predicate for

reliance on competitive generation markets to ensure just and reasonable wholesale rates. This impairment is critical, because "[e]fficient and competitive markets will develop only if market participants have confidence that the system is administered fairly," and the "[l]ack of market confidence resulting from the perception of discrimination … has real-world consequences," impairing both competitive markets and reliability. Order No. 2000 at 824.[21] As the Commission has found:

- "[T]here is a reluctance on the part of market participants to share operational real-time and planning data with transmission providers because of the suspicion that they could be providing an advantage to their affiliated marketing groups, and this can, in turn, impair the reliability of the nation's electric systems," *id*. at 824-25 (footnote omitted); and
- "The perception that a transmission provider's power sales are more reliable may provide subtle competitive advantages in wholesale markets, *e.g.*, purchasers may favor sales by the transmission provider or its affiliate, expecting greater transmission service reliability," *id*. at 825.

The potential for such problems will only increase "unless the market can be made structurally efficient and transparent with respect to information, and equitable in its treatment of competing participants." *Id*.

Order No. 889 likewise found, before retreating on subsequently repudiated jurisdictional grounds in Order No. 889-A, that the separation of transmission-function employees from a "public utility's employees (or of any of its affiliates' employees) who are engaged in *wholesale purchases and* sales of electric energy in interstate commerce …. is *vital* if we are to ensure that the utility does not use its access to information about

[21] *Regional Transmission Organizations*, Order No. 2000, 65 Fed. Reg. 809 (Jan. 6, 2000), [1996–2000 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,089 (to be codified at 18 C.F.R. pt. 35) ("Order No. 2000"), *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).

transmission to unfairly benefit its own or its affiliates' sales." Order No. 889 at 21,740 (emphasis added).

To advance its pro-competition policies, the Commission must promulgate standards of conduct that ensure the non-discriminatory transmission service that constitutes the indispensable foundation for these policies. The Commission should eliminate the exemption for employees engaged in bundled retail sales—especially those who are engaged in wholesale market activities to purchase resources (such as energy, capacity, or physical or financial transmission rights) with which to serve bundled retail load. Specifically, the Commission should delete the exception contained in proposed 18 C.F.R. § 358.3(c)(1) for "[b]undled retail sales, including sales of electric energy made by providers of last resort.

b) If It Is Retained, The Bundled Retail Sales Exception Should Apply Only Where The Retail Marketing Function Has Been Separated From The Wholesale, And Only To Employees Engaged "Solely" In Bundled Retail Sales, And Not To Actions In Organized Markets

The Commission's current standards of conduct regulations encompass within the "Energy Affiliate" definition Transmission Provider of affiliate employees who are engaged in (among other things) "transmission transactions in U.S. energy or transmission markets," 18 C.F.R. § 358.3(d)(1), purchases, sales, trades, or the administration of "natural gas or electric energy in U.S. energy or transmission markets," *id.* § 358.3(d)(3), or "financial transactions relating to the sale or transmission of natural gas or electric energy in U.S. energy or transmission markets," *id*. § 358.3(d)(4). The current regulations encompass within the definition of "Marketing, sales or brokering" a

public utility Transmission Provider's energy sales unit, "unless such unit engages *solely* in bundled retail sales." 18 C.F.R. § 358.3(e)(2) (emphasis added).

In effect, the same limitation was embodied in the Order No. 889 standards of conduct. As the Commission explained in Order No. 889-B:

> [T]he public utility has no choice pursuant to Order Nos. 888 and 888-A but to separate its wholesale power marketing function (including power purchase transactions made by the marketing function on behalf of wholesale native load) from the transmission operations function. This means that those persons in the company that are involved in wholesale power purchases as well as wholesale sales cannot interact with the transmission personnel other than through the OASIS. Thus, to the extent they are making purchases on behalf of wholesale as well as bundled retail native load as part of a single purchase, they will have to abide by the separation of function requirement. As discussed above, such a purchase is not divisible. Additionally, it is conceivable that there could be a separate retail marketing function for native load and a separate wholesale marketing function for native load. If a challenge is made to the way a utility organizes its functions, then the utility bears the burden of demonstrating that it is maintaining a separate staff to perform retail marketing functions. Furthermore, in such cases, it would clearly be inappropriate for the retail staff to share transmission information with the wholesale marketing staff.

Order No. 889-B at 64,719.

The instant NOPR eliminates the "Energy Affiliate" concept and consolidates most (though not all) of the activities formerly encompassed within that definition under the new definition of "marketing functions." At the same time, the instant NOPR purports to carry forward the past exemption from "marketing" of bundled retail sales. The NOPR states that "[i]n the past, the following categories [including bundled retail sales] have been exempted from the definition of marketing," that the comments on the 2007 NOPR "did not suggest deleting these exemptions," and that "we propose to carry

them forward in this reissued NOPR." NOPR at P 36. In fact, TAPS' comments on the 2007 NOPR *did* advocate deleting the exemption for bundled retail load,[22] just as it advocates eliminating the exemption here.

However, the NOPR does not carry forward the language of the existing exemption precisely, and the differences in wording—combined with the structural changes in the proposed standards of conduct regulations—could give rise to unwarranted inferences that would sweep away protections that were contained in both the Order No. 889 and the Order No. 2004 standards of conduct. Whereas the existing exemption is limited to sales units engaged "solely" in bundled retail sales, the proposed exemption (to be codified at 18 C.F.R. § 358.5(c)(1)) contains no such limitation.

The omission of the word "solely" is especially troubling in the context of the larger changes made to the proposed standards of conduct regulations. Under the current regulations, the existing bundled retail sales exception operated only to determine whether a Transmission Provider's sales unit would be deemed to be engaged in "marketing, sales, or brokering." The existing bundled retail sales exception did not affect whether a functional unit of the Transmission Provider would be deemed an "Energy Affiliate." Consequently, a sales unit that purchased electricity at wholesale and sold that electricity exclusively to bundled retail load would not have been considered a Marketing Affiliate but could have been considered an Energy Affiliate.

Under the proposed rule, however, the bundled retail sales exception is contained in a subsection of the definition of "marketing functions," the consolidated provision that

[22] TAPS 2007 Initial Comments at 36-44.

encompasses what used to be Marketing Affiliate and Energy Affiliate functions. The proposed rule also omits the word "solely" from the bundled retail sales exception, which may signal a retreat from Order No. 889-B's limitations on the scope of the bundled retail load exception. The Commission should revise the proposed rule to limit any "bundled retail sales" exemption to employees who are engaged "solely" in sales to bundled retail load. Further, it should emphasize that in the move away from Order No. 2004's corporate-functional approach, the Commission is not abandoning the restrictions contained in Order No. 889-B. Thus, the Commission should make clear it is carrying forward Order No. 889-B's restrictions on the scope of the retail marketing function, quoted above, which put the burden on the utility to demonstrate that it is maintaining a separate retail marketing function for native load, whose purchases are not used for wholesale sales.

In addition, the Commission should revise the proposed rule or otherwise clarify that the bundled retail load sales exemption does not extend beyond the physical bilateral purchases contemplated by Order No. 889-B to the activities of the transmission provider's merchant function (even if nominally retail) in organized wholesale markets. In other words, the Commission should clarify that the exemption does not apply to the "offers or bids to buy or sell … electric energy or capacity, demand response, virtual electric … supply or demand, or financial transmission rights in interstate commerce" (NOPR at P 35; proposed 18 C.F.R. § 358.3(c)) on behalf of bundled retail load. Because transmission owning members of RTOs can likely characterize the bulk of their organized market activities as taken on behalf of their bundled retail sales, failure to limit the exemption will taint (by access to non-public transmission information) a significant

portion of the transactions in organized markets. Particularly in light of the Commission's recent recognition that "[e]nsuring the competitiveness of organized wholesale markets is integral to the Commission fulfilling its statutory mandate to ensure adequate and reliable non-discriminatory service at just and reasonable rates" in connection with its ongoing efforts to improve the efficiency and competitiveness of those markets,[23] the Commission should not erode confidence and undermine the competitiveness and integrity of organized markets, contrary to its express intent in creating such markets (*see* Order 2000 at 31,017), by enlarging the bundled retail load exemptions to enable participating transmission owners to gain a competitive advantage from non-public transmission information.

c) The Commission Should Not Expand The Bundled Retail Sales Exception To Include *Un*-bundled Sales As A Provider of Last Resort

The Commission also should avoid expanding the bundled retail sales exception to include, for the first time in the Commission's standards of conduct regulations, un-bundled retail sales as a provider of last resort ("POLR") in jurisdictions that have adopted retail competition. As the NOPR observes, the Commission has previously refused to adopt a generic exemption for POLR sales. NOPR at P 37, citing Order No. 2004-C. The Commission's case-by-case consideration of standards of conduct waivers involving affiliates engaged in POLR sales has been highly fact specific. *E.g.*, *Exelon Corp.*, 121 F.E.R.C. ¶ 61,092 (2007) (granting waiver regarding administrative and ministerial activities related to provider of last resort service, but deferring action on

[23] *Wholesale Competition in Regions with Organized Electric Markets*, 73 Fed. Reg. 12,576, P 1 (proposed

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waiver, in part, because applicant had not shown that its activities in the PJM market and relating to load forecasting were merely "passive."). In a number of cases, the Commission denied the requested waivers on grounds that remain applicable today. *Id.* P 19 n.26 (citing cases).

For example, in *Allegheny Power Serv. Corp.* , 85 F.E.R.C. ¶ 61,390 (1998), the Commission denied the request for a "limited waiver of the functional unbundling requirement with regard to employees who make purchases of wholesale energy for unbundled retail sales pursuant to a state retail choice program." *Id.* at 62,507. The Commission denied the request, stating that "[w]hile the Commission does not have jurisdiction over the unbundled retail merchant function (*i.e.*, unbundled sales of electric energy at retail), it does have jurisdiction over unbundled retail transmission" and therefore "has jurisdiction to require separation of the unbundled retail transmission function from any merchant, whether wholesale or retail." *Id.* at 62,508. The Commission further held that "APS has not provided any compelling reason why a power provider of last resort needs a special relationship with the transmission/reliability function," and declined to allow APS to "obtain a preferential advantage through transmission information obtained by its unbundled retail power sales unit if the Commission were to grant the waiver." *Id.* The other cases cited in footnote 26 of *Exelon Corp.*, 121 F.E.R.C. ¶ 61,092, are in accord.

The NOPR provides little reason for the Commission's change in direction, and does not attempt to address or distinguish prior Commission decisions denying waivers of

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Mar. 7, 2008), IV F.E.R.C. Stat. & Regs. ¶ 32,628, P 1(to be codified at 18 C.F.R. pt. 35).

standards of conduct in the POLR context. The Commission should not follow through on its proposed change of course and should not exempt POLR sales from the "marketing" definition in the standards of conduct regulation. By definition, POLR sales occur within the context of a competitive environment, using unbundled transmission service clearly subject to the Commission's jurisdiction, and it is wholly inappropriate to allow Transmission Providers to use their preferential access to transmission information to provide employees who make sales in such a competitive environment with undue advantages. Moreover, Transmission Providers or affiliates that make POLR sales also participate in wholesale markets—and compete with their transmission customers—to acquire the power supply resources, financial transmission rights, and other resources that they will use in connection with POLR sales. Transmission Providers should not be permitted to give themselves or their affiliates undue advantages in obtaining such resources to the detriment of their transmission customers and competitors, and the integrity of competitive wholesale markets.

3. The Commission Should Correct The Omission From "Marketing" Of Purchases And Sales Of Physical Transmission Reservations And Resales Of Transmission Capacity

The NOPR's marketing definition correctly includes the purchase or sale of *financial* transmission rights, but omits—and fails to acknowledge the omission of—the reservation or resale of *physical* transmission capacity. The omission is particularly glaring because both TAPS *and* EEI suggested that the definition of marketing should include making transmission reservations and scheduling transmission, at least to the

extent that such reservations are made in connection with other marketing activities.[24] TAPS also explained that marketing should include resales of transmission capacity, particularly now that the Commission has proposed lifting previously applicable price caps on such sales. As TAPS pointed out in its 2007 comments, transmission providers and customers "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." TAPS 2007 Reply Comments at 6.

The instant NOPR does not mention or explain the omission of physical transmission reservations or resales of excess transmission capacity.[25] The omissions are significant and should be fixed. Absent such a prohibition, Transmission Providers and their affiliates could use non-public information about the transmission system, including non-public *customer* information such as that provided in connection with transmission service requests or interconnection study requests, in order to identify and acquire the rights to competitively significant or particularly valuable transmission paths, which they may then resell at inflated prices if they deem it to be in their interests to do so.

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[24] *See* Comments of the Edison Electric Institute, *Standards of Conduct for Transmission Providers*, Docket No. RM07-1-000, at 54, 93 (Mar. 30, 2007) (*available at* eLibrary Accession No. 20070330-5187) ("EEI 2007 NOPR Comments") ("EEI proposes to change the proposed regulatory text from 'Marketing also includes managing or controlling transmission capacity of a third party as an asset manager or agent' to '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.'"); TAPS 2007 Reply Comments at 7-8.

[25] The omission is not justified by the existence of the OATT or the requirement that resales of transmission capacity (by the Transmission Provider's merchant function and affiliates, as well as third parties) must be posted on the Transmission Provider's OASIS and effectuated through the assignee's execution of a service agreement with the Transmission Provider (*see* Order 890-A at P 394). Resale of transmission capacity at market-based rates is plainly a merchant activity, not a transmission function.

Allowing transmission providers or affiliates to use non-public transmission information when making transmission reservations, scheduling transactions, or reselling excess transmission capacity would be especially pernicious given Order No. 890's lifting of the price caps as to transmission resold by a Transmission Provider's merchant function or affiliates as well as unaffiliated customers. TAPS 2007 Initial Comments at 35. As the Commission observed in Order No. 890, Commission-regulated public utilities have a monopoly on transmission service, which they can (and will) use to favor their own financial interests at the expense of third parties. Order No. 890 at PP 39–42. This may occur by providing undue preferences to the Transmission Provider's (or an affiliate's) generation sales, or it may occur by providing undue preferences to the Transmission Provider's (or an affiliate's) acquisition and resale of other resources, including scarce transmission capacity. Indeed, Order No. 890-A's determination to extend the elimination of the reassignment price cap to the transmission provider's merchant function and affiliates was expressly premised on the Commission finding (P 404) that "[u]nder the Standards of Conduct, affiliated and unaffiliated customers have equal access to transmission-related information and, through the OASIS, equal opportunity to acquire primary transmission capacity." That fundamental predicate would not be true if the final rule adopted the NOPR's marketing function definition, without expanding it to include the reservation and resale of transmission capacity.

That Order No. 890-A provided a 3-year sunset date for the lifting of the cap does not negate TAPS' concern. The absence of a price cap simply provides Transmission Providers with additional incentives to provide preferential transmission information to employees or affiliate employees engaged in transmission resales; the presence of a price

cap would not completely remove the incentive. In any case, the Federal Power Act does not permit the Commission to tolerate statutorily-prohibited undue discrimination even for a three-year trial period. *See FPC v. Texaco, Inc.*, 417 U.S. 380, 399 (1974) ("[T]he Act makes unlawful all rates which are not just and reasonable [or are unduly discriminatory], and does not say a little unlawfulness is permitted.").

In order to eliminate such opportunities for undue discrimination, the Commission should adopt the "marketing" definition proposed by EEI, as modified by TAPS, in connection with the 2007 NOPR. In relevant part, that definition would provide that "marketing" includes:

> the purchase or sale for resale 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 … transmission capacity or reservations… . 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 [other marketing] activities."

See TAPS 2007 Reply Comments at 8.

4. The Commission Should Clarify That Providing Ancillary Services Pursuant To An OATT Is A Transmission Function, But Offering Ancillary Services Competitively To Is A Marketing Function

In its Reply Comments on the 2007 NOPR (at 8), TAPS stated that the "marketing" definition should include "ancillary services." In the text of the instant NOPR, the Commission responds that it is "unnecessary to include … ancillary services" in the marketing definition, as TAPS had suggested, because such services are "included in the definition of sales of electric energy." NOPR at P 35 n.53. In fact, however, the proposed regulatory text includes ancillary services within the definition of transmission.

See proposed 18 C.F.R. § 358.3(f) ("*Transmission* means electric transmission, network or point-to-point service, ancillary services or other methods of electric transmission… ."). Similarly, proposed 18 C.F.R. § 358.4(a)(3) states that "A transmission provider may not, through its tariffs or otherwise, give undue preference to any person in matters relating to the sale or purchase *of transmission service* (*including*, but not limited to, issues of price, curtailments, scheduling, priority, *ancillary services*, or balancing)" (emphasis added).

These inconsistencies highlight the need for more precision. TAPS suggests that the Commission draw a distinction between (1) ancillary services offered by a Transmission Provider to its transmission customers pursuant to its OATT, and (2) ancillary services offered competitively by a Transmission Provider or an affiliate—either bilaterally, to customers who are self-supplying ancillary services in support of transmission service purchased from another Transmission Provider, or through an organized market for such services.[26] Specifically, the Commission should clarify that, when transmission-function personnel interact with transmission customers and generation operators in order to arrange for the provision of ancillary services in support of transmission services taken under the Transmission Provider's open access transmission tariff, the transmission-function personnel are not performing a marketing function. However, the Commission should recognize equally that, when a Transmission Provider or affiliate offers ancillary services in organized markets or bilaterally to third parties seeking to self-supply ancillary services on another Transmission Provider's

[26] *Avista Corp*., 87 F.E.R.C. ¶ 61,223, *order on reh'g*, 89 F.E.R.C. ¶ 61,136 (1999).

system (*e.g.*, through dynamic scheduling), the employees offering or providing such services are engaged in marketing functions.

C. The Commission Should Ensure That Transmission Customers' Planning Personnel Have Non-Discriminatory Access to the Same Kinds of Information That Transmission Providers Make Available to Their Own Employees

The Commission issued the 2007 NOPR largely to remove standards-of-conduct-based obstacles to integrated resource planning. The instant NOPR attempts to achieve that end in an even more comprehensive and less cumbersome way. According to the NOPR (P 32), the shift from a corporate-function approach to an employee-function approach, combined with clarification of the relevant definitions, "addresses the concerns raised by the industry regarding the obstacles the Standards place in the way of system planning." Specifically, the Commission explains that

> because we are returning to the functional separation approach adopted in Order No. 889, and because a marketing function employee is one who is actively and personally engaged in marketing activities, an employee who performs merely a planning function and is not "engaged in" making wholesale offers, bids, or sales does not fall within the prohibited category.

Id. Thus, employees engaged in resource planning, but who do not make wholesale offers, bids, or sales, are free to interact with transmission function employees and vice versa. *Id*.

The Commission has taken these steps to reduce standards of conduct-based obstacles to transmission and resource planning against the backdrop of major regulatory initiatives to foster joint, open, regional transmission planning processes. Indeed, the NOPR explicitly points to the importance of the Order 890 coordinated and open joint

planning process as a reason for eliminating unnecessary standard of conduct restrictions on interactions. NOPR at P 32.

However, in proposing to modify the standards of conduct to allow a Transmission Provider's planning employees to freely interact with its transmission personnel, the NOPR fails to make clear that network customer planning employees should be afforded the same access for the network customer's resource planning, and as part of the Order 890 planning process. The NOPR permits Transmission Providers to share non-public transmission information with their own planning employees without making explicit the requirement that they must also make the same kinds of information available, on a non-discriminatory basis and during comparable time frames, to transmission customer planning personnel.

TAPS continues to have the same concerns about the instant NOPR that it had about the 2007 NOPR's proposal to create excepted categories of integrated planning personnel under the Order No. 2004 corporate-functional regime: creation of the worst of all worlds, in which jurisdictional Transmission Providers share non-public transmission information internally when planning for bundled retail load, but use standards of conduct as an excuse to deny network customers access on a comparable, informal basis to the non-public transmission information that those customers need to efficiently plan resources and evaluate purchases to serve their loads dependent on the Transmission Provider's transmission system, and to participate fully in the Order No. 890 regional joint planning process. As stated in its 2007 NOPR comments, TAPS acknowledges the importance of facilitating integrated resource planning of generation, transmission, and demand-side resources. But facilitating information sharing among Transmission

Provider (or affiliate) employees to that end, without simultaneously requiring the sharing of the same kinds of information on a non-discriminatory basis with network transmission customers' employees, may exacerbate undue discrimination between Transmission Providers and their network transmission customers. It will also frustrate the Commission's efforts to foster integrated resource planning and joint regional transmission planning.

The final rule should be modified to achieve the Commission's purposes of ensuring non-discriminatory transmission service, and efficient and effective transmission expansion through joint, regional transmission planning. The Commission should require comparable sharing of transmission information with the network customer's resource planning personnel and should clarify that the standards of conduct create no impediment to the sharing of such information with transmission customers' planning personnel as part of the Order 890 joint regional planning process.

1. The Commission Should Require Transmission Providers To Make Available To Transmission Customers' Planning Personnel The Same Kinds Of Information That They Provide To Their Own Or Affiliates' Resource Planners

The NOPR aims to facilitate bilateral information sharing among a Transmission Provider's transmission-function employees and its (or an affiliate's) resource planning employees. In general, standards of conduct limitations are aimed at restricting preferential information to benefit a Transmission Provider's own marketing functions or those of affiliates. Relaxing the standards of conduct limitations on information sharing with a Transmission Provider's resource planning employees, or those of an affiliate,

would seem *a fortiori* to allow the Transmission Provider to share similar information with unaffiliated transmission customers' resource planning personnel.

However, Transmission Providers have not construed the standards of conduct regulations favorably to transmission customers. On the contrary, Transmission Providers, left to their own devices, have incentives both to share non-public transmission information with their own planning personnel (or those of affiliates) and to withhold such information from competitors' planning personnel. TAPS is concerned that despite the general prohibitions against undue discrimination,[27] removal of standards of conduct barriers to sharing of such information with Transmission Provider (or affiliate) planning personnel will not prevent the Transmission Providers from using standard of conduct concerns as an excuse for withholding of such information from network customers' planning personnel.

For example, Transmission Providers attempt to justify the withholding by suggesting that it would be discriminatory, and prohibited by the standards of conduct, to share non-public transmission information with load-serving customers' planning personnel when that information is not also simultaneously available to other transmission customers or market participants, such as merchant generators. While the Commission's removal of the bar to sharing such information with the Transmission Provider's planning personnel (without simultaneously sharing with all other transmission customers) eliminates any credible basis for such a claim, TAPS is

[27] *See* proposed 18 C.F.R. § 358.2(a).

concerned that, in practice, standards of conduct will continue to be used as an excuse to withhold transmission information from network customers' planning personnel.

The prospect of such disparate treatment is a significant concern. For network customers dependent on the Transmission Provider's grid and attempting to plan, site, or acquire new generation or secure power purchases, obtaining information about and planning for the delivery of such resources to load is often the most challenging part of the process. Such customers must rely on OATT processes to obtain transmission information when they engage in competitive solicitations or consider constructing new generation resources. Network customers limited to those processes frequently find it necessary to submit multiple requests for transmission service and/or interconnection service in order to obtain the necessary information regarding transmission availability and to maintain the required flexibility to pick among the generation options being considered. In contrast, under the proposed rule, the Transmission Provider's transmission-function employees and retail resource planners would be permitted to interact freely, outside the OATT processes and OASIS, providing the resource planners with preferential access to information about the Transmission Provider's system. The competitive implications of this discrimination would be especially plain if Transmission Providers and network transmission customers are competing to purchase from the same suppliers or considering participation in the same generating units or sites.

As a result, the Commission must not relax the standards of conduct limitations that restrict information sharing with Transmission Provider (or affiliate) resource planning personnel without simultaneously requiring Transmission Providers to provide transmission dependent utilities' ("TDUs'") resource planners a comparable ability to

request and obtain, through the same informal processes used by the Transmission Provider, non-public transmission information that the network customer can use to assess its resource and purchase options. Such a requirement is necessary not only to prevent undue discrimination; it is also necessary to satisfy the Commission's obligations under FPA Section 217(b)(4), 16 U.S.C. § 824q(b)(4), which requires the Commission to "facilitate[] the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities" and to enable them to secure long-term transmission rights for their long-term power-supply arrangements. Section 217 makes no distinction among load-serving entities ("LSEs"). The mandate applies equally whether they are Transmission Providers or TDUs. To adopt standards of conduct that facilitate integrated planning by transmission-owning LSEs, while leaving TDUs to a less flexible, more time-consuming process, would violate Congress's mandate, as well as the FPA's prohibition against undue discrimination.

To ensure comparability, the final rule should make clear that that the non-discrimination requirements imposed by the relevant statutes and standards of conduct regulations require Transmission Providers to make available to transmission customers' planning personnel, on a non-discriminatory basis and during comparable timeframes, the same kinds of information that they make available to their own planning personnel and those of their affiliates.

2. The Commission Must Make Clear That The Standards Of Conduct Will Not Interfere With Order 890-Mandated Joint Planning

The NOPR states that the functional approach, including the definitions of "transmission functions" and "marketing functions," "addresses the concerns raised by

the industry regarding the obstacles the Standards place in the way of system planning." NOPR at P 31-32. It continues (*id*. P 32 (footnotes omitted)):

> We stressed in Order Nos. 890 and 890-A not only the critical importance of long-range planning, but also the desirability of a coordinated and open planning process. Unnecessary restrictions on employee interactions militate against that objective. However, because we are returning to the functional separation approach adopted in Order No. 889, and because a marketing function employee is one who is actively and personally engaged in marketing activities, an employee who performs merely a planning function and is not "engaged in" making wholesale offers, bids or sales does not fall within the prohibited category. He or she is therefore free to discuss system planning, including state-mandated Integrated Resource Planning, with transmission function employees.

While the NOPR thus references the Order 890 joint transmission planning process as a rationale for eliminating the restrictions of the access of the transmission provider's planning employees to transmission information, it does not make explicit the NOPR's change also removes any standards-of-conduct-based excuse for withholding such information from transmission customer planning employees participating in the Order 890 joint planning process. While the Commission may believe that this is implicit (among other reasons, because the standards of conduct only address information exchanges between the transmission provider and its marketing function and affiliates, not third parties), the Commission should connect the dots by making it explicit. Thus, in addition to the clarification requested above that the NOPR's approach will not prevent network customers' resource planners from having access to transmission information comparable to that obtained by the Transmission Providers' planners, the Commission should clarify that standards of conduct do not stand in the way of providing the network

customers' employees engaged in the Order 890 joint transmission planning process with comparable information access that is essential to making such process effective.

In Order No. 890 (P 435), the Commission found it necessary, "[i]n order to limit the opportunities for undue discrimination … and to ensure that comparable transmission service is provided by all public utility transmission providers," to direct public utilities to establish "coordinated, open, and transparent transmission planning on both a local and regional level." Order No. 890-compliant, joint regional planning processes must satisfy nine planning principles: coordination, openness, transparency, information exchange, comparability, dispute resolution, regional participation, congestion studies, and cost allocation. *Id*. PP 426, 444. The purpose of the first principle, coordination, "is to eliminate the potential for undue discrimination in planning by opening appropriate lines of communication between transmission providers, their transmission-providing neighbors, affected State authorities, customers, and other stakeholders." *Id*. P 452.

Order No. 890-A reaffirmed the need for coordinated, open, and transparent regional planning processes that "treat similarly-situated customers (*e.g.*, network and retail native load) comparably in transmission system planning." Order No. 890-A at P 181. The Commission reiterated that "the planning process must provide for the timely and meaningful input and participation of all interested customers and other stakeholders in the development of transmission plans," and that "Customers and other stakeholders therefore must have the opportunity to participate at the early stages of the development of the transmission plan, rather than merely given an opportunity to comment on transmission plans that were developed in the first instance without their input." *Id*. P 188. The Commission emphasized that "[i]n order to satisfy the openness principle,

transmission planning meetings must be open to all affected parties including, but not limited to, all transmission and interconnection customers." *Id*. P 192. The Commission likewise stressed that "[i]n order to satisfy the transparency principle, transmission providers must disclose to all customers and other stakeholders the basic criteria, assumptions, and data that underlie their transmission system plans," *id*. P 195, including transmission base case and change case data used by the transmission provider, *id*. P 199.

Order 890-A also noted that "many of the concerns regarding management of non-public information shared in the planning process can be alleviated by simultaneous disclosure of that information to all participants" and that "the Standards of Conduct govern the relationship and exchange of information between transmission providers and their marketing or energy affiliates." *Id*. P 201. While the NOPR contemplates that non-public transmission information could be shared by the Transmission Provider with its own or others' employees engaged in resource planning functions, TAPS is concerned that Transmission Providers will claim that the Standards of Conduct, even as revised, prohibit such sharing with non-marketing personnel of transmission customers unless posted on OASIS.[28] While TAPS supports broader disclosure of information through the OASIS, TAPS is concerned that if such claims were allowed by the Commission the real

[28] Similar issues arise in the context of participation of TDU load-serving entities and distribution providers in development and implementation of mandatory reliability standards, including those requiring sharing of information (*e.g.*, in regional entity working groups) despite FPA Section 215(c)(2)(A) and (D)'s express statutory directive for an open, inclusive process. *See also Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards*, Order No. 672, 71 Fed. Reg. 8662, 8675-76 (Feb. 17, 2006), [2006-2007 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,204, P 153 (to be codified at 18 C.F.R. pt. 39), *corrected*, 71 Fed. Reg. 11,505 (Mar. 8, 2006), *on reh'g*, Order No. 672-A, 71 Fed. Reg. 19,814 (Apr. 18, 2006), [2006-2007 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,212, *modified*, 73 Fed. Reg. 21,814 (Apr. 23, 2008), 123 F.E.R.C. ¶ 61,046 (2008); NERC Rules of Procedure § 1302 (*available at* ftp://ftp.nerc.com/pub/sys/all_updl/rop/NERC_Rules_of_Procedure_EFFECTIVE_20080321.pdf).

transmission planning would likely occur in newly authorized, informal processes in which a Transmission Provider's transmission and resource planners can communicate privately, without disclosure to or the presence of other load-serving entities that are equally dependent on the grid (much less posting such information on the OASIS). Such preferential access to transmission-function employees would result in transmission expansion plans that disproportionately reflect the Transmission Providers' own needs, compared to that of its network customers, and thus would render Order 890/890-A's joint planning process a charade.

For example, a number of the "Attachment K" planning processes that Transmission Providers have filed for Commission approval propose stakeholder committees or working groups that allow participants—the Transmission Provider, transmission customers (including the Transmission Provider's own LSE function), and other stakeholders (*e.g.*, state commission representatives)—to review and assess information and studies regarding transmission planning. The information and studies include transmission planning models and the assumptions underlying them, status reports on upgrades, study scope, and draft transmission plans, among other things. If the NOPR's reference (P 32) to planning employees is limited to just the Transmission Provider's planning employees, Order 890/890-A's comparability mandate, not to mention the other planning principles such as transparency and information exchange, will be frustrated.

TAPS assumes the NOPR's failure to explicitly state that the revised definition of marketing employees permitted sharing of information with transmission customer planning employees participating in the Order 890 joint planning process was an artifact

of the focus of the standards of conduct on interactions between the Transmission Provider and its merchant function and affiliates, not third party employees, rather than an intent to provide Transmission Provider planning employees exclusive access to the transmission information that would usefully be part of a robust joint planning process. While the Commission has observed that "reciprocity obligation requires non-public utility transmission providers to abide by the Standards of Conduct or obtain waiver of them," Order No. 890-A at P 200, it also observed:

> [T]he Standards of Conduct govern the relationship and exchange of information between transmission providers and their marketing or energy affiliates. *Entities that do not own, operate or control transmission facilities, and who are not affiliated with transmission providers, are not subject to the Standards of Conduct.*

Id. P 201 (emphasis added). Thus, network transmission customers that do not own, operate, or control transmission facilities are not subject to the Standards of Conduct, either directly or by reciprocity. To the extent that there is a need to preserve the confidentiality of information disclosed through the joint regional transmission planning processes, such needs can and should be met through the use of appropriate confidentiality agreements. Such agreements may provide, by contract, that marketing function employees will not attend transmission planning meetings at which non-public transmission information is disclosed and that participants will not act as conduits for the disclosure of such information to their own or to affiliates' marketing function employees. Further, as noted above, the better course in many cases may be to make such information available even more broadly (through the OASIS)—thus obviating potential standards of conduct considerations. *See* Order No. 890-A at P 201.

The Commission must not allow pretextual concerns about discrimination as between unaffiliated transmission customers justify undue discrimination against network customers/load serving entities vis-à-vis Transmission Providers and their affiliates. The Commission must not allow standards of conduct regulations and non-discrimination requirements that were enacted to protect transmission customers against undue discrimination in favor of Transmission Providers to become the tools by which such discrimination is accomplished.

Therefore, the Commission should not permit lack of clarity in its revised standards of conduct to undermine its Order 890 joint planning process. It should connect the dots by making express that the ability of the Transmission Provider to share non-public transmission information with planners includes not just the Transmission Provider's own but also the planning employees of transmission customers participating in joint, regional transmission planning processes.

D. The Commission Should Conform the Independent Functioning Rule Regulatory Text to the Discussion in the NOPR

The NOPR proposes to perpetuate and codify certain exceptions to the independent functioning requirement. Declaring it "the first order of business … of a transmission provider to ensure reliability of operations," the NOPR establishes an exception to the Independent Functioning Rule for "the exchange of information necessary to maintain or restore operation of the transmission system." NOPR at P 33; *see also* proposed 18 C.F.R. § 358.5(b)(2). The NOPR cautions that information exchanged pursuant to this exception should be limited to information concerning reliability activities; the exception does not extend to other transmission function

information. NOPR at P 33. The NOPR also explains that "[e]xchanges of information pursuant to this exception should be made only to the same extent that a transmission provider would exchange information with similarly situated marketing function employees of a non-affiliated entity." *Id*. However, the proposed regulatory text does not include this limitation. The Commission should revise the proposed regulation to incorporate this important limitation.

The NOPR also recognizes that there will be instances when transmission function employees must communicate with marketing function employees who are responsible for operating generating plants. *See* NOPR at P 43. Specifically, the Commission proposes to allow transmission function employees and marketing function employees to exchange "[i]nformation regarding generation necessary to perform generation dispatch." *See* proposed 18 C.F.R. § 358.5(b)(1). The NOPR proposes the same limitations and conditions for this exception as are discussed above: namely, such information may be shared only to the same extent that a transmission provider would exchange information with similarly situated marketing function employees of a non-affiliated entity, and the transmission provider must maintain contemporaneous records of information shared pursuant to this exception and must make such record available to Commission staff upon request. NOPR at P 43. As above, this limitation has been omitted from the text of the regulation itself. The Commission should revise the proposed regulation to correct the omission.

CONCLUSION

Wherefore, the Commission should issue a final rule consistent with TAPS comments.

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