UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Standards of Conduct for Transmission Providers	Docket No. RM07-1-001

PETITION FOR REHEARING OR CLARIFICATION OF TRANSMISSION ACCESS POLICY STUDY GROUP

Pursuant to Section 313(a) of the Federal Power Act ("FPA"), 16 U.S.C. § 825l(a), and Rules 212 and 713 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.212, 385.713, the Transmission Access Policy Study Group ("TAPS") requests rehearing or clarification of Order No. 717.[1]

I. EXECUTIVE SUMMARY

Order No. 717 resulted from public utilities' complaints that the rules promulgated by Order No. 2004 were too complicated and made it difficult to engage in integrated resource planning. TAPS supports simplification of the standards of conduct and facilitation of integrated resources planning, but Order No. 717 goes too far. Order No. 717's "reforms" are more sweeping than necessary to achieve those ends and will eviscerate the Commission's ability to prevent transmission providers from using their ownership or operation of jurisdictional transmission facilities to grant themselves undue preferences. They will also undermine the organized wholesale markets that the Commission is attempting to promote.

[1] Standards of Conduct for Transmission Providers, Order No. 717, 73 Fed. Reg. 63,796 (Oct. 27, 2008), 125 F.E.R.C. ¶ 61,064 (2008) ("Order No. 717").

Order No. 717 lists TAPS as a supporter of the shift to an employee-functional approach, but, as discussed below, it fails to fulfill the conditions that were placed on that support. The January 2007 NOPR[2] proposed to amend the Order No. 2004[3] rules to create new exceptions for employees who conduct integrated resource planning or competitive solicitations pursuant to a state mandate. The March 2008 NOPR[4] proposed to abandon Order No. 2004's focus on corporate entities, focusing instead on the relationships between individual transmission-function employees and marketing-function employees. TAPS' comments on the March 2008 NOPR indicated that it did not object to the move away from Order No. 2004's corporate-functional approach *provided* that the marketing definition used under the employee-functional approach were sufficiently broad.[5]

Unfortunately, Order No. 717 fails to adopt a sufficiently encompassing definition of "marketing." Order No. 717 rolls back Order No. 2004's extension of the standards of conduct to cover the relationships between transmission functions and additional types of marketing or energy affiliate functions, including but not limited to purchasing electric

---

[2] 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) ("January 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)).

[3] Standards of Conduct for Transmission Providers, Order No. 2004, 68 Fed. Reg. 69,134 (Dec. 11, 2003), [2001-2005 Reg. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,155 ("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 No. 2004-C"), *order on reh'g*, Order No. 2004-D, 110 F.E.R.C. ¶ 61,320 (2005), *vacated in part sub nom. Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831 (D.C. Cir. 2006).

[4] Standards of Conduct for Transmission Providers, 73 Fed. Reg. 16,228 (proposed Mar. 27, 2008), IV F.E.R.C. Stat. & Regs. ¶ 32,630 ("March 2008 NOPR").

[5] *See* Comments of the Transmission Access Policy Study Group, Standards of Conduct for Transmission Providers, Docket No. RM07-1-000, at 6-7 (May 12, 2008) ("TAPS May 2008 Comments").

energy in interstate commerce. In doing so, Order No. 717 permits transmission providers to use confidential, non-public transmission information for their own competitive advantage in securing transmission rights, entering into virtual transactions, and purchasing valuable energy and capacity in wholesale markets to serve retail load—all of which activities they undertake in competition with other providers who serve wholesale and/or retail load but lack access to such information.

In addition, Order No. 717 goes beyond rolling back the Order No. 2004 standards and eliminates the *Order No. 889-era* requirement to separate transmission functions from employees making purchases for wholesale load. Order No. 717 neither acknowledges its retreat from Order No. 889-era standards nor provides any evidence that those rules were unworkable or unduly impeded integrated resource planning. At minimum, if the Commission does not modify the Final Rule to reach the use of non-public transmission information in making purchases generally, the Commission should return to the rule established in Orders Nos. 889, 889-A and 889-B and should define marketing to include making purchases for wholesale load.[6]

More generally, Order No. 717 tries to have it both ways. While Order No. 717 narrows and clarifies the standards of conduct in order to promote "regulatory certainty," *id*. at P 10, it adds that "the Commission still possesses statutory authority to rectify and sanction, where necessary, instances of undue discrimination and preference even if they are not specifically addressed in the per se regulations of the Standards," *id*. at P 285. The Commission's attempts to create "regulatory certainty" and reserve its authority are

[6] As explained in Order No. 889-B and discussed below, reverting to the Order No. 889-era standards would mean that employees making purchases for bundled retail sales could have access to non-public transmission information *only* if those employees were separated from the employees making purchases for or sales to wholesale load.

in tension, and TAPS is concerned that Order No. 717's references to "regulatory certainty" give rise to an appearance of *de facto* safe harbors for conduct not proscribed expressly by the Order. Simply put, the Commission may not create safe harbors for conduct that would violate the FPA's prohibition of unjust discrimination and undue preferences. Thus, if the Commission intends to allow transmission providers to give non-public transmission information to employees participating in wholesale markets—*i.e.*, to employees making wholesale purchases for wholesale sales or retail sales—when such information (such as outage timing) will give transmission providers and their affiliates a competitive advantage in securing such purchases or the transmission service to support them, the Commission must say so and must attempt to explain why that result is permissible under the statute.

Order No. 717 also errs in other ways that threaten to undermine the Commission's standards of conduct and the statutory prohibition against undue discrimination, particularly in organized markets. For example, Order No. 717 exempts from the standards of conduct electric transmission providers that do not conduct transmission transactions with marketing affiliates. TAPS expects that transmission owners in RTOs—including those who have neither sought nor received waivers—will claim that the standards do not apply to them because the RTO, not the TOs, conducts transmission transactions in their regions. In addition, despite proposing to include "bids to buy" in the March 2008 NOPR's marketing definition, Order No. 717 omits that phrase from the final regulation. The result will be to allow transmission owners to use non-public transmission information to identify and acquire the most valuable locational products in organized markets, including but not limited to financial transmission rights

("FTRs"), the acquisition of which is particularly vulnerable to such information disparities. Further, the Order arguably extends the bundled retail sales exception to cover sales as "provider of last resort" ("POLR") even though such sales are by definition unbundled.[7] The Commission must correct these errors in order to protect the integrity of the competitive wholesale markets it is attempting to promote and to fulfill its statutory duty to eliminate undue discrimination.[8]

The Commission also should clarify or revise the definitions of transmission function and transmission function employee. In particular, the Commission should (1) clarify that the inclusion as "transmission function employees" of those who are responsible for granting or denying transmission service does not depend on the duration of the transmission service requested; (2) clarify or grant rehearing to provide that the transmission function includes engineers or other analysts who perform OATT-required system impact studies or otherwise determine whether the transmission system can support requests for new transmission service; and (3) clarify or grant rehearing to provide that engineers or other employees who plan or coordinate transmission outages will be considered transmission function employees.

---

[7] The bundled retail sales exception is itself unjustified. The Commission itself has recognized that public utilities should not be permitted to use their ownership or operation of jurisdictional transmission facilities to grant themselves undue preferences in making bundled retail sales, and on several occasions it has proposed eliminating that exception only to retreat later based on purported jurisdictional concerns. As TAPS has shown, however, there is no jurisdictional impediment to eliminating the bundled retail sales exception. Standards of conduct regulation is directed at jurisdictional transmission providers and the use of information derived from ownership and operation of jurisdictional transmission facilities. Such regulation does not require the exercise of any jurisdiction over bundled retail sale itself. Moreover, the Commission itself has found, and the Supreme Court has affirmed, that the Commission has jurisdiction to regulate bundled retail transmission as necessary to avoid undue discrimination.

[8] The Commission also should grant rehearing to require transmission providers to post information identifying by name, job title and description, and position in the chain of command, each of their marketing function employees. Such information is necessary not only to aid in monitoring compliance with the Independent Functioning Rule but, also, as an aid to those who are attempting to remain in compliance with the No Conduit Rule.

II. STATEMENT OF ISSUES

1. Whether Order No. 717 erred in exempting from the standards of conduct transmission providers that do not "conduct transmission transactions" with marketing affiliates, even though such transmission providers—including transmission owners in RTOs who may claim that they do not "conduct transmission transactions"—have valuable, non-public transmission information with which to provide undue benefits to marketing affiliates [16 U.S.C. § 824*d*(b); Order No. 2004 at P17; 18 C.F.R. § 358.1(c)];

2. Whether Order No. 717 erred in removing purchases from the definition of marketing and thereby eliminating *both* (a) protections established Order No. 2004 regarding use of non-public transmission information in buying electric energy or engaging in financial transactions related to the sale of electric energy in U.S. energy or transmission markets [16 U.S.C. § 824*d*(b); *New York v. FERC*, 535 U.S. 1 (2002); *FPC v. Conway Corp*., 426 U.S. 271, 274 (1976); Order No. 889, 61 Fed. Reg. at 21,739, 21,764; Order No. 2004 at P 40]; *and* (b) pre-existing protections established by *Order No. 889 et seq.* against the non-independent functioning of, and use of non-public transmission information by, employees making purchases for wholesale load [16 U.S.C. § 824*d*(b); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970); Order No. 889, 61 Fed. Reg. at 21,764; Order No. 889-B, 62 Fed. Reg. at 64,719];

3. Whether Order No. 717 erred in continuing the exemption from marketing of sales to bundled retail load [16 U.S.C. § 824*d*(b); *New York v. FERC*, 535 U.S. 1; Order No. 2004 at P 88; Order No. 2000, 65 Fed. Reg. at 824; *City of Corona v. S. Cal. Edison Co.*, 104 F.E.R.C. ¶ 61,086, P 2 (2003)];

4. Whether Order No. 717 erred in exempting from marketing "sales of electric energy made by providers of last resort (POLRs) acting in their POLR capacity" [16 U.S.C. § 824d(b); *New York v. FERC*, 535 U.S. at 27; Order No. 2004-C; *Exelon Corp*., 121 F.E.R.C. ¶ 61,092 P 19, n.26 (2007), *order on waiver*, 123 F.E.R.C. ¶ 61,167 (2008); *Allegheny Power Service Corp*., 85 F.E.R.C. ¶ 61,390 (1998)];

5. Whether Order No. 717 erred by eliminating from the proposed marketing definition "bids to buy" electricity, capacity, demand response, financial transmission rights and other electric-market-related products [16 U.S.C. § 824d(b); Order No. 2004 at P 40];

6. Whether the "granting [or] denying of" long-term transmission requests is a transmission function under Order No. 717, and, if not, whether the exclusion of those activities from the "transmission function" is in error [16 U.S.C. § 824d(b); Order No. 717, new 18 C.F.R. § 358.3(h); *pro forma* OATT §§ 15, 17, 18, 19, 20, 22, 29, and 32];

7. Whether engineers or other analysts engaged in conducting system studies or otherwise determining whether transmission requests can be accommodated by the existing transmission system are "transmission function employees," and, if not, whether the exclusion of those activities from the "transmission function" is in error [*id.*];

8. Whether engineers or other employees who plan or coordinate transmission outages are "transmission function employees," and, if not, whether the exclusion of those activities from the "transmission function" is in error [16 U.S.C. § 824d(b); Order No. 717, new 18 C.F.R. § 358.3(h)]; and

9. Whether Order No. 717 erred in failing to require that transmission providers and their affiliates identify by name, job title and description, and position in the chain of command of their marketing function employees.

III. SPECIFICATION OF ERRORS

1. Order No. 717 erred in exempting from the standards of conduct transmission providers that do not "conduct transmission transactions" with marketing affiliates, even though such transmission providers—including transmission owners in RTOs who may claim that they do not "conduct transmission transactions"—have valuable, non-public transmission information with which to provide undue benefits to marketing affiliates;

2. Order No. 717 erred in removing purchases from the definition of marketing and thereby eliminating *both* (a) protections established Order No. 2004 regarding use of non-public transmission information in buying electric energy or engaging in financial transactions related to the sale of electric energy in U.S. energy or transmission markets, *and* (b) pre-existing protections established by *Order No. 889 et seq.* against the non-independent functioning of, and use of non-public transmission information by, employees making purchases for wholesale load;

3. Order No. 717 erred in continuing the exemption from marketing of sales to bundled retail load;

4. Order No. 717 erred in exempting from marketing "sales of electric energy made by providers of last resort (POLRs) acting in their POLR capacity";

5. Order No. 717 erred by eliminating from the proposed marketing definition "bids to buy" electricity, capacity, demand response, financial transmission rights and other electric-market-related products;

6. Order No. 717 erred in failing to make clear that the "granting [or] denying of" long-term transmission requests is a transmission function;

7. Order No. 717 erred in failing to make clear that engineers or other analysts engaged in conducting system studies or otherwise determining whether

transmission requests can be accommodated by the existing transmission system are "transmission function employees";

8. Order No. 717 erred in failing to make clear that engineers or other employees who plan or coordinate transmission outages are "transmission function employees"; and

9. Order No. 717 erred in failing to require that transmission providers and their affiliates identify by name, job title and description, and position in the chain of command of their marketing function employees.

IV. ARGUMENT

Through three generations of standards of conduct rulemakings, TAPS's positions have been driven by a single, overarching purpose: to ensure 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. This is neither more nor less than the Federal Power Act ("FPA") requires, and the Commission is legally bound to follow the same course.

As the D.C. Circuit has held, the "fundamental purpose" of the statutes that the Commission administers is "to protect … consumers from the monopoly power of" transmission providers. *Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 833 (D.C. Cir. 2006). The Commission also "has a duty to prevent undue discrimination in the rates, terms, and conditions of public utility transmission service …."[9] The Commission itself 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 their competitive activities in related

[9] 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 ("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"), *order on reh'g*, Order No. 890-B, 73 Fed. Reg. 39,092 (July 8, 2008), 123 F.E.R.C. ¶ 61,299 (2008), *review docketed*, No. 08-1278 (D.C. Cir. filed Aug. 22, 2008).

markets.[10] The Commission frequently has acted to prevent undue discrimination flowing from such inherent incentives.[11] The premise that transmission providers will use their ownership and operation of monopoly transmission facilities to their own advantage, and to the detriment of others, is the foundation of the Commission's open access transmission policy. And, as the Commission recognized in Order No. 889,[12] the companion to its landmark open access order, exploiting information disparities may be just as harmful—and just as much a violation of the FPA—as other forms of non-comparable treatment. As TAPS explained in its comments on the March 2008 NOPR

[10] 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, *clarified*, 76 F.E.R.C. ¶ 61,009 (1996), *modified*, Order No. 888-A, 62 Fed. Reg. 12,274, 12,295 (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 No. 888-A"), *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).

[11] *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 Distrib. 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, 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 depends… .") (footnote omitted).

[12] 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 ("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).

(*e.g.*, at 1), the revised approach to standards of conduct adopted in Order No. 717 *could* have merit *if* properly structured and defined. Unfortunately, it is not.

A. The Commission Should Revise the "Marketing" Definition to Include Purchases for Wholesale Sales (as Provided by Order No. 889 et seq.), Purchases for Bundled Retail Load (as Provided by Order No. 2004), and Bundled Retail Sales

As discussed below, many of Order No. 717's deficiencies stem from emaciating the definition of "marketing," a step that was neither consistent with the underlying purposes of the standards of conduct nor required by jurisdictional or other considerations. Order No. 717 requires the separation of transmission function employees from personnel engaged in the "the sale for resale in interstate commerce, or the submission of offers to sell in interstate commerce, of electric energy or capacity, demand response, virtual transactions, or financial or physical transmission rights," except for bundled retail sales and sales as a provider of last resort ("POLR"). 18 C.F.R. § 358.3(c)(1). Order No. 717's exclusion of "purchases" from the marketing definition means that transmission providers may use non-public transmission information to: (i) identify and acquire particularly valuable physical transmission rights or financial transmission rights; (ii) exploit profitable opportunities to engage in virtual transactions, which inherently involve both a purchase and a sale in organized wholesale markets;[13] and (iii) purchase energy or capacity resources in wholesale markets in competition with others, including regulated utilities, that do not have such information.

By providing non-public transmission information to their own employees (or affiliates' employees) engaged in such activities, transmission providers are effectively

[13] Virtual demand bids are effectively bids to purchase energy in the day-ahead market and re-sell the same energy in the real-time market. Virtual supply bids involve selling energy day-ahead and purchasing it in the real-time market.

providing themselves and their affiliates with transmission service which is superior to that which they are providing to other customers. Moreover, the non-applicability of separation of functions requirements allows transmission providers to give themselves and their affiliates undue competitive advantages when competing with transmission customers in wholesale markets for purchasing capacity, energy, FTRs, and other resources with which to make or hedge subsequent sales, either at retail or wholesale.

Such preferences impact profoundly the operation of the competitive wholesale markets on which the Commission seeks to rely to maintain reliability and ensure just and reasonable rates. As the Commission has explained:

> Lack of market confidence resulting from the perception of discrimination is not mere rhetoric. It has real-world consequences for market participants and consumers.

Order No. 2000 at 824.[14] For example, the Commission has found that "there 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). Likewise, the Commission has explained, "[t]he perception that a transmission provider's power sales are more reliable"—a perception based on the transmission provider's access to non-public transmission information in determining the resources to purchase for resale and in acquiring physical or financial transmission rights with—"may provide [transmission providers with] subtle competitive advantages in wholesale markets …." *Id.* at 825

[14] Regional Transmission Organizations, Order No. 2000, 65 Fed. Reg. 809, 824 (Jan. 6, 2000), [1996–2000 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,089 ("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 ("Order No. 2000-A"), *appeal dismissed for want of standing sub nom. Pub. Util. Dist. No. 1 v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

(noting that "purchasers may favor sales by the transmission provider or its affiliate, expecting greater transmission service reliability"). These problems will continue and will increase unless—in the words or Order No. 2000—"the market can be made structurally efficient and transparent with respect to information, and equitable in its treatment of competing participants." *Id.*

In eliminating separation of functions requirements regarding purchases for wholesale sales, Order No. 717 overturns restrictions going back all the way to Order No. 889 and allows transmission providers, for the first time since the advent of open access transmission service, to use non-public transmission information to obtain undue preferences in acquiring resources to be sold for resale.[15] As explained in subsection 1 below, the Commission should restore the Order No. 889 proscription by defining marketing to include purchases for wholesale sales. Further, as explained in subsection 2, the Commission should restore Order No. 2004's proscription against the use of non-public transmission information when making purchases in wholesale markets for bundled retail load.[16] Finally, as TAPS has argued consistently, the Commission should abandon the long-running but unjustified exception from separation of function requirements of employees engaged in bundled retail sales. *See* subsection 3.

[15] Order No. 717 does acknowledge that, if the same employee makes both the purchase and the wholesale sale, that employee would be considered a marketing function employee. Order No. 717, P 148 ("[M]arketers making off-system sales as marketing function employees; personnel making purchases destined to serve off-system sales would be so categorized by virtue of their involvement in the sale portion of the transaction.") However, if the employees making the purchases and sales are not the same, the one making wholesale purchases for wholesale load would be free to obtain and exploit non-public information about transmission operations in order to make such purchases.

[16] We address below (*see* subsection 3) the Commission's new exception from separation of function requirements sales to unbundled retail load by providers of last resort.

1. The Commission Should Restore the Order No. 889-era Separation of Transmission Function Employees from Employees Engaged in Purchases for Wholesale Sales

Order No. 717 appropriately recognizes that transmission function employees should function separately from employees making *sales* for resale. However, it errs in allowing transmission employees—for the first time since initiation of open access transmission service—to interact with and provide non-public transmission information to personnel making *purchases* for wholesale sales. Although Order No. 717 does not acknowledge it (much less provide a reasoned basis for departing from it), the proscription against non-independent functioning of transmission personnel and employees making purchases for wholesale sales dates back to the Order No. 889 series of orders.

Throughout the Order No. 889 rulemaking, the Commission consistently recognized that informational advantages given to the transmission provider's merchant functions violate the FPA's prohibition of unjust discrimination in the provision of jurisdictional transmission services. As explained in the Order No. 889 NOPR:[17]

> 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, 60 Fed. Reg. at 66,185.

Order No. 889 likewise found (61 Fed. Reg. at 21,739, emphasis added) that "[o]pen access non-discriminatory transmission service requires that information about

[17] *E.g.*, Real-Time Information Networks and Standards of Conduct, 60 Fed. Reg. 66,182 (proposed Dec. 21, 1995), [1999-2003 Proposed Regs.] F.E.R.C. Stat. & Regs. ¶ 32,516 ("Order No. 889 NOPR").

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 the "sale for resale" or the "purchase for resale" of electric energy in interstate commerce.[18] Purchases for retail sales are purchases for resale of electric energy in interstate commerce; more specifically, they are purchases in wholesale electric markets, delivered using jurisdictional transmission facilities, of resources for which transmission providers and transmission customers compete. Thus, Order No. 889 required public utilities to "make available to others the same transmission information that is available to their own employees and that is pertinent to decisions they make involving the sale *or purchase* of electricity."[19]

Ultimately, Order No. 889-A carved out an exception from the separation requirement for merchant functions that serve bundled retail load exclusively, because the Commission then believed it was jurisdictionally compelled to do so.[20] However, Order No. 889-A did *not* repudiate the findings it had made regarding the *need* to separate transmission functions from the bundled retail merchant function—or the risk of undue discrimination in the absence of such separation. In any case, Order No. 889-B clarified

---

[18] Order No. 889, 61 Fed. Reg. at 21,764 (defining "Wholesale merchant function" as "the sale for resale, or purchase for resale, of electric energy in interstate commerce.").

[19] *Id.* at 21,739 (emphasis added).

[20] Order No. 889-A, 62 Fed. Reg. 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…."). The Commission therefore defined "Wholesale merchant function" as "the sale for resale of electric energy in interstate commerce." Order No. 889-A, 62 Fed. Reg. at 12,503. As discussed below, subsequent Supreme Court and the Commission cases resolved any jurisdictional concerns regarding application of separation of functions requirements to the relationship between transmission function employees and those making purchases for bundled retail sales.

that the Commission would continue to require the separation of transmission function employees from those making purchases for *wholesale* sales. Order No. 889-B expressly recognized (62 Fed. Reg. at 64,719) that the "wholesale power marketing function" "includ[es] power purchase transactions made by the marketing function on behalf of wholesale native load …." The Commission went on to explain (*id.*) that:

> [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.

Accordingly, for more than a decade, the Commission's standards of conduct have required the separation of the transmission function from employees making purchases for resale. Order No. 2004 built on this framework by further requiring the separation of transmission function employees from employees engaged in purchases generally, including for bundled retail load,[21] but the required separation of transmission function employees and employees making purchases for wholesale load goes back to the original standards of conduct in the electric industry. The Commission does not even

[21] Order No. 2004 expanded the functional separation initiated by the Order No. 889 order series by including as an "Energy Affiliate" activity—which had to be separated from the transmission function—the purchase of electric energy in interstate commerce. *See* Order No. 2004 at P 40 (establishing an "Energy Affiliate" definition codified at 18 C.F.R. § 358.3(d)).

acknowledge, much less provide a reasoned basis for, its reversal of this long-standing requirement.

For the reasons discussed below, the Commission should (at minimum) preserve the protections that were established in Order No. 889 *et seq*.[22] Because of Order No. 717's new exclusion of purchases for wholesale load from the marketing definition, employees engaged in such purchases may "[c]onduct transmission functions," and "[h]ave access to the system control center or similar facilities … that differs … from the access available to other transmission customers." Order No. 717, new 18 C.F.R. § 358.5(b)(1)(i), (ii). They are permitted preferential access to information about the transmission provider's transmission system, including ATC, price, curtailments, ancillary services, balancing, maintenance activity, and expansion plans, 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. This new access gives them a significant advantage in competition with other transmission customers for wholesale purchases and for wholesale sales, severely undermining confidence in the competitive wholesale markets over which the Commission has jurisdiction.

Order No. 717 provides no legitimate justification for concluding, for the first time since the advent of open access, that transmission provider (or affiliate) employees engaged in making purchases for wholesale sales should be permitted preferential access to such information. Indeed, the Commission fails even to acknowledge that its uncritical

[22] As explained below, the Commission also should heed the wisdom originally expressed in Order No. 889 and require the separation of transmission function employees from employees making purchases for bundled retail load (*see* subsection 2) and those making bundled retail sales (*see* subsection 3).

elimination of all purchasing activities from the marketing definition reverses protections contained in Order No. 889-B.[23] The Commission states that "[m]any commenters requested th[e] exclusion [of purchases] for reasons that include the jurisdictional reach of the Commission and … concerns [about the lack of evidence of abuse]." Order No. 717, P 77. In response, the Commission asserts without explanation that limiting marketing to sales, not purchases, would "more closely match[] the statutory prohibitions against undue preferences." *Id.*[24] The Commission also argues that the removal of purchases from marketing would "free[] companies to conduct the informational exchanges necessary to engage in integrated resource planning, and eliminate[] the difficulties which might otherwise be experienced by executive personnel who have overall procurement responsibilities that include both transmission and marketing." *Id.* P 77.

None of these assertions withstands scrutiny, however. First, and most generally, the Commission has already rejected claimed jurisdictional limitations on the degree of separation to be required of transmission providers. Clearly, there is no jurisdictional impediment to requiring the separation of transmission function personnel from employees making purchases for wholesale sales, since, until Order No. 717, that limitation had been in place continuously since at least Order No. 889-B. Moreover, in Order No. 2004 (*e.g.*, P 78), the Commission rejected claimed jurisdictional limitations on the Commission's authority to require more complete functional separation than was

[23] *Compare Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) ("[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute." (footnote omitted)).

[24] *See also id.* P 77 n.98 (asserting that "statutory coverage" encompasses "any transmission or sale of electric energy subject to the Commission's jurisdiction").

required by Order Nos. 889-A and 889-B.[25] Second, there has been no claim—much less any showing—that the standards of conduct that were in place *prior* to Order No. 2004 impaired "the informational exchanges necessary to engage in integrated resource planning" or caused "difficulties ... [for] executive personnel who have overall procurement responsibilities that include both transmission and marketing." Order No. 717, P 77. Thus, perceived concerns about the impacts of the Order No. 2004 standards provide no basis for overturning requirements that have been in place since the Commission first adopted such standards in the electric industry in the mid-1990s.

Order No. 717 also errs badly in suggesting that differential access to non-public transmission information in the acquisition (as opposed to sale) of resources does not implicate the statutory prohibition against unjust discrimination and undue preferences. First, the comparability of the rates, terms, and conditions of transmission service—including both physical and financial transmission rights—is at the heart of the Commission's open access regime. Yet the omission of "purchases" from the marketing definition would allow transmission providers and their affiliates to exploit their access to non-public transmission information in order to identify and acquire especially valuable physical and financial transmission rights to be used in making wholesale sales. For example, in regions without organized markets, transmission providers may use preferential information about upcoming transmission outages in order to secure point-to-point service in order to support off-system sales or to identify the best opportunities for securing replacement energy.

[25] As noted above, standards of conduct requirements are imposed on transmission providers and govern the use of non-public information derived from the ownership or operation of jurisdictional transmission facilities; they do not involve any exercise of jurisdiction over the sale of electric energy or any other activity.

Second, undue preferences in the acquisition at wholesale of capacity, energy, or other resources translate directly into undue preferences in subsequent resales. For example, where transmission providers and transmission customers are competing for the opportunity to make wholesale sales, Order No. 717 permits transmission providers to use non-public information about the transmission system in order to identify and acquire resources that are about to become available because of the resolution of previous transmission constraints. This differential access to low-priced resources give the transmission provider or its affiliates an undeniable (and equally undeserved) advantage in making subsequent wholesale sales. Likewise, in LMP-based, multi-settlement markets, transmission providers may use preferential information about upcoming transmission outages to submit virtual demand bids (*i.e.*, bids to purchase power on a day-ahead basis that will be sold at wholesale in real-time) at nodes where the transmission provider expects the outage to cause real-time prices to exceed day-ahead prices.[26] In such cases, the use of non-public transmission information about outages and their likely effects on day-ahead and real-time prices is crucial to the transmission provider's ability to profit from such day-ahead purchases and real-time sales in organized wholesale markets.

Consequently, Order No. 717 is simply incorrect in asserting that "the removal of purchases from the definition of marketing ... preserves protection against affiliate abuse, as it is those employees who are making wholesale *sales* of electricity, not purchases, who can improperly benefit from transmission function information obtained from the affiliated transmission provider. Order No. 717, P 77. The issue is not which *employees*

[26] As noted above, virtual demand bids are effectively bids to purchase energy day-ahead and re-sell the same energy in real-time.

benefit but whether their *employer*, the transmission provider and its affiliates, will derive undue preferences from the use of non-public transmission information in acquiring resources to be used in making sales. Employees engaged in such activities have incentives to exploit such information for their employers' benefit by acquiring especially valuable resources, even if other employees are the ones making the subsequent sales.

Furthermore, the competitive damage is done when non-public transmission information is used to acquire control of particularly valuable resources. Employees in charge of selling capacity or energy at wholesale do not need personal access to non-public transmission information in order to extract the additional value of the resources that were acquired with such information. Thus, unless purchases for wholesale sales are included in the definition of marketing, Order No. 717 leaves a gaping hole allowing transmission providers to continue to grant themselves undue preferences through the use of non-public transmission information.

It is impossible to reconcile the Commission's action here, not only with long-standing Order No. 889-era requirements, but also with its own much more recent rulings in connection with the *pro forma* transmission tariff's prohibition on use of secondary network service to support wholesale sales to third parties (*i.e.*, not to the transmission provider's network or native load). In that context, the Commission has expressed its intention to ensure a level playing field for wholesale sales by precluding a transmission provider from obtaining an unfair competitive advantage by improperly using secondary network service to make purchases for resale to non-native load.[27]

---

[27] *See, e.g.*, Preventing Undue Discrimination and Preference in Transmission Service, 71 Fed. Reg. 32,636, 32,699 (proposed June 6, 2006), [2004-2007 Proposed Regs.] F.E.R.C. Stat. & Regs. ¶ 32,603, P 428 (explaining its rationale for a proposed limitation on use of secondary network service: "While we reiterate that secondary network service may be used only to serve a network customer's designated

Consequently, and at minimum, the Commission should continue the prohibition that predates Order No. 2004, forbidding the use of non-public transmission information in the acquisition of capacity, energy, and other products that will be sold for resale in interstate commerce and requiring the separation from transmission function employees of personnel engaged in such purchases. Order No. 717 proffers no evidence that the restrictions clarified in Order No. 889-B unduly impaired integrated resource planning or presented any of the interpretive difficulties of the Order No. 2004 standards. While the Commission may have concluded that it has adequate record evidence and policy justification to revert to pre-Order No. 2004 standards, it may not silently and without reasoned decision-making reverse the pre-existing Order No. 889-era standards. Nor has the Commission demonstrated that the standard of conduct protections that it has found essential since the initiation of open access are no longer needed to ensure just and reasonable and non-discriminatory transmission service.

Therefore, the Commission should grant rehearing and reinstate the standards of conduct protections that existed under Order Nos. 889, 889-A, and 889-B. To that end, the Commission should revise its definition of "marketing" to include making purchases for wholesale sales. It should also explain, consistent with Order No. 889-B, that the requirement to separate functions extends to *any* employee making purchases for wholesale load or making sales for resale, even if that employee also makes purchases for

---

network load, we do not intend to discourage market participants from identifying opportunities to profitably purchase for resale. We simply intend to ensure that all market participants compete on a comparable basis and use point-to-point service to complete all segments of a purchase for resale off-system.") (to be codified at 18 C.F.R. pts. 35 and 37), *corrected*, 71 Fed. Reg. 37,109 (June 29, 2006), *reply comment period extended*, 71 Fed. Reg. 39,251 (July 12, 2006). The Commission has been vigilant in policing transmission providers' improper use of secondary network service for purchases for wholesale sales. *See, e.g.*, *Idaho Power Co.*, 103 F.E.R.C. ¶ 61,182 (2003); *MidAmerican Energy Co.*, 112 F.E.R.C. ¶ 61,346 (2005).

or sales to retail load. Thus, just as the Commission required *before* Order No. 2004, public utilities seeking to share non-public transmission information with employees engaged in wholesale purchases for retail sales should be required to separate them from personnel engaged in wholesale sales or purchases for wholesale load.

2. The Commission Should Also Restore Order No. 2004's Required Separation of Transmission Function Personnel From Employees Making Purchases for Bundled Retail Load.

Under Order Nos. 889-A and 889-B, transmission providers were required to separate their transmission functions from employees making purchases for wholesale sales. However, no separation was required from employees making purchases for bundled retail load or those making bundled retail sales. The Order No. 2004 NOPR[28] proposed eliminating both exceptions. As explained below, Order No. 2004 ultimately retained the bundled retail *sales* exception, contrary to the NOPR proposal and notwithstanding the Commission's repudiation of unfounded jurisdictional concerns advanced to support it. However, Order No. 2004 expanded the Order No. 889-era functional separation by including as an "Energy Affiliate" activity—which had to be separated from the transmission function—the purchase of electric energy in interstate commerce.[29] Thus, Order No. 2004 required the functional separation from transmission employees of personnel engaged in *either* purchases for wholesale sales or purchases for bundled retail load.

The previous section explained why the Commission should grant rehearing of Order No. 717's *sub silentio* reversal of the Order No. 889-B standards requiring

[28] Standards of Conduct for Transmission Providers, 66 Fed. Reg. 50,919 (proposed Oct. 5, 2001), [1999-2003 Proposed Regs.] F.E.R.C. Stat. & Regs. ¶ 32,555 (Sept. 27, 2001).

[29] *See* n.21, *supra*.

separation from employees making purchases for wholesale load. In this section, we explain why the Commission also should include as a marketing function purchases in wholesale markets for resale to bundled retail load. Doing so would mark a return, in effect, to the standards of conduct requirements first outlined for the electric industry in Order No. 889, which defined the "wholesale merchant function" to mean "the sale for resale, or purchase for resale, of electric energy in interstate commerce." Order No. 889, 61 Fed. Reg. at 21,764 (promulgating definition to be codified at 18 C.F.R. § 37.3(e)).[30]

A return to the definition originally proposed in Order No. 889 is both justified and required in order to satisfy the Commission's statutory obligations and to fulfill its policy objectives. First, the jurisdictional concerns that caused the Commission to retreat from that standard in Order No. 889-A (at 12,487) have been repudiated. 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). Moreover, in Order No. 2004, the Commission recognized that requiring transmission providers to separate transmission-function employees from those making sales to (or purchases in wholesale markets for) 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. *See* Order No. 2004 at P 88 ("[T]he Commission has jurisdiction over the

[30] Order No. 889-A revised the definition to exclude purchases. *See* Order No. 889-A, 62 Fed. Reg. at 12,503 ("Wholesale Merchant Function means the sale for resale of electric energy in interstate commerce."). Order No. 889-B clarified, as discussed above, that the wholesale power marketing function included "power purchase transactions made by the marketing function on behalf of wholesale native load …." Order No. 889-B, 62 Fed. Reg. at 64,719.

Transmission Provider and is exercising that jurisdiction by governing the behavior of the Transmission Provider to ensure that it does not provide any Energy Affiliate with any undue preferences.").[31]

Second, the opportunities for unjust discrimination and undue preferences, described above with respect to purchases for wholesale sales, are not limited to that context. On the contrary, transmission providers' preferential treatment of their own (or their affiliates') activities on behalf of bundled retail load, as compared to their treatment of transmission customers, goes to the very heart of the statutory prohibition against unjust discrimination and undue preferences. By providing non-public transmission information to their employees or affiliates engaged in purchases for bundled retail load, transmission providers effectively provide superior transmission service to themselves than they make available to their competitors. In addition, they tilt the competitive playing field in the wholesale markets where the purchases are made—again, contrary to both the FPA and to Commission policy favoring competition in electricity markets—by enabling the transmission provider to identify and acquire more valuable resources to sell to bundled retail load.

As noted above with respect to purchases for wholesale load, the omission from marketing of purchases for bundled retail load means that employees engaged in such activities may "[c]onduct transmission functions," "[h]ave access to the system control

[31] The Commission also 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, 281. 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).

center or similar facilities … that differs … from the access available to other transmission customers," 18 C.F.R. § 358.5(b)(1)(i), (ii), and are permitted preferential access to information about the transmission provider's transmission system, including ATC, price, curtailments, ancillary services, balancing, maintenance activity, and expansion plans, 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.

If the Commission declines to grant rehearing, vertically integrated transmission providers will be able to inflict substantial competitive harm upon competitors and on the competitive wholesale markets, both inside and outside RTOs, that Commission is trying so hard to foster. Among other things:

- Retail merchant employees will be able to 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 later, when the ATC information is posted on OASIS, to their competitors seeking to purchase power at wholesale to serve retail load, some of whom may be in direct competition with the transmission provider for new or existing retail customers;
- In LMP-based markets, retail merchant employees will be able to use advance 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 advance 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 will also be able to 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 other ways,

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

Such actions 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. In order to safeguard the competitiveness of such markets and to fulfill the Commission's obligation to prevent unjust discrimination in the provision of jurisdictional transmission service (including transmission to support bundled retail sales), the Commission should require the separation of transmission employees from those making purchases in wholesale markets for bundled retail load.

3. The Commission Should Require the Separation of Transmission Function Personnel from Employees Making Bundled Retail Sales.

Finally, the Commission should eliminate the exemption from separation of functions requirements of employees engaged in sales to bundled retail load. As noted above, both the Supreme Court and the Commission have rejected the jurisdictional concerns that formed the basis for the original exemption. Moreover, as also noted above, transmission providers' use of non-public transmission information derived from their ownership and operation of jurisdictional transmission facilities strikes at the heart of the statutory prohibition against unjustly discriminatory transmission service. As discussed above, the failure to require separation of transmission function employees from those making *purchases* for bundled retail load severely distorts competition between the transmission provider and transmission customers to make retail sales because it unfairly advantages the transmission provider (or its affiliates) in acquiring the resources with which to make those sales. Omitting from the marketing definition

employees engaged in bundled retail *sales* exacerbates the problem by allowing them to use non-public transmission information—including information submitted by transmission customers—to identify sales opportunities.

Transmission providers and transmission customers compete for retail sales in a number of ways, not only where restructured retail markets exist but also in states with traditional franchise areas. *See generally* Lawrence J. Spiwak, *Is The Price Squeeze Doctrine Still Viable In Fully-Regulated Energy Markets?*, 14 Energy L.J. 75 n.6 (1993) (describing four generally recognized forms of retail competition: (1) franchise; (2) fringe-area; (3) industrial/locational; and (4) yardstick"). For example, transmission providers and load-serving transmission customers compete with each other for customers located at the edges of their territories. They compete with each other for new load, such as industrial customers choosing where to site new facilities. They even compete with each for existing load insofar as that load is free to choose other suppliers, either on an individual-customer basis through a retail choice program or on a system-wide basis through the purchase or sale of an entire electric system.

Public utilities' misuse of non-public transmission information for anti-competitive purposes in retail sales is not a merely hypothetical possibility. It has happened already. For example, when 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, SCE's transmission function personnel shared non-public transmission and customer information with its retail merchant personnel to help them respond to the competitive threat. *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.

The bundled retail sales exception (and the omission of purchases for bundled retail load) thus 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.[32] 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, 65 Fed. Reg. at 824. Thus, in addition to including purchases within the marketing

[32] As noted above, *see FPC v. Conway*, footnote 31, the Commission has an obligation to consider the anticompetitive impacts of jurisdictional activities.

definition as discussed above, the Commission should eliminate the exemption for employees engaged in bundled retail sales.[33]

B. The Commission Should Revise or Clarify the Standards As Necessary to Maintain the Competitiveness of Organized Wholesale Markets.

As the Commission has recognized, "[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."[34] The Commission must not erode confidence in and undermine the competitiveness and integrity of organized markets, contrary to its express intent in creating such markets (*see* Order No. 2000, 65 Fed. Reg. at 824). Unfortunately, Order No. 717 threatens to do just that.

1. The Commission should either eliminate the exemption for electric transmission providers that do not conduct transmission transactions with marketing affiliates, or clarify that transmission owners in RTOs remain subject to the standards absent a waiver.

Order No. 717 extends to the electric industry an exemption that was sought by and granted to natural gas pipelines. Under the previous regulations (unchanged in relevant respect by the March 2008 NOPR), the standards of conduct applied to:

- "any interstate natural gas pipeline that transports gas for others …[,] is affiliated in any way with a marketing or brokering entity[,] *and conducts transportation transactions with its marketing or brokering affiliate*," 18 C.F.R. § 358.1(a) (emphasis added); and

[33] At minimum, and as noted above, even if the Commission does not eliminate the bundled retail sales exception or include purchases generally within the scope of marketing functions, it should include purchases of capacity, energy, etc., that will be sold for resale.

[34] Wholesale Competition in Regions with Organized Electric Markets, 73 Fed. Reg. 12,576, 12,577 (proposed Mar. 7, 2008), IV F.E.R.C. Stat. & Regs. ¶ 32,628, P 1; Wholesale Competition in Regions with Organized Electric Markets, Order No. 719, 73 Fed. Reg. 64,100, 64,101 (Oct. 28, 2008), 125 F.E.R.C. ¶ 61,071 (2008).

- "any public utility that owns, operates, or controls facilities used for the transmission of electric energy in interstate commerce," *id*. § 358.1(b).

The March 2008 NOPR asked (P 58) whether the provisions pertaining to electric transmission providers and natural gas pipelines "should be made parallel by deleting this provision (or in some other way)." A number of pipelines resisted eliminating the exemption for pipelines that conduct no transportation transactions with a marketing or brokering affiliate, so, instead of deleting it, the Commission added the pipeline limitation to the electric transmission provider provision:

> The Commission agrees with those commenters that suggest parallelism between the electric and gas industries could be achieved by also applying to public utilities the limitation applicable to pipelines. Because the core abuse to which the Standards are directed is that of undue preference in favor of an affiliate (defined to include divisions of the transmission provider as well as separate corporate entities), a public utility that does not engage in any transmission transactions with a marketing affiliate should be excluded from the Standards' coverage, just as should a pipeline.

Order No. 717 P 23.

The Commission should eliminate this new carve-out from the applicability of the standards of conduct to electric transmission providers. If this exception is not eliminated on rehearing or clarified as discussed below, transmission owners in RTO regions may interpret this provision to exempt them from the standards of conduct regulations *regardless* of whether they have sought and obtained a waiver in accordance with the applicable provisions.[35] That is the case in part because the Commission has not defined

[35] As a general matter, under Order No. 2000, the RTO and not individual transmission owners must be the "transmission provider" for purposes of tariff administration and filing of changes to the terms and conditions of transmission service within the RTO footprint. *See* Order No. 2000-A, 65 Fed. Reg. at 12,097 ("[I]t is the RTO, and *not* the transmission owners, that in this context is the provider (seller) of jurisdictional service.") However, transmission owners continue to have authority over the revenue requirements collected through rates for transmission service under the RTO, and they continue to own the transmission facilities and operate them at the direction of the RTO. For purposes of the standards of conduct regulations, the term "transmission provider" is used differently. In that context, the term refers to

what it means to "conduct[] transmission transactions with an affiliate that engages in marketing functions." Order No. 717, new 18 C.F.R. § 358.1(b). We are concerned that transmission owners within RTO footprints may argue that the RTO is the (only) entity that "conducts transmission transactions" with market participants, including the transmission owners' marketing affiliates. If that interpretation prevailed, then transmission owners in RTO regions would be exempt from the standards of conduct by virtue of the new limitation in 18 C.F.R. § 385.1(b), *regardless* of whether the transmission owner satisfies the more restrictive standards for a waiver.

Under the new Section 358.1(c), transmission owners in an RTO may request a waiver only if they "do[] not operate or control [their] transmission system and [have] no access to transmission function information." That is the appropriate standard for determining whether a transmission owner in an RTO should receive a waiver of standards of conduct requirements, and the Commission should not moot the existing waiver provision by exempting all transmission owners in RTOs through the new limitation in Section 358.1(b). In many instances, transmission owners in RTOs do continue to operate or control their transmission systems and have access to substantial transmission function information. In fact, in many cases, RTOs rely on the transmission owner to perform (at least in the first instance) the system impact studies, facilities studies, and other system evaluations that are required by the RTO's open access transmission tariff, including but not limited to responding to interconnection requests.

---

the transmission owners, who are subject to the standards (absent a waiver) because they continue to "own[]" and "operate[]" transmission facilities. *See* 18 C.F.R. § 358.1(b). For standards of conduct purposes, the term "transmission provider" generally does not include the RTO itself, because 18 C.F.R. § 358.1(c) provides that "[t]his part does not apply to a public utility Transmission Provider that is a Commission-approved Independent System Operator (ISO) or Regional Transmission Organization (RTO)."

In the course of performing these duties, transmission owner personnel have access to substantial non-public information about the transmission system and about customer requests for new service. If the standards of conduct were not to apply to such transmission owners, they could provide that information to their marketing employees doing business in those markets and, in doing so, substantially tilt the competitive playing field.

Nor are the problems created by the new language in Section 358.1(b) limited to RTO regions. In the operation of interconnected transmission systems, operators of adjacent systems must exchange non-public information with each other about the state of each system, including anticipated outages. If a transmission provider receives non-public transmission information about an adjacent transmission system, it should not be permitted to pass that information to a marketing affiliate that is using the adjacent transmission system. However, under the new language of Section 358.1(b), the transmission provider would be free to do so as long as the marketing affiliate took transmission service only on that adjacent system (*i.e.*, not from the affiliated transmission provider itself). That is because, under Section 358.1(b), transmission providers that do not conduct transmission transactions with a marketing affiliate are simply exempted from the standards of conduct, including but not limited to the No Conduit Rule. If the Commission intends to permit transmission providers in such circumstances to provide non-public transmission information to their marketing affiliates taking transmission service from other transmission providers, the Commission should say so and explain why that is consistent with the FPA's prohibition of unjust discrimination and undue preferences.

We do not think that is what the Commission intended. Thus, the Commission should reverse course and drop the new limitation in Section 358.1(b) as applied to electric transmission providers. Doing so would give effect to the waiver provision contained in the new Section 358.1(c) as we believe the Commission intended. Alternatively, and at minimum, the Commission should clarify that the new language in Section 358.1(b) does not exempt transmission owners in RTO regions who conduct marketing activities (or who have affiliates that are engaged in marketing activities) in the RTO market.

2. The Commission Should Revise the Marketing Definition to Include Bids to Buy Products Traded in Organized Markets, Particularly FTRs

The March 2008 NOPR proposed to include in marketing "bids to buy" various products in organized markets, although it omitted from marketing purchases that were not effected through submission of such bids. As noted above, TAPS asked the Commission to resolve the inconsistency by including all purchases (or at least purchases for sales for resale) in the marketing definition. Order No. 717, however, went the other direction. It continued to omit purchases generally and opted to eliminate the phrase "bids to buy" from the marketing definition. The Commission should grant rehearing and reinstate as a marketing function the submission of bids to purchase products in organized wholesale electricity markets.

The NOPR's proposed inclusion of "bids to buy," but not purchases generally, reflected an implicit acknowledgment that organized electricity markets and the products traded in them are different and may be treated differently for standards of conduct purposes. To begin, these markets and the organizations that operate them are creatures

of Commission policy, which places on the Commission an even greater obligation to ensure that they cannot be turned into tools of unjust discrimination. Moreover, markets based on locational marginal prices ("LMPs") and financial transmission rights ("FTRs") use markets, prices, and tradable commodities to accomplish what the Commission's open access policies and OATTs require other transmission owners to provide on a non-discriminatory basis. For example, to deal with transmission congestion outside of RTO markets, Order No. 888 and the OATT required transmission owners to curtail their own transactions and those of network transmission customers on a *pro rata* basis. *See, e.g.*, Order No. 890 at P 1138. In contrast, so-called "Day Two" markets allocate scarce transmission by using differences between LMPs to price congestion and allowing load-serving entities (and others) to purchase short-term or long-term FTRs to hedge their exposure to congestion costs.[36]

In order for the "Day Two" market mechanism to allocate scarce transmission capacity in a non-discriminatory way, no market participant may enjoy any undue preference with respect to any of the products that determine the total cost of delivering electricity from a resource to a load. Yet the removal of "bids to buy" from Order No. 717's marketing definition would permit transmission owners in organized markets (or their affiliates) to use non-public transmission information to determine when, where, and how much to bid for the acquisition of various products, including not only capacity, energy, and ancillary services, but also financial products such as virtual supply or demand and FTRs. For example, transmission owners could use non-public information regarding planned outages to identify and acquire FTRs on transmission paths that are

[36] As noted below, the availability of FTRs is not limited to load-serving entities and, except for some cases involving allocated long-term financial transmission rights, may be purchased by virtually any market participant for any reason.

expected to become congested, or they could use such preferential information to determine whether and when to sell FTRs on paths that are expected to become less congested when new facilities become operational or when off-line transmission facilities or generators return to service. Similarly, transmission owners in LMP-based markets could use non-public transmission information about the transmission system (including transmission constraints and outages) to predict when real-time prices at specific locations will exceed day-ahead prices (making it profitable for the transmission owner to submit virtual demand bids at the relevant node) or *vice versa* (in which case virtual supply bids will be more profitable).

Given the way in which LMP-based markets works, bids to buy *any* of these products have the potential to affect the prices paid by the transmission provider, its affiliates, and other market participants. The Commission should not permit transmission owners in RTO markets to provide themselves or their affiliates with undue preferences by using non-public transmission information to determine where, when, and how much of these products to buy.[37]

In addition, standards of conduct rules guarding against the improper use of transmission information in organized wholesale markets can be derived not only from the obligation to provide non-discriminatory transmission service. They also can be founded on the need to protect the organized wholesale market used to establish just, reasonable, and not unduly discriminatory rates in those regions. In this respect,

[37] While transmission owners should not be permitted to use non-public transmission information to determine when, where, and how much to bid for any product traded in RTO markets, the use of such information in acquiring FTRs seems especially pernicious. As noted, the ability to obtain FTRs on a non-discriminatory basis is a vital component of obtaining comparable, non-discriminatory transmission service in an LMP-based market. And the trading of FTRs—the prices and values of which depend on expected and actual system congestion patterns, respectively—seems uniquely vulnerable to undue preferences arising from differential access to non-public information about the transmission system.

standards of conduct rules guarding against the anticompetitive use of non-public transmission information are like any other rule the Commission establishes for participation in these market—rules that govern both purchases and sales in RTO markets. There is no reason why a standard of conduct rule against the improper use of non-public transmission information for competitive advantage in organized wholesale markets must be more limited than other market rules.

Finally, the inclusion of "bids to buy" as a marketing function would not be inconsistent with the reasons underlying Order No. 717's exception for bundled retail sales or the omission of purchases generally. The desire to promote long-term, integrated resource planning is not impaired by restrictions on the use of non-public transmission information when submitting bids to buy commodities in short-term markets—particularly not financial products "virtual" supply or demand, which are traded in day-ahead or real-time markets, or FTRs that are bought through monthly RTO auctions. Moreover, as noted, there is no necessary connection between a public utility's purchase of financial products in such markets and their service to bundled retail load—or, indeed, to any load at all. Public utilities may buy and sell such products simply as a means of producing extra revenue, or to hedge risk, while their activities toward that end substantially affect the availability and price of the resources that their competitors need to serve *their* load. There is simply no reason why transmission owners or their affiliates should be able to enjoy the use of non-public information, derived from ownership or operation of jurisdictional transmission facilities, to provide themselves with unique advantages in those pursuits. To do so would be to destroy the integrity of the organized markets the Commission is striving to improve.

3. The Commission Should Not Include POLR Sales as Part of the Bundled Retail Exception

The Commission should also grant rehearing of its decision to exempt from the marketing definition retail sales by a provider of last resort ("POLR"). As explained below, the exemption is unjustified and appears to be based on a misconception.

In the March 2008 NOPR (P 37), the Commission stated its belief that "the general exemption for bundled retail sales should also apply to transmission providers acting as POLRs," and it therefore proposed to "include POLRs in the list of exempt marketing functions." TAPS opposed that proposal. TAPS explained that the Commission had previously refused to adopt a generic exemption for POLR sales. TAPS May 2008 Comments at 26 (citing March 2008 NOPR P 37; Order No. 2004-C). TAPS also noted that the Commission's case-by-case consideration of standards of conduct waivers involving affiliates engaged in POLR sales has been highly fact specific. *Id.* 26-27 (citing *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 waiver, in part, because applicant had not shown that its activities in the PJM market and relating to load forecasting were merely "passive."), *order on waiver*, 123 F.E.R.C. ¶ 61,167 (2008) (grating temporary waiver)). In a number of cases, TAPS explained, the Commission denied the requested waivers on grounds that remain applicable today. *Exelon Corp.*, 121 F.E.R.C. ¶ 61,092, P 19 n.26 (citing cases).

For example, TAPS explained, in *Allegheny Power Service 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.

In response to this, Order No. 717 has little to say, and what it does say is either a *non sequitur* or based on an incorrect premise. Order No. 717's full justification for exempting POLR retail sales from the marketing definition is that:

> As the Commission explained in the NOPR, actual instances of abuse in this regard have not been presented, even though entities have been granted waivers to exempt their POLR activities from the Standards. Inasmuch as entities acting as POLRs are providing bundled retail service, it is appropriate to include POLR sales in the definition of bundled retail sales.

Order No. 717, P 80 (footnote omitted).

The first sentence in the above-quoted passage is based on flawed reasoning and therefore fails to justify the POLR exemption. As TAPS noted in its NOPR comments, the Commission's case-by-case consideration of standards of conduct waivers involving affiliates engaged in POLR sales has been highly fact specific, and has resulted in the denial of a number of waivers. Where the Commission has granted waivers, it has done

so based on factual determination that the specific circumstances posed relatively little risk of abuse. *E.g.*, *Exelon Corp.*, 121 F.E.R.C. ¶ 61,092, PP 18-20. It is therefore unsurprising that "actual instances of abuse in this regard have not been presented, even though entities have been granted waivers to exempt their POLR activities from the Standards," Order No. 717, P 80, since waivers were granted only in benign cases.

What Order No. 717 does—and fails to acknowledge that it is doing—is to *overrule* those cases in which the Commission gave factual consideration to a specific waiver request and denied it because the risk of abuse was too great. Order No. 717 provides no reasoned basis for reversing those determinations. On the contrary, Order No. 717 seems to *acknowledge* that "POLRs should not have special exclusions" and that POLR sales are susceptible to abuse based on transmission information disparities. *See id.* (declining to extend the exemption to off-system *wholesale* sales by a POLR). Order No. 717 fails to explain why providers of last resort should enjoy preferences based on their transmission ownership when they compete to make unbundled retail sales or to acquire resources in wholesale markets with which to serve retail load.

The other part of Order No. 717's justification for exempting POLR retail sales is based on a false premise. As noted, Order No. 717 concludes that "[i]nasmuch as entities acting as POLRs are providing bundled retail service, it is appropriate to include POLR sales in the definition of bundled retail sales." *Id.* However, retail sales made by providers of last resort are not *bundled* retail sales; they are *unbundled* retail sales. (If they were bundled retail sales, there would be no need to mention them separately as a further exclusion from the marketing definition.) Thus, whatever unjustified jurisdictional concerns may underlie the Commission's decision to exempt *bundled* retail

sales from the marketing definition—and thus to allow transmission providers to provide their bundled retail sales employees with preferential information about the transmission system—there is no such foundation for an exemption for unbundled retail POLR sales. *See* Order No. 888, Appendix G, 61 Fed. Reg. at 21,725 ("Based on an analysis of the relevant legislative history and case law under the [FPA], the Commission concludes that it has exclusive jurisdiction over the rates, terms, and conditions of the unbundled transmission in interstate commerce, by a public utility, of electric energy to an end user."); *New York v. FERC*, 535 U.S. at 27 (concluding that FERC may "regulate bundled retail transmissions" if necessary to eliminate undue discrimination).

POLR sales occur within the context of a competitive environment,[38] 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.

[38] By definition, POLR sales occur in a retail competition environment. In most, if not all, cases, retail choice environments and POLR sales occur within the footprint of organized wholesale markets.

C. The Commission Should Revise the Transmission Function Definition

Order No. 717 attempts to clarify and narrow the activities categorized as "transmission functions" and the number of employees who will be classified as "transmission function employee[s]." Order No. 717 (P 40) defines "transmission functions" as "the planning, directing, organizing or carrying out of day-to-day transmission operations, including the granting and denying of transmission service requests." The Commission makes clear that this definition is intended to exclude long-term system planning and is focused instead on "those areas most susceptible to affiliate abuse," which Order No. 717 identifies as "short-term real time operations, including those decisions made in advance of real time but directed at real time operations." *Id*.

TAPS is concerned that the Order's emphasis on short-term or real-time operations—an emphasis that is meant to exclude long-term planning employees from the transmission function—might be misconstrued. Specifically, TAPS is concerned that the short-term focus might be misinterpreted as limiting the Commission's determination that employees engaged in the "granting and denying of transmission service requests" are transmission function employees. TAPS asks the Commission to clarify that personnel engaged in such activities are transmission function employees regardless of the duration of the service requested. First, the granting or denying of transmission service requests is an integral part of "planning, directing, organizing or carrying out of day-to-day transmission operations." *See* new 18 C.F.R. § 358.3(h). Indeed, much of the *pro forma* OATT is dedicated to prescribing procedures to be used by the transmission provider in

assessing applications for various types of open access transmission service, including long-term service.[39]

It would be anomalous if activities so central to administration of the OATT on a day-to-day basis were excluded from the transmission function simply because of the duration of the transmission service requested. The OATT itself makes no such distinction. Rather, the provisions requiring transmission customers to submit specific information in support of their applications for transmission service compel the transmission provider to "treat this information consistent with the standards of conduct contained in Part [358] of the Commission's regulations." *E.g.*, OATT §§ 17.2, 18.2, 29.2.[40] These OATT provisions, promising standards of conduct treatment for information submitted in the course of applying for transmission service, make no distinction based on the duration of the service requested. Nor should the standards of conduct status of the employees processing such applications turn on the duration of the service requested.

For similar reasons, TAPS asks the Commission to clarify (or, if necessary, to grant rehearing to provide) that the "transmission function" includes not just the employees who post on the OASIS that a particular request has been granted or denied but, also, the employees who are responsible for performing the underlying system

---

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

[40] The *pro forma* OATT promulgated by Order No. 890-A mistakenly cites Part 37 as the location of the standards of conduct regulations. The standards of conduct regulations promulgated by Order Nos. 889 *et seq.* were codified at Part 37. More recent standards of conduct have been codified at 18 C.F.R. Part 358.

impact studies or otherwise determining whether the transmission system can support requested services. As recounted in paragraph 42 of Order No. 717, commenters requested categorical exclusions from the "transmission function" of engineers engaged in different activities, including: (1) "[e]ngineers who plan, design and oversee construction of transmission facilities," (2) "engineers who make engineering decisions regarding the operation and maintenance of transmission facilities," and (3) "engineers who determine whether transmission requests can be accommodated by the existing transmission system." In response to these and related requests, the Commission concluded that "field, maintenance and construction workers, as well as engineers and clerical workers, are not normally involved in the day-to-day operations of the transmission system[, and] … would not fall within the scope of the definition of transmission function employee, unless in addition to functioning in their stated capacity they also engaged in the day-to-day operation of the transmission system." *Id.* P 46.

While the Commission's response may make sense with respect to the first categories of engineers discussed above (*i.e.*, those who plan, design and oversee construction of transmission facilities), it does not make sense with regard to the other two categories. Nor can it be reconciled with the inclusion as a transmission function of the granting or denying of transmission service requests. Under the *pro forma* OATT, the transmission provider's role in processing transmission service applications expressly includes conducting System Impact Studies and Facility Studies. *See pro forma* OATT §§ 19, 32, and Attachment D. Employees charged with performing these studies, or otherwise determining whether the transmission system can support requested services, are clearly performing activities that are integral to a transmission provider's

administration of its tariff and that are central to the "planning, directing, organizing or carrying out of day-to-day transmission operations, including the granting and denying of transmission service requests." *See* new 18 C.F.R. § 358.3(h).

Likewise, "engineers who make engineering decisions regarding the operation and maintenance of transmission facilities" (Order No. 717, P 42) should not be excluded categorically from the transmission function. To the extent that such employees plan or coordinate transmission outages, they are actively and personally involved in "planning, directing, organizing or carrying out of day-to-day transmission operations" (new 18 C.F.R. § 358.3(h)) and should be considered transmission function employees.

Moreover, both sets of employees—those who plan or coordinate transmission outages and those who assess whether the transmission system can support new service requests—will inevitably have access to substantial non-public information about the transmission system and will make decisions that will affect the operation of the transmission system in the short-to-mid-term. Thus, even if they were not making decisions that affect the operation of the transmission system, we submit that the extent of their exposure to non-public information about the transmission system (and transmission customer requests) should render them transmission function employees. Personnel engaged in those roles will possess intricate knowledge of the transmission system's current topology and usage patterns, as well as likely changes in such topology or patterns, and competitors' planned uses of the system—information that would be very useful to the transmission providers' marketing function.

The "No Conduit Rule" is not a sufficient protection. It would be anomalous to declare that, under the No Conduit Rule, engineers responsible for assessing the

transmission system's ability to accommodate requested services are prohibited from sharing transmission information with the transmission provider's marketing function while the very same engineers could actually *perform* marketing functions because they are not transmission function employees and are not subject to the Independent Functioning Rule. Occasional and incidental receipt of transmission information should not render an employee part of a transmission provider's transmission function. In such cases, the No Conduit Rule should suffice. But where a substantial part of an employee's job involves the receipt and use of non-public transmission information, that alone should render the employee part of the "transmission function."

D. The Commission Should Require Transmission Providers to Identify Their Marketing Employees on Their Websites

The new Section 358.4(b)(3)(iii) of the regulations that were in place prior to Order No. 717 required transmission providers to identify transmission function and marketing function employees by name, job title and description, and position in the chain of command:

> For all employees who are engaged in transmission functions for the Transmission Provider and marketing or sales functions or who are engaged in transmission functions for the Transmission Provider and are employed by any of the Energy Affiliates, the Transmission Provider must post the name of the business unit within the marketing or sales unit or the Energy Affiliate, the organizational structure in which the employee is located, the employee's name, job title and job description in the marketing or sales unit or Energy Affiliate, and the employee's position within the chain of command of the Marketing or Energy Affiliate

In contrast, under the new Section 358.7(f) of the regulations promulgated by Order No. 717, transmission providers must post on their websites only "the job titles and job descriptions of its transmission function employees," *id.* § 358.7(f)(1), and a "notice ... of any transfer of a transmission function employee to a position as a marketing function

employee, or any transfer of a marketing function employee to a position as a transmission function employee," *id.* § 358.7(f)(2). Order No. 717 does *not* require the identification of marketing function employees except in connection with job transfers.

This omission should be corrected on rehearing for two reasons. First, the identification of both transmission function and marketing function employees should be posted to facilitate monitoring of compliance with the Independent Functioning Rule. Second, if employees are to be expected to comply with the No Conduit Rule, they need a centralized and authoritative list of the employees to whom they may not provide transmission function information. Further, posting of that list on the transmission provider's website will facilitate compliance by agents, contractors, etc., and will aid in monitoring of compliance by the customers and the Commission.

V. CONCLUSIONS

WHEREFORE, the Commission should grant clarification or rehearing as requested above.

Respectfully submitted,

/s/ *Jeffrey A. Schwarz*
Robert C. McDiarmid
Cynthia S. Bogorad
Jeffrey A. Schwarz

Attorneys for TAPS

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

November 17, 2008