

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

**Standards of Conduct for
Transmission Providers**

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Docket No. RM01-10-000

**SUPPLEMENTAL COMMENTS
OF
THE NATIONAL ENERGY MARKETERS ASSOCIATION**

In accordance with the May 8, 2002, "Notice Organizing Technical Conference," the National Energy Marketers Association (NEM) respectfully submits the following supplemental comments to its initial comments dated December 19, 2001, in this proceeding. NEM submits that compliance with competitively-neutral affiliate rules is vital to competitive markets, and the Commission's continued vigilance on market power related issues is essential.

NEM supports the Commission's unwavering commitment to a competitively neutral, liquid, and transparent wholesale market that ensures a level playing field for all market participants. Particularly in the current context of industry standardization efforts at the wholesale and retail levels and recent events in the electric and gas industries, the Commission's efforts to implement uniform standards of conduct for transmission providers is particularly appropriate and necessary.

I. Separation of the Retail Sales Function from the Transmission Function

NEM strongly supports the Commission's proposal to separate transmission providers' retail sales function from their transmission function.¹ As noted in NEM's previously filed comments, a lack

¹ Proposed Section 358.3(e) of the Standards of Conduct for transmission providers provides that, (e) Marketing, sales or brokering means a sale for resale of natural gas or electric energy in interstate commerce. Sales and marketing employee or unit includes (1) any pipeline's sales

of formal separation between functions that justify an exclusive franchise monopoly and those functions that are competitive creates both the opportunity to abuse market power, significant financial conflicts of interest and discrimination that operate to the detriment of competitors trying to conduct business within a utility's franchise territory.

It is within FERC's authority to require transmission providers to make this separation of functions. The U.S. Supreme Court recently reviewed the Commission's Federal Power Act authority with respect to Order 888 and the open access requirement for unbundled retail transmissions. The Court found that,

It is true that FERC's jurisdiction over the sale of power has been specifically confined to the wholesale market. However, FERC's jurisdiction over electricity transmissions contains no such limitation. Because the FPA authorizes FERC's jurisdiction over interstate transmissions, without regard to whether the transmissions are sold to a reseller or directly to a consumer, FERC's exercise of this power is valid.²

The Commission's proposal that governs the relationship between transmission providers and their energy affiliates incident to the operation of the transmission system falls squarely within the bounds of the Commission's authority recognized by the U.S. Supreme Court.

NEM submits that if the Commission does not require this separation of functions then we will only have traveled halfway to the attainment of an open market. The need for separation was demonstrated by Southern Co.'s explanation at the technical conference of its RFP evaluation process, in which both generation and transmission function employees evaluate potential options. Through the RFP evaluation process, Southern Co.'s purchasing arm has the ability to share information with its transmission arm in a manner that other market participants, such as

operating unit, to the extent provided in ' 284.286 of this chapter, and (2) an electric transmission provider's sales unit, including those employees that engage in wholesale merchant sales or bundled retail sales.

² New York et. al. v. FERC et al., slip op. at 17 (March 5, 2002).

other wholesale customers and merchant generators, would not. It is critical to the success of the competitive market that all participants have access to the same information, and the Commission's proposed separation of retail and transmission functions is a crucial component of the standards of conduct that is necessary to achieve this goal.

The costs of compliance with the separation requirement were raised by some commenters and technical conference participants. They warned that these increased costs could be significant and ultimately be passed through to consumers. NEM submits that these comments fail to consider and account for the significant benefits of a truly competitive energy market as facilitated by the proposed standards of conduct and the Commission's other current initiatives, including standardized market design and generation interconnection. The benefits of competitive energy markets to energy consumers and energy market participants cannot be overstated and are well known by this Commission.

Some commenters and participants in the technical conference proposed that the retail sales function of transmission providers in states that have not yet enacted retail access should be exempted from the separation requirement. NEM asserts that drawing a distinction in the application of the standards of conduct between retail access and non-retail access states is inappropriate and will perpetuate the discrimination that this rulemaking was intended to address. Even in non-retail access states, there is still a wholesale market in which discrimination may be present and for which the standards are needed. NEM urges the Commission not to adopt this distinction.

2. No Conduit Rule Versus Automatic Imputation Rule

The Commission's NOPR in the instant proceeding did not address whether the "automatic imputation" rule for the gas industry or the "no conduit" rule for the electric industry should be adopted with respect to information prohibitions for shared employees. NEM's initial comments suggested that one rule should apply consistently to both the natural gas and electricity industries.

In the "Staff Analysis of the Major Issues Raised in the Comments," Staff recommended that the Commission adopt the "automatic imputation" rule as the better means to address the concern that, "where shared employees have regular access to transmission-related information, such as billing or accounting, and provide services to both the transmission provider and its energy affiliates . . . there is an opportunity for transmission information to be used for other functions."

However, Staff also stated that it, "expects transmission providers would continue to share non-operating employees, including officers and directors with their energy affiliates." Staff also noted that, "[s]ome non-operating functions, for example, Human Resources or Travel, clearly have little or no access to transmission-related or market information and application of the information disclosure prohibitions has little practical impact on those operations."

NEM submits that the ability of companies to perform enterprise-wide risk management is critical. However, it is unclear how companies can perform this function without violating either of the "automatic imputation" or "no conduit" rules. Accordingly, NEM urges the Commission to provide guidance as to how companies can perform the risk management function within the constructs of either information-sharing prohibition.

III. Conclusion

NEM strongly supports the Commission's development and implementation of standards of

conduct that level the playing field, promote liquidity and price transparency, and mitigate market power. NEM urges the Commission to require separation of the retail sales function from the transmission function. NEM also urges the Commission to clarify how companies can perform enterprise-wide risk management activities within the constructs of the "automatic imputation" or "no conduit" rules.

Respectfully submitted,

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