STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

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June 14, 2002

Honorable Magalie R. Salas
Federal Energy Regulatory Commission
888 First Street, N.E.
Room 1-A209
Washington, D.C. 20426

Re: Docket No. RM01-10-000 – Affiliate NOPR

Dear Secretary Salas:

For filing please find the Comments of the Public Service Commission of New York in the above-entitled proceeding. Should you have any questions, please feel free to contact me at (518) 486-2652.

Very truly yours,

Saul A. Rigberg
Assistant Counsel

Enclosures

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Standards of Conduct for Transmission Providers) Docket No. RM01-10-000

COMMENTS OF THE PUBLIC SERVICE COMMISSION OF NEW YORK GENERALLY SUPPORTING THE PROPOSED STANDARDS OF CONDUCT BUT OPPOSING SEPARATION OF TRANSMISSION FROM DISTRIBUTION

INTRODUCTION AND SUMMARY

Pursuant to the Notice Organizing Technical Conference, issued on May 8, 2002, the New York State Public Service Commission (NYPSC) respectfully submits the following comments.

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The NYPSC supports the Commission's goal in the Notice of Proposed Rulemaking (NOPR)[1] of reducing opportunities for anti-competitive behavior by ensuring that electric and gas transmission providers and their energy affiliates do not share market-sensitive information on a preferential basis. We agree that development of workably competitive markets requires strict protections against misuse of such confidential information. Accordingly, we endorse the

[1] *Standards of Conduct for Transmission Providers*, Docket No. RM01-10-000, 66 Fed. Reg. 50,919 (October 5, 2000), FERC Stats. and Regs., Proposed Regulations, ¶ 32,555 (Sept. 27, 2001).

foundation principles and broad concepts embodied in the NOPR. Fair competition in energy markets requires protection against companies with market power from being able to leverage that power to gain an advantage in the competitive market at the expense of their rivals.

Meaningful customer choice requires that both state regulatory commissions and the Commission protect competition from any company's attempt to create barriers to entry, increase costs for rivals, shift costs to core customers, or engage in any other actions that unfairly favor affiliates or harm competitors. Based on our experiences in New York[2] and our knowledge of situations in the federal arena,[3] the NYPSC agrees with the Commission that as the gas and electric industries converge and affiliates proliferate, the potential for anti-competitive and discriminatory behavior between a transmission provider and its affiliate engaged in energy-related business is exacerbated.

We have serious misgivings, however, with two proposals: (1) that transmission providers must treat the distribution function of their bundled retail sales businesses as energy affiliates;[4] and, (2) that transmission personnel and activities must be completely separate from

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[2] See, for example, Opinion 97-9, Case 90-C-0912, *Proceeding on Motion of the Commission to Investigate Transactions Among New York Telephone Company and its Affiliates;* Case 92-C-0272, *Proceeding on Motion of the Commission to Investigate the Directory Publishing Operations of New York Telephone Company and its Affiliates* (issued June 5, 1997); Opinion No. 91-4, Case 90-C-0191, *Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of New York Telephone Company* (issued March 7, 1991); Case No. 98-G-0122, *Proceeding on Motion of the Commission to Review the Bypass Policy Relating to the Pricing of Gas Transportation for Electric Generation*, Untitled Order (issued March 17, 1999).

[3] See, for example, *United States v. Western Electric*, 673 F. Supp 525, 553 (D.D.C. 1987); *Amoco Production Company and Amoco Energy Trading Company v. Natural Gas Pipeline Company of America*, 82 FERC ¶61,038 (1998); *Exelon Corporation*, 97 FERC ¶61,009 (October 31, 2001).

[4] "Staff Analysis of the Major Issues Raised in the Comments" (at 13), which was attached to the May 8, 2002 Notice.

distribution personnel and activities.[5] Despite the protocols that Commission Staff suggest may be developed for the sharing of crucial information pertaining to reliability, we believe that treating the distribution function as a separate energy affiliate will only impair reliability and increase costs. It would be a mistake to classify the distribution function as an energy affiliate because of the critical importance of coordination between the distribution function and the transmission function. Such coordination requires free flowing communications between distribution and transmission operation and planning.[6]

If, however, the Commission does make such a classification, then we recommend that the category of entities eligible to apply for an exemption from specific aspects of the codes of conduct should include transmission providers that have divested their generation assets and have ceded control and operation of their transmission systems to an Independent System Operator (ISO) or a Regional Transmission Organization (RTO). In addition, the category of exemptions should be expanded to include situations that may impair operational reliability such as constraints preventing the sharing of flow information between transmission employees and distribution employees.

[5] Comment of Commission Staff at the May 21 Technical Conference.

[6] The proposed rule may also impinge on state jurisdiction because the transmission component of bundled retail sales is not within the Commission's jurisdiction. Federal Power Act §201(a) (16 USC 824(a)) establishes Commission jurisdiction to "extend only to those matters, which are not subject to regulation by the states." *Federal Power & Light Co. v. Federal Power Comm'n*, 319 U.S. 61, 74 (1943); *Federal Power Comm'n v. Southern California Edison Co.* 376 U.S. 205, 214 (1964).

THE COMMISSION SHOULD NOT REQUIRE THAT TRANSMISSION FUNCTIONS MUST BE SEPARATED FROM DISTRIBUTION FUNCTIONS, OR, IN THE ALTERNATIVE, THE PROPOSED CATEGORY OF EXEMPTIONS SHOULD BE BROADENED TO AVOID IMPAIRING RELIABILITY.

The Commission proposes to include the distribution of retail sales in the merchant function, which must be separated from transmission functions:

> In this NOPR, the Commission is proposing to apply the standards of conduct to require a separation of the transmission function from all sales functions, including bundled retail sales and a restriction on preferential access to transmission information for the bundled retail sales function.
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> .

Id. at 50922. The transmission provider would be required to treat its bundled retail sales business as an energy affiliate. The Commission, in effect, proposes to define the retail bundled sales function as a sales affiliate of the transmission provider equivalent in function to all other competitive wholesale power sales activities and other affiliates. *Id.*

Commission Staff, moreover, indicated at the Technical Conference that it would recommend complete separation of the transmission function from the distribution function so that utility employees engaged in the distribution of power for retail native load would be treated the same as wholesale merchant function employees. Employees managing electricity supply for retail native load would, then, be restricted from preferential access to the transmission facilities owned and managed by the utility as a necessary component of service to retail native load. Similarly, employees of gas companies like National Fuel Gas Distribution Company would not be able to obtain customers' flow information from National Fuel Gas Supply Company, which information is necessary to ensure reliability of the gas distribution system.

While the NYPSC agrees with the proposed restriction on *preferential* access to transmission information necessary to provide bundled sales, customer information needs to be communicated to transmission and distribution operators and planners to ensure the reliable functioning of the system. Care must be taken to prevent the proposed rules from being implemented in a way that compromises the reliability of the transmission and local distribution systems because full and prompt communication is critical to the reliable operation of the electric and gas systems.

It is absolutely critical that electric transmission and distribution function employees are able to exchange information rapidly on a real-time basis because the electric system must be in balance at all times and, therefore, decisions must be made quickly. The transmission and distribution components comprise an integrated grid, albeit with separate functions and characteristics. For example, facilities that support voltage on the transmission system are frequently located on the distribution side of transformers, requiring active coordination of operation. Unlike transmission systems, distribution systems often need to be reconfigured through manual switching when performing line maintenance at the transmission or distribution level; maintenance activities on the transmission system must be carefully coordinated with the distribution system to ensure power availability to the reconfigured distribution system. Transmission and distribution lines frequently occupy the same rights-of-way and are serviced by the same line crews; maintenance schedules, therefore, have to be coordinated. Planning information, moreover, must be exchanged to ensure sufficient transmission capacity is present to supply growing distribution load.

Requiring the physical separation of the transmission and distribution functions could lead to unintended consequences, especially for smaller utilities. It would not be economically feasible for a small utility whose primary business is distribution, but also have a few miles of transmission line to establish separate operation centers and line crews. Many utilities do not employ separate distribution and transmission engineers; a single engineer is likely to be responsible for a particular aspect of both transmission and distribution for gas and electric.

Additionally, in an emergency situation, *every* engineer in a company (regardless of title or function) is often deployed to assist in returning the system to operation as quickly as possible.

Similarly, the experience in New York with National Fuel Gas Supply Company (Supply) and National Fuel Distribution Company (Distribution) presents a situation where the proposed rules would impair operational reliability. Supply and Distribution were originally one corporation. A corporate reorganization occurred in the 1970s, which separated the supply and distribution functions. However, the corporation retained a single gas dispatch and operation center, allocating the costs between Supply and Distribution. Distribution has separate New York and Pennsylvania jurisdictional areas; Supply physically links different parts of the Distribution system that are not connected. The distribution systems within each state, moreover, are not contiguous; the supply company provides that transmission link. There are approximately 2,100 interconnections between Supply facilities and Distribution facilities.

According to the NOPR, a transportation customer of Supply (subsequently a customer of Distribution), and Distribution, as a customer of Supply, would not have access to each other's nominating, scheduling and operating information (collectively, flow information). However, in this instance, the transportation customer would also be a Distribution customer, and as such, Distribution would need to have access to the customer's flow information. Therefore, even while causing significant disruption and cost impacts, separation of the Supply and Distribution facilities would not eliminate the need for the two companies to share flow information of the transportation customer. The transmission and distribution functions must communicate smoothly to assume reliable and efficient operation of the system. Otherwise, basic information, such as pressures on the system and capacity constraints, necessary for the reliable and efficient operation of the system would not be known. We urge, therefore, that the Commission not classify the distribution function as an energy affiliate.

The Commission's regulations now broadly provide that electric transmission providers subject to Order Nos. 888 and 889 may file a request for waiver of all or part of the requirements of those Orders, including the present standards of conduct, "for good cause shown."[7] The NOPR sets forth, by contrast, an extremely limited category for exemption from the rules, namely, transfer of control and operation of transmission facilities to a Commission-approved RTO. We agree that such transfer is an important but not a dispositive factor.[8] Also critical is whether the transmission provider has divested itself of generation and whether equal access to the transmission system is guaranteed. If the Commission does classify the distribution function as an energy affiliate, then the NYPSC urges a broadening of the exemption category to include: (1) entities that have substantially divested themselves of generation and have transferred control and operation of transmission facilities to a Commission-approved ISO; and, (2) situations where operational reliability may be impaired such as the National Fuel Gas Distribution/Supply situation described above.

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7 18 C.F.R. § 35.28(d).

8 *Exelon Corporation*, 97 FERC §61,009 (October 3, 2001) is a recent example of a transmission owner improperly operating its transmission system with the objective of increasing congestion revenues.

CONCLUSION

The NYPSC supports the Commission's goals in developing the NOPR, but suggests the refinements set forth above.

Respectfully submitted,

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Dated: June 14, 2002
Albany, New York

CERTIFICATE OF SERVICE

I, Karen Houle, do hereby certify that I will serve on June 14, 2002, the foregoing Comments of the Public Service Commission of the State of New York by depositing a copy thereof, first class postage prepaid, in the United States mail, properly addressed to each of the parties of record, indicated on the official service list compiled by the Secretary in this proceeding.

Karen Houle

Date: June 14, 2002
Albany, New York