

STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

THREE EMPIRE STATE PLAZA, ALBANY, NY 12223-1350

Internet Address: <http://www.dps.state.ny.us>

PUBLIC SERVICE COMMISSION

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General Counsel

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December 20, 2001

Honorable David Boergers
Secretary
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 Boergers:

For filing please find the Notice of Intervention and 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

***NOTICE OF INTERVENTION AND COMMENTS OF THE
PUBLIC SERVICE COMMISSION OF NEW YORK
GENERALLY SUPPORTING THE PROPOSED STANDARDS OF CONDUCT
BUT SUGGESTING GREATER OPPORTUNITIES FOR SEEKING
EXEMPTIONS***

I. INTRODUCTION AND SUMMARY

Pursuant to the Federal Energy Regulatory Commission's (Commission) Notice of Proposed Rulemaking (NOPR),¹ issued on September 27, 2001, and Notice of Extension of Time, issued on October 26, 2001, the New York State Public Service Commission (NYPSC) respectfully submits the following comments.

Copies of all correspondence and pleadings should be addressed to:

Lawrence G. Malone, Esq.
Saul A. Rigberg, Esq.
Public Service Commission
of the State of New York
3 Empire State Plaza
Albany, NY 12223-1350
saul_rigberg@dps.state.ny.us

Ron Liberty
Director Fed. En. Interv.
Public Service Commission
of the State of New York
3 Empire State Plaza
Albany, NY 12223-1350
ronald_liberty@dps.state.ny.us.

The NYPSC wholeheartedly supports the Commission's goal in issuing the NOPR 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 suggest, however, that the Commission consider broadening 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).

opportunities for seeking exemption from specific aspects of the proposed rules and also revisit the proposed requirement that the transmission function be separated from all sales functions.

Our comments focus on two areas. First, the NOPR states that it “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.” NOPR at 50922.² As discussed below, the NYPSC objects to this proposal on jurisdictional grounds; we also suggest a clarification.

Second, we suggest that the category of entities eligible to apply for an exemption from aspects of the codes of conduct be expanded.³ The proposed standards of conduct would automatically exempt an electric transmission provider that itself is a Commission-approved regional transmission organization (RTO) under Order 2000. The standards would also allow an electric transmission provider that participates in a Commission-approved RTO and does not manage or control transmission facilities to request exemption from the standards of conduct. Because Commission approval of any particular RTO may not occur for some time, we urge the broadening of the category of transmission providers able to seek exemptions to include those that have ceded control of their transmission systems to a Commission-approved independent system operator (ISO). Finally, the category of exemptions should be expanded to include situations that impair operational reliability such as if flow information could not be shared between transmission employees and distribution employees.

² The NOPR specifically invites and strongly urges state commissions to provide their views on this proposal and notes that in the final rule, it “may determine that this separation is not required.” *Id.*

³ We also recommend that the rules should specify the exemption standards to guide applicants in preparing their waiver requests.

II. COMMENTS ON THE PROPOSED RULEMAKING

The NYPSC endorses the foundation principles and broad concepts embodied in the NOPR. Fair competition in energy markets requires that those companies with market power not be 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 York⁴ and our knowledge of situations in the federal arena,⁵ 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 transmission provider and its affiliate engaged in energy-related business is exacerbated.

We have, however, several concerns and suggestions. As discussed below, the one-size-fits-all proposal to separate transmission function employees from sales functions employees impinges on state jurisdiction and is also fraught with practical implementation difficulties. We also suggest expansion of the category of situations that would allow transmission providers to request exemption from the proposed rules.

⁴ 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).

⁵ 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).

A. The Commission Should Reconsider The Requirement That Transmission Functions Must Be Separate From All Sales Functions.

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

In the 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.

Id. at 50922.

Utility employees engaged in sales functions for retail native load are proposed to be treated the same as wholesale merchant function employees. Employees managing electricity supply for retail native load would, under the proposed rule, 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 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. 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.*

1. The Proposed Rule Impinges on State Jurisdiction

The Commission first established codes of conduct for electric transmission providers in Order No. 889.⁶ Its purpose is to prevent utilities selling power at wholesale from advantaging their power merchant function through preferential access to the utility's available transmission capacity. Order No. 889 specifically exempted from the codes of conduct employees that engage in sales or purchases solely on behalf of bundled retail load.⁷ The Commission found that purchases of power made on behalf of retail native load customers were not sales for resale. Consequently, service to native load retail customers does not fall within the Commission's jurisdiction.⁸

The NOPR states that "the Commission is not proposing to assert jurisdiction over the underlying transactions in a retail sale..." *Id.* But adopting the proposed separation standard would, for all intents and purposes, extend Commission regulation into retail service matters preserved for the states by the Federal Power Act.⁹

It is appropriate for the Commission to require codes of conduct to separate functions properly within its jurisdiction such as sales of wholesale power for resale and use of transmission facilities by the utility or other parties to transmit power for resale.

⁶ Open Access Same-Time Information System (formerly Real-Time Information Networks) and Standards of Conduct. 61 FR 21737 (May 10, 1996), FERC Stats. & Regs., Regulations Preambles 1991-1996, P31,035 (April 26, 1996).

⁷ Order No. 889-A at 30,558, order on reh'g, 62 FR 12484 (March 14, 1997), FERC Stats. & Regs., Regulations Preambles 1996-2000, ¶31049 (March 4, 1997).

⁸ *Id.*

⁹ 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).

However, the transmission component of bundled, and perhaps unbundled,¹⁰ retail transactions is not FERC-jurisdictional and, therefore, the Commission should not impose standards of conduct and separation regulations.

2. The Proposed Separation May Impair Reliability

The NYPSC agrees with the proposed restriction on *preferential* access to transmission information for the bundled sales function, but existing and future customer information needs to be communicated to transmission and distribution operators and planners to ensure the reliable functioning of the system. It is essential that the final rules make clear that there is not a total prohibition on communication, but only on preferential communication. 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.

Similarly, from a gas perspective, the relationship of National Fuel Gas Supply Company and National Fuel Distribution Company presents a situation where the proposed rules would impair operational reliability.¹¹ Supply and Distribution were originally one corporation. A corporate reorganization occurred in the 1970s, splitting off the transmission function to the Supply Company and subjecting it to Commission jurisdiction. 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

¹⁰ The United States Supreme Court is deliberating on both issues. *Enron v. FERC*, Docket No. 00809 and *New York v. FERC*, Docket No. 00568.

¹¹ As suggested above, the NOPR also presents a jurisdictional issue in that National Fuel Gas Supply Company is within the Commission's jurisdiction but National Fuel Gas Distribution Company is not. See, 15 USC §717(r).

within each state jurisdiction, moreover, are not contiguous; the Supply Company provides that transmission link. There are approximately 2,100 interconnections between the Supply Company and the Distribution Company 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.

B. The Category of Exemptions Should Be Broadened.

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."¹² The NOPR sets forth, by contrast, an extremely limited category for exemption from the rules, namely, transfer of control of transmission facilities to a Commission-approved RTO. The NYPSC urges a broadening of the exemption category to include transfer of control of transmission facilities to a Commission-approved ISO and situations where operational reliability is impacted, such as the National Fuel Gas Distribution Supply situation described above. The NYPSC also suggests that the Commission specify the factors or standards against which a request for exemption will be considered.

¹² 18 C.F.R. § 35.28(d).

IV. CONCLUSION

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

Respectfully submitted,

Lawrence G. Malone
General Counsel
By: Saul A. Rigberg
Assistant Counsel
Public Service Commission
of the State of New York
3 Empire State Plaza
Albany, NY 12223-1305
(518) 473-8178

Dated: December 20, 2001
Albany, New York

CERTIFICATE OF SERVICE

I, Karen Houle, do hereby certify that I will serve on December 20, 2001, 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.

Date: December 20, 2001
Albany, New York

Karen Houle