

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

---

Standards Of Conduct For )  
Transmission Providers ) Docket No. RM01-10-000

---

COMMENTS OF  
THE ELECTRICITY CONSUMERS RESOURCE COUNCIL

The Electricity Consumers Resource Council (ELCON) commends the Federal Energy Regulatory Commission (FERC) for issuance of a notice of proposed rulemaking (NOPR) extending code of conduct requirements to all merchant function employees of electric utilities, whether they are engaged in bundled retail sales or wholesale sales.

NOTICES AND COMMUNICATIONS

Notices and communications should be addressed to:

Dr. John Anderson  
Executive Director  
The Electricity Consumers Resource Council  
1333 H Street, N.W.  
The West Tower, 8th Floor  
Washington, D.C. 20005

Sara D. Schotland, Esq.  
Cleary, Gottlieb, Steen & Hamilton  
Suite 9000  
2000 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006

## I. Summary

FERC is correct in the rationale for this NOPR. Absent a code of conduct including retail merchant function employees, there are opportunities for abuse. There is no economic rationale or principled justification to exempt retail merchant employees from functional separation and other code of conduct requirements necessary to avoid opportunities for unfair competitive advantage.

The instant NOPR is one of a series of recent initiatives by the Commission to foster the development of competitive markets. Apart from the Standards of Conduct NOPR, these include: (i) FERC's advance rulemaking on interconnection; (ii) pending initiatives to require consolidation of RTOs in the Eastern Interconnection; and (iii) review of market power issues. As a proponent of vigorous competition in electricity markets, ELCON applauds these initiatives. Bravo!

## II. FERC Correctly Proposes To Extend The Code Of Conduct To All Merchant Functions of Public Utilities

FERC adopted the standards of conduct in Order No. 889 to restrict the ability of electric utilities to give their marketing affiliates or wholesale merchant functions undue preferences over non-affiliated transmission customers.<sup>1</sup> To date, the transmission provider has been able to share operational and reliability information with employees engaged in making economic and other purchases for retail bundled load on a preferential basis as compared with other transmission customers. FERC's limitation of the standard of conduct requirement to

---

<sup>1</sup> Open-Access Same-Time Information System and Standards of Conduct, Order No. 889, FERC Stats. & Regs. ¶ 31,035 (1996), order on reh'g, Order No. 889-A, FERC Stats. & Regs. ¶ 31,049 (1997), order on reh'g, Order No. 889-B, FERC Stats. & Regs. ¶ 31,253 (1997), order on reh'g, Order No. 889-C, 82 FERC ¶ 61,046 (1998), codified at 18 C.F.R. part 37 (2000).

wholesale merchant functions has left a mega loophole in the functional unbundling requirement. Industrial Consumers have long sought comparability in the electric industry such as the Commission effected in natural gas under Order No. 636.<sup>2</sup>

The Commission correctly observes in the NOPR that both gas and electric standards of conduct are needed “to prevent market power over transmission from being used in competitive commodity markets.”<sup>3</sup> There is no principled basis that would justify allowing transmission providers to exercise market power in commodity markets but not in wholesale markets. There is the same need to separate employees used in the transmission services from those engaged in commodity marketing and to assume that all transmission customers, affiliated and non-affiliated, are treated on a non-discriminating basis. There is no principled basis to continue the status quo whereby the electricity standards of conduct -- but not the gas standards - - allow transmission providers to assign responsibility for making purchases to serve bundled retail customers to the transmission operations and reliability function.

FERC’s authority to remedy discrimination in transmission by extending the code of conduct to the retail merchant function of transmitting utilities is unassailable. The Commission states that it is not proposing to assert jurisdiction over the underlying transactions in a bundled retail sale. As FERC observed in Order 2000, the Commission has a duty to eradicate discrimination:

[T]he Commission is granted the authority and responsibility by FPA sections 205 and 206, 16 U.S.C. 824d and 824e, to ensure that the rates, charges, classifications, and service of public utilities

---

<sup>2</sup> See Petition for a Rulemaking on Electric Power Industry Structure and Commercial Practices, Docket No. RM95-8000, March 25, 1998 (petitioning FERC to remedy discrimination by requiring that all users of transmission, wholesale and retail, take service under the same tariff at posted rates).

<sup>3</sup> Standards of Conduct for Transmission Providers, 66 Fed. Reg. 50,919, 50,920 (Oct. 5, 2001).

(and any rule, regulation, practice, or contract affecting any of these) are just and reasonable and not unduly discriminatory, and to remedy undue discrimination in the provision of such services. In fulfilling its responsibilities under FPA sections 205 and 206, the Commission is required to address, and has the authority to remedy, undue discrimination and anticompetitive effects. The Commission has a statutory mandate under these sections to ensure that transmission in interstate commerce and rates, contracts, and practices affecting transmission services, do not reflect an undue preference or advantage (or undue prejudice or disadvantage) and are just, reasonable, and not unduly discriminatory or preferential. Additionally, as discussed in Order No. 888, there is a substantial body of case law that holds that the Commission's regulatory authority under the FPA "clearly carries with it the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations pursuant to [FPA] sections 202 and 203, and under like directives contained in sections 205, 206, and 207."<sup>4</sup>

The Commission's authority is "at its zenith when fashioning remedies for undue discrimination."<sup>5</sup>

Respectfully submitted,

/s/ Sara D. Schotland

Sara D. Schotland  
CLEARY, GOTTLIEB, STEEN &  
HAMILTON  
Suite 9000  
2000 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006-1801  
202-974-1500

Dated: December 6, 2001

---

<sup>4</sup> Order 2000, 65 Fed. Reg. 810, 840 (Jan. 6, 2000) (footnotes omitted).

<sup>5</sup> See Order 888, FERC Stats. & Regs. ¶ 31,036 at 31,676 (1996); Niagara Mohawk Power Corp. v. FPC, 379 F.2d 153, 159 (D.C. Cir. 1967); Tapoco, Inc., et al., 39 FERC ¶ 61,363 at 62,169 (1987).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Comments of the Electricity Consumers Resource Council were today mailed to parties on the service list of this proceeding by U.S. mail, postage prepaid.

Dated at Washington, D.C., this 6<sup>th</sup> Day of December, 2001.

/s/ Kari Vander Stoep

Kari Vander Stoep  
Law Clerk  
Cleary, Gottlieb, Steen & Hamilton  
Suite 9000  
2000 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006-1801  
(202) 974-1500