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June 14, 2002

VIA HAND DELIVERY

The Honorable Magalie Roman Salas
Secretary
Federal Energy Regulatory Commission
Room 1 - A
888 First Street, N.E.
Washington, DC 20426

**Re: *Standards of Conduct for Transmission Providers* , Docket No.
RM01-10-000**

Dear Ms. Salas:

Enclosed for electronic filing in the above referenced proceeding please is the Motion for Leave to Intervene and Comments of the Salt River Project Agricultural Improvement and Power District.

Sincerely,

/s/ Deborah A. Swanstrom

Deborah A. Swanstrom

Enclosure

cc: Service List

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

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

**MOTION FOR LEAVE TO INTERVENE AND COMMENTS
OF THE SALT RIVER PROJECT AGRICULTURAL
IMPROVEMENT AND POWER DISTRICT**

Pursuant to the May 8, 2002, Notice Organizing Technical Conference issued by the Federal Energy Regulatory Commission ("FERC" or "Commission"), the Salt River Project Agricultural Improvement and Power District ("SRP") respectfully moves to intervene and submit these comments on the *Standards of Conduct for Transmission Providers Notice of Proposed Rulemaking* ("NOPR") and the *Staff Analysis of the Major Issues Raised in the Comments* ("Staff Paper"). As set forth in detail below, SRP is concerned that the overbroad provisions contained in the NOPR are costly, inefficient, and jeopardize reliability. Specifically, SRP has concerns regarding: (1) the functional separation of the employees involved in sales for retail native load; (2) shared personnel in non-operational positions, such as long-term planning, accounting, information technology and legal staff; and (3) FERC's proposed means for prohibiting information disclosure. Included in SRP's comments are suggestions on how FERC could more appropriately tailor its proposed rule to promote competition without imposing unnecessary costs or negatively impacting reliability. In addition, SRP supports the comments filed today by the Large Public Power Council.

SUMMARY OF POSITION

In the words of the United States Court of Appeals for the D.C. Circuit, the Commission's overbroad proposal to rigidly restrict communications among all energy affiliates of a transmission provider is akin to "using a tank to block a mouse hole." *Dominion Resources, Inc. v. FERC*, 286 F.3d 586, 593 (D.C. Circuit 2002). As a low cost provider of electricity with an obligation to serve retail customers reliably, SRP objects to several provisions contained in the Standards of Conduct.

First, SRP believes the Commission has not made the requisite finding of discrimination relating to the retail market necessary to apply the separation of function requirements to merchant and affiliate sales involved in sales for native retail load. While the Supreme Court recently held that language in the Federal Power Act does not preclude application of open access provisions to the transmission portion of bundled retail sales, it also held that without a finding of discrimination in the retail market, FERC appropriately stopped short in Order No. 888 of applying the open access provision to such bundled retail sales. Further, FERC has not conducted a cost/benefit study relating to application of the Standards of Conduct to the transmission portion of bundled retail sales and the harms which result from FERC's overbroad proposal will far outweigh any benefits.

SRP believes where a state has adopted a code of conduct and auditing rules, transmission providers should receive a waiver of the application of FERC's proposed Standards of Conduct rule to retail merchant function employees and marketing affiliates. Further, SRP has identified a number of outstanding issues relating to implementation and transition of the rule to those employees who were not previously covered under the Standards of Conduct.

Second, while the Commission's rationale for modifying the disclosure prohibitions is not entirely clear in the NOPR or Staff Paper, SRP believes that the Commission will go too far in implementing its disclosure prohibitions if it imposes an "automatic imputation rule" across the board. SRP strongly urges the Commission to apply the more appropriate "no conduit rule" which allows for the continuation of shared services departments such as long-term resource planning, accounting, information technology and legal staff.

Finally, SRP appreciates the Commission's recognition that certain information is crucial for merchant function personnel to have access. SRP proposes that the transmission provider must be able to continue to share with its merchant employees or marketing affiliates information contained in the North American Electric Reliability Council ("NERC") Operating Policies and Planning Standards and other applicable regional planning standards. Additionally, in its comments SRP has included a listing of information, based on previous FERC findings, that it believes a transmission provider should not be permitted to share with its merchant employees or marketing affiliates off of the OASIS or in a manner that is not otherwise available to third party eligible customers.

I. BACKGROUND

On September 27, 2001 FERC issued a Notice of Proposed Rulemaking (“NOPR”) regarding Standards of Conduct for Transmission Providers.¹ FERC seeks to promote competition by implementing a uniform Standards of Conduct rule that applies to both the electric and gas industries. The proposed Standards of Conduct rule would govern the relationship between transmission providers (both electric and gas) and all of their energy affiliates and merchant function employees. FERC proposes to apply the Standards of Conduct not just to wholesale marketing affiliates and merchant function employees, but to retail affiliates and retail merchant employees as well.

On April 25, 2002, FERC issued a Staff Paper analyzing the major issues raised by comments in response to the NOPR, including the definition of an energy affiliate, functional separation of merchant function employees for retail sales and information disclosure requirements and prohibitions. FERC held a technical conference on May 21, 2002 to further discuss the issues raised in FERC’s Staff Paper. In its May 8, 2002 Notice Organizing Technical Conference, FERC provided a June 14, 2002 deadline for providing comments on the Standards of Conduct NOPR and Staff Paper.

II. MOTION FOR LEAVE TO INTERVENE

SRP is a political subdivision of the State of Arizona that provides retail electric service to more than 750,000 residential, commercial, industrial, agricultural and mining customers in Arizona. In addition, SRP provides open access transmission and power sales service to wholesale customers.

¹ *Standards of Conduct for Transmission Providers*, FERC CIV FERC Staff Papers and Regs. 32,555 (2001).

SRP did not originally intervene in this proceeding in response to FERC's September 27, 2001 NOPR. However, SRP has heightened concerns regarding the Commission's approach for disclosure prohibitions after reviewing the Commission's Staff Paper and attending the Technical Conference on May 21, 2002. SRP's comments will serve the public interest and aid the Commission's decision making. Moreover, no party will be prejudiced by the grant of this Motion because SRP will accept the record as it currently stands.

III. COMMUNICATIONS

All communications, including any correspondence, pleadings or other documents, related to this matter should be directed to the following individuals:

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IV. COMMENTS

A. FERC Has Not Made the Requisite Finding Necessary to Support its Proposal to Require Separation of Bundled Sales Function for Retail Native Load

In the NOPR, "energy affiliate" includes an affiliate of a transmission provider that, among other things, buys, sells, trades or administers natural gas or electric energy. The NOPR defines "marketing, sales or brokering" to include an electric transmission provider's sales unit, including those employees that engage in wholesale merchant sales or bundled retail sales.² FERC staff justifies inclusion of the bundled retail sales employees as being consistent with

the Supreme Court's recent ruling affirming Order No. 888 in *New York et al. v. FERC et al.*, 122 S.Ct. 1012 (2002). The *New York v. FERC* case was decided after the Commission issued its NOPR. In that case, the Supreme Court held that there is no statutory language limiting the Commission's transmission jurisdiction to the wholesale market but it was a proper exercise of the Commission's discretion not to assert jurisdiction over bundled retail sales. Using the Supreme Court case as a springboard, FERC staff now asserts that requiring the transmission provider to treat its bundled retail sales business as an energy affiliate is a critical step to achieving competition and full comparability. ³

What FERC staff fail to recognize, however, is that the Supreme Court also explained that the reason it was acceptable that FERC did not exercise its authority over bundled retail sales when promulgating Order No. 888 is:

Because FERC determined that the remedy it ordered constituted sufficient response to the problems FERC had identified in the wholesale market, FERC had no §206 obligation to regulate bundled retail transmission or to order universal unbundling... Were FERC to investigate this alleged discrimination and make findings concerning undue discrimination in the retail electricity market, §206 of the FPA would require FERC to provide a remedy for that discrimination... However, because the scope of the order presently under review did not concern discrimination in the retail market, Enron is wrong to argue that §206 requires FERC to provide a full array of retail market remedies. ⁴

Nowhere in its NOPR or Staff Paper does FERC reference a finding of undue discrimination in the retail electricity market. Indeed, FERC Staff readily admits that the Circuit Court's ruling in the recent *Dominion Resources, Inc.* case

² Staff Paper at 11.

³ *Id.* at 14.

⁴ *New York, et al. v. FERC, et al.*, 122 S.Ct. 1012, 1028 (U.S. Sup. Ct. 2002) (footnotes omitted).

prompts further analysis with respect to the proposed Standards of Conduct.⁵ In the *Dominion Resources, Inc.* case, the Court vacated FERC's broad application of Standards of Conduct to the corporate family of a newly merged electric and gas company because FERC did not provide an adequate basis for such application.⁶ SRP submits that FERC has failed to make the requisite finding in this case and has no legal basis to apply it over broad separation requirements to bundled sales for retail native load.

SRP also has concerns with several aspects of FERC's proposal as it relates to the transmission portion of bundled retail sales. First, the Commission should complete a cost/benefit study before it proceeds to expand the Standards of Conduct to merchant employees or affiliates involved in bundled retail sales. Such a study should precede application of the rule, and not come as an after-the-fact study, as the Commission has done with respect to RTOs. SRP is concerned that the harm which will result far outweighs any benefits that the Commission may determine exist.

Second, SRP believes that where a utility is governed by a state code of conduct and auditing rules, the utility should receive a waiver of the Standards of Conduct or an exemption from the applicability of the Standards of Conduct rule to retail sales. Indeed, at the Technical Conference, Chairman Wood noted that where a state has rules governing affiliate conduct, a waiver may be appropriate. SRP is subject to and complies with code of conduct requirements under Arizona law.⁷ As required by Arizona statute, SRP's publicly elected regulatory authority,

⁵Staff Paper, at 1. FERC Staff stated: "Further analysis will be necessary to evaluate the implications of the D.C. Circuit Court's recent decision in *Dominion Resources Inc. v. FERC*."

⁶ *Dominion Resources, Inc. v. FERC*, 286 F.3d 586 (D.C. Circuit 2002).

⁷Arizona Revised Statutes, § 30-803(F) and (G).

its Board of Directors, has, after public notice and public meetings, developed a detailed code of conduct to ensure there is no undue discrimination or preference that would thwart retail competition. Compliance with the code of conduct is subject to an annual independent audit. SRP is concerned that the proposal to apply Standards of Conduct to merchant employees involved in retail sales is duplicative and may conflict with the state code of conduct to which it is already subject and with which SRP is in compliance.

Third, SRP is concerned that the NOPR could be interpreted to require that the retail sales groups and transmission groups will have to do their resource planning separately, and there could be disparities in the plans. Lack of communication and any disparities in the plans developed by retail sales groups and transmission groups will jeopardize reliability, increase costs, and cause problems for purposes of going to state commissions or local bodies for approval of the resource plans. To ensure that the planning function is not detrimentally impacted, SRP offers the following suggestions:

- More narrowly define a transmission function employee to exclude employees who are responsible for long-term transmission planning activities so that long-term planning can be carried out on a coordinated basis.
- Add the suggested underlined language to the definition of Energy Affiliate to carve out sales function employees who are involved in long-term resource planning:

(d)(i) Energy Affiliate means an affiliate of a transmission provider that (1) engages in or is involved in transmission transactions in U.S. energy or transmission markets; or (2) manages or controls transmission capacity of a transmission provider in U.S. energy or transmission markets; or (3) buys, sells, trades or administers natural gas or electric energy in U.S. energy or transmission markets; or (4) engages in financial transactions relating to the sale or transmission of natural gas or electric energy in U.S. energy or transmission markets.

(ii) The definition of energy affiliate excludes (1) other affiliated regulated transmission providers; (2) employees of the transmission provider engaged in long-term resource planning; and (2) (3) holding or service companies that do not engage in or are involved in transmission transactions in U.S. energy markets.

Finally, while SRP believes that FERC should abandon our right to its proposal to apply the Standards of Conduct separation of function requirements to employees involved in bundled sales to retail load, if FERC decides to continue with its proposal, the proposal must include an appropriate transition for implementation. Without a transition period, reliability will be threatened and there could be unintentional hoarding of capacity. For instance, SRP is concerned that, without a proper transition for the retail sales function to operate through an OASIS, FERC's rule will jeopardize the ability of a utility's retail sales function to operate on a day-to-day, minute-to-minute basis to serve load reliably. In addition, SRP appreciates that FERC will grant a waiver for utilities who join an RTO. However, SRP submits that even though it is working in good faith toward RTO development, it is unlikely that an RTO will be fully operational by the time FERC issues its final Standards of Conduct rule.

B. Shared Personnel and the Information Disclosure Prohibitions

SRP is concerned that FERC's proposal regarding shared personnel and information disclosure prohibitions is confusing and may cause transmission providers to duplicate departments where there is no rational need to do so. In its Staff Paper, FERC staff notes that:

[T]he Commission has recognized that different transmission providers are faced with different practical circumstances in reviewing the appropriate degree of separation between the transmission function and the marketing affiliate or wholesale merchant function... The Commission's approach has been to

balance its regulatory goals with the practicalities of operating a transmission system, large or small.⁸

FERC staff recommends that the Commission continue to permit the sharing of non-transmission functions such as legal, accounting, human resources, travel and information technology between the transmission business and its energy affiliates under the proposed regulations.⁹

In its NOPR, FERC proposes to prohibit the transmission provider from disclosing transmission information to their marketing and sales employees and energy affiliates through non-public communications. FERC staff states that under the current standards of conduct:

[T]he Commission has permitted the transmission function to share with its marketing affiliate or wholesale merchant function *non-operating* officers or directors, and personnel performing various *non-operating* functions.¹⁰

With respect to large gas and electric transmission providers, FERC staff notes that:

The Commission has permitted the sharing of various *non-transmission* functions such as legal, accounting, human resources, travel and information technology. By permitting such sharing of non-operating employees, the Commission has allowed the transmission provider to realize the benefits of cost saving through integration where shared employees do not have duties or responsibilities relating to transmission and could not give a marketing affiliate an undue preference.¹¹

Thus, in theory, it appears that FERC staff is promoting the continuation of allowing shared personnel. Indeed, FERC staff proposes the following language in 385.5(b) regarding information prohibitions:

⁸Staff Paper at 16.

⁹ *Id.* at 17.

¹⁰ *Id.* at 16 (*emphasis added*).

¹¹ *Id.* at 16 -17 (*emphasis added*).

(3) An employee of a transmission provider and a transmission provider cannot use any affiliate or employee of an affiliate as a conduit for sharing information with an energy affiliate that is prohibited by sections 358.5(b)(1) and (2).¹²

This language implies that the “no conduit rule” would remain in place for electric transmission providers. The no conduit rule prohibits a shared employee from becoming a conduit for the transfer of information between the transmission side and any of its energy affiliates. However, in its Staff Paper, FERC also promotes the “automatic imputation rule” as being the clearer standard and easier to implement.¹³ As its name suggests, the “automatic imputation rule” assumes that transmission related information received by an employee that performs non-operating functions for both the transmission provider and its energy affiliates will be automatically imputed to an energy affiliate.

SRP strongly opposes the automatic imputation rule because it is overly broad, unduly expensive, and it will have the impractical effect of stifling the continuation of shared services departments. Indeed, when FERC similarly sought to apply standards of conduct to the entire corporate family of a merged electric and gas company to prevent employees from becoming a conduit of commercially sensitive information, the D.C. Circuit stated that FERC is unnecessarily using a “tank to block a mouse hole[,]”¹⁴ and remanded the decision back to FERC for further findings and explanation.

The records simply do not support that there have been abuses of the no conduit rule or the Standards of Conduct on the electric side. Without such support, the Commission has not provided the basis upon which it should

¹² *Id.* at 22 (*emphasis added*).

¹³ *Id.* at 21.

¹⁴ *Dominion Resources, Inc. v. FERC*, 286 F.3d at 593.

abandon the no-conduit rule and move to an automatic imputation rule across the board. It is troublesome to SRP that FERC is reacting to the unspecified violations of a few in proposing to apply a stricter standard to all, including those who consistently comply with the rules.

At the May 21 Technical Conference, it appeared that FERC was receptive to the idea that if the “automatic imputation rule” should be applied at all, it should apply only to operational employees, and the “no -conduit rule” should remain applicable to non -operational employees. This seems to be a fair distinction, however, SRP submits that currently its operational employees already operate separately from its non -operational employees and, thus, no further separation is necessary (*i.e.*, in complying with the current Standards of Conduct and state code of conduct, its operational employees already adhere to a prohibition rule akin to the automatic imputation rule.)

SRP suggests that the Commission continue to apply the no -conduit rule to shared services departments. To ensure compliance with this rule, SRP believes the Commission could implement reporting measures such as an annual written confirmation from companies that they continue to comply with the Standards of Conduct and that they continue to train new employees on the Standards of Conduct.

C. FERC Must Permit the Flow of Information Necessary to Meet Regional and National Reliability Standards

FERC recognizes that there may be types of information to which it is crucial for affiliates to have access. FERC staff notes: “One option for resolving this concern would be to promulgate rules governing the specific types of

information that a transmission provider could share with its energy affiliates.” 15

If FERC decides to implement such a rule, the rule must permit transmission employees to continue to share information with all transmission customers, including merchant affiliates, that is necessary to ensure system reliability. Such information can be found in the NERC Operating Policies and Planning Standards.¹⁶ These standards require transmission owners to communicate with transmission customers on a real-time basis in response to certain system events. The NERC Operating Policies and Planning Standards recognize that the OASIS is not always the quickest and most efficient way to disseminate information necessary to ensure the reliability of the system. In order to ensure that we “keep the lights on,” transmission providers must be permitted to share information required by the NERC Operating Policies and Planning Standards.

Additionally, SRP agrees with FERC’s findings over time, through decisions on Order No. 889 Standards of Conduct filings, that certain types of information should not be available to merchant function employees off of the OASIS or in a manner that is not equally available to other transmission customers, including: 17

- ✓ transmission and market-related data pertaining to third party transmission customers, including any information about the transmission and ancillary service transactions of third party customers;
- ✓ prices for transmission and ancillary services;
- ✓ available transfer capability;

¹⁵ Staff Paper at 21.

¹⁶ The NERC Operating Policies and Planning Standards can be found at <http://www.nerc.com/~filez/pss-psg.html>.

¹⁷ SRP suggests that there are open processes used for planning transmission and generation at which this information may be disclosed. For instance, in Arizona, transmission providers, generators, and other interested market participants work collaboratively to plan and develop transmission expansion plans through a process known as the CATs (Central Arizona Transmission System) study process which provides an open forum for transmission providers and generators to come together to plan for the systems’ needs.

- ✓ specific load of other third party transmission customers within SRP's control area;
- ✓ specific tied data for interchanges of any interchanges scheduling information that would allow a wholesale merchant function to determine directly or indirectly the interchange schedules of the third party customers;
- ✓ transmission system alarms;
- ✓ flows on transmission lines;
- ✓ transmission system voltage;
- ✓ transmission constraints; and
- ✓ records of scheduled and unplanned transmission system outages.

SRP suggests that the Commission adopt a rule that precludes the transfer of this commercially sensitive information off of the OASIS or in a manner not otherwise available to third party transmission customers, while allowing transfer of other information that does not impede the Commission's pro-competitive policy goals.

V. CONCLUSION

SRP requests the Commission to address the issues described in these comments to ensure that appropriate Standards of Conduct are implemented.

Respectfully submitted,

/s/Deborah A. Swanstrom

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June14,2002

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document, in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure, 18 C.F.R. 385.2010(2001), upon each person designated on the service list in this proceeding as compiled by the Secretary of the Federal Energy Regulatory Commission.

Dated at Washington, DC, this 14th day of June, 2002.

/s/
Jennifer H. Tribulski