

# FERC Proposes Changes to Standards of Conduct Applicable to Electric Transmission Providers

January 25, 2007

On January 18<sup>th</sup>, the Federal Energy Regulatory Commission (FERC) issued a Notice of Proposed Rulemaking (NOPR) proposing, *inter alia*, changes to its Standards of Conduct to address impediments to integrated resource planning (IRP) and competitive procurements by electric utilities. The NOPR also solicits public comment on whether the Standards of Conduct applicable to electric utilities should continue to cover all energy affiliates, or should be narrowed to cover only marketing affiliates. **Initial comments on the proposed regulations are due 45 days after the NOPR is published in the *Federal Register*, and reply comments are due 20 days thereafter.**

## Impact of Standards of Conduct on IRP and Competitive Procurement

In an April 2006 technical conference on Standards of Conduct issues, commenters raised concerns that the Standards of Conduct, as expanded by Order No. 2004, were impeding utility integrated resource planning and competitive procurement. The existing Standards of Conduct rule for FERC-jurisdictional electric utilities applies the Standards of Conduct to all “Energy Affiliates,” a broadly-defined term that includes any affiliate or unit that “[e]ngages in or is involved in transmission transactions” or “[b]uys, sells, trades or administers...electric energy.” Transmission Providers and Energy Affiliates must operate independently and Energy Affiliates may not have access to non-public transmission information. As a result, if utility employees engaged in IRP or procurement activities are deemed to be engaging in “energy affiliate functions” (e.g., buying electric energy), they are precluded from access to relevant transmission function expertise and non-public information in evaluating optimal resource packages.

## FERC Proposal

**Planning Employees.** To address the obstacles to IRP, the NOPR proposes to allow utilities to designate Planning Employees, who would be allowed to engage in IRP activities, have unrestricted access to non-public transmission information (but not non-public customer information) and interact with transmission employees. An employee would qualify as a Planning Employee as long as:

- The employee engages in “integrated resource planning” designed to satisfy “future bundled retail load obligations”;
- The integrated resource planning process is a result of a state mandate;
- The employee does not otherwise engage in sales or purchases of energy, capacity, ancillary services, or transmission services; and
- The employee does not share non-public transmission information obtained from the transmission function with employees of an Energy Affiliate.

**Competitive Solicitation Employees.** To address obstacles to competitive procurement, the NOPR proposes to allow utilities to designate Competitive Solicitation Employees, who would be allowed to engage in procurement activities, have unrestricted access to non-public transmission information (but not non-public customer information) and interact with transmission employees. An employee would qualify as a Competitive Solicitation Employee as long as:

- The competitive solicitation is used to satisfy a public utility’s “bundled retail load obligations pursuant to an Integrated Resource Planning obligation”;

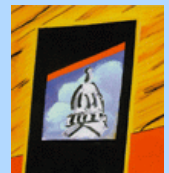
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- The employee does not engage in any sales of energy, capacity, ancillary services, or transmission services;
- The employee does not engage in the purchase of energy, capacity, ancillary services, or transmission services other than the competitive solicitation to serve bundled retail load under an Integrated Resource Planning obligation;
- The employee does not share non-public competitive solicitation information with any Energy Affiliate employee; and
- The employee does not share non-public transmission information obtained from the transmission function with employees of an Energy Affiliate.

### **Comments Requested on Scope of Standards of Conduct**

The NOPR also seeks comment on whether the Standards of Conduct should be narrowed for electric transmission providers to cover only their relationships with Marketing Affiliates. In a November 2006 decision, the U.S. Court of Appeals for the D.C. Circuit vacated and remanded the Standards of Conduct adopted in Order No. 2004 as they applied to natural gas pipelines, finding that FERC had not provided a sufficient factual record or theoretical justification with respect to abuse of relationships between Transmission Providers and Energy Affiliates. (See VNF Issue Alert on [National Fuel decision](#).) The court did not address the parallel issues for electric utilities because petitioners did not challenge these aspects of Order No. 2004. In response to the court's decision, on January 9<sup>th</sup> the Commission issued an interim rule (Order No. 690) providing that for interstate natural gas pipelines, the Standards of Conduct apply only to relationships between pipelines and their Marketing Affiliates and not to relationships with Energy Affiliates. The January 18<sup>th</sup> NOPR proposes to codify this approach for gas pipelines, and seeks comment on whether the same approach should be applied to electric utilities (See VNF Issue Alert on [Proposed Revisions to Standards of Conduct](#)).

### **For More Information**

Van Ness Feldman has actively represented clients before FERC on Standards of Conduct policy, and counsels clients on the full range of Standards of Conduct compliance matters. For additional information on the proposed rule, or for assistance in participating in the rulemaking proceeding or with other Standards of Conduct matters, please contact Gary Bachman, Doug Smith, or any other member of our Electricity Practice at (202) 298-1800.

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