

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

Standards of Conduct for
Transmission Providers

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Docket No. RM07-1-002

**MOTION FOR LEAVE TO ANSWER AND ANSWER OF
THE ELECTRIC POWER SUPPLY ASSOCIATION**

Pursuant to Rules 212 and 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or the “Commission”), 18 C.F.R. §§ 385.212 & 385.213 (2009), the Electric Power Supply Association (“EPSA”)¹ hereby requests leave, to the extent leave is required, to answer and answers the November 16, 2009 request for clarification or, in the alternative, rehearing² of Order No. 717-A³ filed by the “Western Utilities” in the above captioned proceeding.⁴ The Western Utilities ask the Commission to clarify that

¹ EPSA is the national trade association representing competitive power suppliers, including generators and marketers. These suppliers, who account for 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities serving global power markets. EPSA seeks to bring the benefits of competition to all power customers. The comments contained in this filing represent the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue.

² The Commission’s Rules of Practice and Procedure permit answers to motions for clarification. See 18 C.F.R. § 385.213(a)(3) (2009) (providing that “an answer may be made to any pleading, if not prohibited under paragraph (a)(2) of this section”). See also *ISO New England Inc.*, 120 FERC ¶ 61,122 at P 46 (2007) (“[U]nlike answers to requests for rehearing, answers to requests for clarification are not prohibited under the Commission’s Rules.”). To the extent this answer is deemed to be a response to the alternative request for rehearing, leave to answer should be granted consistent with Commission precedent allowing answers where, as here, such answers provide further explanation or otherwise help ensure a full and complete record and Commission understanding of the record. See, e.g., *PJM Interconnection, L.L.C.*, 104 FERC ¶ 61,154 at P 14 (2003); *Williams Energy Mktg. & Trading Co. v. Southern Co. Servs., Inc.*, 104 FERC ¶ 61,141 at P 10 (2003); *Ameren Servs. Co.*, 100 FERC ¶ 61,135 at P 15 (2002).

³ Order No. 717-A: Standards of Conduct for Transmission Providers, 129 FERC ¶ 61,043 (October 15, 2009).

⁴ Request for Clarification or, in the Alternative, Request for Rehearing of the Western Utilities, Docket No. RM07-1-002 (filed Nov. 16, 2009) (the “November 16 Filing”).

transmission system impact studies will not be considered transmission activities for the purposes of the Standards of Conduct.⁵ But the Commission already addressed this precise question in Order No. 717-A, and held, correctly, that transmission system impact studies are transmission activities. The November 16 Filing does not seek clarification, but rather requests rehearing on an issue that was correctly decided in Order No. 717-A.

I. ANSWER

The Western Utilities have asked for the following “clarification” of Order No. 717-A:

The Commission should clarify that studies related to determining the upgrades to the transmission system necessary to provide service, including system impact studies, do not affect day-to-day transmission operations and should not be included within the definition of Transmission Functions. Furthermore, on this basis, the Commission should clarify that employees involved in conducting system impact studies are not Transmission Function Employees.⁶

But this would require the Commission to clarify that it meant precisely the opposite of what it said in Order No. 717-A. In Order No. 717-A, the Commission “clarifie[d] that ‘transmission function employee’ includes an employee responsible for performing system impact studies or determining whether the transmission system can support the requested services as this type of employee

⁵ Western Utilities Filing, p. 1-2.

⁶ Ibid.

is planning, directing, organizing or carrying out the day-to-day transmission operations.”⁷

At least as it relates to the function of employees who perform system impact studies, the November 16 Filing is not a request for clarification of Order No. 717-A, but is, in fact, an untimely request for rehearing of Order No. 717. When the Commission said that employees who prepare system impact studies are transmission function employees, it was merely “**clarif[ying]**”⁸ – not granting rehearing of – its holdings in Order No. 717. To the extent the Western Utilities wished to challenge those holdings, they were required to file a request for rehearing within 30 days.⁹ The Commission’s clarification of those holdings in Order No. 717-A does not re-start the 30-day clock or otherwise alter the fact that, as the Commission and the courts have made clear, “untimely rehearings are statutorily barred.”¹⁰

Even if the Commission were willing to look past the glaring procedural deficiencies in the November 16 Filing, there would be no basis for granting the Western Utilities’ request, because the Commission properly recognized in Order No. 717-A that system impact studies do affect day-to-day operations.

⁷ Order No. 717-A at P. 27.

⁸ *Id.* (emphasis added).

⁹ See 18 C.F.R. § 385.713(b) (2009).

¹⁰ *Mirant Americas Energy Mktg., L.P. v. ISO New England Inc.*, 99 FERC ¶ 61,003 (2002), P. 14. See also, e.g., *City of Campbell v. FERC*, 770 F.2d 1180, 1183 (D.C. Cir. 1985) (noting that “[t]he 30-day time requirement of the [FPA] is as much a part of the jurisdictional threshold as the mandate to file for a rehearing”); *Boston Gas Co. v. FERC*, 575 F.2d 975, 977-98, 979 (1st Cir. 1978) (describing identical rehearing provision of Natural Gas Act as “a tightly structured and formal provision. Neither the Commission or the courts are given any form of jurisdictional discretion.”); *Pacific Gas & Elec. Co., et al.*, 116 FERC ¶ 61,207 (2006) (explaining “the courts have repeatedly recognized that the time period within which a party may file an application for rehearing of a Commission order is statutorily established at 30 days by section 313(a) of the FPA and that the Commission has no discretion to extend that deadline.”).

Employees who conduct system impact studies should therefore be considered Transmission Function Employees. In Order No. 717, the Commission's definition of Transmission Functions was focused on short-term real time operations¹¹ as being the most susceptible to affiliate abuse. The Western Utilities assert in the November 16 Filing that system impact studies have nothing to do with day-to-day operations of the transmission system (i.e., granting or denying transmission requests). This assertion is unconvincing.

Transmission system impact studies do have an impact on day-to-day transmission operations as they are used to assess whether any additional costs may be incurred in order to provide the requested transmission service. These studies are integral to a transmission provider's administration of its tariff. Transmission service applications are provided on a confidential basis to assess whether any additional costs may be incurred in order to provide the requested transmission service and provide a preliminary indication of the cost and length of time that would be necessary to correct any problems identified in those analyses and implement the interconnection. The Interconnection System Impact Study may provide a list of facilities on the grid that are required as a result of the Interconnection Request, a non-binding good faith estimate of cost and cost responsibility, a non-binding good faith estimated time to construct, and an estimate of any other financial impacts (i.e., on Local Furnishing Bonds). Additionally, studies evaluate the impact of the proposed interconnection on the safety and reliability of the grid and, if applicable, an affected system. The study

¹¹ *Order No. 717: Standards of Conduct for Transmission Providers*, 125 FERC ¶ 61,064 (October 16, 2009), P. 40.

may identify and detail the system impacts that would result if the Generating Facility were interconnected without project modifications or system modifications, focusing on the Adverse System Impacts identified in the Interconnection Feasibility Study. As such, these studies provide significant insight into the non-public development plans of market participants and opportunities for additional investments. Indeed, it is well recognized that interconnection studies are a core function of transmission providers.¹²

The Western Utilities argue that system impact studies should be viewed as “long-range planning,” and thus excluded from the definition of Transmission Functions, because where such studies are required, they trigger the process for determining the modifications needed to provide the service at some future date. But the Commission properly rejected this theory when it granted the request of the Transmission Access Policy Study Group (“TAPS”) for clarification on this point. TAPS argued:

Under the *pro forma* OATT, the transmission provider’s role in processing transmission service applications expressly includes conducting System Impact Studies and Facility Studies. Employees charged with performing these studies, or otherwise determining whether the transmission system can support requested services, are clearly performing activities that are integral to a transmission provider’s administration of its tariff and that are central to the “planning, directing, organizing or carrying out of day-to-day transmission operations, including the granting and denying of transmission service requests.”¹³

¹² See Duke Power’s proposal for an Independent Entity to perform generation interconnection studies along with other core transmission functions, 113 FERC ¶ 61,288.

¹³ TAPS Request for Rehearing of Order No. 717, Docket No. RM07-1-001 (November 17, 2008), p. 43-44.

The Commission found TAPS' argument compelling and clarified in order No. 717-A that employees who conduct transmission studies do have an impact on day-to-day operations and should be considered Transmission Function Employees. The Western Utilities have offered no reason for revisiting the Commission's reasoned conclusion in this regard. Moreover, when adopting standardized procedures for generation interconnection, the Commission made clear that generation interconnections are transmission service and interconnection studies are central to this service.¹⁴ In Tennessee Power Company (Tennessee), the Commission held that interconnection service is "an element of transmission service"¹⁵ and that:

. . . [G]enerator interconnection is a critical aspect of open access transmission service. In order to fully realize the benefits of open access transmission service, interconnection procedures must be established that will encourage needed investment in infrastructure, remove incentives for transmission providers to favor their own generation, ease entry for competitors, and encourage efficient siting decisions. In the Commission's view, standard interconnection procedures are essential for providing the right incentives for both transmission providers and generators.¹⁶

When generators pay for system impact studies there is an expectation of confidentiality. Clearly, the third party investments the Commission intended to foster in Tennessee Power Company would be discouraged if transmission service applicants are aware that the studies, and projects for which the studies

¹⁴ 97 FERC ¶ 61,099 (2001); 104 FERC ¶ 61,103 (2003).

¹⁵ 90 FERC ¶ 61,238 (2000) at ¶ 61,761, order on reh'g, 91 FERC ¶ 61,271 (2000).

¹⁶ *Standardizing Generator Interconnection Agreements and Procedures Advance Notice of Proposed Rulemaking*, 97 FERC ¶ 61,099 (October 25, 2001), p. 5.

are being conducted, could become known by transmission provider marketing function employees. To classify this information as long-term, and therefore render it permissible for the utility transmission function employees that conduct these studies to share them with their marketing function employees, is arguably discrimination in its worst form. To do so would provide a substantial competitive advantage to marketing function employees affiliated with transmission function employees. In addition to breaching the confidentiality of individual applicants, this level of access would provide utility marketing function employees – competitors of the generator seeking transmission service – with exclusive access to non-public information regarding the constraints identified as well as the costs and interconnection plans associated with all previously studied interconnection requests. It would also provide these marketing function employees with access to non-public information regarding available capacity and constraints throughout the system, which would provide a tremendous competitive advantage for marketing function employees in making generation siting and procurement decisions.

II. CONCLUSION

WHEREFORE, for the foregoing reasons, EPSA respectfully requests that the Commission (1) grant leave for EPSA to answer the Western Utilities' request for rehearing; (2) deny the Western Utilities' request, as the Commission has already sufficiently ruled on transmission system impact studies and the employees who conduct them.

Respectfully Submitted,



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December 1, 2009

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the Answer via email upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C. December 1, 2009.

A handwritten signature in cursive script that reads "Nancy Bagot".

Nancy Bagot, VP of Regulatory Affairs