



**Federal Energy Regulatory Commission**  
**January 18, 2007**  
**Open Commission Meeting**  
**Statement of**  
**Commissioner Suede G. Kelly**

**Item M-2: Standards of Conduct for Transmission Providers (RM07-1-000)**

- The Standards of Conduct were implemented for important reasons: to prevent transmission providers from wielding their market power over transmission to give undue preference or unduly discriminatory treatment in favor of their marketing affiliates over non-marketing affiliates. As we noted in the Order 888 NOPR, there is an inherent conflict of interest when the same corporate family owns both generation and transmission, thus giving it both the incentive and opportunity to use its position to discriminate against non-affiliated generation.
- Because of the important issues at stake, the Commission has not taken lightly its responsibilities to implement and enforce the Standards of Conduct. Indeed, over the past two years, the Commission has held two public technical conferences and numerous outreach meetings with industry participants, in an effort to understand industry concerns in complying with Standards of conduct, and what, if any, fixes can be made to make implementation more efficient.
- As we were reviewing the results of our outreach, and, in an instance of uncanny timing, the Court of Appeals issued a decision in National Fuel, in which the court ruled on SOC matters which, quite frankly, had not been the focus of our outreach. However, the silver lining is that the National Fuel decision provides a forum for us to consider, not just the issues limited to that case, but an array of important SOC issues that affect both the natural gas and electric industries, including those issues vetted through our outreach.
- As I believe today's NOPR makes clear, any changes to the existing Standards of Conduct should be made if, and only if, the Commission is clearly convinced that such changes are needed, and that such changes do not result in unfair access to non-public transmission information on a preferential basis. Likewise, commenters must clearly and convincingly provide support for their comments. For example, it would not be enough for a utility to argue that the costs of compliance with Standards of Conduct are, in its view, too high, or that it is too burdensome to have different standards for the gas and electric industries, or that it would simply be more efficient to have one standard set of rules.
- Rather--and I cannot emphasize this point enough--the critical issue of concern for the Commission should be to ensure that access to non-public information will not result in obstacles to market access to the lowest cost power. Needless to say, confidence will be undermined if some competitors have access to information that others do not, and that such information is used at the expense of a competitive bidding process.
- In that vein, I would like to highlight one issue set forth in today's NOPR that is particularly important to me. We propose to add a new category of competitive solicitation employees who would be permitted to direct, organize and execute certain "competitive solicitations." Under this proposal, such employees could obtain non-public information from the Transmission

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Provider, to the extent needed to evaluate bids or proposals responsive to a competitive solicitation.

- I believe this proposal is appropriately balanced, and invites commenters to consider not only its benefits, but some of the specific potential downsides. I personally have heard from states over the years that this type of employee could use information from a transmission provider to design an RFP that favors an affiliate. I think these are legitimate concerns, and that the NOPR reflects these concerns.
- Accordingly, I look forward to hearing from commenters on the how the designing of contracts by competitive solicitation employees really works, and whether information from Transmission Providers to these employees could be used in a discriminatory manner. If valid concerns are identified, it would be interesting to hear from industry whether our \$1 million a day civil penalty authority will induce competitive solicitation employees to be even more careful and cautious in how they use non-public information provided by the Transmission Provider. I would also be interested in knowing whether it makes sense to encourage, if not require, such information to be made public at an appropriate point.
- I encourage commenters to provide insight into all the issues posed today. I believe that today's NOPR takes an appropriate "go-slow" approach that asks the right questions, and seeks the right answers. We genuinely seek an open and honest process that will result in Standards of Conduct that are more effective and efficient. I look forward to hearing from all interested parties. With that, I am pleased to vote out this NOPR.