



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

**Standards of Conduct for  
Transmission Providers**

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**Docket Nos. RM01-10-000  
RM01-10-001**

**MOTION FOR CLARIFICATION OR, IN THE ALTERNATIVE,  
REQUEST FOR REHEARING OF THE LARGE PUBLIC POWER COUNCIL**

Pursuant to Rules 212 and 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission" or "FERC"), 18 C.F.R. § 385.212 and 385.713 (2003) the Large Public Power Council ("LPPC") hereby submits this *Motion for Clarification or, In The Alternative, Request for Rehearing* regarding Order No. 2004-A.<sup>1</sup> LPPC seeks clarification, or in the alternative, rehearing regarding four topics addressed in Order No. 2004-A: (1) the role of senior officers and directors; (2) the role of shared legal counsel; (3) Energy Affiliates and scoping meetings; and (4) shared risk management personnel.

**I. Background**

On April 16, 2004, the Commission issued Order No. 2004-A, its order on rehearing regarding the Standards of Conduct for Transmission Providers. On April 19, 2004, FERC issued a Notice of Technical Conference announcing a technical conference to be held on May 10, 2004 in the above-captioned docket. The purpose of the conference was to discuss compliance, training and best practices for implementing the Standards of Conduct for Transmission Providers. The Notice of Technical Conference invited interested parties to submit questions to FERC Staff

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<sup>1</sup> *Standards of Conduct for Transmission Providers*, Order No. 2004-A, 107 FERC ¶ 61,032 (2004) ("Order No. 2004-A").

to be addressed at the technical conference. In response to the Notice of Technical Conference, LPPC submitted a series of questions to FERC Staff to be addressed at the May 10, 2004 technical conference in the above-captioned docket, and FERC Staff replied to the questions at the technical conference. LPPC requests that the Commission grant clarification confirming Staff's responses to LPPC's questions, or in the alternative, grant rehearing.

## **II. Motion for Clarification**

LPPC requests that the Commission clarify Order No. 2004-A by confirming the responses of FERC Staff to several questions submitted by LPPC at the May 10, 2004 technical conference in the above-captioned docket. LPPC's questions centered around four primary topics: (1) the role of senior officers and directors; (2) the role of shared legal counsel; (3) Energy Affiliates and scoping meetings; and (4) shared risk management personnel.

### **A. Senior Officers and Directors**

Order No. 2004-A provides that a Transmission Provider may share privileged transmission information with its senior officers and directors, provided that they do not (1) participate in directing, organizing or executing transmission system operations or marketing functions; or (2) act as a conduit to share such information with a Marketing or Energy Affiliate.<sup>2</sup>

LPPC is concerned that it would be difficult for senior officers and directors to discharge their fiduciary and corporate responsibilities to engage in informed decision-making if they are prohibited from participation in identification and

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<sup>2</sup> Order No. 2004-A at P 139.

development of strategies, options and solutions for transmission system operations and/or marketing and sales functions. Commissioner Kelliher raised concerns in his partial dissent to Order No. 2004-A that the rule, through, *inter alia*, the provision regarding senior officers and directors, would “destroy[] . . . [corporate] efficiencies’ without justification,” which the U.S. Court of Appeals for the District of Columbia Circuit found to be problematic in *Dominion Resources, Inc. v. Federal Energy Regulatory Commission*, 286 F.3d 586, 593 (D.C. Cir. 2002).

LPPC asked Staff how the Commission envisions utilities preserving the corporate efficiencies of informed decision-making by senior officers and directors while complying with the independent functioning requirement of the Standards of Conduct. LPPC is concerned because senior officers and directors are accountable for the performance of the utility, and therefore must have a certain level of authority regarding large transactions. As LPPC understood Staff’s reply, Staff indicated that the independent functioning requirement of the Standards of Conduct would not be violated if senior officers and directors upon occasion are involved in reviewing and executing transmission function or energy affiliate function transactions because, for example, such transactions exceed the delegated authority for middle management to approve such transactions. LPPC requests that the Commission confirm LPPC’s understanding of Staff’s response and clarify that senior officers and directors may be informed of and knowledgeable about key transactions and matters throughout the corporation. Such officers and directors are prohibited under the Standards of Conduct from acting as conduits of information about transmission functions to the marketing and sales function of the utility.

B. Legal Counsel

Order No. 2004-A provides at paragraph 157 that if lawyers participate in transmission policy decisions on behalf of a Transmission Provider, the Commission considers that activity as a Transmission Function and the lawyer is a Transmission Function Employee. Paragraph 157 offers the example that a lawyer who participates in a decision on whether the Transmission Provider should seek a contract with a customer is acting as a Transmission Function Employee, however, a lawyer that is asked to implement the Transmission Provider's business decision and negotiate a contract with that customer would not be a Transmission Function Employee.

At the May 10 technical conference, LPPC requested further examples of when legal counsel is considered to be "participating in" transmission policy decisions under Order No. 2004-A. LPPC asked in particular for Staff to elaborate upon whether or not shared legal counsel may offer legal opinions regarding whether or not a policy proposed to be adopted by the Transmission Function is in compliance with applicable statutes, rules and regulations.

LPPC understood Staff's response to indicate that shared attorneys and regulatory affairs staff may offer legal and regulatory advice about rules, regulations and compliance as long as such counsel do not engage in day-to-day specific decision-making about transmission functions. LPPC requests that the Commission clarify Order No. 2004-A by confirming that shared legal counsel and regulatory affairs personnel may offer legal and regulatory advice regarding whether a policy under consideration by the Transmission Function or the Marketing

and Sales Function would be in compliance with applicable statutes, rules and regulations, and if not, how it could be brought into compliance.

C. Energy Affiliates and Scoping Meetings

Paragraph 211 of Order No. 2004-A provides that when a Transmission Provider and its Energy Affiliate participate in scoping meetings, the Transmission Provider must post advance notice of the meeting on its OASIS or Internet website, transcribe the meeting in its entirety and retain the transcript for three years. LPPC is concerned that this requirement may have a chilling effect upon such necessary discussions and asked Staff how such meetings may be held without discouraging discussions that are critical for corporate efficiency and economies. LPPC understood Staff's reply to indicate that, while such meetings must be publicly noticed, the public need not be admitted, and that notice of such meetings need only give a general description of the nature of the meeting and need not refer to specific times of the considered project, financial terms or be geographically specific. LPPC also understood from Staff's reply that such meetings may be recorded or videotaped or that minutes or notes of the meeting may be taken instead of a transcript, and that any such documentation need not be made public, but be retained solely for the purposes of examination by FERC should questions regarding the meeting arise. LPPC requests that FERC clarify Order No. 2004-A by confirming this understanding of the rule.

D. Risk Management

Paragraph 153 of Order No. 2004-A provides that a shared risk management function is not permitted to assess creditworthiness of a particular customer under a pipeline's tariff. LPPC requested clarification from Staff regarding the extent to

which a shared risk management unit could assess creditworthiness of particular customers. LPPC interpreted Staff's answer to mean that shared risk management staff may provide an analysis of the creditworthiness of a particular customer so long as the risk management unit (1) bases the assessment upon financial and other public information and not upon privileged transmission information; and (2) does not participate in the subsequent decision regarding whether or not to enter into a transaction with the customer given its creditworthiness.

LPPC requests that FERC clarify Order No. 2004-A by confirming this interpretation of the rule and clarifying that shared risk management units may assess creditworthiness of third parties under these conditions. LPPC also requests clarification from the Commission regarding the extent to which a shared risk management group may provide the transmission and marketing and sales units with information regarding the financial risk associated with doing specific types of business with particular customers. Based upon LPPC's understanding of Staff's answer and comments at the May 10 technical conference, as long as a risk management group restricts its work to assessing creditworthiness and potential financial risk of doing business with potential customers, regardless of the specific nature of the contemplated business, the risk management group may be a shared service group within the corporation.

### **III. Request For Rehearing**

In the event that the Commission declines to offer any of the clarifications requested above, LPPC seeks rehearing.

A. Senior Officers and Directors

Senior Officers and Directors are accountable to the utility's customers and, in the case of public power, to the citizens of the city, county and/or state to whom the utility answers, for the performance of the utility. Such officers and directors must be able to exercise authority over decisions that have the potential to have a significant impact upon the operations of the utility. For this reason, while much decisional authority is typically delegated to lower-level management for day-to-day decisions, authority to approve transactions in excess of certain dollar amounts or certain megawatt levels is often reserved to senior management.

If senior officers and directors are to be held accountable for the operation of the utility, they must have the authority to disapprove transactions that may have a significant negative impact upon the utility's operations. Corporate efficiency and economies, as well as common business practices, would dictate that senior officers and directors be involved in the consideration of major projects and transactions from the early stages to provide guidance and ensure that only projects and transactions that are appropriate for the corporation are pursued. They must also be informed of and knowledgeable about key transactions and matters throughout the utility and cannot function effectively if they are prohibited from exercising their duties and responsibilities to all departments and business units in the corporation.

Therefore, to the extent that the Commission declines to grant the clarification requested above, LPPC seeks rehearing and requests that the Commission provide that shared senior officers and directors may reserve authority to approve or disapprove transactions above certain dollar or megawatt level that would be likely to have a significant impact upon the utility's operations. Moreover,

LPPC requests that the Commission modify Order No. 2004-A to provide that senior officers and directors may have access to adequate information to enable their informed decisions on major projects and transactions.

B. Legal Counsel

The primary purposes of many utility legal and regulatory affairs departments are to assure that a utility's policies and actions are in compliance with applicable statutes, rules and regulations, and if not, to bring them into compliance, and to assure that contracts entered into by the utility are both legal and afford the utility all necessary legal protections. The Commission clarified at paragraph 157 of Order No. 2004-A that shared lawyers may negotiate contracts with customers, but did not address whether shared lawyers and regulatory affairs personnel may offer legal opinions and regulatory advice regarding proposed policies.

However, Order 2004-A provides at paragraph 157 that a lawyer who "participates in" transmission policy decisions is considered a Transmission Function Employee. Narrowly and strictly interpreted, this language could mean that a shared legal or regulatory affairs department may not provide the Transmission Function of a utility advice regarding whether a policy the Transmission Function proposes to adopt is in compliance with applicable statutes, rules or regulations. Such an interpretation, however, would both effectively prohibit one of the primary functions of a legal or regulatory affairs department and give rise to the need for most utilities to create duplicative departments. Therefore, to the extent that the Commission denies the clarification requested above, LPPC seeks rehearing and requests that the Commission permit shared legal and regulatory affairs departments to provide advice to Transmission Functions regarding whether or not

their proposed policy is in compliance with the applicable statutes, rules and regulations, and if not, how it can be brought into compliance.

C. Energy Affiliates and Scoping Meetings

In Order No. 2004-A, FERC clarifies that discussions between a natural gas Transmission provider and an Energy Affiliate to provide an interconnection or expansion for the Energy Affiliate would fall into the transaction-specific information exception to the prohibition on sharing transmission function information with Energy Affiliates.<sup>3</sup> Order No. 2004-A provides at paragraph 211, however, that when a Transmission Provider and its Energy Affiliate participate in such scoping meetings or planning discussions, the Transmission Provider must post advance notice of the meeting on its OASIS or Internet website, transcribe the meeting in its entirety and retain a copy of the transcript for three years. Such a requirement is onerous on the Transmission Provider, requiring the hiring of a stenographer or court reporter. Such a requirement also has the potential to chill the candor of such meetings. If an Energy Affiliate believes that the transcript of the meeting may become public, it may not divulge some of its plans to the Transmission Provider for fear that if the details are made public, its competitors would gain an advantage. This would inhibit the ability of the Transmission Provider to plan for appropriate expansion of the transmission capacity. Additionally, the Transmission Provider needs the benefit of the business acumen and advice of the Energy Affiliate to assist in planning for cost-effective and strategic projects to serve customers and ensure grid reliability.

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<sup>3</sup> Order No. 2004-A at P 210.

Therefore, to the extent that the Commission declines to grant the clarification requested above, LPPC seeks rehearing and requests that the Commission find that such scoping and planning meetings need not be made open to the public, that notes or minutes of the meeting are sufficient to meet this requirement or in the alternative, that the meeting may be video or tape recorded.

D. Risk Management

Paragraph 153 of 2004-A states that a shared risk management group may not assess the creditworthiness of particular customers. Creditworthiness can be assessed without the use of customer-specific transmission information, and it certainly is possible for risk management units to assess creditworthiness and adequately advise both the Transmission Function and the Energy Affiliate without improperly acting as a conduit for transmission information. Yet, the requirement in Order No. 2004-A would necessitate the creation of duplicative risk management units for each function to perform the same creditworthiness analyses, often on the same customers.

Therefore, to the extent the Commission declines to grant the clarification sought above, LPPC seeks rehearing and asks the Commission to find that as long as the risk management unit does not improperly act as a conduit for transmission information, a shared risk management unit may perform creditworthiness analyses for particular potential and current counterparties.

**IV. Conclusion**

WHEREFORE, for the reasons set forth above, LPPC requests that the Commission grant the clarification requested herein, or in the alternative, grant the rehearing requested herein.

Respectfully submitted,

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Clinton A. Vince  
Regina Y. Speed-Bost  
Emma F. Hand  
Sullivan & Worcester LLP  
1666 K Street NW, Suite 700  
Washington, D.C. 20006  
(202) 775-1200 tel.  
(202) 293-2275 fax

Attorneys for the Large Public  
Power Council

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