



As indicated in comments filed in response to the Commission's superseded NOPR<sup>3</sup> in this docket, LPPC members seeking to comply with the Commission's current regulations have struggled with ambiguity in the rules, and they have been frustrated by the loss of efficiencies inherent in the vertically integrated business model. LPPC is heartened by the Commission's willingness to engage these issues directly. LPPC viewed the superseded NOPR as a positive step in endeavoring to restore certain efficiencies associated with Integrated Resource Planning ("IRP") and Competitive Solicitation. Yet, LPPC also thought the proposal missed the mark in creating a separate category of IRP and competitive procurement employees who would be unable to function as an integral part of the companies on whose behalf they worked.

With the new NOPR, the Commission has been remarkably agile in its reaction to the industry's comments. As explained below, LPPC believes the Commission is absolutely right that reform of the framework established in Order No. 2004 is essential, and that such reform is consistent with the direction given to the Commission by the court in *National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831 (D.C. Cir. 2006) ("*National Fuel*"). Most important, the Commission is correct that the corporate separations approach taken in Order No. 2004 is untenable, and that a return to a functional, employee-specific approach, will substantially improve intra-corporate efficiencies.

Nevertheless, LPPC believes that further work remains to be done. Specifically, LPPC recommends that the proposed rules be revised in the following respects:

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<sup>3</sup> *Standards of Conduct for Transmission Providers*, Notice of Proposed Rulemaking, 72 Fed. Reg. 3958 (January 29, 2007) ("Prior NOPR"), FERC Stats. & Regs. ¶ 31,611 (2007).

- The rules should provide that long-term supply procurement for native load is an aspect of integrated resource planning and not a marketing function.
- The Commission should clarify that shared officers and directors may exercise such decision-making authority as is consistent with their fiduciary responsibility.
- The Commission should remove demand response from the definition of marketing functions.
- The Commission should exempt exchanges of electricity undertaken in order to effectuate transmission from the definition of marketing functions.
- The Commission should clarify what is meant with respect to the establishment of “*per se*” rules governing conduct and with respect to other enforcement activity related to discriminatory conduct.
- The rules should be clarified to permit attorneys to continue to operate in their traditional role, even where such advice impacts strategic decision-making.

## COMMENTS

### 1. **The Commission is Correct that the Corporate Separations Approach Taken in Order No. 2004 Was Untenable**

The Commission was right to conclude that the decision in *National Fuel* broadly questioned whether the breadth of the regulations under Order No. 2004 compromised the public interest in unjustifiably thwarting the benefits of vertical integration in the utility industry. In *National Fuel*, the D.C. Circuit had the benefits of vertical integration clearly in mind in its remand of Order No. 2004. While the court specifically vacated only those rules related to natural gas company non-marketing “Energy Affiliates,”<sup>4</sup> the court reiterated its view, expressed initially in *Tenneco Gas v. FERC*, 969 F.2d 1187, 1197 (D.C. Cir. 1992) (“*Tenneco*”) (upholding Order No. 497), that overly restrictive rules governing Standards of Conduct would eliminate beneficial efficiencies for

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<sup>4</sup> *National Fuel*, 468 F.3d at 834.

consumers achieved through vertical integration. *See National Fuel*, 468 F.3d at 840, quoting *Tenneco*, 969 F.2d at 1205) (“there are efficiencies to be derived from such integration and any separation reduces those benefits to some extent”).<sup>5</sup>

LPPC is gratified to see the Commission expressly endeavor to come to grips with this precedent. Citing the decision in *Tenneco*, the NOPR correctly concludes that:

...vertical integration can produce efficiencies of operation, and advantages given to an affiliate are not improper if they do not amount to exercise of market power. *Tenneco* at 1201. Unnecessarily balkanizing employees one from another and erecting barriers to the free flow of information can thwart perfectly legitimate efficiencies, a consequence which disadvantages not only the companies involved but ultimately consumers as well, in the form of higher rates.<sup>6</sup>

LPPC member Santee Cooper submitted an economic study supporting this conclusion in comments on the prior NOPR that were supported by LPPC.

As made clear by the court in *National Fuel*, where the Commission’s rules establishing Standards of Conduct reduce such efficiencies, those rules must be supported by substantial evidence establishing either a “plausible theoretical threat of anti-competitive information-sharing” or a “vast record of evidence of abuse.”<sup>7</sup> Where neither predicate has been established, reforming the rules is essential.

The proposed repeal of Order No. 2004’s corporate separations approach to the Standards of Conduct is a substantial step in the right direction. By focusing the

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<sup>5</sup> As the court further explained: the “advantages a pipeline gives its affiliate are improper only to the extent that they flow from the pipeline’s anti-competitive market power. Otherwise vertical integration produces permissible efficiencies that ‘cannot by themselves be considered uses of monopoly power.’” *Id.* (quoting *Berkey Photo, Inc., v. Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir. 1979)). Further, the court identified the danger of setting rules on the basis that “‘any advantage a pipeline gives its marketing affiliate is improper.’” *Id.* (emphasis in original).

<sup>6</sup> NOPR at P 19.

<sup>7</sup> *National Fuel*, 468 F.3d at 844.

restrictions in the rules on individuals directly involved in transmission and marketing operations, instead of on the corporate or divisional structure in which such individuals reside, the Commission would free up the flow of information and coordination among employees within an organization, as is essential to efficient operations, without disadvantaging transmission customers.

As the Commission recognized in both in the prior NOPR and in the current superseding NOPR, intra-corporate communication and coordination are particularly important with respect to Integrated Resource Planning (“IRP”) and supply procurement (“Competitive Solicitation”).” These functions are critical to achieving the benefits of vertical integration in the utility industry, and their effectiveness depends on the coordination and free flow of information between individuals engaged in planning for transmission and generation operations, and long-term supply procurement for native load, in order to meet customer needs. However, the proposed creation in the prior NOPR of separate categories of employees exclusively dedicated to the planning and procurement functions, and the limitation on the function of such employees to provide service on behalf of bundled retail load only, substantially undermined the Commission’s intent by continuing to balkanize decision-making and communications. This was a particular problem for smaller utilities for whom the creation of a new category of highly trained employees specifically devoted to the planning and procurement functions would pose an enormous expense and the inefficient use of highly skilled personnel. Moreover, a separate category of employees would operate without the benefit of the institutional knowledge available to existing employees historically engaged in transmission and generation operations. The current NOPR is a substantial improvement in narrowing the

category of employees who may not be involved in integrated planning to those individuals who are specifically engaged in the function of marketing power to wholesale load.

The current NOPR is also a substantial step in the right direction in proposing to reverse the categorization of all employees within an “affiliate” (defined to include divisions within a single corporate organization) as merchant employees, based on the residence of certain individuals within the affiliate structure involved in those functions.<sup>8</sup> The over-breadth of the approach taken in Order No. 2004 needlessly inhibits intra-corporate communications among individuals uninvolved in either the marketing or transmission function, but classified to divisions including those activities.

This proposed change in policy is particularly important with respect to the generation function. As the Commission acknowledges in the current NOPR, Commission precedent with respect to generation operations and communications has been particularly troublesome and confusing,<sup>9</sup> giving rise to a series of case-specific exemptions designed to enable communications between transmission and generation personnel that are absolutely essential in order to dispatch generation efficiently and otherwise coordinate transmission and generation operations.<sup>10</sup> LPPC heartily endorses

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<sup>8</sup> NOPR at P 26.

<sup>9</sup> NOPR at P 28.

<sup>10</sup> See Audit of Standards of Conduct, Code of Conduct, OASIS & Transmission Practices, Duke Energy Corporation, Docket No. PA03-15-000 at pp. 6-8 (Jan. 21, 2005); Algonquin Gas Transmission, L.L.C., 111 FERC ¶ 61,099, at P 21-32 (2005); Audit of Standards of Conduct, Code of Conduct, and Open Access Transmission Tariff Requirements at Florida Power and Light Company, Docket No. PA05-7-000 at pp. 6-10 (May 12, 2006); Interpretive Order Relating to the Standards of Conduct, 114 FERC ¶ 61,155 (2006) (Interpretive Order), clarified in 115 FERC ¶ 61,202 (2006); and Alcoa Power Generating Inc., 108 FERC ¶ 61,243, at P 29-35, 42-56, 136-46 (2004), reh’g granted in part as to unrelated issue, Nat’l Fuel Gas Supply Corp., 116 FERC ¶ 61,048 (2006); High Island Offshore System, L.L.C., 116 FERC ¶ 61,047, at P 59-68 (2006).

the Commission's new focus on individual employee responsibilities in defining prohibited communications and coordination. The proposed rules appropriately narrow the list of employees falling into the marketing function, and would generally exclude generation operations employees. Since such employees are not generally involved in sales activities or in the submission of offers or bids to buy or sell natural gas or electric energy or capacity (per the definition of the marketing function under section 358.3(c) of the proposed regulations), the proposed rules recognize that there is simply no reason to insist on their separation from transmission operations employees. On the contrary, there is a substantial operational downside to such segregation.

## **2. Further Limited Reforms of the Proposed Rules Are Needed**

While LPPC enthusiastically embraces much of what the Commission has proposed, it remains concerned with respect to certain key functions, for reasons explained below. With respect to each area, LPPC asks the Commission to keep in mind the touchstone principle of the decision in *National Fuel: Standards of Conduct* regulations that adversely impact efficient vertically integrated functions must be supported by substantial evidence establishing either a “plausible theoretical threat of anti-competitive information-sharing” or a “vast record of evidence of abuse.”<sup>11</sup> Where neither predicate has been demonstrated, the proposed rules should be modified to allow greater flexibility.<sup>12</sup>

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<sup>11</sup> *National Fuel*, 468 F.3d at 844.

<sup>12</sup> 468 F.3d at 840.

**a. Long-Term Supply Procurement for Native Load Is An Aspect of Integrated Resource Planning and Should Not Be Defined as a Marketing Function.**

The Commission was right in concluding in the prior NOPR that the procurement of supplies in the competitive market on behalf of native load is a function that should be facilitated, and that rules governing standards of conduct should not interfere with that function.<sup>13</sup> Yet, the proposed rule appears not to provide for effective long-term resource procurement on behalf of native load. The NOPR defines “marketing functions” to include “the submission of offers or bids to buy or sell...electric energy or capacity...in interstate commerce. ....” On the surface, this definition would appear to preclude coordination between individuals involved in procuring long-term supplies even on behalf of bundled native load, as had been proposed in the prior NOPR. LPPC strongly urges the Commission to clarify that this is not its intent and that individuals involved in the purchase of long-term supply on behalf of native load will not be defined as marketing function employees, so long as purchases are made with the aim of serving native load, and related off-system sales of excess power are incidental and undertaken by a separate group of marketing employees.

The process of determining the availability, price, and terms and conditions under which off-system energy supplies are available is a necessary and integral part of the IRP function. Where off-system supply options are available, the public benefits when utilities are permitted to evaluate them on the same basis as on-system resources. In various settings, the Commission has taken steps to promote reliance on long-term supply

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<sup>13</sup>*Id.* at P 35.

contracts.<sup>14</sup> Further, the Commission has recognized that the efficient operation of the interstate grid calls for utilities to be able to rely on off-system supply agreements in the same manner as they might on-system resources.

In order for resource planners to evaluate all supply options on the same footing, whether transmission construction, self-built generation or off-system purchases, they must know the availability, price and other relevant terms and conditions of each option. For off-system power supply, this information may only be secured through the process of soliciting and negotiating bids for service, a function that, without further modification by the Commission, would be defined as marketing activity. With this in mind, LPPC asks for a limited additional exception to the definition of the marketing function under proposed section 358.3(c), as follows:

- (6) the procurement of power or capacity through the submission and negotiation of offers or bids to buy electric energy or capacity for the primary purpose of serving native load, so long as any wholesale sales of such power or capacity as is excess to native load are incidental, and such wholesale sales are undertaken by marketing function employees.

This exception expressly makes allowance for incidental wholesale sales undertaken where power or capacity exceeds native load needs. LPPC notes that the prior NOPR proposed an exception for procurement on behalf of bundled sales service, without provision being made for incidental sales. But it is simply inevitable that purchases on behalf of native load will, from time-to-time, be in excess of bundled sales serviced needs, and that power or capacity will be sold off system. To accommodate this fact, and yet to ensure the fundamental integrity of the Standards of Conduct, LPPC

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<sup>14</sup> See *Wholesale Competition in Regions with Organized Markets*, Notice of Proposed Rulemaking, Docket No. RM07-19-000, et al., 73 Fed. Reg. 12,576, FERC Stats & Regs ¶ 32,628 (2008).

proposes to limit the exemption to the procurement of power for the primary purpose of serving native load. Related off-system sales would, under the proposal, be undertaken only where they are incidental to the primary purpose of the procurement, and would be undertaken by separate marketing function employees who are bound by the Standards of Conduct.

**b. The Commission Must Clarify that Shared Officers and Directors May Exercise Such Decision-Making Authority as is Consistent With Their Fiduciary Responsibility.**

LPPC is quite concerned that the proposed rules do not permit shared officers and directors to exercise a level of authority needed to carry out their fiduciary responsibility. As did Order Nos. 889 and 2004, *et al.*, the current NOPR continues to contemplate that officers and directors may continue to exercise oversight of both transmission and merchant functions, subject to restrictions designed to guard against discriminatory conduct. As the Commission has long recognized, this dual responsibility is an inevitable attribute of the separation of merchant and transmission functions, in an environment in which full corporate divestiture has not been mandated. The necessity of an exception to the general rules governing functional separations for shared officers and directors follows directly from the observation that organizations must tie their functions together at some level, and that shared managers and directors have a responsibility for both functions.

LPPC recognizes that this is a difficult area, and one that calls for a delicate balance of two legitimate, competing concerns: On the one hand, the Commission must ensure that individuals responsible for both marketing and transmission functions do not use their positions to provide their marketing function with an unduly preferential

advantage in the marketplace. And, on the other hand, those individuals entrusted with this dual responsibility must be given information and authority sufficient to carry out their responsibilities meaningfully. If it were otherwise, these individuals would be unable to carry out their fiduciary obligation to their organizations.

In place of existing rules specifically providing an exception for shared officers and directors, the new NOPR (proposed sections 358.3(d) and (i)), attempts to define the issue away by providing that officers, directors or other supervisory employees are not considered to be either marketing or transmission function employees if they are not “actively and personally” engaged in these functions. Providing limited additional gloss on this approach, the NOPR states (P 34) that supervisors of transmission function employees “will, of course, have access to transmission function information, and will be barred from sharing it with marketing function employees under the no-conduit rule....” Yet, the NOPR goes on to suggest that investing these individuals with meaningful decision-making authority would violate the rules. According to the Commission:

For instance, if a transmission department supervisor is charged with the general responsibility of overseeing system control center personnel, but does not himself engage in system operations or grant or deny transmission service requests, he would not be a transmission function employee. But if he is involved in system operations or the processing of transmission service requests, or engages in decision-making regarding system operations or the processing of transmission service requests, he would be a transmission function employee even if he also has supervisory responsibilities.<sup>15</sup>

LPPC does not believe this approach is tenable. The prohibition against shared officers and directors being “actively and personally” involved in merchant or transmission operations would preclude the exercise of any meaningful responsibility. If

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<sup>15</sup> *Id.*

one posits that the obverse of this construct defines what is permissible – i.e., that shared officers and directors may only be “passively and impersonally” involved in the area over which they maintain authority – it is clear that the proposed approach would rob supervisory positions of all meaningful responsibility. Nor does the Commission’s gloss provide much comfort: In suggesting that supervisors and directors may not be involved in substantive decision-making, the Commission reinforces the notion that their oversight function must be limited to a meaningless formalism if it is to comply with the proposed rules.

If, indeed, the Commission contemplated that no meaningful decisional authority may be invested in shared officers and directors, the proposed rule would call upon these individuals to violate the trust that has been placed in them to manage their organizations for the good of their principals. As this pertains to publically traded corporations, the approach would violate corporate law imposing a fiduciary responsibility upon corporate directors and their appointed officers, for whom informed decision-making is a bedrock principal.<sup>16</sup> Similar principles govern the obligations of directors and supervisors of municipal utilities, for whom the duties of due diligence, prudent review and good judgment are owed to their owner-customers.<sup>17</sup>

Although LPPC appreciates that the overall intention of the NOPR is to liberalize the existing rules, the existing regulations contain certain features that LPPC believes the Commission would do well to preserve. First, current section 358.4(a)(5) contains an

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<sup>16</sup> Edison Electric Institute filed extensive comments on this point on March 30, 2007 (pp. 37 – 40) in response to the prior NOPR.

<sup>17</sup> For example, South Carolina Code Section 58-31-55 (applicable to South Carolina Public Service Authority) expressly provides that directors will discharge their duties in good faith, prudently and in a manner necessary to ensure the organization’s financial integrity and its obligation to provide reliable service at just and reasonable rates, taking into account all relevant input.

express provision stipulating that officers and directors may be shared by the marketing and transmission functions. This express provision permitting shared officers and directors provides important direction.

Second, current section 358.4(a)(5) stipulates that dual functions are permissible, so long as these individuals are not defined as “Transmission Function employees.” Current section 358.3(j) of the rules defines such employees as individuals who “conduct[] transmission system operations or reliability functions, including, but not limited to, those who are engaged in day-to-day duties and responsibilities for planning, directing, organizing or carrying out transmission-related operations.” LPPC members have found the prohibition against directors and officers undertaking “day-to-day” responsibilities to be relatively easy to comprehend, and believe it provides clearer direction than the proposed prohibition against “active and personal” involvement.

Building on these provisions, LPPC recommends that the following new provision be adopted as section 358.5(c)(2):

Transmission Providers are permitted to share employees, officers, directors and supervisory employees who do not direct, organize or carry out Marketing, Sales or Brokering Functions or involve themselves in such activities on a day-to-day basis. Such individuals may exercise such decision-making authority as is necessary to carry out their direct or delegated fiduciary responsibility for the good of the organization. The exercise of such responsibility with respect to the transmission function may not be used for the purpose of discriminating against third parties.

**c. The Commission Must Remove Demand Response from the Definition of Marketing Functions.**

LPPC asks the Commission to remove demand response from the definition of “marketing functions” in order to ensure that utilities may consider demand response options as an integral part of the IRP function. Along with the construction of

transmission, distribution, and generation facilities, the potential for demand reduction is a critical consideration in the planning function. LPPC firmly believes that enabling utilities to plan for and to count on demand response in undertaking integrated resource planning, as an alternative to constructing additional infrastructure, is key to a successful demand response program.

In the superseded NOPR, the Commission expressly endorsed the inclusion of demand response in the planning function, stating that “improved coordination between transmission planning, generation planning and demand response programs, which are the main elements of integrated resource planning, is necessary to improve the economics and reliability of the transmission grid.” When the Commission issued the current NOPR, it similarly expressed its intent to remove obstacles to planning. It would be inconsistent with the Commission’s objective of improving coordination of demand response programs and removing obstacles to planning now to include demand response within the definition of “marketing functions.”

LPPC understands that the Commission has an interest in permitting demand side resources to compete with supply in certain markets. LPPC supported the Commission’s proposal in Docket No. RM07-19-000<sup>18</sup> to require RTOs to accept bids from demand response resources on a basis comparable to any other resources, for generation-related ancillary services subject to a bidding process. Yet, the Standards of Conduct rule is not limited to that setting, and, if not clarified, might be construed to implicate retail-based demand response programs that simply must be accounted for in the planning process. Accordingly, LPPC asks the Commission to

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<sup>18</sup> *Wholesale Competition in Regions With Organized Electric Markets*, 73 Fed. Reg. 12,576; 122 FERC ¶61,167 (2008).

clarify that the definition of “marketing functions” does not encompass the development, administration or implementation of demand response programs, including the issuance of requests for proposals or the awarding of contracts for demand response.

**d. The Commission Should Exempt Exchanges of Electricity Undertaken to Effectuate Transmission From the Definition of Marketing Functions.**

LPPC members have found that an exchange of electricity is often necessary in order to accomplish a transmission transaction. This has been the case in instances in which multiple systems must be crossed in order to access renewable sources of power. In such cases, an exchange of electricity with an intermediate utility serves as a means of avoiding a transmission constraint. While the exchange may, technically, be defined as a purchase and sale, the effect of the transaction is to make transmission possible. The Commission has recognized such transactions as legitimate in the context of market manipulation rules that would otherwise prohibit so-called “wash trades.”<sup>19</sup>

Because the intent of these transactions is not to effectuate a market sale, LPPC asks for the Commission to provide an additional exemption to the definition of “marketing functions” under section 358.3(c), as follows:

- (7) Exchanges of electricity used in order to effectuate a transmission transaction.

The Commission could, in the alternative, add electricity to the second exemption to the definition of marketing functions. That provision, which now exempts “Incidental

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<sup>19</sup>*Investigation of Terms and Conditions of Public Utility Market-Based Authorizations*, 105 FERC ¶ 61,218 at P 54 (2003); The prohibition against wash trading expressed in the market rules were adopted as an example of market manipulation in *Prohibition of Energy Market Manipulation*, 114 FERC ¶61,047 at P 54, *order on reh'g* 114 FERC ¶61,300. (2006); 71 Fed. Reg. 4244. FERC Stats. & Regs. ¶ 31,202.

purchases or sales of natural gas to operate interstate natural gas pipeline systems ” could be revised to read as follows:

- (2) Incidental purchases of sales of natural gas or electricity to operate interstate natural gas pipeline transmission facilities or to effectuate electric transmission.
- e. **The Commission Must Clarify What is Meant With Respect to the Establishment of “*Per Se*” Rules Governing Conduct and With Respect to Other Enforcement Activity Related to Discriminatory Conduct.**

At P 20, the Commission states: “...in this NOPR we take the approach of structuring Standards to establish per se rules that address the greatest prospect for undue preference. However, this streamlined approach does not diminish our ability to rectify and sanction, where necessary, instances of undue discrimination or preference.” At related footnote, 22, the Commission states: “Whereas failure to comply with a per se rule of the Standards automatically establishes a sanctionable violation, an alleged violation of the Federal Power Act...or the Natural Gas Act...would require an investigation into both the facts and surrounding circumstances to determine if, in fact, an undue discrimination occurred.”

LPPC is concerned with these passages on two levels. First, the indication at footnote 22 that the Commission is contemplating assessing criminal and civil penalties with respect to discriminatory conduct that is not specifically proscribed through orders or rules suggests an area of enforcement activity of which the Commission should be wary. Section 4(b) of the FPA, 16 U.S.C. 824(d)(4)(b), specifies that no public utility shall “make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage.” The Commission has, of course, gone to great lengths to implement this provision, with measures including the open access

framework itself and the Standards of Conduct.<sup>20</sup> Yet, to date, the Commission has not suggested that the anti-discrimination provisions of the FPA or NGA may give rise to penalties without an order expressly directing specific conduct or establishing a prohibition. Rather, like the analogous mandate in section 4(a) of the FPA that all rates and charges must be just and reasonable, section 4(b) has been given meaning by regulatory orders directing specific action.

Since the anti-discrimination provisions of the FPA and NGA can only be understood when given regulatory meaning, LPPC asks the Commission to clarify that it does not mean to suggest that criminal or civil sanctions may follow a broad allegation of discriminatory conduct, without prior notice that specific conduct has been identified as discriminatory. Any other approach risks a violation for want of due process through the enforcement of provisions that are unconstitutionally vague.<sup>21</sup>

LPPC's second concern lies in the Commission's indication that the proposed Standards of Conduct establish *per se* violations of the FPA and NGA. In the law, the term *per se* means, literally, "as a matter of law," and connotes a violation that does not require a further investigation into the facts.<sup>22</sup> Negligence *per se*, for example, refers to a set of facts that establish negligence without the need for a jury to determine whether the behavior at issue otherwise violates the duty of reasonable care.<sup>23</sup> In antitrust law, the concept of a *per se* violation refers to conduct, such as price fixing, that establishes a

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<sup>20</sup> *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000) (*TAPS v. FERC*), *aff'd sub nom*, *New York v. FERC*, 535 U.S. 1 (2002).

<sup>21</sup> *Georgia Pacific Corp. v. Occupational Safety and Health Review Commission*, 25 F.3d 999, 1005 (11th Cir. 1994) (striking down an impermissibly vague regulation under the due process clause of the Fifth and Fourteenth Amendments).

<sup>22</sup> See Black's Law Dictionary 1178 (8<sup>th</sup> ed. 2008)

<sup>23</sup> *Id.* at 1063 (8<sup>th</sup> ed. 2008)

violation of law without a further inquiry into whether the conduct actually had an adverse impact on the market.<sup>24</sup>

With this background in mind, LPPC's concern is that while certain features of the rules governing Standards of Conduct are fairly specific (such as, e.g., the prohibition in section 358.6(a) against transmission employees disclosing non-public transmission function information), the general rule requiring independent functioning is quite broad. As LPPC believes is evident from the discussion above related to shared officers and directors, there is an inevitable level of ambiguity in the rule that calls for interpretation and nuance, and does not lend itself to a bright line *per se* approach to enforcement. Where that is so, the Commission must approach enforcement carefully, proceeding first with interpretive orders and directives and specific orders enjoining conduct. Criminal and civil sanctions may follow only when one can be confident that a prohibition is clear, widely understood, and that sufficient notice has been given of what conduct constitutes a violation of the Commission's rules.

**d. The Rules Governing Attorneys Should Be Clarified to Protect Their Traditional Role.**

The Commission proposes to eliminate the concept of "shared employees (P 41 - 42), expressing the view that "attorneys, accountants, risk management personnel and rate design employees" may continue to perform shared functions, so long as they do not fall within the definition of transmission or marketing function employees."

While LPPC finds this approach to be generally workable, it seeks further clarification that attorneys may continue to advise both merchant and transmission

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<sup>24</sup> See *Datagate, Inc. v. Hewlett-Packard Co.*, 60 F.3d 1421 (9<sup>th</sup> Cir. 1995), *cert denied*, 116 S.Ct. 1344, 134 L.Ed.2d 492 (U.S. 1996)

employees with respect to the state of law and regulations that may impact strategic decision-making. LPPC can envision situations in which an attorney's advice impacts decision-making regarding the exercise of marketing or transmission functions. Accordingly, LPPC asks for clarification ensuring that so long as the advice is limited to matters of law and regulation, it is permissible.

### **CONCLUSION**

For the reasons articulated above, LPPC supports the NOPR in certain key respects as a distinct improvement in the regulatory environment. In other respects, LPPC asks for clarification and modification.

Respectfully submitted,

/s/  
Jonathan D. Schneider  
Douglas E. Micheel  
Stinson Morrison Hecker, LLP  
1150 18<sup>th</sup> Street  
Washington, D.C. 20036  
(202)785-9100

Attorneys for the Large Public Power  
Council

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