

134 FERC ¶ 61,046  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Marc Spitzer, Philip D. Moeller,  
John R. Norris, and Cheryl A. LaFleur.

Market-Based Rates for Wholesale Sales  
of Electric Energy, Capacity and Ancillary  
Services By Public Utilities

Docket No. RM04-7-009

ORDER DENYING REHEARING  
AND MOTION FOR STAY AND RESCISSION

(Issued January 20, 2011)

1. On May 17, 2010, the Edison Electric Institute (EEI) filed a motion for stay or rescission and a request for rehearing of the Commission's April 15, 2010 order addressing the Compliance Working Group's request for clarification of the market-based rate affiliate restrictions.<sup>1</sup> In this order, we deny EEI's motion for stay or rescission of the April 15 Clarification Order and deny rehearing of that order, as discussed below.<sup>2</sup>

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<sup>1</sup> *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, 131 FERC ¶ 61,021 (2010) (April 15 Clarification Order).

<sup>2</sup> According to the electronic time stamp of EEI's electronic filing, EEI submitted its request for rehearing fifteen seconds after the Commission's official 5:00 pm close of business (18 C.F.R. § 375.101(c) (2010)) on the date that requests for rehearing were due in this case. However, it has since been determined that, at the time that EEI submitted its request for rehearing, the electronic time stamp on the Commission's server was incorrect. Accordingly, we will accept EEI's request for rehearing as timely submitted. Since that time, the Commission has put in place processes to regularly check the accuracy of its server's time. Additionally, current Commission time is now displayed during the eFiling submission process so that filers know the Commission's time as they make their filing. Moreover, for every electronic filing, an electronic receipt is provided that shows the time the filing was made, and thus whether the filing was (or was not) timely made. With these protections in place, the Commission will rely on its electronic time stamp as to the date and time for determining whether electronic requests for

(continued....)

In addition, in an order issued concurrently with this order, we are withdrawing the Notice of Proposed Rulemaking in Docket No. RM10-20-000.<sup>3</sup>

## **I. Background**

2. In Order No. 697, the Commission adopted affiliate restrictions that govern the relationship between franchised public utilities with captive customers and their “market-regulated” power sales affiliates, i.e., affiliates whose power sales are regulated in whole or in part at market-based rates.<sup>4</sup> These affiliate restrictions govern the separation of functions, the sharing of market information, sales of non-power goods or services, and power brokering. The Commission requires that, as a condition of receiving and retaining market-based rate authority, sellers comply with these affiliate restrictions unless explicitly permitted by Commission rule or order granting waiver of the affiliate restrictions. Failure to satisfy the conditions set forth in these affiliate restrictions constitutes a violation of a seller’s market-based rate tariff.<sup>5</sup>

3. Under the separation of functions requirement in the market-based rate affiliate restrictions, employees of market-regulated power sales affiliates must operate separately, to the maximum extent practical, from employees of affiliated franchised public utilities with captive customers.<sup>6</sup> Order No. 697 provides for exceptions to the separation of functions requirement for certain categories of employees who are

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rehearing are submitted untimely after close of business on the date that such filings are due. *E.g., Midwest Independent Transmission System Operator, Inc.*, 112 FERC ¶ 61,211, at P 10 (2005); *Pacific Gas and Electric Co. v. Delta Energy Center, LLC*, 116 FERC ¶ 61,207, at 61,866-67 (2006); *North American Electric Reliability Corp.*, 130 FERC ¶ 61,002, at P 12 (2010); *accord Boston Gas Co. v. FERC*, 575 F.2d 975, 977-79 (1st Cir. 1978); *City of Campbell v. FERC*, 770 F.2d 1180, 1183 (D.C. Cir. 1985).

<sup>3</sup> *Market-Based Rate Affiliate Restrictions*, 134 FERC ¶ 61,047 (2011).

<sup>4</sup> *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, at P 467, 490, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh’g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055, *order on reh’g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh’g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh’g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010).

<sup>5</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 549-550.

<sup>6</sup> 18 C.F.R. § 35.39(c)(2)(i) (2010).

permitted to be shared and gives examples of permissibly “shared employees.”<sup>7</sup> For instance, in Order No. 697, the Commission, referencing Order No. 2004, concluded that senior officers and members of boards of directors that do not participate in “directing, organizing or executing generation or market functions” would not be subject to the separation of functions.<sup>8</sup>

4. Following issuance of Order No. 697, the Commission issued Order No. 717, the Standards of Conduct Final Rule.<sup>9</sup> The Standards of Conduct Final Rule adopted an employee functional approach *for purposes of the Commission’s Standards of Conduct*. The employee functional approach rendered continuation of the concept of “shared employees” unnecessary under the Standards of Conduct because only those individuals who engage in transmission functions or marketing functions are required to function independently from one another.<sup>10</sup>

5. On March 9, 2009, the Compliance Working Group submitted a request for clarification in the Commission’s market-based rate rulemaking proceeding regarding which employees can be shared for purposes of compliance with the Commission’s market-based rate affiliate restrictions. Specifically, the Compliance Working Group requested that the Commission interpret its market-based rate affiliate restrictions to permit sharing of employees who are neither “transmission function employees” nor

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<sup>7</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 561-566 (citing *Standards of Conduct for Transmission Providers*, Order No. 2004, FERC Stats. & Regs. ¶ 31,155, at P 96, 99-101, 145-146 (2003), *order on reh’g*, Order No. 2004-A, FERC Stats. & Regs. ¶ 31,161, at P 134, *order on reh’g*, Order No. 2004-B, FERC Stats. & Regs. ¶ 31,166, *order on reh’g*, Order No. 2004-C, FERC Stats. & Regs. ¶ 31,172 (2004), *order on reh’g*, Order No. 2004-D, 110 FERC ¶ 61,320 (2005), *vacated and remanded as it applies to natural gas pipelines sub nom. National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831 (D.C. Cir. 2006)).

<sup>8</sup> *Id.* P 562 (citing 18 C.F.R. § 358.4(a)(5)). Like the affiliate restrictions in Order No. 697, the Order No. 2004 Standards of Conduct required the separation of corporate or business unit functions, but permitted certain categories of employees to be shared.

<sup>9</sup> *Standards of Conduct for Transmission Providers*, Order No. 717, FERC Stats. & Regs. ¶ 31,280 (2008) (Standards of Conduct Final Rule), *order on reh’g*, Order No. 717-A, FERC Stats. & Regs. ¶ 31,297, *order on reh’g*, Order No. 717-B, 129 FERC ¶ 61,123 (2009).

<sup>10</sup> Standards of Conduct Final Rule, FERC Stats. & Regs. ¶ 31,280 at P 129.

“marketing function employees” under the Standards of Conduct Final Rule.<sup>11</sup> The Compliance Working Group submitted that shared employees under the affiliate restrictions are defined by reference to shared employees under the Order No. 2004-era Standards of Conduct. It added that as of the effective date of the Standards of Conduct Final Rule, November 26, 2008, the concept of shared employees is no longer applied in the Standards of Conduct context. In its March 9, 2009 request for clarification, the Compliance Working Group argued that this created a compliance conundrum that needed to be addressed in order to enable companies and their employees to understand, and comply with, the affiliate restrictions.

6. In the April 15 Clarification Order, the Commission provided guidance regarding which employees may not be shared under the market-based rate affiliate restrictions codified in Order No. 697. Concurrently, the Commission issued a Notice of Proposed Rulemaking in Docket No. RM10-20-000 in which it proposed to revise the affiliate restrictions in order to reflect the guidance provided in the April 15 Clarification Order.<sup>12</sup>

7. The April 15 Clarification Order denied the Compliance Working Group’s request that the Commission interpret the affiliate restrictions adopted in Order No. 697 to permit the sharing of employees who are neither “transmission function employees” nor “marketing function employees” under the Standards of Conduct Final Rule. However, in order to address the Compliance Working Group’s concerns regarding compliance with the market-based rate affiliate restrictions, the Commission provided guidance regarding which employees may not be shared under the affiliate restrictions. Specifically, the Commission rejected the Compliance Working Group’s interpretation of the market-based rate affiliate restrictions because the Compliance Working Group’s interpretation would permit the sharing of employees who are prohibited from being shared under the market-based rate affiliate restrictions (for instance, employees that make economic dispatch decisions or that determine the timing of scheduled outages). Thus, the Commission explained that granting the Compliance Working Group’s requested interpretation would permit market-based rate sellers to share employees that may not currently be shared under the affiliate restrictions. The April 15 Clarification Order also explained that “marketing function employee” is not a defined term in the market-based rate regulations adopted in Order No. 697, and explained that the

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<sup>11</sup> “Transmission function employee” and “marketing function employee” are defined terms under the Standards of Conduct. *See* 18 C.F.R. §§ 358.3(d), 358.3(i) (2010).

<sup>12</sup> *Market-Based Rate Affiliate Restrictions*, 75 FR 20796 (Apr. 22, 2010), Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,567 (2010) (NOPR).

restrictions on which employees may be shared under the market-based rate affiliate restrictions are not limited to those employees who are engaged in sales.<sup>13</sup>

8. Consistent with the Commission's determinations in Order No. 697-A, the Commission clarified in the April 15 Clarification Order that, for purposes of compliance with the affiliate restrictions, a franchised public utility with captive customers and its market-regulated power sales affiliates may not share employees that make economic dispatch decisions or that determine the timing of scheduled outages.<sup>14</sup> The Commission also clarified that franchised public utilities with captive customers are prohibited from sharing employees that engage in resource planning<sup>15</sup> or fuel procurement with their market-regulated power sales affiliates. The Commission reasoned that if a franchised public utility and its market-regulated power sales affiliate were permitted to share employees that make strategic decisions about future generation supply, such strategic decision-making by a shared employee could result in generation being built or acquired for the benefit of the market-regulated power sales affiliate and at the expense of the captive customers of the franchised public utility. With respect to the prohibition against sharing fuel procurement employees, the Commission explained that shared fuel procurement employees may have the incentive to allocate purchases of lower priced fuel supplies to the market-regulated power sales affiliate while allocating purchases of higher priced fuel supplies to the franchised public utility.<sup>16</sup>

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<sup>13</sup> Under the Standards of Conduct regulations, "marketing function employee" is defined as "an employee, contractor, consultant or agent of a transmission provider or of an affiliate of a transmission provider who actively and personally engages on a day-to-day basis in marketing functions." 18 CFR 358.3(d) (2010). "Marketing functions" means "in the case of public utilities and their affiliates, the sale for resale in interstate commerce, or the submission of offers to sell in interstate commerce, of electric energy or capacity, demand response, virtual transactions, or financial or physical transmission rights, all as subject to an exclusion for bundled retail sales, including sales of electric energy made by providers of last resort. . . ." 18 CFR 358.3(c) (2010). As the Commission stated in the April 15 Clarification Order, the Standards of Conduct definition of "marketing function employee" may be read to be limited to those employees engaged in sales.

<sup>14</sup> Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 253.

<sup>15</sup> The prohibition on sharing employees that engage in resource planning applies only to the sharing of employees between a franchised public utility and its market-regulated power sales affiliate, and is not intended to alter resource planning activities by transmission providers that are permitted under the Standards of Conduct Final Rule.

<sup>16</sup> April 15 Clarification Order, 131 FERC ¶ 61,021 at P 42.

9. On April 21, 2010, EEI submitted a request for an extension of time to comply in which it requested an expedited determination that the guidance provided in the April 15 Clarification Order will not be subject to enforcement unless and until the Commission issues a final rule pursuant to the NOPR.

10. On May 18, 2010, EEI filed a motion for stay or rescission, or, in the alternative, rehearing of the April 15 Clarification Order.

11. As discussed in the order withdrawing the NOPR issued concurrently with this order, on June 21, 2010, EEI, Dominion Resources Services, Inc. (Dominion), Ameren Services Company (Ameren), Duke Energy Corporation (Duke), Entergy Services, Inc. (Entergy), and the Nuclear Energy Institute (NEI) filed comments opposing the NOPR's proposed codification of the clarifications provided in Commission's April 15 Clarification Order. The Transmission Access Policy Study Group (TAPS) submitted comments supporting the proposal. The Compliance Working Group did not submit comments on the NOPR.

12. On July 2, 2010, the Commission issued an order granting in part EEI's request for an extension of time.<sup>17</sup> In particular, the Commission granted EEI's request for an extension of time to comply with the guidance provided in the April 15 Clarification Order regarding employees that engage in fuel procurement or resource planning until such time as the Commission issues a final rule in the NOPR proceeding. The Commission denied EEI's request, however, with respect to employees who engage in economic dispatch or who determine the timing of scheduled outages on the basis that the Commission had explicitly prohibited the sharing of such employees in Order No. 697-A.<sup>18</sup>

## **II. EEI's Motion for Stay or Rescission and Request for Rehearing**

13. In its motion for stay or rescission and request for rehearing of the April 15 Clarification Order, EEI argues that the Commission erred by issuing the Clarification Order on the same day that it issued the NOPR. According to EEI, by creating a "bright-line" rule in the April 15 Clarification Order that certain employees cannot be shared at the same time that it issued the NOPR proposing to codify this rule, the Commission failed to provide the public with an effective opportunity to provide input prior to the

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<sup>17</sup> *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services By Public Utilities*, 132 FERC ¶ 61,014, at P 4-5 (2010) (Order Granting Extension of Time In Part).

<sup>18</sup> *Id.* P 4 (citing Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 253).

implementation of the proposed rule.<sup>19</sup> EEI argues that in doing so, the Commission suggested that it has predetermined the outcome of the rulemaking.<sup>20</sup> In addition, EEI argues that the April 15 Clarification Order violates the principle articulated in *National Fuel Gas Supply Corp. v. FERC* because the order imposes new restrictions on the sharing of employees, but does not show how the potential dangers of affiliate abuse justify the Commission's new restrictions on the sharing of employees that engage in fuel procurement or resource planning.<sup>21</sup>

14. EEI maintains that the April 15 Clarification Order represents a departure from prior Commission precedent insofar as its pronouncements on the sharing of dispatch, outage, fuel procurement, and resource planning employees are stated as blanket exclusions, and that the Commission has failed to explain or justify this departure.<sup>22</sup> EEI contends that although the Commission "constrained" the sharing of economic dispatch and outage scheduling employees in Order No. 697-A,<sup>23</sup> the Commission has granted waivers and issued no-action letters permitting the sharing of such employees in some circumstances.<sup>24</sup> EEI maintains that the April 15 Clarification Order calls into question the continuing validity of the practices of entities that have followed the guidance provided in these no-action letters and waiver orders. Similarly, EEI states that it has "understood that 'traditional' resource planning employees who make direct resource planning decisions" cannot be shared, but argues that the April 15 Clarification Order is written so broadly that it could inadvertently prevent the "use of shared-services employees ... [that] provide inputs and other support to the resource planning process, such as accounting, engineering, environmental, finance, legal, and real estate inputs."<sup>25</sup> EEI contends that the affiliate restrictions currently permit the sharing of support, field and maintenance employees, which EEI states "include such shared services staff who provide inputs to the resource planning process."<sup>26</sup> With respect to the sharing of fuel procurement employees, EEI argues that the Commission has not previously prohibited

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<sup>19</sup> EEI Request for Rehearing at 2.

<sup>20</sup> *Id.* at 4.

<sup>21</sup> *Id.* at 10-11 (citing 468 F.3d 831 (D.C. Cir. 2006) (*National Fuel*)).

<sup>22</sup> *Id.* at 4-5, 8, 10.

<sup>23</sup> *Id.* at 8 (Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 253).

<sup>24</sup> *Id.* (citing *Allegheny Energy, Inc.*, 119 FERC ¶ 61,025 (2007)).

<sup>25</sup> *Id.* at 9.

<sup>26</sup> *Id.* (citing 18 C.F.R. § 35.39(c)(2) (2010)).

the sharing of such employees, arguing that the Office of the General Counsel has previously authorized the sharing of such employees in certain contexts.<sup>27</sup>

15. Thus, to address its concerns about the April 15 Clarification Order, and to avoid prejudging the outcome of the rulemaking, EEI argues that the Commission should stay enforcement of the April 15 Clarification Order pending the completion of the rulemaking, or rescind the order as premature, so that the issues EEI raises can be addressed in the rulemaking.<sup>28</sup> EEI argues that by staying or rescinding the April 15 Clarification Order, the Commission would be returning to the status quo of the affiliate restrictions and prior orders, which “generally prevent the sharing of economic dispatch and outage schedulers ... and staff who make decisions as to new generation and energy supply resources.”<sup>29</sup> EEI contends that in the interim, the Commission should allow companies to rely on guidance set forth in prior regulations, orders, and other guidance regarding the separation of dispatch, outage, fuel procurement, and resource planning employees.<sup>30</sup> EEI also asserts that a number of the pronouncements in the April 15 Clarification Order and the NOPR go well beyond “an interpretative order,” and will have far reaching impacts, and should not be adopted without a notice-and-comment rulemaking process.<sup>31</sup> EEI contends that, at a minimum, the Commission should stay or rescind conclusions in the April 15 Clarification Order relating to the prohibitions against the sharing of fuel procurement or resource planning employees.

16. EEI also argues that developing any changes to the Commission’s regulations through the rulemaking instead of through this proceeding will better ensure that any restrictions are reasonable, based on a sufficient evidentiary basis, and are narrowly tailored to avoid losing the benefits associated with the sharing of employees where the

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<sup>27</sup> *Id.* at 9-10 (citing *Entergy Corp.*, No-Action Letter, Docket No. NL07-4-000 (Feb. 8, 2007); *Repeal of the Public Utility Holding Company Act of 1935 and Enactment of the Public Utility Holding Company Act of 2005*, Order No. 667, FERC Stats. & Regs. ¶ 31,197 (2005), *order on reh’g*, Order No. 667-A, FERC Stats. & Regs. ¶ 31,213, *order on reh’g*, Order No. 667-B, FERC Stats. & Regs. ¶ 31,224 (2006), *order on reh’g*, Order No. 667-C, 118 FERC ¶ 61,133 (2007); *Cross-Subsidization Restrictions on Affiliate Transactions*, Order No. 707, FERC Stats. & Regs. ¶ 31,264 (2008), *order on reh’g*, Order No. 707-A, FERC Stats. & Regs. ¶ 31,272 (2008)).

<sup>28</sup> *Id.* at 11-13.

<sup>29</sup> *Id.* at 13, 15 (citing Order No. 667, FERC Stats. & Regs. ¶ 31,197; Order No. 697, FERC Stats. & Regs. ¶ 31,252; Order No. 707, FERC Stats. & Regs. ¶ 31,264).

<sup>30</sup> *Id.* at 11.

<sup>31</sup> *Id.* at 13.

risk of harm to captive customers is unlikely.<sup>32</sup> EEI also argues that the rulemaking should focus on whether any additional restrictions on fuel procurement and resource planning beyond those already in place prior to the April 15 Clarification Order are necessary to protect captive customers, and whether more carefully worded provisions than those proposed would address the Commission's concerns.<sup>33</sup>

17. Further, EEI argues that if the Commission does not stay or rescind the April 15 Clarification Order, the Commission should grant rehearing of the order and provide clarification in several respects. First, EEI requests that the Commission clarify that franchised public utilities with captive customers and their market-regulated power sales affiliates can share employees that perform economic dispatch and outage scheduling functions in circumstances where the utility and its affiliate jointly own a shared generating plant or unit operated by a franchised public utility with captive customers, and are abiding by guidance provided by the Commission or its staff regarding co-owned generating plants.<sup>34</sup> Second, EEI asserts that the Commission should clarify that franchised public utilities and their market-regulated power sales affiliates may share employees that provide service functions to the resource planning process such as accounting, engineering, environmental, finance, legal, operations, maintenance, permitting, real estate, safety, and siting functions, so long as the employees do not make "economic decisions related to generation plant acquisitions."<sup>35</sup> EEI maintains that prohibiting the sharing of such employees would result in the unnecessary duplication of functions, which would increase the costs borne by ratepayers. EEI further maintains that the Commission's existing regulations and state regulations already ensure that sharing of these functions does not result in cross-subsidization and argues that, at a minimum, the Commission needs to develop an adequate evidentiary record before it restricts the sharing of such employees.<sup>36</sup>

18. Third, EEI asks that the Commission clarify that franchised public utilities with captive customers and their market-regulated power sales affiliates that currently rely on a shared fuel procurement unit may continue to do so, so long as the Commission or a

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<sup>32</sup> *Id.* at 14-15 (citing *National Fuel*, 468 F.3d 831 (D.C. Cir. 2006)).

<sup>33</sup> *Id.* at 15.

<sup>34</sup> *Id.* at 6, 16.

<sup>35</sup> EEI notes that it assumes that the Commission does not mean to prohibit the sharing of senior executives responsible for overseeing overall corporate family activities and fiduciary responsibilities, including acquisitions of assets, finance, and operations. *Id.* at 17, n.19.

<sup>36</sup> *Id.* at 17-18.

state commission has approved the sharing of such employees or such sharing is consistent with no-action letters or other such guidance. According to EEI, employees engaged in joint fuel procurement are directly governed by the requirements of Order Nos. 667 and 707 and by applicable state orders and regulations, which already ensure that captive customers are protected. EEI contends that the Commission has failed to provide a basis for treating fuel procurement any differently from any other supply chain issue, arguing that if a franchised public utility and its market-regulated power sales affiliate purchase anything through an affiliate procurement entity, they will be subject to the Commission's applicable affiliate regulations. EEI states that if the Commission determines, based on record evidence, that there is a legitimate concern that a shared fuel procurement employee will allocate lower-cost fuel supplies to the market-regulated affiliate, "the Commission could address this concern by imposing protective procedural requirements on any shared fuel procurement group."<sup>37</sup>

19. Finally, EEI requests that the Commission clarify that franchised public utilities with captive customers and their market-regulated power sales affiliates "can continue to rely on No-Action letters, informal guidance, and other such documents that the Commission or its staff has issued authorizing the sharing of employees, assets (including generating plants), and/or functions even if those documents precede and depart from the April 15 [Clarification] Order and any final rule issued pursuant to the April 15 NOPR."<sup>38</sup> EEI argues that if, as the Commission states, the April 15 Clarification Order merely clarifies existing rules, all of the Commission's previous guidance should continue in effect without change.<sup>39</sup>

### **III. Discussion**

20. We reject EEI's arguments that the Commission's April 15 Clarification Order is a departure from prior Commission precedent. As discussed in the order withdrawing the NOPR that is being issued concurrently with this order,<sup>40</sup> the separation of functions requirement in the existing regulations already requires that "[t]o the maximum extent practical, the employees of a market-regulated power sales affiliate must operate separately from the employees of any affiliated franchised public utility with captive customers."<sup>41</sup> Therefore, the clarifications provided in the April 15 Clarification Order

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<sup>37</sup> *Id.* at 18-20.

<sup>38</sup> *Id.* at 6, 20 (citing 18 C.F.R. § 35.39(a) (2010)).

<sup>39</sup> *Id.* at 20.

<sup>40</sup> *Market-Based Rate Affiliate Restrictions*, 134 FERC ¶ 61,047 (2011).

<sup>41</sup> 18 C.F.R. § 35.39(c)(2)(i) (2010).

that employees that determine the timing of scheduled outages, or that engage in economic dispatch, fuel procurement, or resource planning may not be shared is not a departure from Commission precedent. Further, the two exceptions noted above to these restrictions – for field and maintenance employees and senior officers – do not pertain to employees that perform these four functions. As stated in the order addressing EEI’s request to extend the time for compliance with the April 15 Clarification Order, the April 15 Clarification Order “was not intended to expand the existing market-based rate affiliate restrictions as codified in our existing regulations, but rather was intended to provide guidance to the industry as to how the Commission interprets and applies its existing market-based rate affiliate restriction regulations.”<sup>42</sup>

21. EEI’s argument that franchised public utilities with captive customers should be permitted to share employees that engage in economic dispatch or that determine the timing of scheduled outages with their market-regulated power sales affiliates is an attempt to re-litigate the Commission’s determination in Order No. 697-A that these employees may not be shared.<sup>43</sup> We therefore deny EEI’s request that the Commission permit sharing of employees that engage in economic dispatch or that determine the timing of scheduled outages; the Commission previously explained in Order No. 697-A that “shared employees may not be involved in decisions regarding the marketing or sale of electricity from the facilities, may not make economic dispatch decisions, and may not determine the timing of scheduled outages for facilities.”<sup>44</sup> With respect to EEI’s request that the Commission clarify that franchised public utilities with captive customers and their market-regulated power sales affiliates can share employees that perform economic dispatch and outage scheduling functions for co-owned generating plants, and are abiding by guidance provided by the Commission regarding co-owned generating plants, we clarify that franchised public utilities with captive customers and their market-regulated power sales affiliates may only share such employees if they have obtained a waiver from the Commission that is based on case-specific circumstances and representations made by the specific applicants for the waiver, and only if the waiver permits the sharing of such employees.<sup>45</sup>

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<sup>42</sup> Order Granting Extension of Time In Part, 132 FERC ¶ 61,014 at P 3.

<sup>43</sup> Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 253. This determination was not challenged on rehearing of Order No. 697-A.

<sup>44</sup> *Id.*

<sup>45</sup> See *Cleco Power LLC*, 130 FERC ¶ 61,102, at P 22-25 (2010) (granting limited waiver to permit sharing of employees that determine the timing of scheduled outages based on the conjoined nature of the facilities and the applicants’ representations that the

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22. With respect to EEI's request that the Commission clarify that franchised public utilities and their market-regulated power sales affiliates may share employees that provide service functions to the resource planning process,<sup>46</sup> we find that, absent a case-specific waiver, employees may be shared by a franchised public utility with captive customers and its market-regulated power sales affiliates only if they are included in the category of permissibly shared support employees set forth in Order Nos. 697 and 697-A. As explained in Order No. 697, permissibly shared employees "include those in legal, accounting, human resources, travel and information technology"<sup>47</sup> and include field and maintenance employees that "perform purely manual, technical or mechanical duties that are supportive in nature and do not have planning or direct operational responsibilities."<sup>48</sup> Field and maintenance employees include "technical and engineering personnel engaged in generation-related activities, provided that such employees do not themselves: (1) buy or sell energy; (2) make economic dispatch decisions; (3) determine (as opposed to implement) outage schedules; or (4) engage in power marketing activities."<sup>49</sup> As the Commission explained in Order No. 697, "[b]ecause permissibly shared employees may have access to market information, they are prohibited from acting as a conduit to provide market information to employees of the franchised public utility with captive customers...."<sup>50</sup> In response to EEI's comment that it assumes that the Commission does not mean to prohibit the sharing of senior executives responsible for overseeing overall corporate family activities, we reiterate that a franchised public utility with captive customers and its market-regulated power sales affiliates are permitted to share "senior officers and members of the board of directors provided that these individuals do not

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waiver was necessary to allow for the practical and efficient operation of the conjoined facilities); *Allegheny Energy Inc.*, 119 FERC ¶ 61,025 at P 20 (granting waiver of the market-based rate code of conduct information sharing provision (the market-based rate code of conduct was the predecessor to the affiliate restrictions codified in Order No. 697) based on the applicants' representations that the waiver was necessary to allow for the practical and efficient operation of the conjoined facilities).

<sup>46</sup> For example, accounting, engineering, environmental, finance, legal, operations, maintenance, permitting, real estate, safety, and siting functions, so long as the employees do not make "economic decisions related to generation plant acquisitions." EEI Request for Rehearing at 9.

<sup>47</sup> Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 564.

<sup>48</sup> *Id.* P 565; Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 251-253.

<sup>49</sup> Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 251.

<sup>50</sup> *Id.* P 564; *see also* 18 C.F.R. § 35.39(g) (2010).

participate in directing, operating or executing generation or market functions.”<sup>51</sup> Permissibly shared senior officers and directors may not act as a conduit to provide market information to non-shared employees of the franchised public utility with captive customers or its market-regulated power sales affiliates.<sup>52</sup>

23. We deny EEI’s request that that the Commission clarify on a generic basis that franchised public utilities with captive customers and their market-regulated power sales affiliates that currently rely on a shared fuel procurement unit may continue to do so, so long as the Commission or a state commission has approved the sharing of such employees or such sharing is consistent with no-action letters or other such guidance. While the Commission has granted waiver of its market-based rate affiliate restrictions to permit the sharing of certain employees in certain circumstances, these waivers were based on case-specific circumstances and representations made by the specific applicants in those cases.<sup>53</sup> We believe that the Commission, for purposes of the affiliate restrictions, should retain its authority to review on a case-by-case basis circumstances where affiliates seek to share employees or market information.

24. Accordingly, we emphasize that prior orders granting waiver and staff-issued no action letters permitting sharing of employees are case specific and apply only to the entities that were granted waiver in those cases. Thus, franchised public utilities with captive customers and their market-regulated power sales affiliates may only share fuel procurement employees, or any other employee that is prohibited from being shared under the market-based rate affiliate restrictions, if they have obtained a case-specific waiver from the Commission or case specific no-action letter from Commission staff that permits them to share such employees, and is based on the specific circumstances and representations made by the applicants for the waiver or no-action letter. Entities that have previously obtained waiver of certain of the affiliate restrictions may continue to

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<sup>51</sup> *Id.* P 562; *see, e.g., American Electric Power Service Corp.*, 119 FERC ¶ 61,064, at P 20 (2007) (granting waiver of the market-based rate code of conduct (the market-based rate code of conduct was the predecessor to the affiliate restrictions codified in Order No. 697) to allow sharing of a senior executive officer based on the applicants’ representations that the senior executive officer was not involved in the daily functions of directing, organizing and executing business decisions).

<sup>52</sup> *Id.*; 18 C.F.R. § 35.39(g) (2010).

<sup>53</sup> In *Cleco Power LLC*, for example, the waiver of certain affiliate restrictions was limited to three employees, was limited to the “specific facts and circumstances” presented by the applicants, and was conditioned on the requirement that the applicants maintain sufficient records to allow the Commission to audit their compliance with the conditions of the waiver. 130 FERC ¶ 61,102, at P 22-25.

rely on those waivers as long as the facts and circumstances relied on by the Commission in granting the waiver remain true and accurate, and as long as any conditions set forth in the order granting the waiver continue to be satisfied.<sup>54</sup> While we are denying EEI's request to permit the sharing of fuel procurement employees when a state commission has approved the sharing of such employees, to the extent an affected entity believes that a state commission's determination supports waiver of the prohibition against sharing fuel procurement employees, the Commission will consider such an argument if it is presented in a case-specific request for waiver or request for a no-action letter.

25. We find that EEI's arguments that the Commission predetermined the outcome of the NOPR proceeding by issuing the April 15 Clarification Order on the same day as the NOPR are rendered moot by our decision to withdraw the NOPR in an order issued concurrently with this order.<sup>55</sup>

26. We will deny EEI's request that the Commission stay or rescind the April 15 Clarification Order. Although the NOPR may have created some confusion regarding compliance with the currently-effective market-based rate regulations, it was not intended to expand the existing market-based rate affiliate restrictions as codified in the regulations, but rather was intended to provide guidance to the industry as to how the Commission interprets and applies its existing market-based rate affiliate restriction regulations. As noted above, the Commission granted EEI's request for an extension of time to comply with the guidance provided in the April 15 Clarification Order regarding employees that engage in fuel procurement or resource planning until such time as the Commission issues a final rule in the NOPR proceeding. Thus, public utilities are not currently subject to enforcement with respect to the sharing of employees that engage in fuel procurement or resource planning. In this regard, stay or rescission of the April 15 Clarification Order is unnecessary.

27. Further, as discussed above, the Commission declined to grant an extension of time to comply with the requirement that a franchised public utility with captive customers may not share outage and economic dispatch personnel with its market-regulated power sales affiliate because the Commission had previously explained that the

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<sup>54</sup> See *Interpretative Order Modifying No-Action Letter Process and Reviewing Other Mechanisms for Obtaining Guidance*, 123 FERC ¶ 61,157, at P 10-12 (2008) (explaining that no-action letters "can offer useful guidance to the industry," however, are non-binding on the Commission, and must relate to a specific, actual transaction, practice or situation in which the applicant is or may be involved, and that the applicant must explain the specific details of the transaction, practice or situation).

<sup>55</sup> *Market-Based Rate Affiliate Restrictions*, 134 FERC ¶ 61,047 (2011).

sharing of such employees was not permitted absent case-specific waiver.<sup>56</sup> Thus, stay or rescission of this aspect of the April 15 Order is unwarranted.

28. While we are issuing an order withdrawing the NOPR concurrently with this order, as explained in that order and herein,<sup>57</sup> the existing regulations already require that “to the maximum extent practical, the employees of a market-regulated power sales affiliate must operate separately from the employees of any affiliated franchised public utility.” We therefore affirm the guidance provided by the Commission in the April 15 Clarification Order that franchised public utilities with captive customers may not share employees that determine the timing of scheduled outages, or that engage in economic dispatch, fuel procurement, or resource planning with their market regulated power sales affiliates.<sup>58</sup> Accordingly, sellers will be required to comply with the guidance provided in the April 15 Clarification Order within 90 days of the date of issuance of this order.

The Commission orders:

(A) EEI’s request for stay or rescission of the April 15 Clarification Order is hereby denied, and its request for rehearing is hereby denied, as discussed in the body of this order.

(B) Sellers are hereby required to comply with the guidance provided in the April 15 Clarification Order within 90 days of the date of issuance of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>56</sup> April 15 Clarification Order, 131 FERC ¶ 61,021 at P 37, 40 (citing Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 253).

<sup>57</sup> See *supra* P 20.

<sup>58</sup> See also April 15 Clarification Order, 131 FERC ¶ 61,021 at P 37, 40-41 (citing Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 253).