

not operate or control its transmission facilities and has no access to transmission or market information covered by § 385.5(b), it may request an exemption from this part.

(d) A Transmission Provider may file a request for an exemption from all or some of the requirements of this part for good cause.

i. Regional Transmission Organizations/Independent System Operators

17. The NOPR proposed to exempt Commission-approved RTOs from the standards of conduct, while Transmission Providers that are members of RTOs would not automatically be exempt from them. The NOPR stated that depending on how an RTO is structured, there may be a continuing need to apply the standards of conduct to public utility Transmission Providers that are members of RTOs. While an RTO may administer or manage the transmission facilities, there are instances in which a transmission owner continues to physically control or operate the transmission facilities or control centers.²⁰

18. EEI urged the Commission to be flexible to accommodate the varying operational arrangements that may be worked out between RTOs or ISOs and participating utilities. EEI, the Kentucky Commission, LG&E and KU urged the Commission to permit utilities that have joined an RTO, but still "technically" operate transmission facilities, to be eligible for exemptions from the rule. They argued that because the RTO "administratively" controls the transmission facilities, concerns about improper transfer and use of transmission information are alleviated.

19. BPA stated that it is unclear whether a Transmission Provider would be eligible for an exemption if, despite turning over operation and control, the Transmission Provider retains preferential access to unposted transmission information and requested that the Commission exempt a Transmission Provider even if it possesses minimal transmission information.

20. BPA has highlighted one of the main concerns of the standards of conduct—information access. If a Transmission Provider operates transmission facilities, regardless of whether it belongs to an RTO/ISO, it has the ability to provide an undue preference to an affiliate and has access to valuable transmission information.

Unless the ISO or RTO has a control center and field employees dedicated to the operation and maintenance of all transmission facilities under its operation, a Transmission Provider may be responsible for the operation of the transmission assets (under the direction of the ISO or RTO) and, more importantly, have direct access to transmission information.²¹

Participation in an ISO or RTO does not necessarily prevent a Transmission Provider from sharing information with its affiliates preferentially or preferentially operating facilities for the benefit of its Energy Affiliates.

21. NYISO requested clarification that it would not be subject to the rule. The Commission clarifies that NYISO would not be subject to the rule.

22. LILCO urged the Commission to require RTOs to be subject to the requirement to implement tariffs in a non-discriminatory fashion under § 385.5(c) of the Commission's regulations. Similarly, MID and the Illinois Commission requested that the Commission require RTOs and comparable entities (ISOs) to comply with the standards of conduct. MID claimed that RTOs and ISOs often procure Ancillary Services and Energy to meet their customers' needs and such purchases can have a significant effect on the market.

23. The Commission will not require ISOs or RTOs to be subject to the requirements of the standards of conduct as these transmission organizations have been designed and approved by the Commission to eliminate unduly preferential practices. Indeed, one of the many reasons for their creation was to provide a remedy to undue discrimination rather than relying on the standards of conduct. If transmission customers observe that an ISO or RTO is not complying with its Commission-approved tariff or behaving in an unduly discriminatory fashion, it may file a complaint with the Commission, or contact the Commission's Enforcement Hotline or the ISO's or RTO's market monitoring unit (MMU).

ii. Non-Public Utilities

24. The Kentucky Commission, LPPC, Nebraska Public Power District and SMUD urged the Commission to clarify that the standards of conduct will apply

to non-public utilities, by virtue of the reciprocity provisions of Order No. 888, in the same manner as the current standards of conduct apply to non-public utilities. Sempra urged the Commission to clarify that public power agencies or non-jurisdictional Transmission Providers that get access to the jurisdictional grid through reciprocity tariffs under Order No. 888 should be required to comply with the standards of conduct to eliminate the preferences they provide to their own merchant operations. The Commission agrees and is amending the proposed regulation to make it clearer which entities are subject to the requirements of the standards of conduct. If a non-public utility voluntarily files a reciprocity open access tariff under Order No. 888, it shall comply with the Final Rule.

iii. Cooperatives and Small Pipelines and Utilities

25. Several commenters, including Alabama Electric Coop., Arkansas Electric Coop., Connexus, Seminole Electric Coop., Old Dominion, Midwest Energy, National Rural Electric Coop. Assoc., Southwest Transmission Coop., East Texas Electric Coop., Wolverine Power Supply Coop., Energy East Companies, Empire Electric District, Wells Rural Electric Coop. and Rural Utilities Service of the Department of Agriculture, asked the Commission to clarify that small utilities or cooperatives (coops) that obtained waivers of the standards of conduct under Order No. 889 would automatically be exempt from the provisions of the Final Rule.²² Along the same lines, B-R Pipeline, Distrigas of Massachusetts, Hampshire Storage, NiSource, SCG, USG, and U.S. Gypsum and Washington Gas Light urged the Commission to categorically exempt small pipelines or those that were built to serve one or several customers. NRECA requested that the Commission incorporate waiver provisions in the standards of conduct and continue the effectiveness of previously issued waivers.

26. The Industrials recommended that the regulatory text contain a specific exemption provision. Dynegy, on the other hand, urges the Commission not to create broad categorical exemptions from the rule but, rather, to evaluate specific claims of hardship on a case-by-case basis.

27. The Commission will continue the exemptions and partial waivers for the entities that have previously received

²⁰ See PJM Interconnection, L.L.C. and Allegheny Power, 96 FERC ¶ 61,060 (2001), where the Commission permitted PJM-West's transmission assets to be operated through PJM's central control center, while the physical control of these transmission assets remained with the transmission owners.

²¹ RTOs and ISOs centrally monitor the transmission system, approve transmission service requests through OASIS, and direct member Transmission Providers in the operation of the transmission assets. RTOs, ISOs and member Transmission Providers share transmission information to facilitate safe and reliable operation of the transmission system.

²² Black Creek Hydro, Inc. 77 FERC ¶ 61,232 (1996).