

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

Westar Energy, Inc.

Docket No. IN03-02-000

**Stipulation and Consent Agreement**

**I. INTRODUCTION**

The staff of the Division of Enforcement, Office of Market Oversight and Investigations ("Enforcement"), of the Federal Energy Regulatory Commission ("FERC" or "Commission") and Westar Energy, Inc. ("Westar") enter into this Stipulation and Consent Agreement ("Agreement"). This Agreement resolves all matters pertaining to a non-public investigation conducted by Enforcement under Part 1b of the Commission's regulations, 18 C.F.R. Part 1b (2004), to evaluate compliance with certain aspects of the Federal Power Act ("FPA"), 16 U.S.C. §§ 792 et seq. (2000), and the Commission's regulations, including the Commission's Standards of Conduct,<sup>1</sup> from 1999 to 2003. This Agreement provides for remedial action through a Remedies Section and a Compliance Plan.

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<sup>1</sup> *Order No. 2004, Standards of Conduct for Transmission Providers*, added Part 358 to the Commission's regulations revising the Standards of Conduct for both Gas and Electric Transmission Providers, 18 C.F.R. § 358 (2004). *Order No. 2004, Standards of Conduct for Transmission Providers*, 68 FR 69134 (Dec. 11, 2003), III FERC Stats. & Regs. ¶ 31,155 (Nov. 25, 2003), *order on reh'g*, Order 2004-A, 69 FR 23,562 (Apr. 29, 2004), III FERC Stats. & Regs. ¶ 31,161 (April 16, 2004), *order on reh'g*, Order 2004-B, 69 FR 48,371 (Aug. 10, 2004), III FERC Stats. & Regs. ¶ 31,166 (Aug. 2, 2004), *order on reh'g*, Order 2004-C, 70 FR 284 (Jan 4., 2005), III FERC Stats. & Regs. ¶ 31,172 (Dec. 21, 2004), However, the former Standards of Conduct for Electric Transmission Providers, codified at Parts 37.4, 18 C.F.R. § 37.4 (2003), govern all violations described

## **II. STIPULATION OF FACTS**

Westar and Enforcement stipulate to the following:

1. Westar is a public utility providing electric transmission, generation, distribution, and marketing and agency services to retail customers in Central and Eastern Kansas and to wholesale customers. Its holding company and public utility business are contained within the same corporate entity. Westar's Transmission Services ("T.S.") division conducts transmission operations and reliability functions for Westar. In April of 1998, Westar placed all of its transmission facilities under the SPP Open Access Transmission Tariff ("OATT"), thereby reducing the scope of activities conducted by Westar's T.S. division. Subsequently, Westar turned over the selling of non-firm, short-term firm, long-term firm, and network transmission services to SPP. As each function was turned over to SPP, SPP took over the responsibility of receiving all requests for transmission service and evaluating and making the final determination of accepting or refusing the requests. However, Westar's T.S. division continues to operate the system control center.

2. Westar's Generation and Marketing ("G&M") division employees operate the company-owned generation facilities and the company's wholesale merchant

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in this Agreement because all such violations occurred prior to the effective date of Part 358.

function, including sales for resale of electricity. They also sometimes serve as agents arranging for transmission on Westar for third party purchasers of power who needed transmission service from Westar.

3. From March 1999 to August 2002, G&M entered into prearranged, simultaneous, offsetting transactions with certain third parties, in which Westar sold power to a third party and the third party sold the same quantity of power back to Westar at roughly the same price. Westar said that the purpose of these types of transactions was to account for imbalances that would otherwise result in their hourly energy schedules in a manner that avoided Westar selling to itself, which Westar said was prohibited by applicable accounting standards. Westar discontinued this practice in September 2002. The Kansas Corporation Commission, which retained a consultant to investigate these transactions, found no basis for enforcement action. *See KCC Order Adopting Navigant Consulting Report*, Docket No. 01-WSRE-436-RTS (Jan. 7, 2003).

4. During the period of the investigation, Westar classified its C&I Business Operations (“Business Operations”) division as providing neither merchant nor transmission functions, but rather customer support and account management services for Westar’s largest retail and wholesale municipal customers. However, during the period of the investigation, some Business Operations employees also occasionally served as agents to obtain transmission on Westar for wholesale merchant customers purchasing

power. Business Operations also provide power and transmission issues support for, and customer relations services to, retail customers.

5. In 1996, Westar obtained authorization to sell power at market-based rates.<sup>2</sup> Among Westar's wholesale customers were, and are, municipal customers throughout Kansas who received power and transmission together under bundled contracts entered into prior to the effective date of Order No. 888.<sup>3</sup> Employees serving wholesale customers under the grandfathered, bundled contracts are not subject to the Standards of Conduct because they are treated like employees engaged in retail activities. Under Order No. 888, when a utility negotiates to revise, renew, or unbundle any grandfathered, bundled contracts, the contract loses its grandfathered status and subsequent power sales activities under it are treated as wholesale merchant activities.

6. In 2002, Westar began to terminate some of these grandfathered contracts with its wholesale municipal customers. Under the new unbundled contracts, which began to take effect in May 2003, G&M agreed to provide power to the wholesale

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<sup>2</sup> *Western Resources, Inc.*, 83 FERC ¶ 61,110 (1996).

<sup>3</sup> *Promoting Wholesale Competition Through Open Access Non-Discrimination Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 FR 21540 (May 10, 1996), FERC Stats. & Regs., Regulations Preambles 1991-1996 ¶ 31,036 (Apr. 24, 1996); *order on reh'g*, Order No. 888-A, 62 FR 12274 (Mar. 14, 1997), FERC Stats. & Regs., Regulations Preambles 1991-1996 ¶ 31,048 (Mar. 4, 1997); *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997); *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom.*, *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *cert. granted*, 69 U.S.L.W. 3574 (Nos. 00-568 (in part) and 00-809), *cert. denied* (No. 00-800) (U.S. Feb. 26, 2001).

municipal customers and to obtain transmission on behalf of the wholesale municipal customers as an agent for them.

7. Section 37.4(a) of the Standards of Conduct then in effect, 18 C.F.R. § 37.4(a)(2003), required that transmission operations and reliability (“TR/O”) employees and wholesale merchant function (“WMF”) employees function independently of one another. Sections 37.4(b)(3) and (4) of the then-effective Standards of Conduct, 18 C.F.R. § 37.4(b)(3)-(4)(2003), restricted the Transmission Provider from sharing transmission, customer, or market information with the WMF employees off-OASIS. The Commission also discouraged off-OASIS communications on the grounds that they could be used to circumvent the Standards of Conduct.<sup>4</sup>

8. Generally, the Commission has permitted authorized agents, acting on behalf of a customer, to obtain specific transmission-related information for their clients necessary to provide transmission service to them, even if the agents are WMF employees.<sup>5</sup>

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<sup>4</sup> *Baltimore Gas & Electric Co., et al.*, 89 FERC ¶ 61,013 at 61,054 (1999) (BG&E).

<sup>5</sup> The ability of electric Transmission Providers to do so was recognized in Order No. 2004. *See Order No. 2004-A*, III FERC Stats. & Regs. ¶ 31,161 (2004), 107 FERC ¶ 61,032 (2004) at P 216 (2004) (“There are circumstances where a customer authorizes the Marketing Affiliate to act as its agent or asset manager regarding transmission transactions on the affiliated Transmission Provider. For example, a municipality may

9. However, a Transmission Provider could only share limited information necessary to respond to the customer's transmission requests provided that the Transmission Provider offered similar information on an equal basis to other customers for their transmission requests and that the Transmission Provider's response to the request did not also convey improper general transmission information.<sup>6</sup>

10. From December 2001 to April 2003, the period immediately prior to the unbundling of some Westar wholesale municipal contracts, Westar's G&M WMF division, as agent for the wholesale municipal customers, provided power and transmission marketing services, and general customer care, to them.

11. On April 1, 2003, Westar changed how the wholesale municipal customers were serviced. A business manager and her supervisor who worked for Business Operations were appointed to serve as agents for approximately 20 wholesale municipal

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authorize a Marketing Affiliate to perform its scheduling or nominations on the Transmission Provider . . .”).

<sup>6</sup> See *Order No. 497-A*, 54 FR 52781 (1989), *FERC Statutes and Regulations*, Regs. Preambles 1986-1990 ¶ 30,868 at 31,597 (The Commission noted that the limited exception for information concerning specific transportation requests was not intended to swallow the rule and that if the pipeline's response to a routine transportation request included general information, such information must be contemporaneously disclosed to all potential shippers.), *aff'd*, *Tenneco Gas v. FERC*, 969 F.2d 1187, 1198 (D.C. Cir. 1992); see also *Algonquin Gas Transmission Co.*, 58 FERC ¶ 61,140, at 61,441-42 (1992) (approving as consistent with standard (f) a pipeline's proposal to "contemporaneously disclose information provided to an affiliate except where the information is limited to that required to negotiate, perform under, and administer specific contracts with the affiliate for transportation, purchase or sale of gas, where such specific information does not also communicate general information about pipeline sales, marketing or transportation").

customers, making them the initial and sometimes continuing points of contact for both transmission and power sales issues. Most of the wholesale municipal customers were small in size and many preferred having a single point of contact with Westar to increase efficiency in their interaction with Westar. The contracts for these wholesale municipal customers included both bundled, grandfathered and unbundled, wholesale merchant contracts. As agent for the wholesale municipal customers, the business manager, *inter alia*, conveyed the municipal customers requests to, and relayed responses received from, the G&M and T.S. employees and, similarly, relayed information initiated by the G&M and T.S. employees to the wholesale municipal customers. With respect to the G&M function, such information consisted of requests for power and billing for the same, while with respect to the T.S. function, such information concerned issues such as billing, system upgrades, outages, and metering. Prior to receiving their new duties, the business manager and her supervisor had been responsible for servicing only retail customers and were classified as neither TO/R nor WMF.

12. Soon after the two Business Operations employees began servicing the wholesale municipal customers in their new roles, the business manager began acting beyond the scope of her duties by participating in the negotiation of proposed power sales agreements and providing several of the wholesale municipal customers with detailed explanations of customer options under such proposals. However, none of the wholesale

municipal customers the business manager marketed to signed a new power contract with Westar. The wholesale municipal customers instead opted to obtain power from other power suppliers.

13. During this period, the business manager was not listed on Westar's OASIS as a WMF employee even though she was conducting WMF activities.

14. In this investigation, Enforcement Staff reviewed thousands of Westar employee emails and communications for the April 2003 through October 2003 period and determined that in two instances, Westar TO/R employees sent emails to the business manager concerning individual wholesale municipal customer issues that also included information regarding Westar's internal transmission operations. Such information included new TO/R internal procedures for load shedding to be implemented in the future, possible legal issues related to any failure by Westar to maintain voltage, and Westar's purpose in terminating the municipal customers' grandfathered contracts in terms of transmission benefits for Westar. This information was not contemporaneously shared with non-affiliated customers. Enforcement Staff did not find any evidence that Westar received any competitive advantage by having this information shared with the business manager.

15. In June 2003, a Westar employee complained to Westar regulatory staff that the business manager's activities in serving the wholesale municipal customers

possibly violated the Standards of Conduct because of improper sharing of transmission information and mixing of WMF and TO/R functions. Following an internal investigation, Westar determined that beginning July 16, 2003, the business manager and her supervisor would not have any involvement with respect to discussions of pricing and terms and conditions of power sales with the municipalities. In September 2003, Westar management modified the duties of the business manager and her supervisor yet again to include marketing of energy to wholesale customers. They continued to serve as agents for the wholesale municipal customers for transmission and power issues, as they had since April 2003, but from that point forward were identified on the Company's OASIS site as being WMF employees.

16. Relations between various Westar divisions and some of the wholesale municipal customers during this period were strained by some pricing disputes and customer care issues. On October 21, 2003, the business manager sent an email message to TO/R employees regarding a sudden curtailment of transmission service to a wholesale municipal customer for which she served as agent. She wrote that, "The relationship we (the entire company of Westar) have with [the municipal customer] and several other south cities is very fragile right now, so it's more important than ever to work as true partners with these folks whenever possible." This was the only communication of its sort discovered among the thousands of written communications examined by

Enforcement Staff. Enforcement Staff found no evidence that the business manager's email influenced the actions of the TO/R employees.

17. When Enforcement Staff accessed Westar's OASIS in July 2003, it found generally that the information required to be posted was accessible. However, certain information required to be posted, including the Standards of Conduct postings and Westar's Open Access Transmission Tariff, could not be accessed. After Staff notified Westar of the omission, Westar promptly notified the Southwest Power Pool, which manages Westar's OASIS server, and caused the broken hyperlinks to be repaired. Westar said that no customer was denied service because of the broken hyperlink to the OATT.

18. After Westar posted the Standards of Conduct information, Enforcement Staff reviewed Westar's organizational charts and determined that, generally, the information was correctly posted. However, Westar had failed to identify the business manager as a WMF employee during the period when she was participating in wholesale merchant activities, from April through August 2003.

### **III. ALLEGED VIOLATIONS**

A. Enforcement alleges:

1. By sharing transmission system operations information with a WMF employee on two occasions, Westar violated former section 37.4(b)(3)-(4) of the

Standards of Conduct, 18 C.F.R. § 37.4(b)(3)-(4) (2003). Section 37.4(b)(3)(i) provided, in pertinent part, that wholesale merchant function employees “must not have preferential access to any information about the Transmission Provider’s transmission system that is not available to all users on an OASIS.” Section 37.4(b)(4)(i) provided, in pertinent part, that transmission employees “may not disclose to [wholesale merchant function employees] any information concerning the transmission system of the Transmission Provider or the transmission system of another...through non-public communications conducted off the OASIS....” These two instances gave the wholesale merchant function unduly preferential knowledge of, and proximity to, Westar’s transmission system and transmission personnel that other power marketers in the marketplace could not access or replicate. Also, frequent informal communications between the business manager and the transmission function employees created “an institutional off OASIS information track that could be used to subvert the Order No. 889 restrictions on. . . wholesale merchant function preferences.” *See Baltimore Gas & Electric Co., et al.*, 89 FERC ¶ 61,013 at 61,054 (1999).

2. The preferential sharing of information on two occasions violated section 205(b) of the FPA, which prohibits public utilities from engaging in preferential or discriminatory arrangements between persons, localities, and classes of services. Westar

preferentially shared transmission information with its WMF and did not make such information available to other customers, resulting in an undue preference to an affiliate.

3. The business manager's email suggesting that the Transmission Service Function and other parts of the Westar work together as "true partners" to serve wholesale municipal customers reflects that the business manager failed to understand the duty to function independently under former section 37.4(a), 18 C.F.R. § 37.4(a)(2003). As noted, that section required WMF and TO/R employees to function independently of one another, a requirement that is reiterated in section 358.4(a) of the Standards of Conduct released in Order No. 2004.

4. Westar's failure to maintain functional OASIS links to Westar's Standards of Conduct information on the SPP OASIS violated former section 37.4(c), 18 C.F.R. § 37.4(c)(2003), of the Standards of Conduct and Commission rules, see *American Electric Power Service Corporation, et al*, 83 FERC ¶ 61,357 (1998) (AEP III), *order on reh'g*, 84 FERC ¶ 61,256 (1998), which required accurate and accessible OASIS postings for Standards of Conduct written procedures, organization charts, and employee functions. Likewise, Westar's failure to accurately identify the business manager's position on its OASIS organization charts as a WMF member from April through August 2003 violated the requirement to post such information.

5. Westar's failure to post its OATT on the SPP-managed OASIS violated section 37.6(c)(2) of the Commission's regulation, 18 C.F.R. § 37.6(c)(2)(2003).

B. Westar's Position:

1. Westar neither admits nor denies the allegations set forth above.

#### **IV. REMEDIES**

For purposes of settling any and all civil and administrative disputes, and in lieu of any other penalty or remedy that the Commission might assess or determine concerning any possible violations of statutes or of Commission orders or regulations arising from all matters included within the scope of the investigations identified in section I of this Agreement:

1. Westar shall implement fully and follow the Compliance Plan attached as Appendix A to this agreement.

a. Westar will conduct new Standards of Conduct training to ensure that employees strictly follow the information disclosure prohibitions under the current Standards of Conduct. Westar will also provide specific training to all agents and customer points of contact, and to transmission employees engaged in system operations or reliability functions, regarding the need for independent functioning between the merchant and transmission

functions, and regarding the duty of agents and points of contact not to request, and transmission employees not to provide, transmission information not necessary to serve the specific transmission request of an agent or point of contact's customers, or preferential access to transmission information or transmission function personnel. Such training shall occur beginning no later than the later of (1) June 1, 2005, or (2) 30 days after FERC approves the training materials, and within each 12-month period thereafter.

- b. Within 30 days after each of the first through third anniversaries of the date on which a Commission order approving this Agreement without modification ("Issuance Date"), Westar shall file with Enforcement a Compliance Report ("Compliance Report") in this docket explaining how, during the previous 12-month period, it implemented the Compliance Plan and ensured continued compliance with the applicable provisions of this Agreement and the Compliance Plan.
- c. Should any audit or reporting activity conducted pursuant to this Agreement or the Compliance Plan indicate that during the period in which the Compliance Plan is in effect, Westar or any affiliate of it

subject to the Compliance Plan engaged in any apparent violation of any rule, regulation, or statutory requirement administered by the Commission, Westar shall describe in the applicable Compliance Report each such violation and any remedy for it Westar implemented after consultation with Enforcement.

2. Westar will put procedures into place to ensure, consistent with the requirements of Orders Nos. 889 and 2004, that all OASIS materials are properly posted and that SPP is notified should hyperlinks maintained by the SPP become inoperable.

3. Failure to comply with any provision of this Part shall violate a final order of the Commission issued pursuant to the FPA and may subject Westar to additional action under the enforcement and penalty provisions of the FPA and the Commission's rules.

## **V. TERMS**

1. Enforcement and Westar state that they enter into this Agreement voluntarily and that, other than the agreements provided herein, no tender, offer, or promise of any kind whatsoever has been made by any party to this Agreement or by any member, officer, agent, or representative thereof, to induce the other party to enter into this Agreement.

2. The Agreement does not address or affect any issues pending in any other docketed matter.

3. By the Agreement, Enforcement and Westar evidence their intention to settle only the matters referred to herein that are within the Commission's jurisdiction and statutory authority to settle.

4. Unless the Commission issues an order approving this Agreement in its entirety without modification or condition, this Agreement shall be null and void and of no effect whatsoever, and neither Enforcement nor Westar shall be bound by any provision or term of this Agreement, unless they agree otherwise in writing.

5. Upon the issuance of a final Commission order approving this Agreement in its entirety without modification or condition, this Agreement shall resolve as to the Westar, their agents, officers, directors and employees, both past and present, and the Commission shall be forever barred from bringing against the Westar, their agents, officers, directors, or employees, both past and present, any and all administrative or civil claims or matters asserting any and all claims, liabilities, causes of action, demands, rights, alleged entitlements, obligations, known or unknown, asserted or not asserted, vested or unvested, without limitation, arising out of, related to, or connected with the investigation referred to in section I of this Agreement. Upon the issuance of a final Commission order approving this Agreement in its entirety without modification or

condition, the investigation referred to in section I of this Agreement and docketed in this Docket No. IN03-02-000 shall be deemed terminated. This Agreement shall not bar Commission action in the event the Commission determines that Westar has failed to comply with any provision of section IV of this Agreement. This Agreement shall not bar Westar from taking legal or factual positions regarding the allegations in section III.A in any legal proceeding not before the Commission provided that such positions are not inconsistent with this Agreement.

6. The provisions of this Agreement shall apply to Westar and its successors and assigns.

7. The parties agree that a Commission order approving this Agreement in its entirety without modification or condition shall be a final and nonappealable order under section 313 of the FPA, 16 U.S.C. § 8251 (2000). With regard to such order, Westar waives: hearings pursuant to the applicable provisions of the FPA; the filing of proposed findings of fact and conclusions of law; an initial decision by an administrative law judge pursuant to the Commission's Rules of Practice and Procedure; post-hearing procedures pursuant to the Commission's Rules of Practice and Procedure; and judicial review by any court.

8. With respect to the representations of the parties set forth herein, the undersigned representative of each party represents and warrants that he or she has read

them and knows the contents thereof, that all the statements and matters set forth are true and correct to the best of his or her knowledge, information, and belief, and that he or she understands that each party enters into this Agreement in express reliance on those representations.

9. Each of the undersigned warrants that he or she is an authorized representative of the party designated, is authorized to bind such party, and accepts this Agreement on behalf of that party.

10. This Agreement may be executed in counterparts, each of which so executed shall be deemed to be an original, and such counterparts shall together constitute one agreement.

**Stipulation and Consent Agreement - 19 -**  
**Westar Energy, Inc.**  
**Docket No. IN03-02-000**

Agreed to and accepted this 22nd day of April, 2005.

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Robert E. Pease,  
Deputy Director,  
Division of Investigations and Enforcement,  
Office of Market Oversight and Investigations

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April 22, 2005

By: Peggy S. Loyd  
Peggy S. Loyd  
Vice President, Corporate Compliance  
and Internal Audit  
Westar Energy, Inc.

4/22/05  
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April 22, 2005