

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

**Preventing Undue Discrimination and)
Preference in Transmission Service)**

**Docket Nos. RM05-25-000
and RM05-17-000**

**MOTION OF THE ORGANIZATION OF MISO STATES AND ORGANIZATION OF
PJM STATES, INC. FOR LEAVE TO COMMENT OUT OF TIME**

Pursuant to Rule 214(a)(2) of the Federal Energy Regulatory Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(a)(2), the Organization of MISO States ("OMS") and the Organization of PJM States, Inc. ("OPSI") respectfully request leave to comment out of time in the above captioned proceeding.

The Commission's May 19, 2006 Notice of Proposed Rulemaking ("NOPR") is clear that Comments in this proceeding are to be filed within sixty days after publication of the NOPR in the Federal Register. Because the Federal Register publication date was June 6, 2006, the Comments in this proceeding were due on August 7, 2006.

However, because of the timing of the National Association of Regulatory Utility Commissioners Summer Meetings (July 30 – August 2), the timing of individual state Commission meetings needed to approve these Comments, and because of the extra effort needed to coordinate among multiple regional state committees, we respectfully request leave to file these Comments out of time.

The OMS is a non-profit, self-governing organization of representatives from each state with regulatory jurisdiction over entities participating in the Midwest ISO. The purpose of the OMS is to coordinate regulatory oversight among the states; to make recommendations to the

Midwest ISO, the Midwest ISO Board of Directors, the Commission, other relevant government entities and state commissions as appropriate; and to intervene in proceedings before the Commission to express the positions of the OMS member agencies. The OMS files this Motion pursuant to the authority conferred by its bylaws and the authorization of its Board of Directors.

The OPSI is a non-profit organization established in July 2005 to provide state Commissions the means to work together on issues of mutual interest related to PJM operations; the electricity generation and transmission system serving the PJM states; FERC matters; and systems within the states' boundaries. The members of OPSI are the state commissions with regulatory jurisdiction over entities participating in the PJM interconnection.

Service of all pleadings, documents, and communications in this matter should be made on the following:

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**COMMENTS OF THE ORGANIZATION OF MISO STATES AND THE
ORGANIZATION OF PJM STATES, INC.**

EXECUTIVE SUMMARY OF THE JOINT RSCs' POSITION

In these comments, the Organization of MISO States (“OMS”) and the Organization of PJM States, Inc. (“OPSI”) (collectively, the “Joint RSCs”) provide comments focusing on the applicability of the Commission’s proposed rulemaking Order 888 reforms to RTOs, particularly to the Midwest ISO and the PJM Interconnection.

These comments discuss six issue areas that the OMS identified in its comments responding to a previous Commission NOI as potentially applicable to RTOs. Specifically, those issue areas are: Hourly Firm Transmission Service – Through and Out Service; Obligation to Expand Capacity - Discrimination by Transmission Owners; Joint Ownership; Reservation Priority; Ancillary Services – General and Pro Forma OATT Definitions. These issues are discussed in more detail in subsection III.A of these Comments.

The Comments also discuss eleven issue areas that are not applicable to RTOs because the issues relate to behavioral remedies for undue discrimination that have already been addressed within the RTO context. Specifically, those issues are: Undue Discrimination Generally; Transmission Pricing; Remedies, Penalties and Enforcement; Changes in Receipt and Delivery Points (Redirects); Rollover Rights – Discriminatory Applications; Rules, Standards

and Practices Governing the Provision of Transmission Service; Joint Transmission Planning; Tariff Compliance Review; Hoarding of Transmission Capacity; Curtailments; and Ancillary Services – i) Energy Imbalances and ii) Generator Imbalances.¹ Those issues are addressed in more detail in subsection III.B of these Comments.

Finally, these Comments discuss seven NOI issue areas involving undue discrimination where an RTO's OATT could be different than that of a Non-Independent Transmission Provider's OATT and would best be addressed within each RTO's stakeholder process. Those issues are: Network and Point-to-Point Transmission Service; Untimely Processing of Requests for Transmission Service; Hourly Firm Transmission Service – Financial Transmission Rights; Rollover Rights – Longer Minimum Term of Service to Qualify; Obligation to Expand Capacity – Overcoming Disincentives to Build Transmission; Designation of Network Resources; and Queuing for Long-Term Transmission Service. These issues are addressed in subsection III.C of these Comments.

Our most significant areas of disagreement or potential disagreement with the policies proposed by the Commission in the NOPR involve the issues of contract roll over policy (Section III.C.iv of the Comments) and liquidated damages contracts as designated network resources (Section III.C.vi of the Comments). On these and on several other issues we make substantive suggestions or recommendations for Commission consideration.

¹ OMS NOI Comments, at 2

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I. INTRODUCTION

On May 19, 2006, the Federal Energy Regulatory Commission (“Commission”) issued a Notice of Proposed Rulemaking (“NOPR”) in the above-captioned dockets to reform and update the pro forma open access transmission tariff (“OATT”) that the Commission previously adopted in Orders 888 and 889.² Pursuant to the Notice issued in the Federal Register on June 6, 2006, establishing August 7, 2006 as the due date for Comments in this proceeding, the Organization of MISO States (“OMS”) and the Organization of PJM States, Inc. (“OPSI”) (collectively, “the Joint RSCs”) respectfully submit the following Comments.

II. BACKGROUND

The Commission’s May 19 NOPR was preceded by a Notice of Inquiry (“NOI”) that was issued on September 16, 2005.³ The NOI asked a series of questions on a number of issues associated with transmission under the Order 888 open access paradigm.

On November 23, 2005, the OMS submitted Comments on the Commission’s NOI in this case. The OMS’ Comments on the earlier NOI in this proceeding primarily addressed whether

² *Preventing Undue Discrimination and Preference in Transmission Service*, 115 FERC ¶61,211 (May, 2006)

Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 Fed. Reg. 21,540 (1996), *FERC Statutes and Regulations, Regulations Preambles* January 1991-June 1996 ¶31,036 (1996), order on reh’g, Order No. 888-A, 62 Fed. Reg. 12,274 (1997), *FERC Statutes and Regulations, Regulations Preambles* July 1996-December 2000 ¶31,048 (1997), order on reh’g, Order No. 888-B, 62 Fed. Reg. 64,688, 81 FERC ¶61,248 (1997), order on reh’g, Order No. 888-C, 82 FERC ¶61,046 (1998), aff’d in part sub nom. *Transmission Access 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) and cert. denied, id. (No. 00-800) (U.S. February 26, 2001).

Open-Access Same-time Information System (Formerly Real-Time Information Network) and Standards of Conduct, Order No. 889, 61 Fed. Reg. 21737 (May 10, 1996), *FERC Statutes and Regulations, Regulations Preambles* January 1991-June 1996 ¶31,035 (Apr. 24, 1996); Order No. 889-A, order on reh’g, 62 Fed. Reg. 12484 (Mar. 14, 1997), *FERC Statutes and Regulations, Regulations Preambles* July 1996-December 2000 ¶31,049 (Mar. 4, 1997); Order No. 889-B, reh’g denied, 62 Fed. Reg. 64715 (Dec. 9, 1997), 81 FERC ¶61,253 (Nov. 25, 1997).

³ *Preventing Undue Discrimination and Preference in Transmission Services*, 112 FERC ¶ 61,299, (September, 2005)

or not the issues raised in each section of the NOI should or should not be applied to RTO tariffs (in particular, to the Midwest ISO tariff).⁴

Similarly, the Joint RSCs' Comments on the NOPR will focus on the applicability of the Commission's proposed Order 888 reforms to RTOs, particularly to the Midwest ISO and the PJM Interconnection ("PJM"). These Comments will address the issues in the order in which they were discussed in the OMS's previous NOI Comments.

III. APPLICABILITY OF THE PROPOSED RULE TO RTOs (NOPR SECTION IV.C.1)

In its Comments responding to the Commission's NOI, the OMS focused primarily on the applicability of the Commission's Order 888 reform rulemaking initiatives to RTO tariffs, in particular to the tariff of the Midwest ISO. Specifically, the OMS Comments stated,

...the OMS believes that changes to the Midwest ISO OATT are not needed to mitigate issues of discrimination or preference, but rather may or may not be desired as a matter of commercial efficiency or convenience for Midwest ISO members. The OMS shares the Commission's concern over RTO/ISO costs and also understands that some changes to RTO/ISO tariffs can require extensive software/hardware investments, including those of both the RTO/ISO and its members. As a result, the OMS believes the Commission needs to allow for flexibility by avoidance of prescribing one-size-fits-all OATT terms and conditions that lump Independent Transmission Providers together with non-Independent Transmission Providers. In this respect, the OMS has classified only six areas where it believes that issues discussed in this NOI could be applicable to the Midwest ISO. If the Commission follows up this NOI with a Notice of Proposed Rulemaking ("NOPR") regarding changes to be made to the pro forma OATT, the OMS would request that the Commission would clearly indicate in its NOPR what changes it is proposing to apply to RTOs, and would take into consideration these OMS comments in making that determination.⁵

However, in Section IV.C.1 of the NOPR, the Commission chose to take a different approach on the issue of applicability of the proposed rule to RTOs than that recommended by the OMS. In particular, the Commission proposes to apply the final rule to all public utility

⁴ OMS NOI Comments, at 1

⁵ OMS NOI Comments, at 11

transmission providers, including RTOs.⁶ Under the proposal, each RTO would be required to submit an FPA section 206 compliance filing within ninety days, following publication of the final rule in the Federal Register.⁷ Further, an RTO's compliance filing must contain the non-rate terms and conditions set forth in the final rule, or alternatively, a demonstration that existing tariff provisions are consistent with, or superior to, those set forth in the final rule.⁸ Finally, after making such FPA section 206 compliance filings, an RTO would be permitted to submit filings under FPA Section 205 proposing rates for the services provided for in their tariffs, as well as non-rate terms and conditions that differ from those in their existing tariffs and those set forth in the final rule, if those provisions are "consistent with or superior to" the pro forma OATT.⁹

The Commission stated, "We generally note that the purpose of this NOPR is not to redesign approved, fully-functional RTO or ISO markets."¹⁰ The Commission further stated, "We do not expect that substantial changes to those markets would be required as a result of this NOPR."¹¹ However, the Commission also stated, "there may be elements of the proposed reforms that are superior to what currently exists in some RTOs or ISOs, e.g., transparency, data exchange or planning, which would require the RTO or ISO to conform to the pro forma OATT."¹²

In its previous NOI Comments, the OMS identified six issue areas that are potentially applicable to RTOs. They are discussed herein, including: Hourly Firm Transmission Service – Through and Out Service; Obligation to Expand Capacity - Discrimination by Transmission

⁶ NOPR, at P 98

⁷ NOPR, at P 100

⁸ NOPR, at P 100

⁹ NOPR, at P100

¹⁰ NOPR, at P 101

¹¹ NOPR, at P 101

¹² NOPR, at P 101

Owners; Joint Ownership; Reservation Priority; Ancillary Services – General; and Pro Forma OATT Definitions.¹³ These issues are addressed in subsection III.A of these Comments.

The OMS also identified eleven NOI issue areas as not applicable to RTOs because the issues relate to behavioral remedies for undue discrimination that have already been addressed through structural reform within the RTO context. Those issues are: Undue Discrimination Generally; Transmission Pricing; Remedies, Penalties and Enforcement; Changes in Receipt and Delivery Points (Redirects); Rollover Rights – Discriminatory Applications; Rules, Standards and Practices Governing the Provision of Transmission Service; Joint Transmission Planning; Tariff Compliance Review; Hoarding of Transmission Capacity; Curtailments; and Ancillary Services – i) Energy Imbalances and ii) Generator Imbalances.¹⁴ Those issues will be addressed in subsection III.B below.

Finally, the OMS identified seven NOI issue areas involving undue discrimination where an RTO's OATT could be different than that of a Non-Independent Transmission Provider's OATT and would best be addressed within each RTO's stakeholder process. Those issues are: Network and Point-to-Point Transmission Service; Untimely Processing of Requests for Transmission Service; Hourly Firm Transmission Service – Financial Transmission Rights; Rollover Rights – Longer Minimum Term of Service to Qualify; Obligation to Expand Capacity – Overcoming Disincentives to Build Transmission; Designation of Network Resources; and Queuing for Long-Term Transmission Service.¹⁵ Those issues will be addressed in subsection III.C below.

¹³ OMS NOI Comments, at 3

¹⁴ OMS NOI Comments, at 2

¹⁵ OMS NOI Comments, at 3

A. NOI Issue Areas That Are Potentially Applicable in the RTO Context

i. Hourly Firm Transmission Service – Through and Out Service (NOPR Section V.D.2)

In the NOPR, the Commission proposes to require transmission providers to provide point-to-point hourly firm service as part of the pro forma OATT.¹⁶ The Commission states that doing so will “eliminate a barrier to the development of markets and thereby decrease opportunities for undue discrimination.”¹⁷ The Joint RSCs have no objection to the Commission’s policy decision in this regard and look forward to reviewing the Section 206 filings that the Midwest ISO, PJM and SPP make in compliance with the Commission’s directive concerning this issue.

ii. Obligation to Expand Capacity - Discrimination by Transmission Owners (NOPR Section V.B)

In the NOI, the Commission asked a series of questions to assess whether changes to the pro forma OATT are needed to clarify transmission providers’ obligations to expand transmission capacity and achieve the Commission’s goal of getting needed transmission built.¹⁸

In its response to these NOI questions, the OMS noted that RTOs generally have regional transmission planning processes and noted the Midwest ISO’s Midwest Transmission Expansion Plan (“MTEP”) process in particular. However, the OMS also stated that, while the Midwest ISO is involved in regional transmission planning, the Midwest ISO is not the builder or owner of transmission facilities.¹⁹ In RTOs, a distinction must be made between the transmission provider (the RTO) and the transmission owner/builder. Accordingly, the OMS advised that,

¹⁶ NOPR, at P 343

¹⁷ NOPR, at P 343

¹⁸ NOI, at P 21

¹⁹ OMS Comments, at 7

Where the Transmission Provider and regional planning functions are separated from the transmission construction and ownership functions, the Commission should carefully consider what its policy should be with respect to the obligation that Transmission Owners that turn functional control of transmission facilities over to an RTO should have with respect to building transmission facilities.²⁰

In describing the Commission's proposals for modifying the transmission planning aspects of the pro forma OATT, the NOPR largely failed to make the important distinction between the transmission provider and the transmission owner/builder in the RTO context. For example, the Commission stated,

Transmission providers have a disincentive to remedy transmission congestion when doing so reduces the value of their generation or otherwise stimulates new entry or greater competition in their area.²¹

While applicable to transmission owners either inside or outside of RTOs, this statement about "transmission providers" was not on point in an RTO context, because it is the RTO - not the vertically integrated electric utility - that is the transmission provider. However, the NOPR did focus on the transmission ownership/control issues when quoting the court in TAPS v. FERC as follows,

[u]tilities that own or control transmission facilities naturally wish to maximize profit. The transmission-owning utilities thus can be expected to act in their own interest to maintain their monopoly and to use that position to retain or expand the market share for their own generated electricity, even if they do so at the expense of lower-cost generation companies and consumers.²²

In coming to its proposed mandatory transmission planning policy, the Commission observed that,

...the transmission grid is being utilized in a fundamentally different way, consistent with the intent of open access, and a decade of experience has shown us that in order to remedy undue discrimination, the existing provisions of the pro forma OATT respecting transmission system planning must be reformed. Accordingly, in order to provide for more comparable open access transmission

²⁰ OMS NOI Comments, at 7

²¹ NOPR, at P 208, emphasis provided

²² NOPR, at P 208, citing 225 F.3d at 684

service, eliminate the potential for undue discrimination and anticompetitive conduct, and satisfy our statutory responsibilities under section 217 of the FPA, we propose that each public utility transmission provider participate in an open and transparent local and regional planning process that addresses certain fundamental principles of transmission planning.²³

The Commission went on to describe the eight principles that it proposes to require of public utility transmission planning processes. These eight principles are: (1) Coordination; (2) Openness; (3) Transparency; (4) Information Exchange; (5) Comparability; (6) Dispute Resolution; (7) Regional Participation; and (8) Congestion Studies.²⁴

These principles are not objectionable. Indeed, the Midwest ISO, PJM and Southwest Power Pool planning processes are generally designed to adhere to these principles. Although, the RTO planning processes can be improved, the RTO stakeholder process is a better forum for designing improvements than a generally applicable rulemaking proceeding.

The Commission's proposed planning principles do not address the issue discussed by the OMS in its Comments on the Commission's NOI. In particular, these principles do not address transmission owners' obligations to expand transmission capacity within the RTO context, where the transmission ownership and construction responsibility is separated from the RTO's transmission planning responsibility. With the Commission's proposal on planning reform, conflicts between a transmission provider and transmission customers are addressed through a dispute resolution process and affected parties would have the right to file complaints with the Commission under FPA section 206. In its final rule, the Commission should make clear that these processes are available to resolve conflicts between a transmission owner and the RTO transmission provider as well as transmission customers. Moreover, where there is an independent transmission planning process, the Commission should give deference to the

²³ NOPR, at P 213

²⁴ NOPR, at P 214

resulting plan and require the transmission facilities included in that plan to be built by transmission owners once the plan has met all of the requirements associated with the proposed planning principles. If a transmission owner objects to building any of the facilities approved in the plan, either the dispute resolution process or a section 206 filing at the Commission would be available.

If all eight of the proposed planning principles are applied in the context of an independent planning authority, there is significant stakeholder review of the plan that must include recommendations for upgrades designed to relieve congestion. While the planning principles require the transmission provider to perform congestion studies, including “the location and magnitude of the congestion; possible remedies for the elimination of the congestion, in whole or in part; the associated costs of congestion; and the cost associated with relieving congestion through system enhancements (or other means),” the Commission remains concerned with what constitutes “significant and recurring” congestion and how such congestion should be addressed by the transmission provider.²⁵

The Joint RSCs do not believe this proposed rulemaking on reforming the pro-forma tariff should address criteria for determining “significant and recurring” congestion, but should require each transmission provider to file criteria for inclusion and cost responsibility for upgrades that are included in the transmission plan to remedy transmission congestion. For example, the Midwest ISO plans to address the criteria for inclusion in the Midwest ISO’s Midwest Transmission Expansion Plan (“MTEP”) and for cost allocation in a filing to occur in the Fall of 2006.

iii. Joint Ownership (NOPR Section V.B)

²⁵ NOPR, at P 214

In the NOI, the Commission asked a series of questions to assess whether revisions should be made to the pro forma OATT to allow transmission customers to participate in the joint ownership of new transmission facilities with public utilities.²⁶ In its Comments on the NOI, the OMS stated that the Commission's joint ownership questions are applicable to transmission owners within the RTO context.²⁷

In the NOPR, the Commission did not propose any particular OATT revisions to address the joint ownership issue. The Commission continues to seek input on the matter stating,

We seek comment on whether there should be a requirement that, at least for large new transmission projects (such as new regional backbone facilities), there be an open season to allow market participants to participate in joint ownership of these projects. We believe that such a requirement could stimulate more investment in the grid and ensure that all customers have the ability to participate in new projects on a nondiscriminatory basis, including smaller market participants that cannot support the construction of large new facilities on their own. We seek comment on whether to include such a requirement and, if so, what conditions or limitations should be associated with it.²⁸

The discussion of joint ownership of new transmission facilities has traditionally kept the concept of ownership distinct from the concept of users or beneficiaries. Traditionally, large new transmission projects could involve multiple owners based on the location of the facilities in various transmission owners' existing service territories. The beneficiaries of such projects were transmission customers. If transmission customers committed to paying for these facilities through annual revenue requirements and such large projects were totally subscribed, then there was minimal risk to transmission owners in making the investment in these facilities.

The Commission's proposed joint ownership policy appears intended to break down the traditional separation between transmission owner and transmission customer. Large new transmission facilities could be built more quickly by allowing ownership in such facilities to no

²⁶ NOI, at P22

²⁷ OMS NOI Comments, at 8

²⁸ NOPR, at P 218

longer be based on the location of these facilities. For example, if transmission customers are not willing to commit to fully paying the annual revenue requirements associated with a transmission upgrade, the transmission line is not likely to be built by the traditional transmission owner. However, if transmission customers are willing to take on the risk of revenue recovery, they should be allowed to participate by providing up-front funding of the project and then receiving a share of the revenues generated through transmission use.²⁹ New tariff language would need to be written to accommodate this arrangement.

This possible approach is different from the one approved by the Commission for the Southwest Power Pool (“SPP”), where customers can commit to paying the full revenue requirement of the upgrade either through the application of “higher of” pricing or simply as a project sponsor, but SPP would then be entitled to receive revenue credits from future service taken on the upgraded facilities.³⁰ For a large new transmission project, the difference in this joint ownership arrangement is that the transmission customer would provide up-front funding for the project and then be entitled to receive revenue payments, rather than revenue requirement recovery.

While it appears most likely that transmission customers (e.g., transmission dependent utilities) would want the ability to participate as owners in such transmission projects, generators might also see the economic advantage of funding such a project and be willing to participate. In either case, joint ownership proposals would need to be accompanied by agreements for providing maintenance of these facilities. This too would also require new tariff language.

²⁹ For example, the benefits expected from the project may more than cover the risk of not obtaining a revenue recovery similar to what is required by a transmission owner.

³⁰ See, *Southwest Power Pool* 110 FERC ¶ 61,028 (2005), *Southwest Power Pool* 111 FERC ¶ 61,118 (2005) and *Southwest Power Pool* 112 FERC ¶ 61,319 (2005)

iv. Reservation Priority (NOPR Section V.D.5.c)

The Reservation Priority subsection of the NOI raised several issues dealing with the first-come, first-served approach to transmission reservation priorities, the right of first refusal as a fair and equitable way to allocate transmission capacity when the transmission system is oversubscribed and whether this provides an unfair competitive advantage or an opportunity for abuse.³¹ In its Comments on the NOI, the OMS stated that fair and equitable allocation of transmission capacity when the transmission system is oversubscribed is an issue that is applicable in the RTO context, particularly in the provision of through and out transmission service.³²

In the NOPR, the Commission proposes several changes to the current first-come, first-served process, but continues to seek feedback on these issues.³³ For example, the Commission proposes to treat all requests submitted within a five-minute window as having been submitted simultaneously. The Commission also proposes to give priority status to pre-confirmed requests. Finally, the Commission proposes to add price as a tie-breaker in determining reservation queue priority when the transmission provider is willing to discount transmission service.

The Joint RSCs suggest that, in addition to adding price as a tie-breaker for discounted service, the Commission should consider requiring point-to-point transmission customers to offer a reservation price at which they would be willing to sell their transmission service. The specifics of the transmission path and the offer price would be posted on the OASIS and be available to other transmission customers willing to pay the reservation price. The transmission customer holding the rights to the transmission service would receive the payment if that transmission service is sold to another transmission customer.

³¹ NOI, at P. 26

³² OMS NOI Comments, at 9

³³ NOPR, at PP 399-401

v. Ancillary Services – General (no Specific NOPR Section)

In the ancillary services section of the NOI, the Commission raised issues associated with whether or not the correct ancillary services are included in the pro forma OATT.³⁴ The OMS stated that this issue is applicable in the RTO context.³⁵

Other than with respect to the energy imbalance issue (discussed elsewhere in these Comments), the Commission's NOPR does not address transmission ancillary services or propose changes or additions to the ancillary services line-up in the Order 888 pro forma NOPR. We agree that the Commission need not make changes or additions to the RTOs' ancillary services line-up in this proceeding

vi. Pro Forma OATT Definitions (NOPR Section V.D.10)

The issues raised in this subsection of the NOI dealt with having a common understanding of terms used throughout the pro forma OATT. The Commission asked whether new or amended pro forma OATT definitions are required.³⁶ In its Comments on the NOI, the OMS stated that it shares the Commission's goal of having a common understanding of terms that are used in the OATT's of both Independent and Non-Independent Transmission Providers.³⁷

In the NOPR, the Commission proposes to require each public utility to modify its definition of "Good Utility Practice" to incorporate the "reliable operation" definition adopted in Section 215 of the FPA.³⁸ The Commission also proposes to add a definition for "non-firm

³⁴ NOI, at P 29

³⁵ OMS NOI Comments, at 10

³⁶ NOI, at P 32

³⁷ OMS NOI Comments, at 11

³⁸ NOPR, at P 461

sales” because that term is used in determining designated network resources.³⁹ Finally, the Commission proposes to add definitions for “affiliate” and “pre-confirmed application” because those definitions are needed to implement other changes that the Commission proposes to make to the pro forma OATT.⁴⁰

The Joint RSCs have no objection to these proposed changes and additions to the pro forma OATT definitions.

B. NOI Issue Areas That Are Not Applicable in the RTO Context

i. Undue Discrimination Generally (NOPR Section III.A)

The issues raised in the undue discrimination subsection of the NOI dealt with whether there are remedies other than structural separation of generation from transmission that would adequately address undue discrimination by Non-Independent Transmission Providers.⁴¹ The OMS took the position that the issues raised in this subsection of the NOI are not relevant in an RTO context.⁴²

In the NOPR, the Commission discussed undue discrimination in the general overview section concerning the need for reform of Order 888. The Commission found that opportunities for undue discrimination continue to exist and that the Commission has an obligation under Section 206 of the FPA to remedy undue discrimination.⁴³

The RTO model has shown itself to have achieved a good level of independence. In order to achieve some level of independence in non-RTO regions, non-independent transmission providers should be encouraged to turn over operational control of their transmission systems to

³⁹ NOPR, at P 462

⁴⁰ NOPR, at P 463

⁴¹ NOI, at P 11

⁴² OMS NOI Comments, at 3

⁴³ NOPR, at P 21

an independent coordinator of transmission (“ICT”) whose functions would include security coordination, determination of ATC, granting of transmission service and oversight for transmission planning.⁴⁴

ii. Transmission Pricing (NOPR Section V.C)

The OMS interpreted the issues being raised in the transmission pricing section of the NOI as being applicable only to systems that do not use locational marginal pricing. For that reason, the OMS concluded in its previous Comments that the Commission’s inquiry in this area is not applicable in the Midwest ISO context.⁴⁵

However, under the “Transmission Pricing” heading of the NOPR, the Commission discusses Imbalances, Credits for Network Customers, Capacity Reassignment, “Operational” Penalties, and “Higher of” Pricing Policy. The Joint RSCs will discuss several of these issues elsewhere in these comments and, so, will not address them here.

In general, the broader issue of transmission pricing in the RTO context is a matter best addressed through the RTO stakeholder process or otherwise, rather than in the context of a generally applicable rulemaking proceeding.

iii. Remedies, Penalties and Enforcement (NOPR Sections V.E.1, V.E.2, and V.C.4)

The issues raised in this section of the NOI dealt with penalties placed on Transmission Providers for violating tariff provisions.⁴⁶ The OMS pointed out in its Comments on the NOI that, because RTOs are not-for-profit organizations, any penalty charges imposed on RTOs

⁴⁴ Montana does not join in this paragraph because the either/or direction of the paragraph, directing membership in either a RTO or an ICT, violates the stated Commission policy that membership in a RTO is voluntary.

⁴⁵ OMS NOI Comments, at 4

⁴⁶ NOI, at P 15

would ultimately be passed on to end-users for cost recovery.⁴⁷ The OMS also pointed out that this significantly reduces the deterrent effect of imposing penalties on RTO transmission providers.⁴⁸ The OMS further pointed out that because RTOs are designed to be independent of market participant interests, there is little or no need to adopt penalty policies to discourage unduly discriminatory or preferential treatment by RTOs.⁴⁹

In the NOPR, the Commission decided that,

aside from [] operational penalties, the Commission does not intend to provide a schedule of enforcement remedies and sanctions in the OATT. Instead, the Commission prefers to examine violations and determine the appropriate response for a violation on a case-by-case basis.⁵⁰

In the NOPR, the Commission drew a distinction between “enforcement remedies and sanctions” and “operational penalties.” The Commission pointed out that, while it is not proposing a schedule of enforcement remedies and sanctions, it proposed elsewhere in the NOPR that “transmission providers as well as transmission customers be subject to specified operational penalties for violations of certain OATT provisions.”⁵¹

In Section V.C.4.b of the NOPR, the Commission addresses how transmission providers should pay operational penalties when the transmission provider is also the transmission customer.⁵² Given that RTOs are transmission providers, but not transmission customers; the provisions of the Commission’s NOPR addressing “operational penalties” do not appear to be applicable to RTOs. For example, the Commission describes “unauthorized use penalties” as one category of “operational penalty.” The Commission stated that “unauthorized use penalties apply to any circumstance when a transmission customer uses transmission service that it has not

⁴⁷ OMS NOI Comments, at 5

⁴⁸ OMS NOI Comments, at 5

⁴⁹ OMS NOI Comments, at 5

⁵⁰ NOPR, at P 475

⁵¹ NOPR, at P 475

⁵² At P 283 of the NOPR, the Commission states, “We propose to have transmission providers pay non-offending, unaffiliated transmission customers when the transmission provider or its affiliate incurs operational penalties.”

reserved.”⁵³ The Commission further stated that, “An unauthorized use penalty would be assessed in circumstances when a transmission customer has a transmission service reservation, but uses transmission service in excess of its reserved capacity.”⁵⁴ Because RTOs are transmission providers, rather than transmission customers, RTOs will not have transmission service reservations and will presumably not be subject to unauthorized use penalties. We also presume that the Commission’s intention regarding unauthorized use penalties - exemption for RTOs - applies equally to the other types of operational penalties as well. Clarification on this matter by the Commission would be helpful.

iv. Changes in Receipt and Delivery Points (Redirects) (NOPR Section V.D.4)

Section 22.2 of the current pro forma OATT permits a transmission customer taking point-to-point transmission service to modify its receipt and delivery points under certain circumstances, commonly referred to as a “redirect”. The Commission discussed this issue in the NOI and requested feedback about unduly discriminatory opportunities with respect to the redirect process.⁵⁵ In its Comments on the NOI, the OMS advised the Commission against modifying RTO redirect practices because, as independent entities, RTOs are not likely to be susceptible to unduly discriminatory behavior with respect to implementing redirects.⁵⁶

In the NOPR, the Commission stated its belief that its recent action in Order 676 to adopt the “Standards for Business Practices and Communication Protocols for Public Utilities” developed by the NAESB’s Wholesale Electric Quadrant (“WEQ”) should go far to address the concerns raised by commenters in response to the Commission’s redirect inquiry in the NOI.⁵⁷

⁵³ NOPR, at P 280

⁵⁴ NOPR, at P 280

⁵⁵ NOI, at P 17

⁵⁶ OMS NOI Comments, at 5

⁵⁷ NOPR, at P 367

The Commission also noted that the ability to redirect transmission service to new points is a function of whether there is ATC at the new points, and stated its belief that other modifications it is proposing in the NOPR will likely improve transmission customers' redirect experiences.⁵⁸ The Commission specifically cited its proposed changes regarding ATC calculation and its proposed modifications to point-to-point transmission service in this regard.

Consequently, in the NOPR, the Commission did not propose any modifications to the current OATT redirect policy, but invited commenters to address whether there are still concerns with respect to redirects.⁵⁹

We continue to subscribe to the OMS position that RTOs are not likely to engage in discrimination with respect to redirects. Consequently, we continue to urge the Commission not to modify RTO redirect policies in the instant rulemaking proceeding.

v. Roll Over Rights – Discriminatory Applications (NOPR Section V.D.3)

In the NOI, the Commission sought feedback about whether transmission customers have concerns with respect to undue discrimination in exercising their contract rollover rights.⁶⁰ In response, the OMS commented that, because of the presumed independence of RTOs, modification of the Commission's rollover policy to prevent undue discrimination by RTOs is not necessary.⁶¹ We continue to subscribe to this belief. Issues associated with rollover rights are discussed further in Section III.C.iv below.

⁵⁸ NOPR, at P 371 and P 372

⁵⁹ NOPR, at P 371

⁶⁰ NOI, at P 18

⁶¹ OMS NOI Comments, at 6

vi. Rules, Standards and Practices Governing the Provision of Transmission Service (NOPR Section V.D.9)

In the NOI, the Commission asked a series of questions about whether certain transmission provider business practices should be included in the transmission provider's tariff.⁶² In response, the OMS stated,

If the Commission's intent is to require standard business practices as a means for eliminating undue discrimination and preferential treatments, then the inclusion of business practices in the Midwest ISO's tariff is not necessary.⁶³

In the NOPR, the Commission decided not to alter its existing policy concerning what rules, standards and practices should be included in a transmission provider's OATT.⁶⁴ The Commission stated that including all of a transmission provider's rules, standards and practices in its OATT could decrease flexibility to change businesses practices and respond to the requests of customers and could be considered to be impractical and potentially administratively burdensome.⁶⁵

Rather than requiring the inclusion of all rules, standards and practices that relate to transmission service in transmission provider OATTs, the Commission proposes to require their posting on transmission providers' OASIS systems instead. The Commission seeks comment on "how to determine what 'relates' to transmission service to facilitate a consistent interpretation and to minimize discretion on what rules, practices and standards should be posted on OASIS."⁶⁶

⁶² NOI, at P 19

⁶³ OMS NOI Comments, at 6

⁶⁴ NOPR, at P 452 The Commission cited *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,163 at P 656, 658, *order on reh'g*, 109 FERC ¶ 61,157 (2004), *order on reh'g*, 111 FERC ¶ 61,043, *order on reh'g*, 112 FERC ¶ 61,086 (2005) and *California Independent System Operator Corp.*, 107 FERC ¶ 61,329 at P 21-22 (2004) for a description of the Commission's policy.

⁶⁵ NOPR, at P 452

⁶⁶ NOPR, at P 451

The Commission carved out an exception for its general proposed policy for creditworthiness and security requirements. The Commission proposed to require that creditworthiness and security requirements be included in a transmission provider's OATT.⁶⁷

The Commission's proposal, with respect to these issues, is acceptable.

vii. Joint Transmission Planning (NOPR Section V.B)

The Commission asked a series of questions about joint transmission planning in the NOI.⁶⁸ In its NOI Comments concerning this issue, the OMS pointed out that the Midwest ISO already has in place a joint transmission planning process.⁶⁹

In the NOPR, the Commission proposed eight principles for public utility transmission planning processes: (1) Coordination; (2) Openness; (3) Transparency; (4) Information Exchange; (5) Comparability; (6) Dispute Resolution; (7) Regional Participation; and (8) Congestion Studies.⁷⁰

The Joint RSCs have addressed the Commission's transmission planning proposals in Sections III.A.ii and III.A.iii of these Comments above.

viii. Tariff Compliance Review (NOPR Sections V.E.1.a and V.E.1.b)

In the NOI, the Commission asked a number of questions regarding auditing of transmission providers' compliance with tariff requirements.⁷¹

In response, the OMS pointed out that each RTO has a market monitor that is generally responsible for, among other things, ensuring that the RTO is appropriately administering its

⁶⁷ NOPR, at P 453

⁶⁸ NOI, at P 20

⁶⁹ OMS NOI Comments, at 7

⁷⁰ NOPR, at P 214

⁷¹ NOI, at P 23

tariff.⁷² Accordingly, the OMS stated its position that, with respect to RTOs, “If the primary purpose of a tariff compliance review is to determine whether or not the transmission provider is being unduly discriminatory or preferential in its provision of transmission service, then adding reviews beyond those of the IMM [independent market monitor] seems to be unnecessary.”⁷³ The OMS did allow that, “there may be some role for audits of RTO operations to ensure that the RTO is actually operating consistent with its tariff and business rules.”⁷⁴

In the NOPR, the Commission stated that it intends to maintain a strong audit program to monitor compliance with the pro forma OATT and that it will primarily rely on its Staff to conduct these audits.⁷⁵

The Commission’s proposal, with respect to audits, is acceptable.

ix. Hoarding of Transmission Capacity (NOPR Section V.C.3)

In the NOI, the Commission asked a number of questions about opportunities for transmission customers to hoard reserved firm transmission capacity.⁷⁶ In response, the OMS stated that Midwest ISO operations do not permit transmission service that is sold as a firm reservation, but not scheduled, to restrict the real-time use of the transmission system.⁷⁷ The OMS explained that the Commission’s concerns about transmission capacity hoarding are not applicable in an RTO system such as that of the Midwest ISO.

In the NOPR, the Commission addressed the concerns about transmission capacity hoarding within the context of proposing new policies for transmission capacity reassignment. With respect to the transmission capacity reassignment issue, the Commission proposes to

⁷² OMS NOI Comments, at 8

⁷³ OMS NOI Comments, at 8

⁷⁴ OMS NOI Comments, at 8

⁷⁵ NOPR, at P 465 and P 469

⁷⁶ NOI, at P 24

⁷⁷ OMS NOI Comments, at 9

remove the price cap on capacity reassignment and allow negotiated rates for transmission capacity reassigned by transmission customers that are not affiliates of the transmission provider.⁷⁸ The Commission explained that eliminating the price cap should: (1) provide more flexibility to market participants; (2) encourage customers to sell their capacity to another customer who values the capacity more highly; (3) facilitate the release of capacity; and (4) encourage the maximum number of voluntary transactions to occur in a secondary market, which will benefit all market participants consistent with the Commission's goals for capacity reassignment.⁷⁹ The Commission stated that development of a more effective capacity trading market will improve efficiency for customers who need capacity during peak periods.⁸⁰

The Commission recognized that loosening the caps on transmission capacity reassignment and allowing negotiated rates for reassigned capacity might exacerbate concerns about transmission capacity hoarding, but the Commission stated that “we now believe that market forces will limit the ability of most assignors to exert market power.”⁸¹ The Commission also observed that the ability of a transmission customer to hoard capacity is limited and explained these limits.⁸² The Commission concluded that “hoarding concerns are overstated.”⁸³ Nevertheless, the Commission has not closed the book on the hoarding issue and invited comment on “whether circumstances exist where unaffiliated transmission customers could amass market power similar to that of the transmission provider.”⁸⁴

The Commission’s proposal to loosen the price caps on transmission capacity reassignment, not needed to serve native load customers, is acceptable. In Section III.A.iv

⁷⁸ NOPR, at P 270

⁷⁹ NOPR, at P 271

⁸⁰ NOPR, at P 274

⁸¹ NOPR, at P 272

⁸² NOPR, at P 274

⁸³ NOPR, at P 274

⁸⁴ NOPR, at P 274

above, we suggested that the Commission also consider requiring point-to-point transmission customers to offer a reservation price at which they would be willing to sell their transmission service.

x. Curtailments (NOPR Section V.D.8)

In the NOI, the Commission reiterated the current OATT definition of “curtailment” and asked a series of questions about whether public utility transmission providers have improperly used the curtailment provisions to advantage the transmission provider or its affiliates.⁸⁵

In its NOI Comments, the OMS explained that the Commission’s apparent concern about unduly discriminatory use of curtailments to advantage a transmission provider’s merchant business would not apply in the RTO context due to the presumed independence of RTOs from commercial interests.⁸⁶

In the NOPR, the Commission reminded transmission providers that existing regulations require posting of transmission curtailment information on OASIS. The Commission did not propose any modifications to its curtailment policy, but specifically sought comment on “whether additional requirements would improve the transparency of transmission curtailment information and the ability of customers to make use of that information.”⁸⁷

We continue to believe that the issue of discriminatory curtailment is not a significant problem in the RTO context.

xi. Ancillary Services – i) Energy Imbalances and ii) Generator Imbalances (NOPR Section V.C.1)

⁸⁵ NOI, at P 25

⁸⁶ OMS NOI Comments, at 9

⁸⁷ NOPR, at P 442

In the NOI, the Commission sought comment on its energy imbalance policy and its generator imbalance policy. The Commission explained that, as described in Order 888, energy imbalance is provided “when the transmission provider makes up for any difference that occurs over a single hour between the scheduled and the actual delivery of energy to a load located within its control area.”⁸⁸ Generator imbalance is “the difference between the scheduled and actual delivery of energy from the generator.”⁸⁹

In its Comments on the NOI, the OMS stated that, because an RTO provides imbalance service through its real-time energy market, the issues raised by the Commission in the ancillary services section of the NOI (e.g., band widths for load imbalances, pricing of generator imbalances, and penalty charges for imbalances that threaten reliability) are not applicable to RTOs.⁹⁰

However, in the NOPR, the Commission expressed its concern about the “variety of different methodologies used for determining imbalance charges and whether the level of the charges provides the proper incentive to keep schedules accurate without being excessive.”⁹¹ Consequently, the Commission proposes to “modify the current pro forma OATT Schedule 4 treatment of energy imbalances and to adopt a separate pro forma OATT schedule for the treatment of generator imbalances.”⁹² The Commission states that it “seeks to balance the needs of transmission providers to operate their transmission systems in a reliable manner with the needs of transmission customers to have reasonable access to those systems at just and

⁸⁸ NOI, at P 30

⁸⁹ NOI, at P 31

⁹⁰ OMS NOI Comments, at 10-11

⁹¹ NOPR, at P 238

⁹² NOPR, at P 238

reasonable rates, as well as the needs of a variety of transmission customers with different generator sources.”⁹³

The Commission proposes to create new energy and generator imbalance schedules based on the following three principles: (1) the charges must be based on incremental cost or some multiple thereof; (2) the charges must provide an incentive for accurate scheduling, such as by increasing the percentage of the adder above (and below) incremental cost as the deviations become larger; and (3) the provisions must account for the special circumstances presented by intermittent generators and their limited ability to precisely forecast or control generation levels, such as waiving the more punitive adders associated with higher deviations.⁹⁴

This proposed change to Schedule 4 is not applicable in the RTO context. To the extent that the Commission’s suggestions regarding “the special circumstances presented by intermittent generators” are applicable to RTOs, those issues are best addressed in a context other than the instant rulemaking proceeding.

C. NOI Issue Areas That May Be Applicable in an RTO Context, But Would Be Best Addressed on a Case-By-Case Basis Through the RTO’s Stakeholder Process

i. Network and Point-to-Point Transmission Service (NOPR Section IV.B.3)

In the NOI, the Commission asked a series of questions that dealt with whether or not to make changes to the OATT requirement to offer network and point-to-point transmission services; specifically in the form of contract demand service or new transmission services (e.g., conditional firm, partial firm and seasonal firm).⁹⁵

⁹³ NOPR, at P 238

⁹⁴ NOPR, at P 239

⁹⁵ NOI, at P 13

In response, the OMS stated that, with respect to RTOs, the decision to offer such modified or additional transmission services should be left to the RTO stakeholder process even if the Commission were to determine that changes are needed in this regard to the tariffs of Non-Independent Transmission Providers.⁹⁶

In the NOPR, the Commission proposed to retain the transmission services required by Order No. 888: firm and non-firm point-to-point service and firm network service.⁹⁷ The Commission recognized that some transmission providers may wish to voluntarily provide additional or different transmission services, but the Commission declined to require such in the NOPR.

The Commission's position on this issue is acceptable.

ii. Untimely Processing of Requests for Transmission Service (NOPR Section V.D.5.a)

In the NOI, the Commission asked a number of questions about transmission provider timeliness in processing requests for transmission service.⁹⁸ The Commission's questions focused on whether the processing of transmission service requests has been or could be used in unduly discriminatory or preferential ways.

The OMS responded that, in general, RTOs process all transmission service requests equally and would not be unduly discriminatory or preferential.⁹⁹ However, the OMS noted that absence of undue discrimination or preference in the manner that RTOs process transmission service requests does not necessarily mean that improvements cannot be made to RTOs'

⁹⁶ OMS NOI Comments, at 4

⁹⁷ NOPR, at P 78

⁹⁸ NOI, at P 14

⁹⁹ OMS NOI Comments, at 4

administration of the process.¹⁰⁰ The OMS suggested that such issues would be better addressed through each RTO's stakeholder process.¹⁰¹

In the NOPR, the Commission proposes to require transmission providers to post on their OASIS sites metrics that track their performance in processing system impact studies and facilities studies associated with requests for transmission service.¹⁰² Transmission providers will be required to post the performance metrics for each quarter within fifteen days of the end of each quarter.

The Commission also proposes to impose operational penalties when a transmission provider routinely fails to meet the sixty day due diligence deadlines specified in the pro forma OATT.¹⁰³ The penalty will equal \$500 for each day the transmission provider takes to complete the study beyond 60 days. For any system impact study or facilities study that is still pending at the end of the quarter and that has been in the study queue for more than 60 days, the penalty will equal \$500 for each day the study has been in the study queue beyond 60 days.¹⁰⁴

However, the Commission stated that, because of their presumed independence, "we do not believe that RTOs have an incentive to neglect their obligation to process applications for service in a timely fashion."¹⁰⁵ The Commission stated that, as a result, RTOs will not be subject to the proposed penalty regime.

The Commission's position on this issue is acceptable, because a penalty does not serve a useful purpose with respect to RTOs.

¹⁰⁰ OMS NOI Comments, at 4

¹⁰¹ OMS NOI Comments, at 4

¹⁰² NOPR, at P 382

¹⁰³ NOPR, at P 384

¹⁰⁴ NOPR, at P 384

¹⁰⁵ NOPR, at P 384

iii. Hourly Firm Transmission Service – Financial Transmission Rights (NOPR Section V.D.2)

In the NOPR, the Commission addresses hourly firm transmission service and proposes to require transmission providers to provide point to point hourly firm service as part of the pro forma OATT.¹⁰⁶ With respect to through and out transmission service, the Joint RSCs addressed the issue of hourly firm service in Section III.A.i of these Comments above.

However, with respect to hourly firm transmission service within the Midwest ISO, in its Comments on the Commission's NOI, the OMS stated that,

Because of the day-ahead market and the associated settlements respecting Financial Transmission Rights ("FTRs"), for transmission within the Midwest ISO, the comparable question is whether or not there are viable ways for market participants to trade FTRs on an hourly basis.¹⁰⁷

For the Midwest ISO, hourly firm transmission service would only apply to point-to-point through and out service. With the day-ahead and real-time energy markets in the Midwest ISO, the incentive for short-term transmission service is a possible hedge against market price. If a transmission customer engages in a short-term bilateral transaction within the Midwest ISO, in order to fully hedge the price that customer would likely want to be able to purchase an FTR to hedge the congestion costs associated with the transaction. The corollary to hourly firm transmission would be for the Midwest ISO to facilitate an exchange for FTRs that would allow for purchases and sales of FTRs with duration as short as one hour.

In its Comments on the NOI, the OMS stated that this FTR issue can be effectively addressed by the Midwest ISO stakeholder process and need not be generally required for RTOs

¹⁰⁶ NOPR, at P 343

¹⁰⁷ OMS NOI Comments, at 5

even if the Commission were to require Non-Independent Transmission Providers to offer hourly firm transmission service.¹⁰⁸

In the NOPR, the Commission did not address the FTR issue discussed by the OMS in its NOI Comments. We continue to believe that issues associated with hourly firm transmission service in the RTO context can best be addressed within each RTO's stakeholder process.

iv. Roll Over Rights – Longer Minimum Term of Service to Qualify (NOPR Section V.D.3)

In the NOI, the Commission sought feedback about whether transmission customers have concerns with respect to undue discrimination in exercising their contract rollover rights.¹⁰⁹ Rollover policy, with respect to undue discrimination, is addressed above in Section III.B.v of these Comments. In addition to the discrimination issue with respect to rollover policy, the Commission's NOI also sought comments on the minimum contract term to qualify for rollover rights. On that particular part of the issue, the OMS stated that stakeholder processes are the best forum in the RTO context to assess "whether or not extending the minimum term to qualify for rollover rights is an approach that would be of benefit with respect to creating incentives for transmission investment."¹¹⁰

In the NOPR, the Commission states that Section 2.2 of the current pro forma OATT allows existing firm transmission service customers - wholesale requirements and transmission-only customers with contracts of one year or more - the right to continue to take transmission service from the transmission provider when the customer's contract expires, rolls over or is renewed.¹¹¹ The NOPR also states that, under the current pro forma OATT, a transmission

¹⁰⁸ OMS NOI Comments, at 5

¹⁰⁹ NOI, at P 18

¹¹⁰ OMS NOI Comments, at 6

¹¹¹ NOPR, at P 348

customer must give notice of whether it will exercise its right of first refusal at least 60 days before the expiration of its service agreement.¹¹²

The Commission now proposes to modify this rule. The NOPR states,

The Commission proposes to revise the right of first refusal provision in the pro forma OATT to apply to wholesale requirements and transmission-only contracts that have a minimum term of five years, rather than the current minimum term of one year. In addition, the Commission proposes that a transmission customer under a rollover agreement must provide notice of whether or not it will exercise its right of first refusal no less than one year prior to the expiration date of the transmission service agreement.¹¹³

The Commission states that the purpose of this proposed policy change is to “encourag[e] long-term contracting, new investment and long-term planning.”¹¹⁴

The Commission proposes to make its revised rollover policy applicable “upon Commission acceptance of the transmission provider’s coordinated and regional planning process set forth in Attachment K of its OATTs.”¹¹⁵ Thus, the effectiveness of the rollover policy changes will be tied to the implementation of a transmission provider’s regional planning process.

The Commission’s purported purpose of requiring a five-year transmission service term to ensure the ability to roll over transmission rights is to provide transmission planners with greater certainty regarding future expected use of the transmission system. Moreover, it appears that under the Commission’s current roll over policy, transmission planners would assume that transmission contracts of one year in duration could be rolled over, and should be recognized throughout the transmission planning time horizon. While moving to five-year transmission service term would decrease the quantity of transmission service that transmission providers

¹¹² NOPR, at P 348

¹¹³ NOPR, at P 355

¹¹⁴ NOPR, at P 355

¹¹⁵ NOPR, at P 357

assume will roll over, the Joint RSCs are concerned about several aspects of this proposed rule change: 1) the impact on competitive alternative supply of generation; and 2) the impact on transmission investment.

With regard to alternative competitive supply of generation, the five-year transmission service term requirement for roll over rights could result in higher-cost, longer-term generation contracts being substituted for lower-cost, shorter-term generation contracts. By eliminating roll over rights on shorter-term transmission contracts, the Commission is changing the transmission environment faced by transmission-dependent utilities that depend on contractual arrangements with traditional or alternative generators for their power supply. States with retail access would also be affected by this proposed change. Not allowing roll over rights for shorter-term transmission service could preclude alternative suppliers whose contracts with customers are shorter than five years. In addition, Illinois has adopted a three-year contractual arrangement for default service that is implemented through an annual auction process. Before changing its policy to accommodate transmission planning, the Commission should consider the impact that this change will have on competitive electricity supply.

The Joint RSCs recommend that the Commission evaluate the impact of the change on competitive supply of generation. Any change in rollover rights policy affecting RTO regions should be made in the RTO stakeholder processes which provide a better forum to negotiate the changes to the RTO's tariff rollover rights provisions and allow for a better balance of the interests of states that may or may not have restructured, or have restructured differently.

With respect to transmission planning, it is not clear how inclusion of transmission service for roll over rights is a bad thing. In essence, the inclusion of this transmission service will increase investment in transmission, and this is generally perceived as a good thing. The

only instances where increased investment in transmission involves a downside risk is where the transmission service is terminated and there is long-term reduced usage on facilities that were added to support the roll over rights for that terminated service.

The Joint RSCs suggest that RTOs incrementally evaluate the impact of roll over rights on their transmission plans to determine whether or not reliability upgrades required by the inclusion of roll over rights would be needed to serve load irrespective of the generation source or would be needed to support expected generation from the source irrespective of the load sink. Any other upgrades could be considered as unique to a specific contract, and the RTO planning process involving stakeholder input should make a recommendation as to whether to go forward with these unique upgrades where shorter term contracts are involved. This same risk of lack of long-term use exists for longer term (e.g., five-year) contracts; however, allowing roll over rights for shorter-term contracts may result in a larger number of instances where this risk occurs. RTO stakeholders must determine whether or not this risk is worth taking. The Joint RSCs recommend that the Commission allow RTOs to determine if a length of contract for rollover rights, different than that set for non-independent transmission providers, is acceptable.

v. Obligation to Expand Capacity – Overcoming Disincentives to Build Transmission

This issue of overcoming disincentives to build transmission facilities was separately addressed in the OMS's Comments on the NOI, but the issue was covered in Section III.A.ii of these Comments above.

vi. Designation of Network Resources (NOPR Section V.D.6)

The Commission's NOI raised a variety of issues dealing with the pro-forma OATT rules applicable to the designation of new or changed network resources.¹¹⁶

In its Comments on the NOI, the OMS stated that "the designated network resource issues discussed in the NOI might have some applicability to the Midwest ISO, as it requires network resources to be designated by load-serving entities."¹¹⁷ However, the OMS advised that the concerns for an RTO that uses FTRs may be different than the concerns expressed in the NOI. For example, the NOI described over-designation of network resources and asked if designation should be limited to some ratio of monthly peak load for the customer. The OMS explained that, in the Midwest ISO, FTR allocations are limited to designated network resources but are also limited by the amount of peak load for the customers. For these reasons, the OMS recommended that the issues surrounding designated network resources in the RTO context would best be dealt with through each RTO's stakeholder process.

Nevertheless, in the NOPR, the Commission attempts to clarify its policy with respect to the qualification of liquidated damages contracts as designated network resources.¹¹⁸ The Commission explained that, under the liquidated damages provisions in the standardized Edison Electric Institute ("EEI") contract, "it is the buyer's responsibility to go out into the market to purchase replacement supplies (cover [the transaction]), and the seller then pays the buyer the difference between the contract price and the cover price."¹¹⁹ The Commission cited several commenters urging that the Commission clarify that such contracts not qualify as designated

¹¹⁶ NOI, at P 27

¹¹⁷ OMS NOI Comments, at 10

¹¹⁸ NOPR, at P 409

¹¹⁹ NOPR, at P 406

network resources and also cited at least one commenter urging the Commission to clarify that such contracts do qualify as designated network resources.¹²⁰

In response, the Commission stated that,

Network customers may not designate as network resources those power purchase agreements that give the seller a contractual right to compensate the buyer instead of delivering power even if the seller is able to deliver power. For instance, a network customer may not designate as a network resource a purchase agreement that allows the seller to interrupt service for reasons other than reliability, but allows the buyer to force delivery at a higher price. In addition, a network customer may not designate as a network resource a purchase agreement that requires a seller to pay buyer's cost of replacement power when the seller chooses not to deliver energy for economic reasons.¹²¹

Thus, it appears that purely financial contracts (i.e. contracts that are not backed by physical generating capacity) do not qualify as designated network resources.

The Joint RSCs acknowledge that contracts with liquidated damages provisions may, or may not be, eligible for designation as a network resource. Accordingly, the Joint RSCs urge the Commission to make a well reasoned policy decision regarding this issue. The eligibility of a particular contract with liquidated damage provisions to serve as a designated network resource should be decided within the RTO stakeholder process.

The decision about the appropriateness of such contracts as designated network resources may be different, for example, depending upon whether service is within an RTO or otherwise. Indeed, if the contract is backed by physical capacity that the RTO has approved as a network resource with a specified sink and source, which is thereby deliverable within the RTO, then the financial form of the contract should not matter. A designated network resource in the Midwest ISO is required to offer that resource into the day-ahead energy market whenever it is available. These Midwest ISO requirements (specified source, deliverable and available to the market)

¹²⁰ NOPR, at P 406

¹²¹ NOPR, at P 409

have been, and continue to be, sufficient to allow a resource to be designated as a network resource, regardless of the financial arrangement between the buyer and the seller.

vii. Queuing for Long-Term Transmission Service (NOPR Section V.D.5.b)

The NOI raised a number of issues dealing with requests for transmission service that cannot be immediately granted due to lack of ATC and whether to consider alternatives to the existing queuing process.¹²² In its Comments on the NOI, the OMS stated that, with respect to the Midwest ISO, these types of issues might be applicable to requests for through and out transmission service.¹²³ The OMS stated that reforms due simply to concerns about undue discrimination probably do not apply in the RTO context, but concerns over improving the efficiency of the process could apply.

In the NOPR, the Commission declined to make additional changes to the queuing process. The Commission pointed out that the Commission's recently issued Order 676 contains many of the business practices that transmission providers are expected to follow.¹²⁴ The Commission also observed that other changes that the NOPR proposes to make to the pro forma OATT should provide additional clarity to the queuing process. However, the Commission stated that it continues to seek comments on whether additional standardization of request queue processing is necessary.¹²⁵

The Commission's proposal concerning the queuing issue is acceptable.

IV. CONCLUSION

The Joint RSCs respectfully request that the Commission consider these comments.

¹²² NOI, at P 28

¹²³ OMS NOI Comments, at 10

¹²⁴ NOPR, at P 393

¹²⁵ NOPR, at P 393

The OMS and the OPSI submit these comments because a majority of the members of each organization agreed to generally support them. Individual members of OMS and OPSI reserve the right to file separate comments regarding the issues discussed in these comments.

The following OMS and OPSI members support these comments:

- District of Columbia Public Service Commission
- Illinois Commerce Commission
- Indiana Utility Regulatory Commission
- Iowa Utilities Board
- Kentucky Public Service Commission
- Michigan Public Service Commission
- Minnesota Public Utilities Commission
- Missouri Public Service Commission
- Montana Public Service Commission
- Nebraska Power Review Board
- New Jersey Board of Public Utility Commissioners
- North Dakota Public Service Commission
- Pennsylvania Public Utility Commission
- South Dakota Public Utilities Commission
- West Virginia Public Service Commission
- Wisconsin Public Service Commission

The following OMS and OPSI members do not join in these comments:

- Delaware Public Service Commission
- Maryland Public Service Commission
- Manitoba Public Utilities Board
- North Carolina Utilities Commission
- Public Utilities Commission of Ohio
- Tennessee Regulatory Authority
- Virginia State Corporation Commission

The Minnesota Department of Commerce and the Iowa Office of Consumer Advocate as

associate members of the OMS participated in these comments and generally support these comments.

Respectfully Submitted,

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/s/

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