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

REPLY COMMENTS OF THE ISO/RTO COUNCIL

In accordance with the filing procedures prescribed by the Commission's May 19, 2006 "Notice of Proposed Rulemaking" ("NOPR"),[1] the ISO/RTO Council ("IRC") submits these reply comments in connection with the Commission's proposed amendments to the regulations adopted in Order Nos. 888 and 889 and to the pro forma open access transmission tariff ("OATT") requirements applicable to transmission providers subject to Commission regulation under the Federal Power Act ("FPA"). These reply comments respond to arguments raised by some commenters urging that the Commission require independent system operators ("ISOs") and regional transmission organizations ("RTOs") to serve up and re-justify their existing tariffs which have been approved by the Commission in a myriad of dockets over the years.[2] In support, the IRC states as follows:

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[1] Preventing Undue Discrimination and Preference in Transmission Service, Notice of Proposed Rulemaking, IV FERC Stats. & Regs., Proposed Regs. ¶ 32,603 (2006).

[2] See, e.g., Comments of The American Public Power Association ("APPA"), Docket Nos. RM05-25-000 and RM05-17-000 (Aug. 7, 2006), Comments of National Rural Electric Cooperative Association ("NRECA") on Notice of Proposed Rulemaking, Docket Nos. RM05-25-000 and RM05-17-000 (Aug. 7, 2006), Initial Comments of the Transmission Access Policy Study Group (continued)

I. INTRODUCTION AND BACKGROUND

The IRC consists of nine functioning ISOs and RTOs operating in the United States and Canada.[3] On August 7, 2006, the IRC submitted comments on the NOPR supporting OATT reform in those circumstances where the opportunity and motivation to engage in discriminatory or anti-competitive behavior was shown to exist.[4]

As will be detailed in these comments, the proposal of some commenters to force ISOs and RTOs to re-justify all of their tariff provisions (as opposed to those which may be impacted by the changes proposed by the Commission) will embroil the Commission in a host of legal, administrative, and policy problems. As explained below, they would, in essence, provide parties, who were unsuccessful either with their stakeholders or before this Commission, with a "second bite at the apple" to relitigate proposals which

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(continued)

("TAPS"), Docket Nos. RM05-25-000 and RM05-17-000 (Aug. 7, 2006) and Comments of Old Dominion Electric Cooperative ("Old Dominion"), Docket Nos. RM05-25-000 and RM05-17-000 (Aug. 7, 2006).

[3] The IRC is comprised of the Independent System Operator operating as the Alberta Electric System Operator ("AESO"), the California Independent System Operator Corporation ("CAISO"), Electric Reliability Council of Texas ("ERCOT"), the Independent Electricity System Operator of Ontario ("IESO"), ISO New England, Inc. ("ISO-NE"), Midwest Independent Transmission System Operator, Inc. ("MISO"), New York Independent System Operator, Inc. ("NYISO"), PJM Interconnection, L.L.C. ("PJM"), and Southwest Power Pool, Inc. ("SPP"). ERCOT has elected not to join in these comments. The IESO and AESO are not subject to the Commission's jurisdiction and their endorsement of these reply comments does not constitute agreement or acknowledgement that either can be subject to the Commission's jurisdiction. In considering these comments, the Commission should be mindful that the markets of the IRC members are at varying stages of development and that there are other factors and circumstances that serve to distinguish the individual members.

[4] Comments of the ISO/RTO Council on Notice of Proposed Rulemaking, Docket Nos. RM05-25-000 and RM05-17-000 (Aug. 7, 2006).

were passed by a super-majority cross-section of the ISO and RTO stakeholders and filed and approved by this Commission pursuant to section 205 of the FPA. Such a blanket filing request would also add significant uncertainty at the very point in time where ISOs and RTOs are seeking to attract capital dollars to invest in new bulk system infrastructure projects in their footprints. In addition, such a blanket filing request would serve as an "end run" around the statutory requirement that parties wishing to challenge approved tariff provisions file complaints pursuant to section 206 of the FPA.

Finally, the targeted reforms suggested by the IRC in its initial comments reflect the organizational and operational characteristics, embodied in Commission-approved tariff provisions, that serve to distinguish ISOs and RTOs from other regulated utilities. As the IRC explained, where an entity both operates the transmission grid and serves as a market participant, the need for additional protections – i.e., to address continuing discrimination concerns – may indeed justify new or revised OATT provisions under section 206 of the FPA. In contrast, because ISOs and RTOs must satisfy strict structural and governance conditions as part of their confirmation process, their organizational documents and existing OATTs ensure operational independence and promote the development of efficient and competitive markets. Thus, the deficiencies in the Order No. 888 OATT model are not present in the customized tariffs and market rules developed through ISO and RTO stakeholder processes. In fact, these tariffs and market rules serve to advance the Commission's policy goals more effectively than the standards prescribed by the pro forma OATT.

II. DISCUSSION

A. APPLICABILITY OF THE PROPOSED RULE (NOPR IV.C)

Over one hundred parties filed initial comments on the NOPR. Echoing the theme of the IRC, many of these parties acknowledged that the ability to engage in anti-competitive behavior is largely a function of an entity's organizational and regulatory characteristics.[5] As explained by these parties, in regions where integrated utilities have transferred operational control of transmission assets to ISOs or RTOs, there exist limited opportunities (and no incentive) for discriminatory conduct.[6] Thus, the case for sweeping OATT reform in the ISO and RTO context cannot be made.

Nonetheless, a handful of parties would seemingly seek to expand the scope of the compliance filing condition to require an ISO and RTO to re-justify all existing OATT

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[5] See, e.g., Comments of Arkansas Public Service Commission, Docket Nos. RM05-25-000 and RM05-17-000, at 2 (Aug. 7, 2006), (observing that "strong and natural incentives" exist for discrimination within the vertically integrated business model); Initial Comments of the Edison Electric Institute on the Notice of Proposed Rulemaking, Docket Nos. RM05-25-000 and RM05-17-000, at 19 (Aug. 7, 2006) (ISO and RTO tariffs provide less potential for discrimination because ISOs and RTOs are not market participants and they administer their own tariffs).

[6] See, e.g., Comments of the Public Utilities Commission of the State of California on the Notice of Proposed Rulemaking, Docket Nos. RM05-25-000 and RM05-17-000, at 25-26 (Aug. 3, 2006), (supporting goal of open, non-discriminatory access, but noting that many of the proposed reforms are inapplicable where the transmission grid is already managed in a non-discriminatory manner by an independent ISO); Comments of New York State Public Service Commission Docket Nos. RM05-25-000 and RM05-17-000, at 2 (Aug. 7, 2006) (stating that many of the abuses targeted by the NOPR's proposed reforms are not implicated in the ISO context).

provisions that deviate from the pro forma OATT, not merely those new provisions prescribed by the final rule.[7]

1. The Commission Should Reject Any Suggested Open-Ended OATT Review and Compliance Requirement for ISOs and RTOs

There is no factual or legal support for the expansive compliance requirement advanced by these parties. The Commission-approved OATTs of ISOs and RTOs already reflect the "increas[ed] [] clarity and transparency of the rules applicable to the planning and use of the transmission system." NOPR at P 3. The Commission itself observed that "[w]ith respect to an RTO or ISO, we recognize that such an entity may already have tariff terms and conditions that are superior to the pro forma OATT." NOPR at P 100.

Moreover, the OATTs of ISOs and RTOs were developed through extensive stakeholder procedures and subject to the Commission's filing, notice, comment and approval process under section 205. Yet, APPA and others would effectively circumvent the Commission's complaint procedures, evidentiary burdens and notice requirements

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[7] See APPA Comments at 22 ("[D]epartures from the pro forma OATT, inducing departures in RTO OATTs, must be justified under the 'consistent with or superior to' standard.") NRECA Comments at 13 (FERC should not exempt ISOs and RTOs from any aspect of the rules governing open access transmission service); Old Dominion Comments at 2 (stating the ISO/RTO must re-justify its OATT to the extent it differs from the pro forma OATT). Cf. TAPS Comments at 13 (asserting that proposed OATT reforms reflect improvements to existing practices in ISOs and RTOs). In anticipation of just such an argument, the IRC sought clarification that any compliance filing required of ISOs and RTOs need only address new OATT provisions prescribed by the final rule and would not require ISOs and RTOs to re-justify the multitude of specific OATT provisions which have been developed through established governance and stakeholder processes and previously approved by the Commission. See IRC Comments at 14.

under section 206 by subjecting previously-approved ISO and RTO OATT provisions to a compliance requirement and renewed scrutiny if such provisions deviate from the pro forma OATT. The post-hoc, open-ended, review invited by these parties – i.e., under which disgruntled participants gain a "second-bite" at legally effective OATT terms -- would undermine the very stakeholder and regulatory processes by which ISO and RTO OATT provisions have been established.

Nowhere is this more evident than with respect to the APPA's call for reexamination of existing transmission rights allocations within an ISO and RTO. See APPA Comments at 22 ("The Commission should apply this [re-justification] standard to LTTRs, as well as to the other terms and conditions of OATT transmission service that RTOs provide"). In section 217 of the Energy Policy Act, Congress addressed the native load service obligation and the role of physical and financial access to the transmission grid. Through section 217(c), Congress made clear that the provisions of section (b)(1), (2) and (3) of this new section, which dealt with native load priority issues, would not affect allocations of rights to the transmission grid for ISOs and RTOs which allocated such rights as of January 1, 2005, and further clarified through the "savings clause" provisions of section (c), that the non-discrimination provision of section (k) does not change such existing approved methodologies. In short, APPA's request to reopen provisions such as access to the transmission grid through the granting of financial transmission rights runs afoul of Congress' intent not to disturb existing FERC-approved allocation methodologies. Clearly, if Congress had wished to reopen ISO and RTO market designs or their handling of native load it could have done so. It clearly chose an

approach which explicitly honored prior Commission decisions on such allocations of rights of congestion-free access to the transmission grid.[8]

Moreover, there appear to be no parameters on the scope of tariff review invited by APPA and others, since these parties would subject all "non-conforming" tariff provisions to scrutiny. But the OATTs of ISOs and RTOs must necessarily deviate from a host of pro forma terms and conditions in order to accommodate the unique ISO/RTO business structure, the regional needs of the particular ISO and RTO, and FERC-imposed regulatory requirements, including stringent neutrality and independence standards.[9]

Accordingly, the IRC urges the Commission to reject calls for re-examination of ISO and RTO OATT provisions. The Commission should instead pursue a more tailored approach that imposes meaningful reforms only where the opportunity and incentive for discriminatory behavior is shown to exist – i.e., those regions where ISOs and RTOs have yet to form.[10]

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[8] Congress did require that FERC undertake, either by rule or order, to develop a supplemental long term financial right product. However, Congress took great pains in section 217(c) to differentiate this product, to be established by future order or rule and described in an entirely different section (section 1233(b)), from existing approved allocation methodologies.

[9] See NOPR at P 101 (noting "the purpose of this NOPR is not to redesign approved, fully-functional RTO or ISO markets").

[10] As the IRC argued in its initial comments, requiring ISOs and RTOs to re-justify their existing OATT provisions raises substantial questions regarding the burden requirements of section 206 of the FPA and the legal mandate for specific evidence demonstrating that a particular provision(s) of an ISO/RTO's existing OATT is unjust and unreasonable and that a proposed replacement provision is just and reasonable. See IRC Comments at 10-14.

2. The ISO/RTO Model, By Design, Includes the Market Mechanisms and Competitive Safeguards that the Commission Seeks to Promote in the NOPR

According to APPA, the "basic industry paradigm," under which most customers are beholden to monopoly transmission providers for service, creates continuing opportunities for anti-competitive behavior and highlights the need for further reform in areas of transparency, transmission planning, and ATC calculation. See APPA Comments at 14. NRECA similarly alleges that additional regulatory oversight is needed to improve transmission planning and to address problems with consistency and transparency of ATC calculations. See NRECA Comments at 6-7. Old Dominion and TAPS also generally endorse the NOPR reforms, while recommending additional OATT modifications, ostensibly to improve planning processes and promote competitive markets. See Old Dominion at 3; TAPS Comments at 12-13.

To meet their stated objectives, APPA, NRECA and Old Dominion assert that the comprehensive OATT reforms proposed in the NOPR should be imposed on all transmission providers, including ISOs and RTOs.[11] TAPS, at least implicitly, takes a similar stance. But none of these parties offer any credible rationale, much less empirical evidence that would support a finding that existing ISO and RTO OATT provisions are inadequate, ineffective, or unjust and unreasonable. To the contrary, the reforms urged by these parties are in most cases manifestly unnecessary and/or inapplicable to the ISO/RTO model.

[11] See APPA Comments at 27-28; NRECA Comments at 13; Old Dominion Comments at 2.

a. Transmission Planning (NOPR V.B)

APPA, NRECA and Old Dominion, for example, assert that ISOs and RTOs should not be exempt from the NOPR's planning requirements, even though, as the IRC has documented, existing ISO and RTO planning procedures already satisfy in all respects the coordinated and regional planning principles prescribed by the NOPR. See IRC Comments at 16-19 and Appendix A. The coordinated, open, and transparent planning processes of ISOs and RTOs have resulted in substantial infrastructure expansions and upgrades over the past several years. Furthermore, in many cases, the planning protocols adopted by the ISO or RTO reflect the product of extensive negotiations, followed ultimately by Commission review and approval.

No persuasive justification has been offered to revisit or disturb these procedures. The proposed re-justification filing requirement for ISOs and RTOs does not follow from, and is not supported by, NRECA's contention that ISOs and RTOs be required to comply with the NOPR's planning principles. As the IRC has shown, existing planning processes of ISOs and RTOs already meet or exceed the planning standards prescribed in the NOPR – a fact that the Commission itself essentially acknowledged. See id. at 16 and Appendix A; Comments of the ISO/RTO Council, Docket No. RM05-25-0000, at 22-23 (Nov. 22, 2005); compare NOPR at P 208 and 209 (expressing concern that current planning processes may allow a transmission provider to favor its own generation/loads by developing transmission plans "with limited or no input from affected market participants") with NOPR at P 211 ("[e]ach of the Commission-approved RTOs in the Northeast, Midwest and Southwest, as well as the CAISO, provide for a coordinated and regional planning process with stakeholder input from each industry segment").

Moreover, ISOs and RTOs are at a critical juncture in encouraging new investment. An investor would be less willing to invest in a needed project if the very regional planning process that determined the need for such a project be built is, itself, under a cloud as a result of an open-ended requirement for re-justification of approved processes.

b. ATC Calculation and Other Proposed OATT Revisions (NOPR V.A. and V.C.4)

Likewise, other proposed OATT reforms are inapplicable to, or incompatible with, the ISO/RTO model. For example, the calculation of ATC is relevant only in the context of physical transmission reservations and, consequently, is not an issue in many ISO and RTO regions (i.e., where transmission rights are based on financial metrics). In addition, operational penalties, which the Commission proposes as a means to curb discriminatory behavior and which TAPS (Comments at 124-25) would impose on non-profit ISOs and RTOs, have no relevance where, as required by law, the ISO or RTO has no affiliates taking transmission or providing generation.

B. THE NEED FOR REFORM OF ORDER NO. 888 (NOPR III)

1. The Commission's Reform Initiatives Should Focus on Promoting Reciprocity Between Organized and Non-Organized Markets

To be sure, there are continuing market impediments that could benefit from additional regulatory reform. As the IRC pointed out in its initial comments, non-organized market areas lack many of the structural and operational protections inherent in ISO and RTO markets. See IRC Comments at 3, 6-7. In addition, the asymmetry between organized and non-organized markets and, in particular, the OATT rules governing each, contributes to continuing seams-related issues. Id. To address these

issues, and improve market inefficiencies and congestion management tools, the IRC offered a series of guidelines and OATT modifications. Id. at 7-9.

The Commission has gained important knowledge and experience through its restructuring of the electric industry. By encouraging the formation of independent organizations to operate large segments of the nation's transmission grid, the Commission has eliminated many of the barriers to open, non-discriminatory access that formerly existed under the industry's monopoly/franchise structure.

Yet, the Commission's restructuring initiative remains a work in progress. More can and should be done. The operational differences that have resulted from the organized versus non-organized market dichotomy continue to impede access to real-time pricing and dispatch information, thereby contributing to interregional coordination problems. Meaningful reform must account for these regional, regulatory, and operational differences in order for market participants to make fully-informed, and economically rational, decisions. The solution is not to revisit previously approved tariff terms that have brought operational neutrality and improved market mechanisms to ISO and RTO regions, but to focus on the shortcomings that continue to exist in non-organized markets.

III. CONCLUSION

For the reasons set forth above, the IRC requests that the Commission consider the foregoing comments in the development of any final rule in this proceeding.

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