

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

Standard of Review for Modifications to  
Jurisdictional Agreements

Docket No. RM05-35-000

**COMMENTS OF TRANSMISSION ACCESS POLICY  
STUDY GROUP**

The Transmission Access Policy Study Group (“TAPS”) appreciates the opportunity to comment on the Notice of Proposed Rulemaking (“NOPR”).<sup>1</sup> TAPS supports and adopts the comments filed today in this docket by the American Public Power Association and National Rural Electric Cooperative Association, and emphasizes the following points:

1. The Federal Power Act (“FPA”) is fundamentally a consumer-protection statute, and the Commission’s highest duty under the FPA is to protect consumers against exploitation and abuse.<sup>2</sup> It therefore commands that all rates, terms, and conditions of jurisdictional transactions must be just, reasonable, and not unduly discriminatory. 16 U.S.C. § 824d(a). Sections 206(a) and 306 of the FPA create (i) a statutory right to complain that existing rates have become unjust and unreasonable, and (ii) a statutory

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<sup>1</sup> *Standard of Review for Modifications to Jurisdictional Agreements*, 113 F.E.R.C. ¶ 61,317 (Dec. 27, 2005), 71 Fed. Reg. 303 (Jan. 4, 2006).

<sup>2</sup> See Hon. Joseph T. Kelliher, “Market Manipulation, Market Power, and the Authority of the Federal Energy Regulatory Commission,” 26 Energy L. J. 1, 1 & n.1 (2005) (The Commission’s “primary task” under the FPA is to “guard the consumer from exploitation by non-competitive electric power companies.”) (quoting *NAACP v. FPC*, 520 F.2d 432, 438 (D.C. Cir. 1975)); see also *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 155 (1962); *Sunray Mid-Continent Oil Co. v. FPC*, 364 U.S. 137, 147 (1960); *Atlantic Ref. Co. v. Pub. Serv. Comm’n of N.Y.*, 360 U.S. 378, 388 (1959); *Pennsylvania Water & Power Co. v. FPC*, 343 U.S. 414, 418 (1952); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944) (The “primary aim” of the Natural Gas Act is “to protect consumers against exploitation at the hands of natural gas companies.”).

command that the Commission fix the just and reasonable rate “[w]henever” it finds that “any” existing rate is unjust, unreasonable, unduly discriminatory or preferential.<sup>3</sup> Nothing in either section suggests that Congress intended automatically to deny those rights to customers who enter into contracts with public utilities without specifically preserving them, and the Commission may not divest them of their rights involuntarily.<sup>4</sup> Contracting parties may agree to waive their statutory rights, but waivers must be explicit, not inferred from silence.<sup>5</sup>

2. The Commission should not create traps for the unwary, requiring that statutory rights be claimed affirmatively or else be deemed waived.<sup>6</sup> Nor should it put the onus on customers to *bargain and pay for* rights that Congress intended to *grant* by law. The Commission may not ignore the consequences of its proposed rule,<sup>7</sup>

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<sup>3</sup> Section 306 directs the Commission to “investigate the matters complained of” whenever “*any* reasonable ground” for investigation appears, 16 U.S.C. § 825e (emphasis added), and Section 206(a) commands the Commission to fix the just and reasonable rate “[w]henever” it finds “*any* rate, charge, or classification ... or ... *any* rule, regulation, practice, or contract affect[ing] such rate, charge, or classification [to be] unjust, unreasonable, unduly discriminatory or preferential,” *id.* § 824e(a) (emphasis added).

<sup>4</sup> *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 9 (D.C. Cir. 2002). This argument does not apply equally to utility-proposed changes under Section 205. Section 205 permits public utilities to change rates on 60-days notice, without showing that the existing rate has become unjust and unreasonable—a right which, if retained, can render a contract promise almost illusory. In contrast, parties seeking contract modification under Section 206 bear a heavy burden to show that the existing agreement has become unjust and unreasonable.

<sup>5</sup> *E.g., Sithe/Independence Power Partners, L.P. v. Niagara Mohawk Power Corp.*, 76 F.E.R.C. ¶ 61,285, at 62,458 (1996), *remanded on other grounds sub nom. Sithe/Independence Power Partners L.P. v. FERC*, 165 F.3d 944 (D.C. Cir. 1999); *So. Cal. Edison Co.*, 41 F.E.R.C. ¶ 61,188, at 61,491 & nn.17-19 (1987) (“It is hornbook law that a waiver is an intentional abandonment or relinquishment of a known right or advantage which ... must be clearly established and will not be inferred from doubtful or equivocal acts or language.”).

<sup>6</sup> Read literally, the NOPR would require application of the “public interest” test where both parties originally intended that modifications be permitted under a just and reasonable standard, but inadvertently failed to include the required language. It also would require application of the “public interest” test where a sophisticated seller takes advantage of an unsophisticated buyer’s failure to realize that the Commission’s regulations require the use of specific contract language to preserve its statutory rights.

<sup>7</sup> *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. at 155; *Gulf States Utils. Co. v. FPC*, 411 U.S. 747, 758-59 (1973) (The Commission’s power “carries with it the responsibility to consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations pursuant to

particularly as the price required to buy back rights to seek modifications will reflect a seller's market power (assuming the right is for sale at all). After all, the proposed rule would apply to both market-based *and* cost-based power sales agreements,<sup>8</sup> and, potentially, to a wide array of other types of agreements in which the seller has market power.<sup>9</sup> Thus, the Commission may not ignore the possibility that the failure to include a contract provision preserving the use of a just and reasonable standard is itself the result of market power.<sup>10</sup>

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§§ 202 and 203, and under like directives contained in §§ 205, 206, and 207.”)

<sup>8</sup> Prior review of cost-based agreements will not eliminate TAPS' concern for two reasons. First, even if the overall deal can be characterized as “just and reasonable,” a customer who is forced to pay consideration in order to retain its rights to seek modification of the agreement necessarily will have a poorer deal than it could have struck without the need to bargain for those rights. Second, where sellers have market power, customers by definition have few (if any) alternatives and may fear to protest lest the seller refuse to do business at all on the conditions the Commission may require. Order No. 888 largely extinguished any obligation to continue to serve wholesale customers, leaving the door open only a crack. *See Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, [1991-1996 Regs. Preambles] FERC Stat. & Regs. ¶ 31,036, at 31,805-06 (1996), *clarified*, 76 F.E.R.C. ¶ 61,009 (1996), *modified*, Order No. 888-A, [1996-2000 Regs. Preambles] FERC Stat. & Regs. ¶ 31,048, at 30-392-93 (1997), *order on reh'g*, Order No. 888-B, 81 F.E.R.C. ¶ 61,248, at 62,110 (1997), *aff'd in part and remanded in part sub nom. TAPS v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd on issues reviewed sub nom. New York v. FERC*, 535 U.S. 1 (2002) (No. 00-568), *order on reh'g*, Order No. 888-C, 82 F.E.R.C. ¶ 61,046 (1998). Further, market-based rate agreements are not reviewed under FPA Section 205 at all. While the Commission intends that market-based rate authority be exercised only by sellers who lack market power, the NOPR would force consumers to bear all of the risk associated with the Commission's market-based rate regime—including the risk that the Commission failed to detect market power that existed when the authority was granted, or that it failed to detect market power arising between the grant of authority and negotiation of an agreement.

<sup>9</sup> APPA and NRECA have requested, in the alternative, clarification to narrow the NOPR's scope, and TAPS supports that request.

<sup>10</sup> *Atlantic City Elec. Co.*, 295 F.3d at 14 (“[T]he purpose of the *Mobile-Sierra* doctrine is to preserve the benefits of the parties' bargain as reflected in the contract, *assuming that there was no reason to question what transpired at the contract formation stage.*”) (emphasis added); *Potomac Elec. Power Co. v. FERC*, 210 F.3d 403, 410 (D.C. Cir. 2000) (applying *Mobile Sierra* because “PEPCO[']s ... statements to FERC in 1987 show that it fully supported the fixed-rate agreement and that it has not alleged bad faith negotiation on the part of the parties to the agreement. Nothing in the record on appeal demonstrates that the contract was the result of APS's market power” (citation omitted).); *Town of Norwood v. FERC*, 587 F.2d 1306, 1312-13 (D.C. Cir. 1978).

3. It is neither necessary nor appropriate to adopt the proposed rule in the name of “promot[ing] the sanctity of contracts” or “recogniz[ing] the importance of providing certainty and stability in competitive electric energy markets.” 71 Fed. Reg. at 303. Congress weighed those interests against the need for flexibility to protect consumer interests, and struck the balance it desired in FPA Sections 206(a) and 206(b). On one hand, Section 206(a) permits contracting parties, other entities affected by a contract but not party to it, or the Commission *sua sponte* to seek changes to agreements that become unjust, unreasonable, unduly discriminatory or preferential. On the other hand, Section 206(b) requires that the resulting changes take effect no earlier than the earliest refund effective date permitted by the statute. Indeed, the NOPR’s attempt to elevate contract certainty above the need for just and reasonable rates flies in the face of Congress’s recent decision to move in the other direction by permitting the Commission to establish an earlier refund effective date than was previously allowed. Even more pointedly, Congress recently *declined* to include in the Conference Report the House provision that would have had the same effect as the Commission’s NOPR but on a much narrower class of agreements.<sup>11</sup> The Commission must not tamper with Congress’s balancing of the competing interests in contract certainty and maintaining just and reasonable rates on an ongoing basis. Nor should it do by rule what Congress decided *not* to do by statute.

4. The NOPR offers no reason for choosing a higher default standard of review for contract modification generally than the standard the Commission found to be appropriate for modification of transmission service arrangements and incorporated into

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<sup>11</sup> See Section 1286 of H.R. 6, as initially passed by the House on April 21, 2005.

the *pro forma* Open Access Transmission Tariff (“OATT”).<sup>12</sup> The NOPR excludes “transmission service agreements” from the scope of the proposed rule, because the OATT already provides for modification of existing arrangements under a just and reasonable standard. However, the Commission fails to explain why it is necessary and appropriate to impose a more onerous default standard for modification of other agreements than the one applied to modification of transmission service agreements. Nor does it assure that transmission service agreements would continue to be excluded from the scope of this proposed rule if the OATT’s express preservation of Section 205 and Section 206 rights were removed. It is also far from clear whether other agreements ancillary to or crucial for the provision of transmission service (*e.g.*, interconnection agreements, network operating agreements, agreements for supply of ancillary services or RMR agreements) would be included within the proposed rule’s scope.<sup>13</sup>

5. Finally, the NOPR errs badly in allowing contracting parties (expressly or by silence) to deprive *non*-parties of their statutory rights and make it harder for the Commission to protect third parties *sua sponte*. As noted above, the Commission may not divest by rule rights that Congress granted by statute. *Atlantic City Elec. Co.*, 295 F.3d at 9. While contracting parties may waive “their” rights, *id.* at 11, they have no

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<sup>12</sup> Section 9 of the OATT preserves Transmission Providers’ rights to propose changes under FPA Section 205 as well as “the ability of any Party receiving service under the Tariff to exercise its rights under the Federal Power Act and pursuant to the Commission’s rules and regulations promulgated thereunder.” Order No. 888, at 31,936. The Commission did so in part because it “recognize[d] that the industry, in response to changes in institutions, competitive pressure, and technological innovations, is evolving rapidly,” a process the Commission sought to encourage. *Id.* at 31,734. Adopting the “public interest” test as the default standard of review for contract modifications will make it more difficult to adapt existing arrangements to accommodate that evolution.

<sup>13</sup> As noted above, we support the APPA/NRECA alternative request for clarification regarding the scope of the proposed rule.

power to waive *other* entities' rights. Prior to issuance of the proposed policy statement in Docket No. PL02-7-000,<sup>14</sup> the Commission closely guarded its power and the rights of third parties to seek modification of unjust and unreasonable agreements. The policy statement acknowledged (at P 4) that it was “proposing to depart from past precedent by agreeing to be bound to a public interest standard of review for market-based power sales contracts where both parties to the contract agree to bind themselves, and also seek to bind the Commission, to this standard.” The NOPR issued in this docket represents an even greater—and more egregious—departure in that it would apply to a wider range of agreements (*i.e.*, not only market-based sales contracts) and would construe contract silence as binding the Commission and third parties to the public interest standard.

6. The NOPR presents no justification for its departure from precedent. Any attempt to justify such a departure must recognize that, frequently, when contracting parties seek to preclude modification of their agreement by the Commission *sua sponte* or upon request by third parties, it is in exactly those situations where Commission protection of third parties is most needed—*e.g.*, situations in which contracting affiliates (or unaffiliated parties with aligned interests) seek to obtain benefits for themselves at the expense of third parties, or agreements in which the “customer” (such as an RTO obtaining reliability services or other ancillary services) will simply pass through the associated costs to others.

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<sup>14</sup> Notice of Proposed Policy Statement, *Standard of Review for Proposed Changes to Market-Based Rate Contracts for Wholesale Sales of Electric Energy by Public Utilities*, Docket No. PL02-7-000, 67 Fed. Reg. 51,516 (Aug. 8, 2002).

## INTERESTS OF TAPS/COMMUNICATIONS

TAPS is an informal association of transmission-dependent utilities in more than 30 states, promoting open and non-discriminatory transmission access.<sup>15</sup> As entities entirely or predominantly dependent on transmission facilities owned and controlled by others, TAPS members are acutely aware of the need to preserve the Commission's responsibility to ensure just and reasonable rates, terms and conditions for all jurisdictional services.<sup>16</sup>

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## CONCLUSION

For the reasons set forth above and in the comments filed by APPA and NRECA, TAPS requests that the Commission reverse course and modify the proposed regulation to provide that: (1) contracting parties may seek modification of their agreements under

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<sup>15</sup> TAPS is chaired by Roy Thilly, CEO of Wisconsin Public Power Inc. Current members of the TAPS Executive Committee include, in addition to WPPI, representatives of: American Municipal Power-Ohio; Blue Ridge Power Agency; Clarksdale, Mississippi; Electricities of North Carolina, Inc.; Florida Municipal Power Agency; Geneva, Illinois; Illinois Municipal Electric Agency; Indiana Municipal Power Agency; Madison Gas & Electric Co.; Missouri River Energy Services; Municipal Energy Agency of Nebraska; Northern California Power Agency; Oklahoma Municipal Power Authority; Southern Minnesota Municipal Power Agency; and Vermont Public Power Supply Authority.

<sup>16</sup> TAPS has commented on nearly all major rulemakings and policy inquiries involving the electricity industry over the past decade.

Section 206, upon a showing that the agreement has become unjust and unreasonable, unless the contract includes express language adopting the public interest standard, and (2) contracting parties may bind only themselves and may not restrict Commission review *sua sponte* or upon request of a third party.

Respectfully submitted,

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