UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Preventing Undue Discrimination and Preference in Transmission Service	Docket Nos. RM05-17-001 and RM05-25-001

REQUEST FOR REHEARING AND CLARIFICATION OF THE TRANSMISSION ACCESS POLICY STUDY GROUP

On December 28, 2007, the Commission issued Order 890-A,[1] its Order on Rehearing and Clarification of its February 16, 2007 final rule on reform of the *pro forma* open access transmission tariff ("OATT").[2] As recognized by the Commission, Order 890-A largely affirms Order 890. The Transmission Access Policy Study Group ("TAPS") for the most part supports the Rehearing Order and appreciates the difficult and thoughtful effort the Commission has put into clarifying its modifications of the *pro forma* OATT in an effort to improve customers' open access to transmission and remedy undue discrimination by transmission providers.

Notwithstanding our general support, TAPS has concerns about several of the changes made in Order 890-A. In a few respects, TAPS believes that the Commission has erred, and requests that the Commission make certain modifications on rehearing. In other instances, TAPS is simply concerned that the revised OATT and/or the Rehearing Order could be misconstrued and should be clarified.

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[1] Preventing Undue Discrimination and Preference in Transmission Service, Order No. 890-A, 73 Fed. Reg. 2984 (Jan. 16, 2008), 121 F.E.R.C. ¶ 61,297 (2007) (to be codified at 18 C.F.R. pts. 35 and 37) ("Rehearing Order" or "Order 890-A").

[2] Preventing Undue Discrimination and Preference in Transmission Service, Order No. 890, 72 Fed. Reg. 12,226 (Mar. 15, 2007), III F.E.R.C. Stat. & Regs. ¶ 31,241 (to be codified at 18 C.F.R. pts. 35 and 37) ("Final Rule" or "Order 890").

By separate pleading, filed this day, TAPS joins with the American Public Power Association, the National Rural Electric Cooperative Association and TDU Systems to seek rehearing and clarification of certain of Order 890-A's determinations pertaining to lifting the price caps of reassigned transmission capacity. In addition, TAPS seeks rehearing and clarification on the following errors:

I. IDENTIFICATION OF ERRORS

Pursuant to Rule 713(c)(1), 18 C.F.R. § 385.713(c)(1), TAPS identifies the following errors:

1. Order 890-A erred by failing to clearly state that, for purposes of overcoming the presumption of integration of a customer's new transmission facilities for which it seeks credits under Section 30.9, a single "integration standard" will apply to both the transmission customer's facilities and the transmission provider's facilities, and that such standard is the more relaxed "integration standard" traditionally applied to the transmission provider's facilities, not the stringent standard that has applied to the transmission customer's facilities under Section 30.9.

2. If the Commission did not intend to apply the more relaxed "integration standard" for purposes of overcoming the presumption applicable to new customer-owned facilities, Order 890-A erred in discontinuing its policy that denial of credits will trigger an investigation of the transmission provider's rate base in order to ensure that all of its facilities pass the "integration standard."

3. Order 890 erred in failing to make clear that its discontinuation of its policy that denial of credits will trigger an investigation of the transmission provider's rate base in order to ensure that all of its facilities pass the "integration standard" applies only to cases in which a customer seeks credits for new facilities to which the presumption of integration applies.

4. Order 890-A erred by enhancing the conditional firm service available to point-to-point customers while continuing to deny network customers the ability to use conditional firm service for on-system network resources.

5. Order 890-A erred by granting priority to the service requesting by a transmission customer that pays for the upgrade without expressly encompassing instances where the upgrade costs are rolled in as a result of application of "or" pricing or inclusion in broader multi-purpose upgrades.

6. Order 890-A erred by finding that network customers can enjoy a service "comparable" to conditional firm service through a combination of secondary (non-firm) network service and short-term resource designations.

7. Order 890-A erred by failing to articulate a consistent, coherent set of rules regarding which third-party sales require undesignation, failing to acknowlege and explain deviations from prior rulings, and by retaining, without modification, a tariff definition that is inconsistent with Commission interpretations of that provision.

8. Order 890-A erred by refusing to permit interruptible short-term sales, such as sales into organized day-ahead (and potentially real-time) markets, to be made without undesignation even if interruption of such sales imposes certain liabilities, with the predictable results of impairing the depth and competitiveness of such markets, as well as restricting supply when it is needed most to maintain reliability.

9. Order 890-A erred in assuming that *any* liability for interruption of a third-party sale, no matter how insignificant, will create incentives incompatible with the use of network resources for network load.

10. Order 890-A erred in holding that system purchases may be undesignated on a system basis (rather than by individual resource) only where the purchaser designates the purchase as a network resource, thus unreasonably discouraging sales of system power in contexts where such designation by the buyer is impossible or impracticable.

II. STATEMENT OF ISSUES

Pursuant to Rule 713(c)(2), 18 C.F.R. § 385.713(c)(2), TAPS provides the following issues statement:

1. Whether, to ensure comparability, the Commission should clearly state that, for purposes of overcoming the presumption of integration of a customer's new transmission facilities for which it seeks credits under Section 30.9, a single "integration standard" will apply to both the transmission customer's facilities and the transmission provider's facilities, and that such standard is the more relaxed "integration standard" traditionally applied to the transmission provider's facilities, not the stringent standard that has applied to the transmission customer's facilities under Section 30.9. Federal Power Act ("FPA") § 206, 16 U.S.C. § 824e.

2. If the Commission did not intend to apply the more relaxed "integration standard" for purposes of overcoming the presumption applicable to new customer-owned facilities, whether the Commission erred in discontinuing its policy that denial of credits will trigger an investigation of the transmission provider's rate base in order to ensure that all of its facilities pass the "integration standard." FPA § 206; *Fla. Mun. Power Agency v. FERC*, 315 F. 3d 362, 366 (2003).

3. Whether the Commission should clarify that its discontinuation of its policy that denial of credits will trigger an investigation of the transmission provider's rate base in order to ensure that all of its facilities pass the "integration standard" applies only to cases in which a customer seeks credits for new facilities to which the presumption of integration applies. FPA § 206; Order 888,[3] *Fla. Mun. Power Agency v. FERC*, 315 F. 3d 362, 366 (2003).

4. Whether the Commission erred by enhancing the conditional firm service available to point-to-point customers while continuing to deny network customers the ability to use conditional firm service for on-system network resources. FPA § 206; Order 888.

5. Whether the Commission erred by finding that network customers can enjoy a service "comparable" to conditional firm service through a combination of secondary (non-firm) network service and short-term resource designations. FPA § 206; Order 888.

6. Whether the Commission should clarify that its ruling granting priority to the service requested by a transmission customer that pays for the upgrade also encompasses instances where the upgrade costs are rolled in as a result of application of "or" pricing or inclusion in broader multi-purpose upgrades. FPA § 206; Order 888.

7. Whether the Commission should articulate a consistent, coherent set of rules regarding which third-party sales require undesignation, and eliminate or modify the Non-Firm Sales definition so that it is not inconsistent with Commission interpretation of that tariff provision. FPA § 206; *Dynegy Midwest Generation, Inc. v. Commonwealth Edison Co.*, 101 F.E.R.C. ¶ 61,295, P 1 (2002), *reh'g dismissed as moot*, 108 F.E.R.C. ¶ 61,175 (2004); *Southwest Power Pool, Inc.*, 121 F.E.R.C. ¶ 61,029, P 2 (2007); *Wisconsin Pub. Serv. Corp. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 120 F.E.R.C. ¶ 61,269, P 58 (2007).

8. Whether the Commission should permit interruptible short-term sales, such as sales into organized daily and real-time markets, to be made without undesignation even if interruption of such sales imposes certain liabilities, with the predictable result of impairing the depth and competitiveness of such markets. FPA § 206; *Dynegy Midwest Generation, Inc. v. Commonwealth Edison Co.*, 101 F.E.R.C. ¶ 61,295, P 1 (2002), *reh'g dismissed as moot*, 108 F.E.R.C. ¶ 61,175 (2004); *Southwest Power Pool, Inc.*, 121 F.E.R.C. ¶ 61,029, P 2 (2007); *Wisconsin Pub. Serv. Corp. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 120 F.E.R.C. ¶ 61,269, P 58 (2007).

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[3] 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, 61 Fed. Reg. 21,539 (May 10, 1996), [1991–1996 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,036, *clarified*, 76 F.E.R.C. ¶ 61,009 (1996), *modified*, Order No. 888-A, 62 Fed. Reg. 12,274 (Mar. 14, 1997), [1996–2000 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 62 Fed. Reg. 64,688 (Dec. 9, 1997), 81 F.E.R.C. ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 F.E.R.C. ¶ 61,046 (1998), *aff'd in part and remanded in part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002) ("Order 888").

9. Whether the Commission erred in assuming that *any* liability for interruption of a third-party sale, no matter how insignificant, will create incentives incompatible with the use of network resources for network load. FPA § 206; *Dynegy Midwest Generation, Inc. v. Commonwealth Edison Co.*, 101 F.E.R.C. ¶ 61,295, P 1 (2002), *reh'g dismissed as moot*, 108 F.E.R.C. ¶ 61,175 (2004); *Southwest Power Pool, Inc.*, 121 F.E.R.C. ¶ 61,029, P 2 (2007); *Wisconsin Pub. Serv. Corp. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 120 F.E.R.C. ¶ 61,269, P 58 (2007).

10. Whether the Commission erred in holding that system purchases may be undesignated on a system basis (rather than by individual resource) only where the purchaser designates the purchase as a network resource, thus unreasonably discouraging sales of system power in contexts where such designation by the buyer is impossible or impracticable. FPA § 206.

III. REQUESTS FOR REHEARING AND CLARIFICATION

A. The Commission Should Further Clarify the New Rules for Credits Under Section 30.9

Order 890-A (PP 349-355) sets out in greater detail the process to be followed by the transmission customer and the transmission provider in future cases in which a transmission customer seeks credits under Section 30.9 for transmission facilities it installs after the effective date of Order 890. While this greater detail is helpful to a point, TAPS believes that this discussion fails to sufficiently spell out a very crucial element. It is not clear whether the Commission intends that a single "integration standard" will apply to both the transmission customer's facilities and the transmission provider's facilities for purposes of overcoming the presumption of integration of the customer's facilities when a credit claim is made, and if so, whether it will apply the more relaxed "integration standard" traditionally applied to the transmission provider's facilities or the stringent standard that has applied to the transmission customer's facilities under Section 30.9.

Several passages in the credits discussion of Order 890-A suggest that the Commission will now apply a single "integration standard," no matter whose facilities

are under consideration. For example, the Commission states that "[a] transmission provider may overcome the network customer's presumed integration by demonstrating, *with reference to its own facilities that meet the integration standard,* that the network customer's facilities do not meet *the standard*" (P 353, emphasis added). It goes on to observe that it is "appropriate for both the transmission provider and its customers to be subject to *the integration standard* to the extent the presumption of integration is overcome …" (P 354, emphasis added).

Yet, in this same discussion, the Commission clarifies (P 349) that the "integration standard" for credits under Section 30.9 remains unchanged, and that precedents applying that standard will continue to apply. Those precedents establish and apply a significantly more stringent test for "integration" of customer-owned facilities than applies to the facilities of the transmission provider. For example, a transmission provider is generally *not* required to show that the facilities in its transmission rate base "provide[] additional benefits to the transmission grid" (*id.*); rather, it is subject to a much more relaxed and inclusive standard for rolled-in rate base treatment of its transmission facilities. The difference between the integration test applied to customer-owned facilities and the integration test applied to transmission providers to assess inclusion of facilities in rate base is described in *East Texas Electric Cooperative, Inc. v. Central & South West Services., Inc.,* 114 F.E.R.C. ¶ 61,027, P 42 (2006), *appeal pending*, *sub nom.*, *East Texas Electric Cooperative, Inc. v. FERC*, No. 06-1090 (D.C. Cir. Mar. 10, 2006). In contrast to the three-part test for credits set forth in P 349 of Order 890-A, when applying the integration test to transmission providers' inclusion of facilities in rate

base, the Commission has stated that "a showing of any degree of integration is sufficient."[4]

The Commission's new policy for new transmission facilities must mean one of three things. Unfortunately, none of the three possibilities can be completely squared with the text of Order 890-A. Further, it is still unclear how the Commission would handle a situation in which (as could be easily foreseen) a transmission customer sought credits for facilities that are similar to those owned by the transmission provider that are included in the transmission rate base, but where the facilities (whoever owns them) do not meet the traditionally stringent integration test under Section 30.9.

1. The first possibility is that, in assessing whether the new integration presumption has been overcome, the Commission will apply a single "integration standard" to both transmission provider and transmission customer, *i.e.*, the relaxed standard that has long applied in determining whether facilities should be rolled in to the transmission provider's rate base. This would seem to be consistent with the repeated references to a single standard as well as the Commission's ruling in Order 890-A, P 352 (removing the trigger for reevaluation of the transmission provider's facilities, as discussed below). It would also be consistent with the Commission's requirement that a transmission provider challenging credits must "demonstrat[e], *with reference to its own facilities that meet the integration standard*, that the network customer's new facilities do

[4] *Northeast Tex. Elec. Coop., Inc.*, 108 F.E.R.C. ¶ 61,084, P 48 (2004), *reh'g denied*, 111 F.E.R.C. ¶ 61,189 (2005). There, the Commission found that the facilities at issue should be rolled in to rate base rather than directly assigned to the wholesale customer (NTEC), and rejected the transmission provider's argument that direct assignment was appropriate because it did not need the facilities nor the line segments on which they were located "to restore service to non-NTEC loads after an outage because its system already has other protection equipment and sufficient redundancy" (*id.* P 50). The Commission concluded that "the transmission network cannot be 'dismembered' in this manner; it is a 'cohesive network moving energy in bulk' that operates 'as a single piece of equipment.' This is true even if the facilities would not currently be needed but for a particular customer's service." *Id.*

not meet *the standard*" (P 353, emphasis added); the more stringent Section 30.9 integration standard focuses narrowly on the customer's facilities, without reference to the transmission provider's own facilities, and the integration standard traditionally applicable to the transmission provider's facilities is the more relaxed standard.

However, application to network customers of the same integration standard as is used to determine integration of the transmission provider's facilities would broaden the scope of facilities eligible for credits by simply requiring that they be comparable to facilities the transmission provider has included in rate base. Thus, in our example scenario above, the credits would be provided to the customer. While TAPS would certainly favor (and has consistently argued for) this interpretation, we note that it seems inconsistent with the Commission's assertion (P 349) that the long-standing Section 30.9 integration test, including all existing precedent thereunder, will continue to apply.

2. The second possibility would be that, again, a single "integration standard" applies, but transmission providers will now be held to the same strict "integration standard" to which transmission customers seeking Section 30.9 credits have long been subject. This interpretation is consistent with the Commission's repeated intimations (noted above) that a single test should apply, as well as its ruling that existing precedent interpreting the integration requirement under Section 30.9 will continue to apply. However, it is inconsistent with other statements in Order 890-A. As discussed above, requiring transmission providers challenging credits to "demonstrat[e], *with reference to its own facilities that meet the integration standard*, that the network customer's new facilities do not meet *the standard*" (P 353, emphasis added) is not consistent with the application of the more stringent integration standard. Further, as discussed below,

application of the more stringent integration standard is inconsistent with Order 890-A's reversal (P 352) of previous rulings regarding the trigger for reexamining the transmission provider's facilities.

In our example scenario, presumably credits for new customer-owned transmission facilities would be denied, because the facilities do not meet this strict test. In this case, comparability would require that the transmission provider also remove from its rate base the facilities that do not meet the same test. However, the Commission in P 352 has reversed its policy of requiring such revisitation of the transmission provider's own rate base, using the strict Section 30.9 integration standard, when credits are denied. This reversal cannot be squared with the notions of comparability and a single, stringent "integration standard" applying to all. In addition, the one-sided nature of application of the stringent standard, without triggering examination of the transmission provider's facilities, would increase the transmission provider's incentive to resist providing customer credits. Instead of credits providing an attractive mechanism for network customers to construct and recover the costs of needed transmission facilities (*e.g.*, that are included in the transmission provider's plan but not constructed, or that the transmission provider refuses to include in its plan notwithstanding studies showing their value), as the Commission envisions,[5] such construction will be deterred because efforts to seek credits will continue to be mired in endless litigation, without a downside risk to the resisting transmission provider.

[5] *See* Order 890-A, P 264 ("Customers and third parties remain free to develop and construct facilities as they see fit and, through the Attachment K planning process, incorporate the development of those facilities into the transmission plan."); Order 890, P 594 ("If a transmission provider declines to construct an identified upgrade, we also encourage customers and third parties to consider, either individually or jointly, development and ownership of a project to the extent consistent with applicable State law.").

3. Finally, it is possible that, to overcome the presumption applicable to new transmission facilities, the Commission will continue to apply two different tests – the more stringent one applicable to customers seeking credits, and the more relaxed one for transmission providers to include facilities in rate base. However, this cannot be squared with Order 890-A's repeated references to a single "integration standard" that applies to both customers and transmission providers. In our example scenario, credits would be denied to the network customer, while the transmission provider would continue to be able to include in its rate base facilities similar to those for which the credits were denied. This interpretation and its predictable outcome would fly in the face of the very notion of comparability that gave rise to the proposed modifications to Section 30.9 in Order 890 to begin with.[6] Further, this would undermine a key precept for the reviewing court's acceptance of the Commission's application of the stringent integration test in credits cases. *Florida Municipal Power Agency v. FERC*, 315 F.3d at 366 (affirming the Commission's denial of credits on grounds that comparability could be assured in the transmission provider's rate case).

Accordingly, the Commission must clarify how it will apply "the integration standard" in a manner that furthers, rather than undermines, the goal of comparability, as well as promotes needed transmission construction, consistent with Federal Power Act Section 217(b)(4), 16 U.S.C. § 824q(b)(4). Specifically, TAPS asks the Commission to clarify that in assessing whether the presumption of integration has been overcome, the relaxed integration standard applicable to the transmission provider's transmission

[6] Preventing Undue Discrimination and Preference in Transmission Service, 71 Fed. Reg. 32,636, P 256 (proposed June 6, 2006), IV F.E.R.C. Stat. & Regs. ¶ 32,603, (to be codified at 18 C.F.R. pts. 35 and 37), *corrected*, 71 Fed. Reg. 37,109 (June 29, 2006), ("NOPR") ("application of the integration test in a manner that exclusively benefits the transmission provider is unduly discriminatory, and a violation of the FPA").

facilities shall also be applied to the network customer's new transmission facilities, as described in the first alternative above.

Further, unless the Commission adopts the first interpretation discussed above, the Commission must reconsider and reverse its conclusion that denial of credits will no longer trigger an investigation into the transmission provider's rate base. Absent such clarification, elimination of this trigger will perpetuate and indeed aggravate discriminatory treatment of customer-owned transmission facilities and deter their construction, contrary to the Commission's stated purposes and the Act's dictates.

In any case, the Commission should clarify that its removal of the trigger applies only to denial of credits for new facilities to which the new presumption of integration applies.[7] The Commission states (P 352) that its action is taken "[i]n light of the modifications to the credits test adopted in Order No. 890," yet it does not expressly limit the scope of its action to those cases where the new credits test applies. The Commission does not and cannot offer any justification for dispensing with the trigger in cases involving requests for credits of existing facilities, in which the presumption of integration adopted in Order 890 does not apply.[8] While TAPS believes that the Commission intends to limit application of P 352 to denial of credits for new facilities, we are concerned that transmission providers will seek to stretch its coverage beyond denial of credits for new facilities, relying *inter alia* on Order 890-A's more general

[7] TAPS' discussion here should not be interpreted as a waiver of its position that the new integration presumption and the application of a single integration standard to both transmission provider and transmission customer should apply to existing facilities as well as new ones. We simply recognize here that the Commission has already rejected TAPS' request for rehearing on that point and it is therefore ripe for appellate review; thus, we do not repeat the arguments here.

[8] Such a conclusion would appear to be irreconcilable with the court's decision in *Florida Municipal Power Agency v. FERC*, 315 F.3d at, 366.

reference to elimination of trigger. *See* P 367. The Commission should therefore, at the very least, make clear that the reversal in P 352 is restricted to denial of credits for new customer facilities that enjoy the presumption of integration.

B. Order 890-A's Enhancement of Conditional Firm Service Further Confirms and Compounds the Error of Precluding Network Customers From Taking Such Service

The Commission's discussion of conditional firm service in Order 890-A further enhances the service provided to conditional firm point-to-point customers, relative to the network customers denied that service, and freshly demonstrates and highlights the infirmity of its conclusion that conditional firm service need not be made available to network customers (Order 890, PP 1092-93), even while it is available to long-term point-to-point customers based on the conclusion that transmission providers already provide conditional firm service to themselves (*id.* P 911). Particularly given Order 890-A's enhancements to conditional firm service, the Commission should reverse this conclusion and modify the *pro forma* OATT to clearly provide network customers with the option to take conditional firm service to support designation of on-system network resources.

At P 584 of Order 890-A, the Commission states:

> We agree with Southern that customers paying for upgrades have priority access to the capability created by those upgrades, up to the point of the amount of transmission service requested. To do otherwise would create disincentives for transmission customers later in the queue to pay for upgrades because upgrades must necessarily be sized to accommodate all earlier-queued customers. We note, however, that any capacity created in excess of the service request should be allocated to those planning redispatch and conditional firm customers earlier in the queue, based on their order in the queue.

This paragraph is not free from ambiguity as to the circumstances under which the later-queued customer would be deemed to be "paying" for the upgrade, and therefore protected from having the sizing of the upgrade required to meet its request driven by earlier-queued conditional firm customers that have elected not to support such upgrades, and would benefit from clarification in this regard.[9] But in any event, this paragraph appears to provide a new entitlement for the conditional firm customer: "any capacity created in excess of the service request should be allocated to those planning redispatch and conditional firm customers earlier in the queue, based on their order in the queue."

This new enhancement of conditional firm service further disadvantages the network customer that is denied conditional firm service because of the Commission's decision not to make it available to network customers. Where a network customer seeks a firm network resource designation, but the transmission provider lacks sufficient capacity to accept the resource designation, the transmission provider will have no obligation to offer conditional network service – service available in all but the specified hours or conditions. Rather, the network customer denied conditional firm service would be relegated to a combination of secondary network service and short-term network resource designations (as expressly envisioned by Order 890-A, P 558).[10] Among other

[9] TAPS understands the Commission to be saying that if a later-queued customer's service can be accommodated by a limited (and relatively inexpensive) upgrade tailored to its request, the transmission provider must allow the customer to choose that option to firm its service. While the Commission speaks of this issue in terms of upgrades that would be "paid for" by the later-queued customer on an incremental basis, TAPS assumes that the same principles would apply when the costs of upgrades are rolled in to the transmission provider's rate base, *e.g.*, as a result of application of "or" pricing to the later-queued request.

[10] TAPS understands that Order 890-A would, in addition, require the transmission provider to study, and make available to the network customer, "automatic devices, such as special protection schemes, to take resources offline during certain system conditions" (P 559) and planning redispatch options (P 542). *See also* OATT Section 32.3, as amended by Order 890-A. However, neither of these options substitute for the conditional firm service available to point-to-point customers and, as found by the Commission (Order 890, P 911), to the transmission provider itself for service to its native load.

things, such network customer would not enjoy the rights Order-890-A newly accords conditional firm point-to-point customers, *i.e.*, priority entitlement to future excess capacity resulting from later upgrades "based on their order in the queue." Order 890-A, P 584. Rather, even a network customer whose (denied) service request was made prior to the conditional firm point-to-point customers would come behind such customers in access to the excess capacity created; as we understand it, such network customer would be entitled to use the excess capacity created by a later upgrade to firm up a network resource only to the extent it submitted another later-queued request for designation of a new network resource.

Order 890-A's clarification of conditional firm service therefore further demonstrates the fallacy of the Commission's assertion that network customers denied that service nevertheless enjoy comparable service. As explained in Order 890-A (P 558):

> Network customers may designate network resources any time firm transmission is available, and the term of the designation can include periods of less than a year. Network customers can also use secondary network service to access resources during times when firm service is not available. This flexibility to use designated network resources and secondary network service to access undesignated resources already provides a service that is like conditional firm service that can be used to integrate new resources, intermittent or otherwise.

The Commission's theory that network customers can cobble together something that resembles the assurance of long-term conditional firm service is unfounded. At best, it would seem to require that network customers have perfect knowledge, *at the time of their network resource designations*, as to the effects of constraints that would preclude the resource's use under certain conditions so that they could limit their designations to

the periods when transmission capacity would be adequate to accommodate the request. Information about such constraints that is gained as a result of an initial designation request would be of minimal (if any) value, since any reframed request based on it would take its place in the queue behind all the requests that were submitted while the network customer's initial request was pending.

But even if network customers had the information and foresight to be able to create a patchwork of short-term designations and secondary network service to make use of a desired network resource, the fact remains that the service would be significantly inferior to the conditional firm service available to the transmission provider and long-term point-to-point transmission customers, especially as that service is clarified to include the added potential benefit of their service being firmed up by excess capacity produced by later upgrades (possibly paid for by other individual customers).

A network customer has no comparable opportunity to have its resource automatically accepted as a designated network resource as a result of subsequent upgrades that relieve constraints that blocked its original application. There is nothing in Order 890-A to suggest that a network customer whose network resource designation was originally denied, and who was thus relegated to taking secondary network service (perhaps combined with a series of short-term resource designations if ATC is still available to accommodate them when the customer's revamped requests hit the queue), would likewise have its service upgraded as a result of upgrades made later. Even if a network customer's original request would have had a better queue position than one or more point-to-point customers who took the option of taking conditional firm service, the network customer will be worse off than the conditional firm customers.

Order 890-A fails to justify such preferential treatment for point-to-point customers, while relegating network customers to secondary network service. The exclusion of network customers is particularly discriminatory given the Commission's finding (on which the extension of this service to point-to-point customers is expressly premised, Order 890 P 964) that transmission providers provide conditional service to themselves and OATT Section 28.2's express requirement that transmission providers "shall be required to designate resources and loads in the *same* manner as any Network Customer under Part III of this Tariff" (emphasis added). Given the definition of network service as comparable to the service provided to the transmission provider's Native Load (*see* Preamble to Part III of the OATT and OATT Section 28.3), the Commission's singling out of network customers (by exclusion from conditional firm service) is plainly unduly discriminatory. The Commission must provide network customers with the option of taking conditional firm service to support designation of on-system network resources on a basis comparable to the transmission provider's own use and the service available to long-term point-to-point customers.

C. Order 890-A Errs By Failing to Articulate a Consistent, Coherent Set of Rules Regarding Which Third-Party Sales Require Undesignation

Order 890-A provides a confusing and counter-intuitive set of "clarifications" of the third-party sales that may be made from a network resource without undesignation. These clarifications conflict with the express terms of the newly adopted Non-Firm Sales definition, are counter-productive to the short-term markets the Commission is seeking to foster, and will make it difficult for network customers (and transmission providers) to ascertain whether they are in compliance with the OATT. TAPS asks the Commission to step back from the tangle created by the already exception-riddled Non-Firm Sales

definition. Instead, the Commission should draw clear, coherent lines for third-party sales requiring undesignation of network resources. Consistent with the fundamental premises of network service, the standard should focus on the firmness of the delivery obligation. The Commission must also ensure that its policy supports competitive markets and facilitates application with confidence by network customers (and transmission providers) operating under the OATT.

1. Background: Order 890

The Order 888 OATT had barred "firm" sales from network resources. *See* Section 30.4. Order 888-B explained: "[A] network customer that seeks to engage in firm sales from its current designated network resources may terminate the generating resource (or a portion of it) as a network resource and request … that the same generation resource be designated as a network resource effective with the end of its power sale."[11]

Order 890 changed Section 30.4's description of permissible sales from a network resource to incorporate a new defined term, "Non-Firm Sales." Order 890 (P 1688) characterized the NOPR as:

> defining a Non-Firm Sale as "an energy sale for which delivery or receipt of the energy may be interrupted for any reason or for no reason, without liability on the part of either the buyer or seller." The Commission also proposed to clarify that, for the purposes of applying section 30.4, energy sales that can only be interrupted to maintain system reliability would be considered firm sales.

[11] 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-B, 62 Fed. Reg. 64,688 at 64,703 (Dec. 9, 1997), 81 F.E.R.C. ¶ 61,248 at 62,093 (1997), *order on reh'g*, Order No. 888-C, 82 F.E.R.C. ¶ 61,046 (1998), *aff'd in part and remanded in part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002) ("Order 888-B").

Order 890 adopted the proposal set forth in the NOPR (Order 890, P 1692), further explaining (P 1539, emphasis added):

> The Commission generally adopts the NOPR proposal to continue to require network customers and the transmission provider's merchant function to undesignate network resources or portions thereof in order to make *certain firm, third-party sales* from those resources. In particular, network customers and the transmission provider's merchant function may only enter into a third-party power sale from a designated network resource if the third-party power purchase agreement allows the seller to *interrupt* power sales to the third party in order to serve the designated network load. Such *interruption* must be permitted without penalty, to avoid imposing financial incentives that compete with the network resource's obligation to serve its network load.

While the above-quoted language left some ambiguity as to whether the referenced interruption was limited to network load reliability purposes or encompassed economics (as Order 890's definition of Non-Firm Sales would require, *see* OATT Section 1.29), elsewhere in Order 890 – in delineating eligibility for network resource designation – the Commission drew a sharp distinction between purchase contracts that are eligible for network resource designation despite being *curtailable* in favor of native load reliability needs, and contracts which are *interruptible* for economics as well and not eligible for network resource designation:

> We disagree with Duke and EEI's argument that there is a conflict between the policy guidance given in *Dynegy* (that a power purchase agreement which is interruptible for reasons other than reliability is not eligible for designation as a network resource) and the guidance given in *WPPI* (that a power purchase agreement which permits curtailment to serve the seller's native load is eligible for designation as a network resource). We reiterate the Commission's finding in *WPPI* that a power purchase agreement properly designated as a network resource may permit *curtailment* to serve the seller's native load. Consistent with the long-standing definition in Order No.

> 888, "curtailment" contemplates a reduction in service as a result of system reliability conditions, not economic reasons.

Order 890, P 1459.

Order 890 (P 1452) observed that "it is the firmness of a power purchase contract, and not simply the presence or absence of an LD provision, that determines the eligibility …" for network resource designation, and characterized the EEI Firm LD product as not allowing interruption for economic reasons. It then found that a "make whole" LD provision "does not create incentives that are incompatible with the firmness of the overall product" (P 1454), while other LD provisions may disqualify such designation (P 1455). In discussing whether LD contracts qualify as Non-Firm Sales, Order 890 stated: "[t]he very existence of an LD provision indicates that interruption of service will result in liability and, thus, such contracts cannot *automatically* be considered Non-Firm Sales for purposes of section 30.4." Order 890, P 1692 (emphasis added). While Order 890 indicated that there are sales not sufficiently firm to be designated by the buyer as a network resource, but which (from the seller's perspective) are too firm to be considered a Non-Firm Sale, it left open the possibility that some LD contracts might qualify as Non-Firm Sales.

2. Order 890-A Clarifications and Modifications

Order 890-A makes several clarifications and creates new exceptions as to the third-party sales that may be made from a network resource without undesignation.

Order 890-A expressly states that sales curtailable[12] for native load reliability purposes may be considered a Non-Firm Sale within the meaning of Order 890 OATT Section 1.29, and thus made from the seller's network resources without undesignation, even if they are simultaneously designated by the buyer as a firm network resource. As summarized in Order 890-A, P 1011, Southern had sought clarification as to whether system sales that are firm enough to be designated as network resources by the buyer – that, in accordance with Order 890, P 1460, are curtailable only for native load reliability purposes (not for economics) – can be made by the seller without undesignation:

> Southern questions whether system-firm sales that permit curtailment without penalty to serve the seller's native load should be treated as Non-Firm Sales for purposes of section 30.4 of the pro forma OATT. Southern states that the Commission has considered the purchase of … system-firm energy to be eligible for designation as a network resource, but contends that it is ambiguous whether the seller should consider those sales as a Non-Firm Sale.

In response, the Commission states (P 1016, emphasis added, footnote omitted):

> We also agree with Southern that, under normal circumstances, a system sale that permits *curtailment* without penalty to serve the seller's native load would fall within the definition of a Non-Firm Sale since the seller would have the right to rely on that capacity in the event it is needed to serve native load, which is the Commission's principal concern in restricting sales from designated network resources to Non-Firm Sales. Whether any particular contract satisfies the definition of Non-Firm Sales, however, must be considered based on the terms and conditions of that contract.

[12] The Commission's use of the term "curtailable" in this regard appears to be inconsistent with both the language of Section 1.29, as discussed below, and the Commission's discussion in P 1539 of Order 890, both of which speak in terms of "interruptions" rather than "curtailments." As noted above Order 890 (P 1460), the Commission placed considerable emphasis on the distinction between these two terms, noting that "'curtailment' contemplates a reduction in service as a result of system reliability conditions, not economic reasons" while "interruption" may be available for reasons other than reliability.

In response to E.ON U.S. LLC's ("E.ON") concerns about redesignation of network resources used to make sales that are curtailable for native load reliability purposes,[13] Order 890-A further explains (P 948):

> [T]here is also no need to undesignate network resources prior to making sales that permit curtailment without penalty to serve the seller's native load.[345] Since there is no need to undesignate resources to make such sales, there is no corresponding need to redesignate those resources in times of emergency when power is recalled to serve native load. We therefore disagree with E.ON U.S. that special redesignation procedures are necessary for LSEs selling recallable energy.
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> [345] *See* Order No. 890 at P 1459; *see also WPPI* 84 FERC at 61,152. Curtailment contemplates a reduction in service as a result of system reliability conditions, not economic reasons.

To address additional reserve-sharing concerns of Pacific Northwest IOUs and South Carolina E&G, Order 890-A modifies OATT Section 1.26's network resource definition and OATT Section 30.4 to create a new exception permitting sales without undesignation pursuant to a "Commission-approved reserve sharing agreement." *Id.*

Second, Order 890-A (P 1016) clarifies that unit-contingent sales generally do not qualify as Non-Firm Sales because "typically delivery can only be interrupted for the specific reasons identified in the underlying agreement."

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[13] *See* Order 890-A, P 939. E.ON's November 1, 2007 Request for Clarification (at 4) describes its reserve-sharing obligations as "not interruptible for economic reasons, but are interruptible if needed to prevent curtailment of reliable service to native load." It continued: "[i]n Order No. 890, the Commission restricted the output from Network Resources under Section 30.4 to serving Designated Network Load and Non-Firm Sales. Order No. 890 adopted a definition of Non-Firm Sales in Section 1.29 of the OATT to be limited to a sale that may be interrupted for any reason or no reason, without liability on the part of the buyer or seller. Order No. 890 clarified that a sale that is interruptible for reliability is firm for purposes of Section 30.4 [citing Order 890, P 1688]. Thus, E.ON is concerned that its sales from network resources under the reserve sharing agreement may not qualify as Non-Firm Sales …." The referenced pleading is *available at* eLibrary Accession No. 20071101-5157.

Third, responding to TAPS arguments that liability for real-time LMPs (and similar charges) should not disqualify interruptible sales into RTO day-ahead markets from consideration as Non-Firm Sales, Order 890-A clarifies that interruptible sales into day-ahead RTO markets that result in financial responsibility for the real-time LMP if interrupted cannot qualify as Non-Firm Sales and require undesignation:

> We disagree with TAPS and Washington IOUs that the definition of Non-Firm Sales includes transactions that permit interruption *with financial liability, whether make whole or limited to certain penalties*. In Order No. 890, the Commission clarified its existing policy prohibiting network customers from making third-party sales from a designated network resource if the third-party power purchase agreement does not allow the seller to interrupt power sales to the third party in order to serve the designated network load. The Commission adopted the definition of Non-Firm Sales to identify more clearly those types of sales that are permitted from designated network resources, explaining that any interruption in service that would create liability on the part of the seller would create conflicting incentives regarding use of the network resource and, therefore, such sale could not be made without first undesignating the resource. The Commission concluded that it would be inappropriate to adopt commenter suggestions to relax the definition of a Non-Firm Sale to include any sale that is not otherwise firm enough to be designated as a network resource.

P 1017 (emphasis added, footnotes omitted). In footnote 379, the Commission further emphasized the broad expanse captured by the term "liability:"

> The Commission's use of the word "penalty" in paragraph 1539 of Order No. 890 was not intended to restrict the scope of Non-Firm Sales. As the Commission explained in that paragraph, our concern is that there not be financial incentives that compete with the network resource's obligations to serve its network load. Interruption must therefore be allowed without liability or penalty.

Finally, responding to TAPS' demonstration that requiring undesignation for day-ahead sales into RTO markets will discourage such sales and harm competition and

reliability in RTO markets, the Commission states that it "appreciate[s] the concerns of E.ON LSE and TAPS regarding the potential effect of this decision on RTO/ISO markets," but concludes: "[i]t does not follow, however, that the *pro forma* OATT must be amended to accommodate the particular market operations of each RTO and ISO." Order 890-A, P 1018.

3. A More Rational, Consistent Approach to Undesignation Requirements is Needed

Order 890-A's modifications and clarifications of the sales that may be made from a network resource without undesignation leaves the OATT in a state of confusion that will make compliance by transmission providers and network customers hazardous because of inconsistency with the tariff and the lack of a coherent policy. Notwithstanding Section 1.29's express language requiring that Non-Firm Sales permit delivery to be "*interrupted* for any reason or no reason" (emphasis added), Order 890-A states that some sales that do not meet the definition's plain language – sales that are *curtailable* only for native load reliability purposes (*not* economics) – are considered Non-Firm Sales by the seller even though the restricted nature of the seller's curtailment rights makes the sales firm enough to be designated by the buyer as a network resource. In adopting this conclusion, Order 890-A appears to modify (without acknowledgement) Order 890's adoption of the NOPR's proposal "to clarify that, for the purposes of applying section 30.4, energy sales that can only be interrupted to maintain system reliability would be considered firm sales." Order 890, P 1688, adopted in P 1692. At the same time, Non-Firm Sale definition limitations caused the Commission to modify the OATT to create a new exception to permit sales under Commission-approved reserve sharing arrangements to be supplied from network resources without undesignation.

In contrast, short-term sales, such as sales into RTO day-ahead markets, that may be "interrupted for any reason or no reason," and which have been treated by both buyer and seller as non-firm (*e.g.*, there is no requirement that sales into RTO markets be firm or supported by firm transmission), are disqualified by assumed incentives created by the liability to pay the real-time LMP.

The emerging gerrymandered rule for when sales may be made from network resources without undesignation is inconsistent with the express terms of the new Non-Firm Sales definition. The definition is strictly limited to sales that are interruptible for any or no reason, which a curtailable sale is not. The Commission's exclusive focus (in the text of Order 890-A) on whether the seller can recall the sale for network load reliability purposes, without incurring any liability, suggests that the ability to interrupt for economic purposes is not relevant to the determination as to whether to the sale qualifies as Non-Firm, despite contrary language in the Non-Firm Sales definition. Despite providing a "clarification" inconsistent with the definition's terms, Order 890-A makes no modification in the definition.

The Commission's focus on the ability to curtail (without liability) for native or network load reliability not only is inconsistent with the Non-Firm Sales definition, it also produces illogical results. Order 890-A treats the same recallable sale as being simultaneously both non-firm and firm. Such a sale is a Non-Firm Sale not requiring undesignation by the seller at the same time it is sufficiently firm to permit designation as the buyer's network resource, allowing the same resource(s) to be designated twice. At the same time that Order 890-A recognizes a class of curtailable sales that qualify as both Non-Firm Sales for the seller and firm network resources for the buyer, Order 890-A

expands the class of transactions falling in neither category, *i.e.*, sales that do not qualify as a network resource (*e.g.*, because they are insufficiently firm, or are not a true "make whole" LD contract) and do not qualify as Non-Firm Sales (because some liability is created in the event of interruption). While Order 890 recognized the potential for such "no man's land" third-party sales that require undesignation (Order 890, P 1692), Order 890-A nowhere justifies expanding the scope of that class, while expressly permitting a class of transactions that simultaneously qualify as firm and non-firm, depending on whether they are viewed from the buyer's or seller's perspective.

Order 890-A finds a total contractual bar on recall for native load economic purposes (as in the case of curtailable sales) to be *less* of a disincentive against recall for native load than *any* financial liability (apparently no matter how small) borne by a seller with the absolute right to interrupt for any or no reason. This conclusion defies common sense, and is not supported by evidence. For example, at the July 30 technical conference,[14] E.ON's representative discussed (among other things) the application of the Order 890 Non-Firm Sales definition to sales into the Midwest Independent Transmission System Operator, Inc.'s ("MISO") markets. E.ON's representative viewed sales into MISO's *real-time* market as interruptible for any or no reason, without liability, and therefore permissibly made from a network resource without undesignation. However, he concluded that sales into MISO's *day-ahead* market would be considered something other than a Non-Firm Sale because of the associated liability to pay the cover price (*i.e.*, the real-time LMP) in the event of non-delivery. Such sales would therefore trigger the

[14] This technical conference was not transcribed, but an audio recording was available for webcast or download. Requests for the audio recording of Technical Conference on Preventing Undue Discrimination and Preference in Transmission Service, No. RM05-17-002 (July 30, 2007) can be made to capcon@gmu.edu.

requirement to undesignate the network resources from which the sale is made. He indicated that E.ON was moving away from participation in MISO's day-ahead market because of uncertainties about redesignation if the (undesignated) resource sold into MISO's day-ahead market were needed in real time to serve native load (*e.g.*, due to a real-time contingency). E.ON's testimony makes clear that the obligation to pay the real-time LMP would *not* create a disincentive to recall the sale if needed for native load and, to the contrary, that flexibility to interrupt such sale for "any reason or no reason" to meet native load needs was so valuable that uncertainties associated with undesignation would deter it from making such sales. TAPS Supplemental Post-Technical Conference Comments stressed that the same considerations apply to network customers selling into RTO markets from network resources designated on other transmission providers' systems.[15]

Order 890-A's distinction between the curtailable sales that may be made from network resources without undesignation, and the fully interruptible sales, entailing some financial liability, which may not, runs contrary to the fundamental principle that it is the nature of the delivery obligation, not the LD provisions, that determine whether a resource is sufficiently firm to qualify for network resource designation.[16] Order 890 suggested that the existence of *any* financial liability controls whether a sale may be deemed a Non-Firm Sale, regardless of the nature of the seller's obligation to deliver under the contract. However, while finding restricting interruption rights to reliability

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[15] *See* TAPS Supplemental Post-Technical Conference Comments, Motion for Clarification or Reconsideration, and Response to E.ON's Motion, (Nov. 5, 2007), *available at* eLibrary Accession No. 20071105-5061 ("Supplemental Comments").

[16] *See* Order 890, P 1452; *Dynegy Midwest Generation, Inc. v. Commonwealth Edison Co.*, 101 F.E.R.C. ¶ 61,295, P 1 (2002), *reh'g dismissed as moot*, 108 F.E.R.C. ¶ 61,175 (2004).

curtailments does not make a curtailable sale ineligible for treatment as a Non-Firm Sale, Order 890-A relies on restrictions on interruption rights to warrant exclusion from the Non-Firm Sales category in other cases.[17] Order 890-A articulates no consistently applied standard that network customers and the transmission providers can use to determine whether a sale qualifies as a Non-Firm Sale, much less one that conforms to the new definition.

Nor do the results of Order 890-A's erratic line-drawing make sense from the standpoint of freeing up ATC, a key purpose of the clarified undesignation requirements.[18] Under Order 890-A, sales that restrict the permissible interruptions to avoiding reliability curtailments of seller's native or network load may be designated as network resources by both buyer and seller. Such dual designation potentially double counts the resources for ATC purposes, tying up firm ATC, possibly on a long-term basis. In contrast, day-ahead hourly sales that *can* be interrupted for any or no reason, that have been treated as non-firm, and that are not and could not be designated as network resources by the buyer, require undesignation because *any* financial consequences of interruption disqualifies them as Non-Firm Sales. The only ATC that might possibly be created by such undesignations would be very short-term; pending the results of ongoing NERC/NAESB ATC refinement efforts, it is far from clear that such short-term undesignations will create firm transmission capacity more useable than the unused non-firm capacity released by the transmission provider without undesignation.[19]

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[17] *See* Order 890-A, P 1016, discussing unit-contingent sales.

[18] *See, e.g.*, Order 890, P 1549 ("Any change in ATC that is determined by the transmission provider to have resulted from the temporary termination [of a designated network resource] shall be posted on OASIS during this temporary period"), PP 1587-89.

[19] The Commission's continued consideration of the timing requirements for undesignations highlights the uncertainty. *See* Order 890-A, P 931. *See also* Order 890-A, P 890 (recognizing that given the pending

Indeed, Order 890-A (P 1018) accepts TAPS' assertion that the RTOs' use of centralized dispatch could eliminate any useful effect of such temporary undesignation on dispatch or ATC.

On the other hand, adverse impacts on RTO markets are real. Order 890-A does not dispute the evidence submitted by TAPS and E.ON that if "liability" as used in the Non-Firm Sale definition is interpreted to include obligations of the sort that sellers into organized markets must bear if they elect not to deliver, the requirement to undesignate will discourage sales into organized markets that the Commission seeks to facilitate because they are "critical to addressing issues of market power and bid insufficiency." *Southwest Power Pool, Inc.*, 121 F.E.R.C. ¶ 61,029, P 2 (2007) (rejecting SPP filing burdening external generation participation in its Energy Imbalance Service Market).[20] To the contrary, Order 890-A expressly "appreciate[s]" these concerns. Order 890-A, P 1018. However, based on reasons that cannot withstand scrutiny, the Commission concludes no modification of the *pro forma* OATT is warranted.

Specifically, Order 890-A (P 1018) points to variations among RTOs, particularly as to network resource designation requirements, as obviating the need to modify the *pro*

NERC/NAESB process, future revisitation of system purchase designation requirements may be appropriate).

[20] As TAPS explained in its Supplemental Comments (at 6): "Where a seller located outside the RTO boundaries has a choice as to whether to sell into an RTO or bilaterally outside the RTO, it may seek to sell elsewhere to avoid undesignation, depriving RTO markets of economic supply. While (as Staff noted at the technical conference) there may be a theoretical potential for real-time redesignation of the undesignated resource in the event it is needed to serve native or network load, that real-time redesignation is unlikely to be timely processed and accepted, particularly … where it would be most needed—a constrained grid. Transmission dependent network customers, whose resources are often remote from their load, will be reluctant to take that risk to their ability to reliably meet network load. In addition, such customers may be concerned that the long-term network resource designations on which they depend to serve their network load may be inadvertently compromised by administrative error by the customer or the transmission provider in the temporary undesignation/redesignation process, particularly if this is [a] daily occurrence."

forma OATT, and assumes (P 1019) that issues about participation in MISO's day-ahead market can be addressed through modification of the MISO OATT. Neither conclusion is correct.

Issues pertaining to the ability of a network customer *within* "RTO A" to use its network resources to participate in "RTO A's" day-ahead market can and should be addressed in "RTO A's" tariff.[21] But restrictions on use by a network customer *outside* "RTO A" of its network resources designated on another transmission provider's system cannot be addressed through modification of "RTO A's" tariff. Rather, restrictions on such network resource usage by a network customer *outside* RTO A are determined by the OATT that governs the transmission system where the network customer's resource has been designated as a network resource.

For example, given Order 890-A's interpretation of Non-Firm Sales, absent undesignation, E.ON's OATT would bar it from selling energy into a day-ahead market, such as MISO's, that imposed financial consequences in the event E.ON chose to interrupt for any or no reason. Network customers located on E.ON's system, who have no control over E.ON's decisions to join or withdraw from RTOs,[22] would similarly be barred absent undesignation. Only by modifying the *pro forma* tariff (or the Commission's interpretation of that tariff) can the Commission avoid discouraging

[21] Thus, for example, the terms of MISO's tariff should be modified to avoid the absurdity of requiring MISO network customers to undesignate network resources in order to bid into MISO's day-ahead market (as required by MISO's must-offer requirement applicable to MISO network resources), or to sell into PJM's market (which is intended to operate on a joint and common basis with MISO). As the Commission recognizes (Order 890-A, P 1019), those changes can and should be made in the MISO Order 890 compliance filing proceeding, Docket No. OA08-14-000. However, those changes, while crucial, will not facilitate sales into MISO by those outside an RTO or in PJM.

[22] *See, e.g., Duquesne Light Co.*, 122 F.E.R.C. ¶ 61,039, P 130 (2008) ("While we recognize that in many cases, LSEs may be required to associate with the same RTO as the transmission owner, we cannot find this to be a sufficient basis to deny the transmission owner the right to withdraw transmission assets from an RTO.").

network customers (and transmission providers) located outside a particular RTO from selling into that RTO's day-ahead market and the associated harm to the robustness of such markets.

Nor can changes in one RTO tariff prevent application of the Non-Firm Sales definition from discouraging sales from neighboring RTOs, *e.g.*, from MISO into PJM and *vice versa*. The Commission's application and interpretation of the Non-Firm Sales definition creates new barriers to precisely the type of cross-border sales the Commission is trying to encourage.[23]

Supply limitations resulting from applying undesignation requirements to sales into RTO day-ahead markets could needlessly increase prices in such markets, and potentially affect reliability. Those located outside an RTO would be most reluctant to undesignate network resources to sell into RTO markets during peak conditions, when transmission is scarce (increasing concerns about re-designation in the event the energy is needed for network load), thus depriving the RTO of supply offers when it needs them the most. Establishing OATT rules that impede the ability of those outside an RTO to provide needed energy is plainly counter-productive to the Commission's ongoing efforts to enhance competition and reduce costs in organized markets, as evidenced by the pending ANOPR.[24]

Indeed, the lack of clarity in the Commission's application of the Non-Firm Sales definition may discourage sales into organized markets even in situations where there is a

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[23] *See, e.g., Wisconsin Pub. Serv. Corp. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 120 F.E.R.C. ¶ 61,269, P 58 (2007) (describing initiatives that allow jointly owned resources to be sold into either RTO's day-ahead or real-time market, to help border prices converge).

[24] Wholesale Competition in Regions with Organized Electric Markets, Advanced Notice of Proposed Rulemaking, 72 Fed. Reg. 36,276 (July 2, 2007).

trivial financial consequence to permissible interruptions that the Commission could not rationally conclude would pose any disincentive to recall for network load needs. RTO scheduling deadlines may result in some short period of liability for real time LMPs even where market participants retain rights to change their bids and schedules. For example, market participants submitting offers into MISO's real-time market from generators located outside the Midwest ISO region must provide notice "prior to 30 minutes before the Operating Hour"[25] in order to make effective their right to change their bids in the real-time market – *i.e.*, to interrupt for any or no reason. Thus, the network customer seeking to recall its interruptible sale would still be subject to financial consequences during the notice period.[26] Does that notice period financial responsibility amount to liability sufficient to bar interruptible sales without undesignation? As noted above, the assumption at the July 30 technical conference was that sales into MISO's real-time market qualify as Non-Firm Sales, but given Order 890-A's clarifications should that conclusion be reassessed? The potential for even short notice period liability to disqualify an interruptible sale from being considered a Non-Firm Sale that can be made without undesignation could cause network customers and transmission providers to decline to supply such energy, even when an organized market is experiencing an emergency. Even in non-emergency conditions, the resulting removal of supply from such markets will result in inefficient use of resources, harming consumers both inside and outside such markets.

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[25] Midwest ISO, *Business Practices Manual - Energy Market Instruments*, § 3.4.2, *available at* http://www.midwestiso.org/publish/Document/20f443_ffd16ced4b_-7e6b0a3207d2?rev=9.

[26] Similarly, a recall during the operating day of energy sales subject to ERCOT's hourly scheduling rules could subject the seller to imbalance energy charges during the period (of one to two hours, depending on timing of the recall) before a schedule change can be implemented to relieve the seller of all financial responsibility.

Particularly given the potential for enforcement actions (and possibly penalties)[27] if a transmission provider or network customer makes a third-party sale that does not qualify as a Non-Firm Sale (or a sale under a "Commission-approved reserve sharing agreement"), the Commission has a responsibility to adopt a tariff whose terms can be taken at face value, and do not invite misapplication. The new Non-Firm Sales definition combined with Order 890-A's inconsistent interpretations and exceptions, do not provide the clarity needed to make the tariff susceptible to fair enforcement.[28]

TAPS therefore asks the Commission to reassess what it was seeking to achieve through "clarification" of the non-firm sales that can be made from network resources without undesignation. The new Non-Firm Sales definition, drawn from another context (the EEI Master Purchase and Sale Agreement, *see* NOPR, P 463), is not well-adapted to drawing an understandable and consistent line that can be applied to determine which of the wide range of transactions should be considered too firm to be made from a network resource without undesignation. Further, it does not even allow sales without undesignation in the very situation the Commission appears quite eager to permit, *i.e.*, where the sale can be recalled without liability *only* to meet reliability needs of native/network load.

Rather than continuing to force square pegs in the round Non-Firm Sales definition hole by interpreting it contrary to its terms, the Commission should remove the definition and enunciate clear and consistent principles for discerning whether,

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[27] *Cf.*, *e.g.*, Order 890's invitation (P 1602) to refer instances of misuse of secondary network service (to make third-party sales) to the FERC enforcement staff.

[28] Statement of Commission Chairman Joseph T. Kelliher, FERC Conference on Enforcement Policy, Docket No. AD07-13. at 5 (Nov. 14, 2007) ("If FERC demands compliance, we must be clear on the nature of our rules").

considering the nature of the delivery obligation, a sale can be made from a network resource without undesignation. These principles should not assume that the mere existence of *any* financial liability creates improper incentives, thereby giving undue emphasis to what is likely to be a minor factor affecting a network customer's ability to interrupt the sale in favor of native load, assuming the contract permits interruption for any or no reasons. The principles should expressly permit short-term sales (such as sales into organized day-ahead and real-time markets) that involve no obligation to deliver (and can be entered by virtual traders with nothing to deliver), to be made from a network resource without undesignation.

Even if the Commission retains the Non-Firm Sales definition, it should construe it consistently with the firmness of the delivery obligation and make clear that it takes more than the liabilities associated with sales into day-ahead (and, to eliminate any doubt, same-day) RTO markets to disqualify such interruptible sales from treatment as Non-Firm Sales. Alternatively, because of the importance of supporting short-term competitive markets, the Commission should make this clear by creating an additional exception to Section 30.4 (like the new exception for sales pursuant to Commission-approved reserve sharing agreements) to permit use of network resources without undesignation for day-ahead and same-day sales that are subject to interruption, without regard to the liabilities associated with such interruption.

At a bare minimum, so that concerns about avoiding potential tariff violations do not discourage transactions that the Commission intends to permit without undesignation, the Commission should provide more realistic guidelines for the level of liability it views as providing incentives that disqualify an interruptible sale from being considered a Non-

Firm Sale. For example, the Commission could reasonably conclude that liabilities restricted to notice periods applicable to the interruption of a sale do not trigger the need for undesignation. It is plainly inconsistent with market realities for the Commission to assume that *any* liability for interruption of a third-party sale, no matter how insignificant, will create incentives incompatible with the use of network resources for network load.

D. System Sale Undesignation Requirements Should be Clarified

TAPS appreciates the clarifications provided by the Commission with respect to designation of firm system purchases as network resources, particularly with respect to on-system purchases. *See* Order 890-A, PP 885-89. These clarifications should enable the continued designation of firm system purchases as network resources, whether they are on-system or off-system. To avoid discouraging system sales, however, TAPS seeks further clarification of Order 890-A's clarification regarding the undesignation requirements associated with certain system sales.

At P 947, the Commission clarifies undesignation of system purchases:

> With regard to the undesignation of units used to supply system sales, we clarify that portions of the seller's individual network resources supporting a sale of system power do not need to be undesignated so long as the system sale is itself designated as a network resource by the buyer. Instead, the seller should undesignate a portion of its system equal to the amount of the system sale, but which is not attributed to any specific generators. If the system sale is not designated as a network resource by the buyer, the seller must submit undesignations for each portion of each resource supporting the third-party sale. Since we believe most, if not all, system sales sourced from designated network resources are themselves designated as network resources by the buyer, we expect that few system sales will require undesignation on a unit-by-unit basis.

TAPS agrees that in many cases a system sale will be designated by a network customer, whether on-system or off-system, thus permitting undesignation on a system basis in such cases. However, TAPS remains concerned that in cases where a system sale is not designated by the buyer as a network resource, the significant challenges associated with undesignating the portion of each resource supporting the sale may needlessly discourage such sales without providing substantial benefits to ATC calculations.

For example, the unit-specific undesignation requirements may discourage suppliers from making firm system sales to load-serving entities that are not network customers. Such customers would include customers taking point-to-point service because of significant behind-the-meter generation that makes network service uneconomical; and customers that continue to be served under pre-Order 888 transmission service agreements. The unwieldy unit-specific undesignation requirement, applied to such sales, invites discrimination against a subset of customers that rely on firm system sales.

Also burdened by the unit-specific undesignation requirements are network customers and transmission providers that make system sales that do not qualify (and/or are not designated) as network resources, but nevertheless require undesignation because the seller incurs some financial liability in the event of interruption (as discussed above). For example, unit-specific undesignation requirements will increase the burden and further discourage network customers from making system sales into day-ahead RTO markets.

Given the Commission’s assumption that unit-specific undesignations would rarely be required for system sales, little purpose would be served by requiring such

undesignations in cases not covered by the Commission's allowance of system-based undesignations for system sales designated as network resources. Given the "under-development" status of the ATC refinements efforts, and the opportunity to revisit requirements once NERC and NAESB have completed their efforts (Order 890-A, P 931), the better course would be to allow system-based undesignation for all system sales.

CONCLUSION

The Commission should grant rehearing and clarify its Rehearing Order to ensure that the *pro forma* OATT provides the non-discriminatory transmission service intended, as described above.

Respectfully submitted,

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