UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities	Docket No. RM10-23-000

REQUEST FOR REHEARING OF THE TRANSMISSION ACCESS POLICY STUDY GROUP

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On July 21, 2011, the Commission issued Order 1000,[1] its Final Rule in this important rulemaking proceeding. As transmission dependent utilities ("TDUs") that have long recognized that regional transmission planning and cost allocation are necessary ingredients to achieving the "right-sized" grid needed to reliably deliver existing and new resources, including renewable and low-carbon resources, to load-serving entities ("LSEs"), and have actively advocated for approaches that get needed transmission built,[2] Transmission Access Policy Study Group ("TAPS") supports efforts to remove obstacles to needed expansion of the grid, and thus, the Commission's goals in enhancing the regional and inter-regional transmission planning process through this Final Rule.

TAPS requests rehearing of selected portions of Order 1000, pursuant to Section 313 of the Federal Power Act ("FPA"), 16 U.S.C. § 825*l*, and Rule 713 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713, to press for modifications in the Final Rule to avoid unintentionally expanding the ability of

[1] Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, Order No. 1000, 76 Fed. Reg. 49,842 (Aug. 11, 2011), 136 FERC ¶ 61,051 (2011) ("Order 1000" or "Final Rule").

[2] *See* TAPS, Effective Solutions for Getting Needed Transmission Built at Reasonable Cost (June 2004), *available at* http://www.tapsgroup.org/sitebuildercontent/sitebuilderfiles/effectivesolutions.pdf.

jurisdictional transmission providers ("TPs") to discriminate, and to better enable the Rule to achieve the Commission's goal of making it more likely that the right transmission will be planned and constructed, consistent with Federal Power Act mandates.

STATEMENT OF ISSUES

1. Did Order 1000 err by enhancing the importance of the regional planning process and creating new opportunities for jurisdictional TPs to discriminate in favor of their own interests, while ignoring TAPS' request that balanced decisionmaking be required, or otherwise induced, to protect transmission dependent utilities? Final Rule PP 83, 254, 256; Order 888,[3] at 31,669 & n.195, 31,670, 31,862; Order 2003,[4] P 696; 18 C.F.R. § 2.21(b)(3); Policy Statement Regarding Regional Transmission Groups, 58 Fed. Reg. 41,626, 41,630 (Aug. 5, 1993), FERC Stats. & Regs. ¶ 30,976, at 30,875 (1993) ("RTG Policy Statement"); *Southwest Reg'l Transmission Ass'n*, 69 FERC ¶ 61,100, at 61,400-02 (1994) ; *PacifiCorp*, 69 FERC ¶ 61,099, at 61,382 n.70 (1994); FPA § 206, 16 U.S.C. § 824e; Order 672,[5] P 153; Order 679,[6] PP 21, 27.

2. Did Order 1000 err by failing to mandate inclusion of Section 217(b)(4) of the Federal Power Act, the only provision of the Act that directly addresses planning, as a

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

[4] Standardization of Generator Interconnection Agreements and Procedures, Order No. 2003, 68 Fed. Reg. 49,846 (Aug. 19, 2003), FERC Stats. & Regs. ¶ 31,146 (2003), *modified*, 68 Fed. Reg. 69,599 (Dec. 15, 2003), *clarified*, 69 Fed. Reg. 2135 (Jan. 14, 2004), 106 FERC ¶ 61,009 (2004) ("Order 2003"), *order on reh'g*, Order No. 2003-A, 69 Fed. Reg. 15,932 (Mar. 26, 2004), FERC Stats. & Regs. ¶ 31,160 (2004) ("Order 2003-A"), *order on reh'g*, Order No. 2003-B, 70 Fed. Reg. 265 (Jan. 4, 2005), FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, 70 Fed. Reg. 37,661 (June 30, 2005), FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. NARUC v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007), *cert. denied*, 128 S. Ct. 1468 (2008).

[5] Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards, Order No. 672, 71 Fed. Reg. 8662 (Feb. 17, 2006), FERC Stats. & Regs. ¶ 31,204 (2006) ("Order 672"), *corrected*, 71 Fed. Reg. 11,505 (Mar. 8, 2006), *on reh'g*, Order No. 672-A, 71 Fed. Reg. 19,814 (Apr. 18, 2006), FERC Stats. & Regs. ¶ 31,212 (2006), *modified*, 73 Fed. Reg. 21,814 (Apr. 23, 2008), 123 FERC ¶ 61,046 (2008).

[6] Promoting Transmission Investment through Pricing Reform, Order No. 679, 71 Fed. Reg. 43,294 (July 31, 2006), FERC Stats. & Regs. ¶ 31,222 (2006) ("Order 679"), *on reh'g*, Order No. 679-A, 72 Fed. Reg. 1152 (Jan. 10, 2007), FERC Stats. & Regs. ¶ 31,236 (2006) ("Order 679-A"), *clarified*, 119 FERC ¶ 61,062 (2007).

Public Policy Requirement that must be considered in Order 890[7] and Order 1000 planning processes? FPA §§ 206, 217(b)(4), 16 U.S.C. §§ 824e, 824q(b)(4); Order 681,[8] PP 319-20.

3. Did Order 1000 err by allowing TPs to plan for their own vision of public policy not reflected in either law or regulation, and by authorizing them to select facilities planned to achieve those objectives in the regional plan for regional cost allocation purposes, without requiring such plans to satisfy the reasonable needs of load-serving entities or support multiple realistic power supply scenarios? FPA §§ 206, 217(b)(4); Order 888, at 31,862; *see, e.g., Cal. Indep. Sys. Operator Corp.*, 133 FERC ¶ 61,224, PP 196-99 (2010).

4. Did Order 1000 err by requiring development of a regional plan without also requiring a timely post-plan process to make the planning process effective in achieving the Commission's objectives—i.e., without providing for a timely process for securing commitments to construct facilities in the regional plan, with accountability for failing to follow through on those commitments? FPA §§ 206, 215, 217(b)(4).

5. Did the Commission err by failing to make clear that the upgrade and commitment status posting required at Paragraph 159 must be made on a timely basis, e.g., within a specified time after the regional plan is posted and periodically thereafter? FPA § 206; Order 890, PP 400, 471.

6. Did Order 1000 err by unduly restricting or leaving unclear its directive to public utility TPs to "determine whether delays associated with completion of a transmission facility selected in a regional transmission plan for purposes of cost allocation have the potential to adversely affect an incumbent transmission provider's ability to fulfill its reliability needs or service obligations," P 329, and take appropriate actions, so that it leaves uncertainty that: (a) "service obligations" include approved service and interconnection requests, even granted based on the delayed upgrade; and (b) third-party impacts will be considered and addressed on a coordinated basis? FPA § 206.

7. Did Order 1000 err by unduly restricting the NERC liability protection provided public utility TPs (or inconsistently, incumbent TPs) for a nonincumbent developer's abandonment of a facility planned to address reliability (P 344), so that the protection

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[7] Preventing Undue Discrimination and Preference in Transmission Service, Order No. 890, 72 Fed. Reg. 12,266 (Mar. 15, 2007), FERC Stats. & Regs. ¶ 31,241 (2007) ("Order 890"), *order on reh'g and clarification*, Order No. 890-A, 73 Fed. Reg. 2984 (Jan. 16, 2008), FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 73 Fed. Reg. 39,092 (July 8, 2008), 123 FERC ¶ 61,299 (2008), *order on reh'g and clarification*, Order No. 890-C, 74 Fed. Reg. 12,540 (Mar. 25, 2009), 126 FERC ¶ 61,228 (2009), *order on clarification*, Order No. 890-D, 74 Fed. Reg. 61,511 (Nov. 25, 2009), 129 FERC ¶ 61,126 (2009).

[8] Long-Term Firm Transmission Rights in Organized Electricity Markets, Order No. 681, 71 Fed. Reg. 43,564 (Aug. 1, 2006), FERC Stats. & Regs. ¶ 31,226 (2006) ("Order 681"), *corrected*, 71 Fed. Reg. 46,078 (Aug. 11, 2006), *clarified*, Order No. 681-A, 71 Fed. Reg. 68,440 (Nov. 27, 2006), 117 FERC ¶ 61,201 (2006), *clarified*, Order No. 681-B, 74 Fed. Reg. 13,103 (Mar. 26, 2009), 126 FERC ¶ 61,254 (2009).

fails to extend to all others in the region (i.e., non-jurisdictional NERC-registered Transmission Planners and Planning Coordinators) that may be subject to NERC violations due to such abandonment or from delay in completion of the regionally planned facility, and to cover delay or abandonment by any entity other than the one shielded from NERC liability, not just abandonment by nonincumbents? FPA §§ 206, 215, 16 U.S.C. §§ 824e, 824*o*.

8. Did the Commission err by failing to take steps to encourage joint ownership by TDUs of regionally planned facilities, notwithstanding its "encourag[ment]" of joint ownership in Order 890 and its recognition in the Final Rule that there are benefits to joint ownership? Order 890, PP 593-594; Order 890-A, P 264; Final Rule P 776 (citing Order 890, P 593); FPA § 206.

9. Did Order 1000 err by defining "nonincumbent transmission developer" to exclude most non-jurisdictional utilities, and by defining "incumbent transmission developer/provider" to exclude municipal joint action agencies and generation and transmission cooperatives (as well as transcos), thereby resulting in disparate treatment of non-jurisdictional utilities with no justification, and notwithstanding the Commission's stated expectation that non-jurisdictional utilities will participate in the regional planning and cost allocation processes mandated by Order 1000? FPA § 206.

10. Did the Commission err by ignoring TAPS' request that the minimum qualification criteria for proposing projects in the regional planning process be required to avoid creating a barrier to TDU joint ownership of facilities selected for regional cost allocation? FPA § 206.

11. Did Order 1000 err by failing to expressly require that within an RTO region, regionally-cost-allocated facilities must be made subject to RTO control and access rules? FPA § 206; 18 C.F.R. §§ 35.34(j)(3)-(4), 35.34(k)(1)(i)-(ii), 35.34(k)(7).

12. Did Order 1000 err by failing to require a regional tariff covering existing and new facilities at non-pancaked rates, in non-RTO regions? FPA § 206; Order 2000,[9] at 31,004; *Fort Pierce Utils. Auth. v. FERC*, 730 F.2d 778, 783-85 (D.C. Cir. 1984) ("Fort Pierce"); *SPP, Inc.*, 98 FERC ¶ 61,038, at 61,103 (2002); *Mid-Continent Area Power Pool*, 69 FERC ¶ 61,347 (1994); *see Black Hills Power, Inc.*, 106 FERC ¶ 61,119 (2004).

13. Did Order 1000 err by failing to address, or at least require a timely process for addressing, access to regionally cost-allocated facilities in non-RTO regions, i.e., by failing to require TPs to address access in their compliance filings, and when a specific cost allocation is applied to a project selected for regional cost allocation

[9] Regional Transmission Organizations, Order No. 2000, 65 Fed. Reg. 809 (Jan. 6, 2000), FERC Stats. & Regs. ¶ 31,089 (1999) ("Order 2000"), *order on reh'g*, Order No. 2000-A, 65 Fed. Reg. 12,088 (Mar. 8, 2000), FERC Stats. & Regs. ¶ 31,092 (2000), *appeal dismissed for want of standing sub nom. Pub. Util. Dist. No. 1 v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

(both in the regional process for selecting the projects for regional cost allocation and in filings with the Commission once the entity to construct that project is determined)? FPA § 206; *Ill. Commerce Comm'n v. FERC*, 576 F.3d 470 (7th Cir. 2009); Final Rule P 254; Order 888, at 31,682, 31,734; *Elec. Dist. No. 1 v. FERC*, 774 F.2d 490, 493 (D.C. Cir. 1985).

14. Did the Commission err by establishing a new generic entitlement to abandoned plant recovery, without acknowledging or justifying this departure from the case-by-case approach required by its incentive rate rule? FPA § 206; Order 679, P 164.

SPECIFICATION OF ERRORS

1. Order 1000 errs by enhancing the importance of the regional planning process and creating new opportunities for jurisdictional TPs to discriminate in favor of their own interests, while ignoring TAPS' request that balanced decisionmaking be required, or otherwise induced, to protect transmission dependent utilities.

2. Order 1000 errs by failing to mandate inclusion of Section 217(b)(4) of the Federal Power Act, the only provision of the Act that directly addresses planning, as a Public Policy Requirement that must be considered in Order 890 and Order 1000 planning processes.

3. Order 1000 errs by allowing TPs to plan for their own vision of public policy not reflected in either law or regulation, and by authorizing them to select facilities planned to achieve those objectives in the regional plan for regional cost allocation purposes, without requiring such plans to satisfy the reasonable needs of load-serving entities or support multiple realistic power supply scenarios.

4. Order 1000 errs by requiring development of a regional plan without also requiring a timely post-plan process to make the planning process effective in achieving the Commission's objectives—i.e., without providing for a timely process for securing commitments to construct facilities in the regional plan, with accountability for failing to follow through on those commitments.

5. The Commission errs by failing to clarify that the upgrade and commitment status posting required at Paragraph 159 must be made on a timely basis, e.g., within a specified time after the regional plan is posted and periodically thereafter.

6. Order 1000 errs by unduly restricting or leaving unclear its directive to public utility TPs to "determine whether delays associated with completion of a transmission facility selected in a regional transmission plan for purposes of cost allocation have the potential to adversely affect an incumbent transmission provider's ability to fulfill its reliability needs or service obligations," P 329, and take appropriate actions, so that it leaves uncertainty that: (a) "service obligations" include approved service and interconnection requests, even granted based on the delayed upgrade; and (b) third-party impacts will be considered and addressed on a coordinated basis.

7. Order 1000 errs by unduly restricting the NERC liability protection provided public utility TPs (or inconsistently, incumbent TPs) for a nonincumbent developer's abandonment of a facility planned to address reliability (P 344), so that the protection fails to extend to all others in the region (i.e., non-jurisdictional NERC-registered Transmission Planners and Planning Coordinators) that may be subject to NERC violations due to such abandonment or from delay in completion of the regionally planned facility, and to cover delay or abandonment by any entity other than the one shielded from NERC liability, not just abandonment by nonincumbents.

8. The Commission errs by failing to take steps to encourage joint ownership by TDUs of regionally planned facilities, notwithstanding its "encourag[ment]" of joint ownership in Order 890 and its recognition in the Final Rule that there are benefits to joint ownership.

9. Order 1000 errs by defining "nonincumbent transmission developer" to exclude most non-jurisdictional utilities, and by defining "incumbent transmission developer/provider" to exclude municipal joint action agencies and generation and transmission cooperatives (as well as transcos), thereby resulting in disparate treatment of non-jurisdictional utilities with no justification, and notwithstanding the Commission's stated expectation that non-jurisdictional utilities will participate in the regional planning and cost allocation processes mandated by Order 1000.

10. The Commission errs by ignoring TAPS' request that the minimum qualification criteria for proposing projects in the regional planning process be required to avoid creating a barrier to TDU joint ownership of facilities selected for regional cost allocation.

11. Order 1000 errs by failing to expressly require that within an RTO region, regionally-cost-allocated facilities must be made subject to RTO control and access rules.

12. Order 1000 errs by failing to require a regional tariff covering existing and new facilities at non-pancaked rates, in non-RTO regions.

13. Order 1000 errs by failing to address, or at least require a timely process for addressing, access to regionally cost-allocated facilities in non-RTO regions, i.e., by failing to require TPs to address access in their compliance filings, and when a specific cost allocation is applied to a project selected for regional cost allocation (both in the regional process for selecting the projects for regional cost allocation and in filings with the Commission once the entity to construct that project is determined).

14. The Commission errs by establishing a new generic entitlement to abandoned plant recovery, without acknowledging or justifying this departure from the case-by-case approach required by its incentive rate rule.

ARGUMENT

I. ORDER 1000 ERRS BY FAILING TO REQUIRE BALANCED DECISIONMAKING IN NON-RTO-REGION PLANNING PROCESSES

The Commission departs from its FPA obligation to eliminate undue discrimination by enhancing the importance of the regional planning process and creating new opportunities for jurisdictional TPs to discriminate in favor of their own interests, while ignoring TAPS' request (TAPS NOPR Comments[10] at 32-40) that balanced decisionmaking be required to protect transmission dependent utilities.

The Commission has long recognized that TPs have the opportunity and incentive to exercise their authority as TPs in a manner that will enhance their self-interest.[11] Order 2003 expressly recognized the potential for a non-independent TP to exploit the "inherent subjectivity" in the planning process to its own advantage, by attributing to others a disproportionate share of the costs of network upgrades needed to serve the TP's own power customers, and found that "any policy that creates opportunities for such discriminatory behavior to be unacceptable."[12] Order 1000 acknowledges that it is in the economic self-interest of TPs to discriminate in deciding whether and how to expand the transmission system (Final Rule PP 254, 256), and that a regional transmission process can provide an opportunity for such undue discrimination (*see, e.g., id.* P 83).

The Final Rule enhances the capability of TPs to benefit their generation function, and the returns they earn by virtue of their ownership and control of transmission, by giving them the right to make decisions as to which upgrades go into the regional plan for

[10] Comments of the Transmission Access Policy Study Group (Sept. 29, 2010), eLibrary No. 20100929-5452 ("TAPS NOPR Comments").

[11] Order 888, at 31,862.

[12] Order 2003, P 696.

regional cost allocation. For example, the Rule leaves decisions on which transmission facilities will be included in the regional plan or actually constructed "to the judgment of public utility transmission providers," giving those TPs ultimate say on whether an upgrade that serves the needs of TDUs is included in the regional plan, or selected for regional cost allocation. *Id.* P 68 & n.57; *see also id.* P 331. This ability of jurisdictional TPs to choose where regionally cost-allocated facilities will be located has enormous implications for TDUs, since the economic feasibility of TDU power supply alternatives may well turn on those decisions. In contrast, TDUs—that undoubtedly will be included in the load required to bear the cost of the facilities selected for regional cost allocation in the new regional transmission plans—are entitled only to the opportunity for "consultation" and to offer "input." *See, e.g., id.* PP 68 & n.57, 153, 203, 207-09, 211, 331, 705. Contrary to the Commission's assumption that such input will somehow "ensure that the [regional cost allocation] method or methods ultimately agreed upon is balanced and does not favor any particular entity" (*id.* P 671), the Final Rule appears to leave TPs free to ignore that input and make decisions that augment their own self-interest and disadvantage others.

Non-jurisdictional TPs are likewise afforded merely the opportunity for input into crucial decisions made in the jurisdictional TPs' regional planning and cost allocation process,[13] even though the Rule expects non-jurisdictional TPs to participate, including bearing a share of the upgrade costs allocated by that process (*see, e.g.*, PP 629, 815). Particularly given the Final Rule's connection of that participation to reciprocity requirements that may be enforced as a condition for OATT service (*id.* P 815), the

[13] *See, e.g., id.* PP 97-98, 117 (non-jurisdictionals are left to advocate to jurisdictional TPs for regional planning processes that accommodate their legal limitations).

Commission has a clear obligation to ensure that small non-jurisdictional TPs have an effective voice in the regional planning process and are not subjected to discriminatory or unjust allocation of transmission costs as a result of the domination of the regional transmission planning process by jurisdictional TPs.

The Commission already has a policy on the decisionmaking procedures to be used in the regional planning function envisioned by Order 1000. Its RTG Policy Statement[14] provides for "fair and nondiscriminatory governance and decision making procedures, including voting procedures." 18 C.F.R. § 2.21(b)(3).[15] In issuing the RTG Policy Statement, the Commission recognized the need to protect TDUs that are susceptible to discrimination by larger TPs:[16]

> Component No. 5 provides for fair and non-discriminatory governance and decisionmaking procedures. No commenter opposed such a standard, and transmission-dependent entities expressed particular concern that they not be powerless within an RTG. … In general, we think an RTG should have rules or procedures to protect the rights of entities that are more susceptible to the exercise of market power, such as transmission dependent utilities (TDUs). If the voting rules permit transmission owners to dominate the RTG, for example, this would disadvantage weaker users and would be unfair. An RTG may wish to strive for consensus when dealing with regional grid issues that affect most members. Accordingly, super-majority voting rules may be appropriate in some circumstances.

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[14] Policy Statement Regarding Regional Transmission Groups, 58 Fed. Reg. 41,626 (Aug. 5, 1993), FERC Stats. & Regs. ¶ 30,976 (1993) ("RTG Policy Statement").

[15] The Commission followed and reinforced this policy in acting on specific RTG proposals. *See, e.g.*, *Southwest Reg'l Transmission Ass'n*, 69 FERC ¶ 61,100, at 61,400-02 (1994) (proposed proportional class voting procedure for general membership and the board is acceptable to avoid domination by any particular class because it ensures that no action can be taken without assent of the majority of each class, but majority voting proposal for committees would permit a measure to pass because of high attendance of one class, even with no support from other classes; therefore requiring revision of bylaws to clarify that all committee actions are subject to board's proportional class voting review); *PacifiCorp*, 69 FERC ¶ 61,099, at 61,382 n.70 (1994) (proportional class voting procedures are acceptable because they ensure that no action can be taken without assent of a majority of the members or directors from each class).

[16] RTG Policy Statement at 30,875 (footnote omitted).

> Different regions and organizations may wish to address these issues in their own manner. … The procedures must be fair and non-discriminatory if an RTG is to meet the objectives discussed above.

By affording TDUs and small non-jurisdictional TPs merely the opportunity to provide "input" to the all-powerful jurisdictional TPs on whom the Rule has placed decisionmaking authority for Order 1000's regional planning and cost allocation determinations, the Final Rule increases the vulnerability of smaller entities to domination by jurisdictional TPs in the regional planning arena, disregarding the need to protect such entities as recognized in its RTG Policy Statement. In this way, the Rule expands, rather than eliminates, jurisdictional TPs' ability to discriminate, contrary to the Commission's obligations under the FPA.[17]

Order 1000 should be modified to incorporate the RTG Policy Statement's recognition of the need for fair and non-discriminatory decisionmaking. While the Order 1000 regional planning and cost allocation processes do not entail an RTG agreement, the reasons for concern and potential adverse impacts on TDUs are just as palpable. The Final Rule is on the right track where it requires "a just and reasonable and not unduly discriminatory process" for certain regional planning decisions.[18] The

[17] FPA §§ 205, 206, 16 U.S.C. §§ 824d, 824e. *See, e.g.*, Order 888, at 31,669 & n.195, 31,670 (the Commission is obligated to order the filing of non-discriminatory open access tariffs to remedy undue discrimination in the provision of interstate transmission service—undue discrimination whose eradication is a primary goal of the FPA). *See also* Final Rule P 58 ("We have an obligation under section 206 to remedy these unjust and unreasonable, or unduly discriminatory or preferential rates, terms, and conditions and practices affecting rates."); *id.* P 99 (footnote omitted) (recognizing obligation to "eliminate opportunities for undue discrimination, including such opportunities in the context of transmission planning").

[18] Final Rule P 209 (requiring a just and reasonable and not unduly discriminatory process through which public utility TPs will identify those transmission needs driven by Public Policy Requirements for which transmission solutions will be evaluated in the regional plan); *id.* P 316 (requiring a just and reasonable and not unduly discriminatory process for granting a transmission developer the ability to use the regional cost allocation method); *see also id.* P 328 (requiring "a transparent and not unduly discriminatory process for evaluating whether to select a proposed transmission facility in the regional transmission plan for purposes

Commission should build on this recognition to require such processes in *all* aspects of regional planning—including the selection of facilities to include in the regional plan—and clarify that "a just and reasonable and not unduly discriminatory process" requires balanced decisionmaking, not just stakeholder "input" opportunities that TPs can disregard.

Thus, at least in non-RTO regions,[19] the Rule's enhanced regional planning and cost allocation authority provided to TPs should have an important string attached: all those that may be required to pay for the upgrades included in the plan, i.e., all LSEs in the region (not just jurisdictional TPs), should have a meaningful decisionmaking role in the regional planning and cost allocation process, not merely the opportunity to express a view that jurisdictional TPs are free to disregard. The Commission should make clear that it expects jurisdictional TPs to propose, as part of their compliance filings, a fair and non-discriminatory decisionmaking process to be used in developing the regional plan and cost allocation and approving the facilities selected for regional cost allocation. Only a proposal that provides for balanced decisionmaking can provide a reasonable foundation for regional cost allocation,[20] thereby avoiding the need for stringent Commission scrutiny of the choices made (discussed below).[21]

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of cost allocation").

[19] While TAPS members in RTO regions may have quarrels with the outcome of an RTO planning process, they can take some comfort from the involvement of the RTO's independent management and board in approving the plan. Even in the RTO context, however, the transmission owners' ("TOs") ever-present right to withdraw may cause the RTO to weigh their views more heavily to maintain its footprint. Indeed, in reviewing cost allocation proposals the Commission has recognized the need to deter TO withdrawal. *Midwest Indep. Transmission Sys. Operator, Inc.*, 129 FERC ¶ 61,060, P 7 (2009).

[20] The Commission has well-established rules on what balanced decisionmaking means. In the reliability context, FPA Sections 215(c)(2)(A) and (D) call for "balanced decisionmaking in any ERO committee or subordinate organizational structure" and "due process, openness, and balance of interests in developing reliability standards and otherwise exercising [the ERO's] duties." In implementing this requirement, the Commission has generally adhered to the standard:

A fair and non-discriminatory decisionmaking requirement could be satisfied by formation of a regional joint planning committee, not dominated by large TPs, that would direct the study process and be responsible for the development of uniform planning criteria, assumptions for base and changed cases, and selection of upgrades for inclusion in the plans.[22] This approach has already been implemented in a variety of shared systems and voluntary planning efforts. For example, the North Carolina Transmission Planning Collaborative ("NCTPC") has established an Oversight/Steering Committee ("OSC") in which TDUs and TOs have equal voting rights, an independent third-party tie-breaker, and dispute resolution procedures.[23] Consensus-based approaches, or voting rights schemes that give each participant one vote regardless of size,[24] could also be used

> [N]o two stakeholder sectors should be able to control the vote on any matter, no single sector should be able to defeat a matter, and no entity should be eligible to be a member of more than one sector in the board selection process ….

Order 672, P 153 (footnote omitted). The governance of NERC regional entities has already been determined to satisfy FPA Section 215(e)(4)(A)'s balanced stakeholder governance requirements; similar structures could be adopted for the Final Rule's new regional planning processes.

[21] The Commission's authority to include governance expectations in the Final Rule, and identify consequences with regard to jurisdictional rates if they are not satisfied, is not restricted by *California Independent System Operator Corp. v. FERC*, 372 F.3d 395, 404 (D.C. Cir. 2004) ("*CAISO v. FERC*"). In finding that the Commission lacked authority to reform and directly regulate the governing body structure of a jurisdictional utility, the D.C. Circuit made clear that the Commission has authority to place conditions on Independent System Operator ("ISO") status and does not have to accept as an ISO an entity whose governance does not meet Commission requirements. *Cf.* Final Rule PP 112, 285, 288 (holding that *CAISO v. FERC* does not limit the Commission's authority with respect to reforms related to transmission planning and the federal right of first refusal ("ROFR")).

[22] In the context of identifying transmission needs driven by Public Policy Requirements, the Rule allows for such committees, but imposes no consequences on jurisdictional TPs that fail to include such committees in their compliance filings. Final Rule P 209.

[23] The OSC is composed of eight voting members, equally divided among Duke Power, Progress Energy Carolinas, ElectriCities of North Carolina, and the North Carolina electric cooperatives. The OSC seeks to reach decisions on reliability and enhanced transmission access planning by consensus. If it is unable to reach a decision by consensus, decisions are reached by majority vote; and in the event of a tied vote, an independent third-party consultant/facilitator is entitled to cast the tie-breaking vote. OSC decisions are not necessarily binding on the TPs. However, a TP that disputes an OSC decision must provide an explanation for its disagreement, and dispute resolution procedures are available to challenge a TP that does not abide by a decision of the OSC.

[24] *Cf.* Policy Statement Regarding Evaluation of Independent Ownership and Operation of Transmission, 111 FERC ¶ 61,473, P 9 & n.6 (2005) (governance structure providing each American Transmission

to achieve balanced decisionmaking if combined with the right other elements. Although there may not be a "one-size-fits-all" solution, the Commission should direct all regions to provide representation and safeguards that will prevent jurisdictional TPs from dominating the transmission planning process, thereby failing to provide just, reasonable, and not unduly discriminatory rates.

Where a non-RTO region does not provide for balanced decisionmaking, there should be consequences. The Commission should apply a tougher level of scrutiny to transmission rates and regional cost allocation methodologies, and to the application of those methodologies to selected projects, from non-RTO regions where the planning is determined solely by jurisdictional TPs. In those regions, even where jurisdictional TPs now use a formula rate, enhanced filing and review requirements should be imposed to facilitate close Commission scrutiny.

Similarly, incentive rate requests for facilities selected by regional planning processes that lack balanced decisionmaking should be more closely examined to make sure that the TPs are not abusing the new regional planning process to extract incentive rates for themselves, and while shifting costs to TDUs. The Rule's generic determination not to revisit its incentive rate policy in this rulemaking (Final Rule P 771) should not rule out consideration of the process used to select regionally cost allocated facilities in assessing the need for and appropriateness of incentives.[25]

Company owner with one vote regardless of size "allows some degree of participation by market participants, but ensures the operational and managerial independence of the stand-alone transmission company").

[25] *See* Order 679-A, P 21 (footnote omitted) ("incentive(s) sought must be tailored to address the demonstrable risks and challenges faced by the applicant in undertaking the project"); *id.* P 24 (nexus criteria is not an exhaustive list of situations where incentives will be granted or denied; "whether to grant or deny incentives to a particular project is appropriately the subject of an individual … application … where the Commission can evaluate whether the applicants have fully supported any incentive rate

Finally, the failure to allow for balanced decisionmaking in the regional planning process—and particularly as to which facilities are included in the regional plan—should be considered in determining what equity return within the range of reasonableness a jurisdictional TP should be allowed. A TP that seeks to dominate the regional planning process should be exposed to having its equity return reduced below the median of comparable companies. The Commission has found that it has authority to adjust equity returns within the range of reasonableness in order to promote governance policy objectives,[26] and there is no principled reason why such adjustments should run in only one direction.

II. THE RULE'S TREATMENT OF PUBLIC POLICY IN REGIONAL PLANNING PROCESSES IS FAULTY

A. Order 1000 Errs by Failing to Mandate Inclusion of FPA Section 217(b)(4) as a Public Policy That Must Be Addressed in Planning

Section 217(b)(4), which was enacted as part of the Energy Policy Act of 2005, is the only provision of the Federal Power Act that expressly addresses planning. It provides:

> The Commission shall exercise the authority of the Commission under this chapter in a manner that facilitates the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities to satisfy the service obligations of the load-serving entities, and enables load-serving entities to secure firm transmission rights (or equivalent tradable or financial rights) on a long-term basis for long-term power supply arrangements made, or planned, to meet such needs.

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treatments being sought").

[26] *See, e.g.*, Order 679, P 27 (Commission may adjust equity returns within the range of reasonableness "where necessary to encourage creation of a Transco or participation in a Transmission Organization").

The explicit intent of Section 217(b)(4) is to protect *all* load-serving entities, whether transmission dependent utilities or transmission owners. *See* FPA § 217(a). By rejecting calls by TAPS[27] to require regions to expressly incorporate Section 217(b)(4) as a public policy that *must* be addressed in regional planning processes, Order 1000 sends exactly the wrong message—i.e., that planning to meet the reasonable needs of transmission dependent LSEs is somehow optional in the planning processes mandated in the Final Rule.

Treating TDU LSEs as simply among the stakeholders whose needs may be considered (or not) in the transmission planning processes of jurisdictional TPs (Final Rule PP 108, 215-216) violates Section 217(b)(4)'s statutory directive to the Commission to facilitate satisfaction of LSE needs. Indeed, the Final Rule's statement that Section 217(b)(4) does not require "that we should ensure that our transmission planning and cost allocation reforms give systematic preference to [load-serving entities]" (*id.* P 108) is inconsistent with the Commission's prior rulings interpreting that statute. In Order 681, the Commission reached exactly the opposite conclusion with respect to Section 217(b)(4)'s parallel directives on long-term firm transmission rights, holding that "a broader preference for load serving entities in general vis-à-vis non-load serving entities is fully supported by the statute" (Order 681, P 319), and stating that "we believe that Section 217 of the FPA provides a general 'due' preference for load serving entities" (*id.* P 320).

Thus, while the Commission can authorize planning for additional purposes, it must at least fulfill Section 217(b)(4)'s mandate by requiring that Order 1000

[27] TAPS NOPR Comments at 8-12.

transmission planning processes plan for the reasonable needs of all load-serving entities and for long-term rights for their existing and planned power supply arrangements.

B. Order 1000 Errs by Allowing TPs to Plan for Their Own Vision of Public Policy Without Grounding That Vision in the Reasonable Needs of LSEs

The Rule's erroneous failure to mandate that the public policies embodied in Section 217(b)(4) be addressed in transmission planning is compounded by its endorsement of the consideration of public policies *not* required by state or federal law or regulations. Final Rule PP 215-16. This broad grant incorrectly allows TPs to substitute their own "public policy" agenda for that of state and federal legislatures and regulators. Contrary to the Final Rule's statement that jurisdictional TPs (after merely consulting with stakeholders) "are in the best position to determine whether to consider in a transmission planning process any public policy objectives beyond those required [by law or regulation]" (*id.* P 216), there is no valid justification for authorizing an end-run around governmental processes. TPs interested in supporting certain public policy goals should seek to convince the appropriate legislative and regulatory bodies, just like everyone else. By endorsing TPs' unilaterally supplementing governmental policies, while requiring others to pay the bill, Order 1000 invites abuse and discrimination. Also, construction of facilities planned to meet the TP's own "public policy" vision, unconstrained by the dictates of law and regulations, will likely result in stranded costs.

This invitation to TPs to plan for their own view of policy not reflected in law or regulation can be a problem in RTO regions, where the RTO exercises its independent judgment without clear accountability to the consumers that will bear the cost.[28] Order

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[28] *See, e.g.*, Wholesale Competition in Regions with Organized Electric Markets, Order No. 719, 73 Fed. Reg. 64,100 (Oct. 28, 2008), FERC Stats. & Regs. ¶ 31,281 (2008), *on reh'g*, Order No. 719-A,

719-A, P 193. It is also problematic in non-RTO regions, where the selection of the facilities included in the local and regional plans may be made by the TPs that benefit from that determination. For example, the TP's definition of "public policy" may well be influenced by the potential for incentive rate recovery for transmission expansion. The TP may also define public policy in a manner that advances its own generation interests, providing themselves an undue preference, while shifting costs onto others. The effect of the Commission's endorsement of TPs' pursuing their privately-held beliefs under the guise of "public policy" is to enhance—and give the Commission's imprimatur to—the TP's ability and incentive to use its control over transmission to discriminate.

Although the Final Rule states that it is merely recognizing that "a public utility transmission provider has, and has always had, the ability to plan for any transmission system needs that it foresees," P 216, public utility TPs in non-RTO regions have never before been authorized to allocate costs to others in the region (including entities excluded from any role in the decisionmaking) for transmission projects aimed at policy objectives not grounded in law or regulation. Moreover, given the Final Rule's reference (P 82 n.72) to PJM's inability to go beyond specific generator interconnection requests in its planning as a basis for the Rule's reform mandating consideration of Public Policy Requirements, the authorization to go beyond public policies reflected in law and regulations cannot be viewed as maintaining the status quo in all RTO regions.

Rather than empowering TPs to plan in accordance with their own idiosyncratic public policy views and to select facilities planned for those purposes for regional cost

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74 Fed. Reg. 37,776 (July 29, 2009), FERC Stats. & Regs. ¶ 31,292, P 193 (2009) (Order 719-A), *on reh'g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009) (denying rehearing of Commission's decision not to mandate that each RTO include, as part of its mission statement, either the provision of reliable service at the lowest possible reasonable rates, or the provision of net benefits to the ultimate consumers served by the RTO).

allocation, the Commission should have grounded planning for aspirational public policies in terms of satisfying the needs identified by LSEs. A focus on LSE needs will not only automatically incorporate satisfaction of the public policy mandates imposed on LSEs, but also the non-mandatory public policies that are reflected in power supply planning. If LSEs are planning for resources in a proactive way that goes beyond the minimum standards set forth in law or regulations, those actions will already be reflected in their network resource designations and the ten-year projections of planned resources and anticipated loads required by Section 31.6 of the OATT, as well as generator interconnection requests and point-to-point service requests. These resource plans can and should be appropriately reflected in regional transmission planning, consistent with Section 217(b)(4).

To the extent that the Commission retains the Final Rule's broad endorsement of jurisdictional TPs' considering public policy objectives that are neither required by law or regulations, nor reflected in LSE service requests, projections, or resource plans, it should at minimum provide guidance that any plans developed based on the TPs' own "public policy" vision should be structured to ensure their usefulness even if the TPs' crystal ball proves cloudy. That is, such upgrades should be designed to support multiple likely power supply scenarios, rather than committing the region's transmission infrastructure future and finances to the construction of a road to what may turn out to be nowhere. This approach will provide a more rational basis for integrating public policies into the transmission planning process; and it should properly focus planning on constructing broadly supported upgrades needed under multiple potential power supply and public policy scenarios—i.e., a "right-sized" grid with greater flexibility to respond to changing technology, resource options, and customer needs.

Investment of transmission dollars should concentrate on the major grid reinforcements that will be needed under a range of different scenarios, while building in optionality for future development. This approach was successfully undertaken by CapX 2020, a joint transmission-planning process in the northern Midwest. CapX consists of eleven investor-owned, municipal, and rural cooperative utilities in Minnesota, North and South Dakota, and Wisconsin that have jointly planned needed transmission upgrades and have opportunities to jointly own those facilities.[29] CapX planners evaluated various generation scenarios, and started by focusing on the substantial transmission facilities that were always required, regardless of the generation scenario studied. In its first phase, CapX is seeking to build four backbone transmission lines—three 345 kV lines and one 230 kV line—to significantly strengthen the Minnesota transmission system.[30] These facilities, estimated to cost about $1.7 billion, [31] are designed to meet the load-serving and reliability needs of all eleven participating utilities, and provide the common infrastructure to reach new sources of supply.[32] As further described in TAPS NOPR Comments (at 17-18), these projects, which benefited from the support of their broad

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[29] *See* CapX2020 frequently asked questions, *available at* http://www.capx2020.com/faq.html (last visited Aug. 17, 2011).

[30] *Id*.

[31] *See id.* Additional "partner project" related upgrades are required on individual systems.

[32] CapX is beginning to plan its later phase projects. They will be focused primarily on enabling area utilities to meet their renewable energy needs under state law. The cost estimates range between $4-7 billion. Statement of Terry Wolf on Behalf of Missouri River Energy Services and the Transmission Access Policy Study Group at 9, *Priority Rights to New Participant-Funded Transmission*, Docket No. AD11-11-000 (Mar. 16, 2011), eLibrary No. 20110316-4012.

range of participating utilities, have been well received by regulators, in many instances with minimal opposition.

As described in TAPS NOPR Comments at 12-14, transmission planning processes designed to achieve a right-sized grid have been underway in some regions or subregions (e.g., the Upper Midwest Transmission Development Initiative and the New England 2030 Power System Study), and the California Independent System Operator Corporation has adopted "least regrets" planning criteria that incorporate key elements of this approach.[33]

On rehearing, the Commission should eliminate the Rule's endorsement of TPs' considering public policies not required by law or regulations, except to the extent such policies are reflected in LSE resource plans and projections or service requests. At minimum, the Commission should limit TPs' planning based on public policies not required by law or regulation to projects designed to support multiple realistic power supply scenarios. Only by focusing regional transmission planning for public policy visions on crafting solutions to address the real needs of LSEs, guided by the mandate of Section 217(b)(4) and "right-sizing," can the Rule's transmission planning process produce just, reasonable, and not unduly discriminatory rates, as is its aim. *See* Final Rule P 12.

[33] On June 4, 2010, the California ISO ("CAISO") proposed an approach to the planning needed to meet that state's 33% renewable portfolio standard. CAISO's Revised Energy Transmission Planning Process proposed a process for identifying Category 1 policy-driven transmission elements based on a "least regrets" evaluation of alternative generation scenarios. This approach was accepted by the Commission in *California Independent System Operator Corp.*, 133 FERC ¶ 61,224, PP 196-99 (2010).

III. THE COMMISSION ERRED IN REQUIRING DEVELOPMENT OF A REGIONAL PLAN WITHOUT ALSO REQUIRING A TIMELY POST-PLAN PROCESS TO MAKE THE PLAN PRODUCTIVE

As the Final Rule noted (P 141), TAPS NOPR Comments (at 45-52) asked that the Commission make its regional planning process effective by requiring TPs to propose a timely transparent "post-plan" process to:

1. secure timely, public commitments by the TPs (or others) to build the upgrades identified in the regional plan, whereupon the upgrade can be included in the "regional base model" on which those in the region can rely as they study specific generator interconnection and transmission service requests; and
2. hold those that commit to construction of facilities included in the "regional base model," at least within the five-year horizon, accountable for failing to follow through on those commitments, subject to an inability, despite good faith efforts, to secure necessary approvals and property rights.

TAPS' proposal would not expand a TP's obligation to construct regionally-planned upgrades in the first instance, consistent with Order 890 (P 594) and the NOPR (P 51 n.59).[34] But once a TP (or nonincumbent developer) makes a public commitment to do so, others in the region would be able to count on that upgrade and include it in the regional base models used to evaluate transmission and interconnection service requests. The TP or nonincumbent that has made such a commitment should not have the option to say, "never mind," and leave other regional TPs that counted on that upgrade for reliability purposes and in granting service requests, as well as potentially customers,[35] holding the bag.

TAPS explained that absent a timely, public commitment process with accountability, the region would be caught in a "damned if you do, damned if you don't"

[34] Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 75 Fed. Reg. 37,884 (proposed June 30, 2010), FERC Stats & Regs. ¶ 32,660 (proposed 2010) ("NOPR").

[35] *See SPP, Inc.*, 118 FERC ¶ 61,148, P 41 (2007) (network service may be made dependent on completion of specified network upgrades).

bind that makes efficient planning impossible. If regional TPs are at risk if they include a planned regional upgrade in the base case used to evaluate individual transmission and interconnection service requests, they will be forced to plan, construct, and charge customers for upgrades that would be unnecessary and duplicative if the regionally planned upgrade is completed as contemplated. This course frustrates the Commission's intent to "reduc[e] the proportion of network upgrades that would otherwise be triggered by individual generator interconnection requests, which can be time consuming and inefficient" so that "network upgrades triggered by interconnection requests should be less significant in size and cost than they have been in the past." NOPR P 68.[36] On the other hand, if regional TPs incorporate in the base case a regionally planned upgrade that fails to be completed on a timely basis, the region can find itself transmission-short when the generation whose interconnection assumed that upgrade comes on line; the result can be reliability and redispatch consequences while suboptimal fixes are rushed into place as quickly as possible. Either way, the regional planning process will not have achieved the Commission's purpose of meeting the needs of the region more efficiently and cost effectively than relying on the planning efforts of individual public utilities (*see, e.g.*, Final Rule PP 6, 81), and may well result in a more costly or less reliable grid (or both).

TAPS argued that a transparent post-plan process, with accountability, is consistent with the practice within RTOs[37] and is particularly necessary in non-RTO

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[36] *See also, e.g.*, Final Rule PP 45-46 (planning reforms are needed to efficiently and cost-effectively integrate new sources of generation).

[37] Each RTO has a process for securing commitments for facilities in the plan, and authority to require that the upgrades get built. Once the facility is in the plan with needed commitments, the RTO can include that upgrade in its models used to assess specific interconnection and service requests. For example, under the ISO-New England Transmission Operating Agreement, "each [Participating Transmission Owner] shall have the obligation to own and construct (or cause to be constructed) any New Transmission Facility or Transmission Upgrade that is designated in the ISO System Plan as necessary and appropriate for system

regions because the OATT's accountability mechanisms are not effective at the regional level. The OATT's construction obligations provide some protections in the individual TP context,[38] but failure to build regionally-planned facilities is likely to have wide impacts, harming other TPs and their customers that may not take OATT service from the TP (or nonincumbent) that failed to fulfill its construction commitment.[39] While OATT Section 33 provides for redispatch, with costs shared on a load ratio basis, in the event of constraints on the TP's system, if failure to follow through on commitments for regionally-planned facilities causes constraints on adjacent systems the delinquent TP (or nonincumbent developer) will not necessarily have any "skin in the game."

The Rule declined to implement TAPS' proposal (P 159), although it seemed to recognize and try to address some of the shortcomings of having no post-plan process.[40] First, the Rule expands public utility TPs' Order 890 requirements to post information on the status of upgrades by adding the obligation to post commitments, if any (P 159):

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reliability or economic efficiency." ISO-NE Transmission Operating Agreement Schedule 3.09(a), § 1.1(a), *available at* http://www.iso-ne.com/regulatory/toa/v1_er07-1289-000_toa_composite.pdf; *see also* Midwest ISO Transmission Owner Agreement, Art. IV, § I.C. (July 30, 2010), eLibrary No. 20100730-5181 ("Each [Transmission] Owner shall use due diligence to construct transmission facilities as directed by the Midwest ISO …."). *See also SPP, Inc.*, 127 FERC ¶ 61,171, P 50 (2009) ("[T]ransmission owners who are signatories to the SPP Membership Agreement … are required under the SPP OATT and the Membership Agreement to use due diligence to construct facilities as directed by SPP" (citing SPP Membership Agreement § 3.3(a), Original Vol. No. 3 (2004), *available at* http://www.spp.org/publications/Current%20Membership%20Agreement.pdf)).

[38] *See* Order 890-A, P 180 (relying on case-by-case determination in the event of violation of OATT Sections 13.5, 15.4, or 28.2).

[39] Also less effective in the regional context is enforcement of a TP's obligations to construct the facilities needed to commence service. *See SPP, Inc.*, 118 FERC ¶ 61,148, P 41 (2004) ("SPP may be held accountable if it fails to satisfy its obligations under Section 29.3 of its tariff, which require that the equipment associated with the upgrades be installed 'consistent with Good Utility Practice' and with the 'exercise [of] reasonable efforts ... as soon as practicable taking into consideration the Service Commencement Date.'").

[40] *See, e.g.*, P 263 (noting "incumbent transmission providers may rely on transmission facilities selected in a regional transmission plan for purposes of cost allocation to comply with their reliability and service obligations," but the development of the facilities may be delayed).

> [P]ublic utility transmission providers already are required to make available information regarding the status of transmission upgrades identified in transmission plans, including posting appropriate status information on its website, consistent with the Commission's CEII requirements and regulations.[154] To the extent an entity has undertaken a commitment to build a transmission facility in a regional transmission plan, that information should be included in such postings.[155] We determine that this obligation, together with the reforms we adopt in this Final Rule, are adequate without placing further obligations on public utility transmission providers.
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> [154] *See* Order No. 890, FERC Stats. & Regs. ¶ 31,241 at P 472.
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> [155] Nothing in this Final Rule limits public utility transmission providers from developing mechanisms to impose an obligation to build transmission facilities in a regional transmission plan, consistent with the requirements below regarding the treatment of nonincumbent transmission developers. Similarly, nothing in this Final Rule preempts or otherwise limits any such obligation that may exist under state or local laws or regulations.

See also id. P 400 (citing Order 890-A, P 202).

Second, the Rule (P 329) partially addresses some reliability problems caused by the evident accountability gap:

> [E]ach public utility transmission provider … [must] amend its OATT to describe the circumstances and procedures under which public utility transmission providers in the regional transmission planning process will reevaluate the regional transmission plan to determine if delays in the development of a transmission facility selected in a regional transmission plan for purposes of cost allocation require evaluation of alternative solutions, including those proposed by the incumbent transmission provider, to ensure the incumbent transmission provider can meet its reliability needs or service obligations.

Third, the Rule (P 344) exempts a public utility TP[41] from NERC liability where a nonincumbent developer abandons planned regional upgrades:

[41] As noted below, the provision uses internally inconsistent terminology, at times referring to incumbent TPs (which as currently defined may include at least some public power entities, although not municipal

> [I]f a violation of a NERC reliability standard would result from a nonincumbent transmission developer's decision to abandon a transmission facility meant to address such a violation, the incumbent transmission provider does not have the obligation to construct the nonincumbent's project. Rather, the transmission provider must identify the specific NERC reliability standard(s) that will be violated and submit a NERC mitigation plan to address the violation. Provided the public utility transmission provider follows the NERC approved mitigation plan, the Commission will not subject that public utility transmission provider to enforcement action for the specific NERC reliability standard violation(s) caused by a nonincumbent transmission developer's decision to abandon a transmission facility.

TAPS appreciates the Commission's attempt to address problems we identified in requesting a post-plan process with accountability. However, these partial fixes fall short of what is required to make the Rule's regional planning process a step forward in efficiently and cost effectively upgrading the transmission grid to meet regional needs.

TAPS supports the Final Rule's addition of posting of construction commitments, if any, to the requirement to make available information on upgrade status. *Id.* PP 159, 400. However, we remain concerned that the postings are not clearly required to be timely (e.g., within an identified period after completion of the plan and with periodic updates thereafter),[42] and that they might be provided only as part of the information-gathering performed in connection with subsequent regional planning cycles whenever a region chooses to update its plan.[43] Ambiguity as to timing of public commitments

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joint action agencies), while at other times referring to public utility TPs (which excludes all non-jurisdictional entities).

[42] *See id.* P 156 (rejecting TAPS' request that the Commission require regional plans to be regularly updated).

[43] The portions of Orders 890 and 890-A cited by the Commission as the basis for this requirement, as part of the Transparency Principle, provide that public utility TPs must "make available information regarding the status of upgrades identified in their transmission plans in addition to the underlying plans and related

impairs their ability to promote efficient and coordinated planning by regional TPs, as well as prompt and orderly resolution of sponsorship and right of first refusal issues.[44]

Further, contrary to the Rule's suggestion (P 159), increasing the likelihood that planned projects will be constructed (as intended by the Rule's reforms) does not address the inefficiency caused by the absence of a process for securing timely construction commitments enabling regionally planned upgrades to be counted on and prudently reflected in the base plan used for responding to interconnection and transmission service requests. Unless a region elects to include a construction obligation (*see id.* P 159 n.155), regional TPs acting on service requests will be faced with the two bad choices discussed above: (a) ignore the regionally planned upgrades and proceed with potentially duplicative construction and costs, or (b) take account of the regionally planned upgrades in evaluating service requests, but expose the region to potential transmission shortages if the regionally planned upgrade doesn't get built on time or at all. This result is precisely the "inefficient and overlapping transmission development due to a lack of coordination, … contribut[ing] to unnecessary congestion and difficulties in obtaining more efficient or cost-effective transmission service," to which the Final Rule pointed in finding Order 890's requirements regarding transmission planning and cost allocation "insufficient to ensure that this evolution will occur in a manner that ensures that the rates, terms and conditions of service by public utility transmission providers are just and reasonable and not unduly discriminatory." *Id.* P 43.

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studies." Order 890, P 472. This requirement is to enable stakeholders to "gather information regarding the progress and construction of upgrades." Order 890-A, P 202.

[44] We share Commissioner Moeller's concern, as expressed in his partial dissent (at 3-4), about "forever" uncertainty as to the ability of third parties to develop an identified project.

The Rule's stopgap measures only partially address a subset of ramifications of certain delays or abandonments of regionally planned projects on a subset of potentially adversely affected entities. The reevaluation requirement (*id.* P 329) "ensure[s] the incumbent transmission provider can meet its reliability needs or service obligations" in the event of delay in a regionally planned project. However, to avoid any doubt as to the scope of this requirement, the Rule should make clear that transmission and interconnection service granted based on the assumption of timely completion of regionally planned upgrades would be included within "service obligations" considered, consistent Commission precedent.[45] In addition, the reevaluation requirement fails to explicitly include consideration of the adverse impacts of the delay on others in the region (e.g., if absent the regionally planned upgrade, the incumbent TP's fulfillment of its service obligations would adversely affect reliability on embedded or adjacent transmission systems).[46]

The Final Rule's conditional exemption from reliability violations (P 344) protects in a clear way only public utility TPs from a nonincumbent developer's abandonment of regionally planned upgrades, even though others are exposed to NERC violations from reliance on regionally planned upgrades that are not completed on a timely basis. The provision inconsistently describes the exemption as applicable to

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[45] *See, e.g.*, Order 2003-A, P 643 (interconnection customer's finance obligations are limited to facilities not already included in the TP's transmission expansion plans, even recognizing that a TP may adjust its plans); *PJM Interconnection, LLC*, 124 FERC ¶ 61,059 (2008) (facilities for which interconnection customer is responsible for funding are "locked in" in the interconnection agreement).

[46] Inclusion of previously granted service requests and consideration of third party impacts is consistent with study requirements in the OATT and LGIA/LGIP; *see, e.g.*, Order 2003, App. C, LGIP Sections 6.2 and 7.3 (executed LGIA and those filed on an unexecuted basis (as well as generation interconnected to Affected Systems) included in the base case for conducting Interconnection Feasibility Studies and Interconnection System Impact Studies) and LGIP Section 3.5 (requiring coordination with Affected Systems).

incumbent transmission providers (which appears to exclude at least some non-jurisdictional TPs[47]) or public utility TPs (which excludes all non-jurisdictional TPs). Non-jurisdictional TPs (that the Commission expects to participate in the regional planning and cost allocation process, *see* Final Rule PP 815-22) may be equally exposed to NERC penalties due to abandonment by others of regionally planned facilities.[48] However, the conditional exemption provided in Final Rule Paragraph 344 does nothing to shield them from NERC penalties in such cases.[49] Nor does Paragraph 344 address NERC violations resulting from an incumbent TP abandoning a regionally planned upgrade on other regional TPs (whether jurisdictional or non-jurisdictional), even though there is no basis to assume that only nonincumbent developers may abandon regionally planned upgrades on which many in the region are depending for reliability purposes.[50] Finally, Paragraph 344's conditional protection from NERC liability is unduly limited because it does nothing to address exposure to reliability violations associated with delay (short of abandonment) of regionally planned facilities.[51]

[47] As discussed in Part IV.B.1 below, municipal joint action agencies and generation and transmission cooperatives do not have retail distribution systems and therefore appear to be excluded from the incumbent TP definition at Paragraph 225.

[48] FPA Section 215(b) gives the Commission jurisdiction over all users, owners, and operators of the bulk power system, including Section 201(f) (16 U.S.C. § 824f) entities, for purposes of enforcing compliance with NERC standards.

[49] Unless the Final Rule is changed as requested by TAPS (*see* Part I, above), such non-jurisdictional TPs may have had no decisionmaking role in the selection of the project for regional cost allocation. *See* Final Rule PP 68 & n.57, 331.

[50] Indeed, the Final Rule's provision for abandoned plant recovery by incumbent TPs (P 267) implicitly assumes that an incumbent TP might abandon facilities that it has committed—and may have an obligation—to build. *See* Part VI, below.

[51] *See, e.g.,* Requirement 2 of TPL-001, -002 and -003 (applicable to NERC-registered Transmission Planners and Planning Coordinators). For example, assume transmission planning simulations show that there will be a violation of one of these standards in 2015 absent an upgrade, such as a project selected in the regional plan that was due in service in 2014. Also assume that project gets delayed until 2017. If others in the region do not become aware of the delay until 2014 and the best alternative takes two years to construct, so it cannot be in service until 2016, those others may risk being found non-compliant for 2015, because they have no plan that "consider[ed] lead times necessary to implement [the] plan[]" (R2.1.3) to

In sum, the Final Rule does little to address the inefficiencies and adverse reliability and financial impacts on many in the region arising from a lack of a post-plan process for securing timely commitments for construction of regionally planned upgrades on which those in the region can rely. The Commission should rehear its denial (*id.* P 159) of TAPS' request (TAPS NOPR Comments at 45-52) for such a post-plan process, with accountability, so that the objectives of the regional planning process can be achieved, consistent with compliance with reliability requirements. For example, in regions that do not already impose an obligation to construct, the Commission could tie the availability of the Rule's regional cost allocation to the willingness of the transmission developer—whether the incumbent TP or a nonincumbent—to make a timely commitment to build that others in the region can rely on. As a condition for receiving the significant financial benefits of regional cost allocation, a transmission developer could be required to agree to be held accountable for following through with good faith efforts to secure necessary approvals and property rights, and for proceeding to expeditiously build the facilities in accordance with the timeline set forth in the regional plan. A transmission developer who fails to do so could then be required to hold customers and neighboring LSEs harmless from redispatch and other costs resulting from that failure.

At minimum, the Commission should enhance the Rule's stopgap measures to better fill this crucial void and avoid discriminating in favor of FERC-jurisdictional TPs to the detriment of others that participate in, or are subject to, the regional planning process. Specifically, the Commission should:

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meet the "required system performance" (R2.1) for that year.

1. Clarify that the commitment and upgrade status posting required at Paragraph 159 must be made on a timely basis, e.g., within a specified time after the regional plan is posted and periodically thereafter.

2. Clarify its directive to public utility TPs to "determine whether delays associated with completion of a transmission facility selected in a regional transmission plan for purposes of cost allocation have the potential to adversely affect an incumbent transmission provider's ability to fulfill its reliability needs or service obligations," P 329, and take appropriate actions, by making clear that: (a) "service obligations" include approved service and interconnection requests, even granted based on the delayed upgrade; and (b) third-party impacts need to be considered and addressed on a coordinated basis.

3. Extend NERC liability protection provided public utility TPs (or inconsistently, incumbent TPs) for a nonincumbent developer's abandonment of a facility planned to address reliability (P 344) to all others in the region (i.e., non-jurisdictional NERC-registered Transmission Planners and Planning Coordinators) that may be subject to NERC violations due to such abandonment or delay in completion of the regionally planned facility, and to cover delay or abandonment by any entity other than the one shielded from NERC liability, not just abandonment by nonincumbents.[52]

IV. THE FINAL RULE ERRS BY FAILING TO FOSTER, AND CREATING NEW OBSTACLES TO, JOINT OWNERSHIP

A. The Commission Should Take Steps on Rehearing to Encourage TDU Joint Ownership of Regionally Planned Facilities

The Commission has recognized the success of joint ownership models in getting transmission planned and sited,[53] and Order 890 "encourage[d]" joint ownership for large backbone transmission facilities.[54] The Final Rule

> reiterate[s] here our statement in Order No. 890 that we believe there are benefits to joint ownership of transmission

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[52] Commissioner Moeller's concern about reliability violation waivers (partial dissent at 2) is best addressed by requiring jurisdictional TPs to propose a post-plan process, with accountability for failing to follow through on commitments, as advocated by TAPS above. However, if the Commission proceeds forward with providing a conditional waiver of NERC liability, it should do so in a non-discriminatory manner, as requested above.

[53] *See* Transcript of the October 14, 2008 Technical Conference on Transmission Barriers to Entry at 55-56, Docket No. AD08-13-000, eLibrary No. 20081014-4031 ("Oct. 14 Tr.") (Commissioner Spitzer: "I can tell you from a very personal experience, having public power and some large, some small participating power lines have a great deal of cachet and a great deal of ability to move the ball forward in that regard in expediting the process.").

[54] Order 890, PP 593-94; Order 890-A, P 264.

> facilities, particularly large backbone facilities, both in terms of increasing opportunities for investment in the transmission grid, as well as ensuring nondiscriminatory access to the transmission grid by transmission customers.

Id. P 776 (citing Order 890, P 593).

As TAPS NOPR Comments (at 19-21) demonstrated, experience has shown that joint ownership structures, whether they be pooled systems as in Georgia, Indiana, and Minnesota, or a load-serving entity transco as in Wisconsin and Vermont, lead to a collaborative and inclusive process for planning and development, which has been proven highly effective in getting transmission sited and built that accommodates all needs.[55] Broad joint ownership that includes transmission customers is a strong indicator that the project "provide[s] for the needs of … transmission customers" (Final Rule P 49), and it helps get planned transmission built by (among other things) mobilizing area LSEs to support the often difficult-to-secure certificate of need and siting approvals—problems the Commission specifically identifies as justifying the need for the Final Rule.[56]

Nevertheless, TDU joint ownership remains the exception despite efforts of TAPS members to seek joint ownership opportunities.[57] In its NOPR Comments, TAPS argued

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[55] *See* TAPS, Effective Solutions for Getting Needed Transmission Built at Reasonable Cost (June 2004), *available at* http://www.tapsgroup.org/sitebuildercontent/sitebuilderfiles/effectivesolutions.pdf.

[56] Final Rule P 50 (noting the "long lead times and complex problems related to … siting, permitting, and financing [of transmission upgrades]" as a justification for this Rule).

[57] *See* Oct. 14 Tr. at 128-29 (Commissioner Spitzer); *see also* Comments of Connecticut Municipal Electric Energy Cooperative and Massachusetts Municipal Wholesale Electric Company at 2-3, *Transmission Barriers to Entry*, Docket No. AD08-13-000 (Nov. 13, 2008), eLibrary No. 20081113-5064 (describing the difficulty public power organizations and individual transmission systems encountered in New England when attempting to pursue joint investment in new transmission with Regional Transmission Owners); Comments of the Transmission Access Policy Study Group at 3 & n.6, *Promoting Transmission Investment Through Pricing Reform*, Docket No. RM06-4-000 (Jan. 11, 2006), eLibrary No. 20060111-5132 (noting the unsuccessful efforts of certain TAPS members to invest in the rebuilding of the Katrina-damaged Entergy system); Comments of the Lafayette Utilities System, Mississippi Delta Energy Agency, the Clarksdale Public Utilities Commission, *et al.* at 22-23, *Preventing Undue Discrimination and Preference in Transmission Service*, Docket No. RM05-25-000 (Nov. 22, 2005), eLibrary No. 20051123-0080 (describing those entities' thwarted efforts to invest in the Entergy system).

that TDUs should have opportunities for joint ownership in projects that emerge from the planning process and that are located in or provide service to customers in the pricing zone or the state(s) where the project is or will be located (or a broader region where an RTO or ISO so provides)—particularly if the TDU will be required to bear the cost of the facility. TAPS suggested multiple ways in which the Final Rule could be structured to promote joint ownership, such as tying opportunities for joint ownership to rights of first refusal, and favoring projects jointly owned by those that must pay the bill in the selection of projects for regional cost allocation and the entity to construct and own them. TAPS NOPR Comments at 4-6, 21, 60-64, 68-69.

By failing to adopt any of these mechanisms, the Commission misses a major opportunity to advance the Final Rule's stated goals of "ensur[ing] that public utility transmission providers use just and reasonable transmission planning processes and procedures, as required by Order Nos. 888 and 890, to provide for the needs of their transmission customers" (P 49), and "increas[ing] the likelihood that transmission facilities in the transmission plan will move forward to construction" (P 42). It is inconsistent with these objectives for the Commission to fail to do anything to encourage projects that feature joint ownership by LSEs that will foot the bill.

Thus, the Commission should rehear its decision to do nothing to promote joint ownership. Instead, it should take positive action to foster joint ownership arrangements, such as identifying joint ownership by TDUs as a feature that should receive positive consideration in the selection of projects for inclusion in regional plans and the selection of projects for regional cost allocation.

Joint ownership by TDUs should also be given positive consideration in determining the entity to construct and own regionally planned facilities. While the Final Rule eliminates the NOPR's proposal to create a new right of first refusal for the entity that sponsors a transmission project in the regional planning process, it leaves open how the entity to construct and own such facilities will be determined. Final Rule PP 334-40. On rehearing, the Commission should provide guidance that transmission developers who have offered broadly inclusive joint ownership arrangements should be favored in selecting the entity to build and own regionally planned transmission facilities, consistent with the Commission's objective of enhancing the likelihood that planned transmission will actually be built.

Further, although the Final Rule largely eliminates the federal right of first refusal ("ROFR") for facilities selected for inclusion in the regional plan, that decision is likely to garner rehearing requests. To the extent that the Commission modifies that aspect of the Final Rule by narrowing the elimination of the federal ROFR, it should condition exercise of the ROFR on incumbent TOs' offering TDUs in the pricing zone (or other appropriate area) a meaningful opportunity to participate in joint ownership of a fair share of the project on reasonable terms, as requested in the TAPS NOPR Comments (at 61-63).

B. The Commission Should Correct the New Obstacles to Joint Ownership Created by Order 1000

1. The Commission Should Fix Order 1000's Definitions of "Nonincumbent Transmission Developer" and "Incumbent Transmission Developer/Provider"

On rehearing, the Commission should eliminate the new obstacles to joint ownership arrangements created by Order 1000. First, the Final Rule's definition of "nonincumbent transmission developer" excludes most municipal electric systems and electric cooperatives from the Rule's provisions governing the development of transmission facilities outside their retail distribution service territory or footprint. According to the Final Rule,

> "[n]onincumbent transmission developer" refers to two categories of transmission developer: (1) a transmission developer that does not have a retail distribution service territory or footprint; and (2) a public utility transmission provider that proposes a transmission project outside of its existing retail distribution service territory or footprint, where it is not the incumbent for purposes of that project.

Id. P 225. This definition excludes most municipal electric systems and rural electric cooperatives, which both have a retail distribution service territory (and therefore do not fall into the first category within the definition) and are not a "public utility" under Section 201(e) of the Federal Power Act (and so do not fall within the second category, either). Order 1000's provisions applicable to nonincumbent transmission developers therefore do not currently apply to most of these non-jurisdictional entities.[58] *See, e.g.*, Final Rule PP 11, 47, 225-227, 253-269, 324, 332-337, 344, 558-563.

The Final Rule provides no justification for the disparate treatment of non-jurisdictional utilities that results from the definition of "nonincumbent transmission developer." This treatment is particularly inexplicable given the Commission's stated expectation (Final Rule P 815) that non-jurisdictional utilities will participate in the regional planning and cost allocation process. The exclusion of non-jurisdictional entities from the definition of "nonincumbent transmission developer" appears to have been

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[58] Municipal joint action agencies and generation and transmission cooperatives appear to fall within the current definition of "nonincumbent transmission developer"; but most municipal electric systems and distribution cooperatives would not. Clearly the Commission did not intend to draw such an arbitrary line.

inadvertent. The Commission should correct the error by adding non-jurisdictional entities to the definition of "nonincumbent transmission developer," while also taking care to clarify the language in the other parts of the Final Rule where the term may in fact be intended to apply only to nonincumbent transmission developers that are jurisdictional public utilities.[59]

In addition, the Rule's definition of "incumbent transmission developer/provider" (i.e., "an entity that develops a transmission project within its own retail distribution service territory or footprint" (P 225) (footnote omitted)) is too narrow to include all non-jurisdictional utilities. As currently drafted, that term arguably excludes most municipal joint action agencies and generation and transmission cooperatives (as well as transcos), which may not have a retail distribution service territory or "footprint." The Commission should fix that definition[60] to assure that such entities are covered by the appropriate provisions of the Final Rule, such as Paragraph 344, which addresses the effects on incumbent transmission providers in the event a nonincumbent transmission developer abandons a transmission facility.[61]

[59] TAPS also notes that the Commission's use of the term "nonincumbent transmission provider" creates confusion in Paragraphs 259, 287, and 332 of the Final Rule. "Nonincumbent transmission provider" is not a defined term in Order 1000, but it is confusing since some nonincumbent transmission developers may not be transmission providers until after the facilities they propose in the regional planning process have been constructed (or ever, if those facilities are turned over to an RTO or other TP). The Commission should make clear where the term is intended to refer to all nonincumbent transmission developers (including non-jurisdictional entities, as discussed above).

[60] In doing so, the Commission must take care to clarify the language in the other parts of the Final Rule where the term "incumbent transmission developer/provider" may in fact be intended to apply only to such entities that are jurisdictional public utilities.

[61] As discussed in Part III above, additional modifications will be necessary with respect to Paragraph 344 because of the inconsistent terminology used within that paragraph.

2. The Commission Should Ensure That the Minimum Qualification Criteria for Proposing Projects Do Not Create a Barrier to TDU Participation in Joint Ownership

Second, the Commission should rehear its failure to address TAPS' request in its NOPR Comments (at 69-70) to clarify the qualification criteria to submit a transmission project to the regional planning process, so that those criteria facilitate TDU joint ownership of transmission facilities, not unintentionally erect new barriers. Order 1000 (P 323) provides:

> [T]he Commission requires each public utility transmission provider to revise its OATT to demonstrate that the regional transmission planning process in which it participates has established appropriate qualification criteria for determining an entity's eligibility to propose a transmission project for selection in the regional transmission plan for purposes of cost allocation, whether that entity is an incumbent transmission provider or a nonincumbent transmission developer. These criteria must not be unduly discriminatory or preferential. The qualification criteria must provide each potential transmission developer the opportunity to demonstrate that it has the necessary financial resources and technical expertise to develop, construct, own, operate and maintain transmission facilities.

As TAPS explained in its NOPR Comments, qualification criteria that interfere with joint ownership would be a step in the wrong direction. Qualification requirements designed for proposals submitted by a single entity could unintentionally and needlessly foreclose beneficial project participation by multiple joint owners, including small public systems. We recognize and support Order 1000's admonition that the criteria must not be unduly discriminatory or preferential (P 323); but if applied to each of the potential joint owners of a project individually, rather than collectively, even seemingly even-handed criteria would unduly burden the ability of small entities to participate through joint ownership arrangements.

The Commission should support—not foreclose—the joint ownership model for building major transmission upgrades. It should therefore require that any new qualification criteria established to determine eligibility to propose a project in the regional transmission planning process reasonably accommodate joint ownership, including by small entities that would not have the financial resources to fund the entire project alone.

V. THE COMMISSION ERRED BY FAILING TO ADDRESS ACCESS AND PANCAKING ISSUES

A. Within an RTO Region, Regionally Cost-Allocated Facilities Should Be Made Subject to RTO Control and Access Rules

The Final Rule focuses on planning and cost allocation without addressing issues of service, access, or pancaked rates (*see* PP 549, 764; *cf*. PP 530-36). In RTO regions, concerns about access at non-pancaked rates can be readily addressed by clarifying what may already be implicit in the Final Rule—for a nonincumbent developer to be eligible for regional cost allocation, the developer must commit to becoming a transmission-owning member of the relevant RTO, so the RTO obtains functional control of the facility, and non-discriminatory access is provided through the RTO tariff without rate pancaking.

Operational control of facilities, with associated responsibility for short term reliability, are required characteristics of RTOs. *See* 18 C.F.R. § 35.34(j)(3)-(4). Commission regulations require the RTO to be the sole provider of transmission service, *id.* § 35.34(k)(1)(i), and to provide that service at non-pancaked rates, *id.*

§ 35.34(k)(1)(ii). RTO planning and expansion responsibility is defined in terms of "enabl[ing] it to provide efficient, reliable and non-discriminatory transmission service," *id.* § 35.34(k)(7).

While upgrades constructed by transmission-owning RTO members fall within the service and access requirements of the RTO tariff, upgrades constructed by nonincumbents do not necessarily do so. But to be capable of delivering equal or greater benefits than upgrades constructed by incumbent TPs (an assumption inherent in the Final Rule's undue discrimination findings, *see* PP 253-56), the facilities once constructed must be subject to the same operational control, service, and access regimen as those owned by transmission-owning members of the RTO.

The Final Rule (P 265) states that a nonincumbent developer whose facility was regionally cost-allocated would, as to the completed facilities, be subject to the same obligations as other transmission-owning members of the RTO,[62] although it imposes no express condition to that effect. The Commission should make explicit what we believe is implicit—that for a nonincumbent developer to be eligible for regional cost allocation through an RTO tariff, the developer must commit to becoming a transmission-owning member of that RTO, with all attendant obligations, including surrendering functional control of the completed facility to the RTO for service at non-pancaked rates.

[62] In complaints regarding third-party construction of facilities whose costs are recovered through RTO rates (rather than as a merchant facility, as defined in the Final Rule P 119), the nonincumbents were seeking to become transmission-owning members of the relevant RTO. *See, e.g.*, *Central Transmission, LLC v. PJM Interconnection, LLC*, 131 FERC ¶ 61,243, P 8 (2010). *Cf. Transmission Technology Solutions, LLC*, 135 FERC ¶ 61,077 (2011) (RTO properly rejected application to become a Participating Transmission Owner because applicant did not meet the requirement that new PTOs turn over operational control of their facilities to the RTO).

B. The Commission Needs to Address, or at Least Provide a Timely Process for Addressing, Access to Regionally Cost-Allocated Facilities in Non-RTO Regions

1. Implementation of the Final Rule in Non-RTO Regions Poses Significant Access Issues That Must Be Addressed

TAPS NOPR Comments (at 79-80) identified significant issues that needed to be addressed to implement the rulemaking in non-RTO regions consistent with the Commission's obligation to ensure not unduly discriminatory transmission service at just and reasonable rates. We noted that it was not clear how regional cost allocations would be implemented in non-RTO regions in the absence of a regional tariff providing access to the existing and new capacity at non-pancaked rates. Absent such a regimen, we raised concerns as to how service will be provided over regionally cost-allocated facilities and on what terms, how new capacity created by the upgrade would be determined and allocated—e.g., who gets to sell the ATC?

In non-RTO regions, access issues are intertwined with the reasonableness of the determination of benefits and the proposed cost allocation. For example, if a potential customer would have to pay multiple pancaked rates to obtain access to a regionally allocated facility, it attenuates its benefits. If some entities have access at non-pancaked rates, while others must pay pancaked rates, that difference should be considered in connection with assessment of benefits and the reasonableness of the relative costs those entities must bear under the regional cost allocation.

Issues also need to be addressed from the perspective of how the upgrade is made available for transmission service. For example, absent a regional rate covering existing and new capacity, how will the incremental ATC associated with that upgrade be determined and sold? In a dynamic AC system, ATC needs to be determined for the system, not a particular upgrade, and any such determination will change with changes in the grid. [63] Efforts to handle access to new regionally cost-allocated facilities separately from the existing capacity of the grid run into significant challenges[64] that are relevant to the selection of that facility for regional cost allocation and the reasonableness of such cost allocation.

If an incumbent TP will be selling the incremental ATC associated with an upgrade and pocketing the revenues, that too must be considered in assessing benefits and the reasonableness of the cost allocation; are others to whom costs were allocated entitled to share those revenues? If a nonincumbent developer constructs the facility, would it provide access through its own OATT? Would the nonincumbent TP charge a new rate pancake (even though the facility has already been paid for through the regional cost allocation) for access (thus creating additional barriers to competitive markets), and if so how would the revenues be divided among all those who shared the cost of the facility? Would the nonincumbent TP's operations be integrated and coordinated with incumbent TPs in a manner that enables the assumed benefits of the regionally cost-allocated facility to be provided?

Although TAPS urged the Commission to address these and other challenging access issues through regional tariffs at non-pancaked rates, the Final Rule found those suggestions beyond the scope of the rulemaking. PP 549, 764. But failing to address these issues leaves a void that must be filled before regional cost allocations can be implemented in non-RTO regions consistent with the FPA's dictates and the objectives of

[63] These same issues form the basis of the Final Rule's correct finding that participant funding is not a reasonable methodology for regionally cost-allocated facilities. PP 723-29.

[64] Questions include: How will new capacity funded by regional cost allocation be assigned in response to

the rulemaking. The Final Rule's focus on cost allocation as disassociated from service relationships (*see* PP 530-49) heightens concerns about access issues. TAPS urges the Commission to rehear its dismissal of regional tariffs as discussed in Part V.B.2 below, or provide a process to address access to regionally cost-allocated facilities in non-RTO regions as discussed in Part V.B.3 below.

2. The Final Rule's Access Implementation Issues Are Best Addressed Through Regional Tariffs

TAPS still believes that a regional tariff, with non-pancaked rates covering both existing facilities and new facilities, would be the best way to address the difficult issues that must be resolved so that the rulemaking furthers the Commission's FPA obligations to ensure not unduly discriminatory transmission service at just and reasonable rates. Regional tariffs can solve the difficult regional cost allocation implementation issues, and avoid creation of new rate pancakes that impede competitive generation markets.[65] And they can do so without requiring formation of RTOs,[66] while reducing the disincentive for formation of new and expanded RTOs and expanding the scope of competitive markets. Contrary to the position taken in the Rule (PP 548, 764), the scope of the rulemaking

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transmission or interconnection requests? Would there be separate queues for existing and new capacity?

[65] *See* Order 2000, at 31,004 (footnote omitted) ("[T]he NOPR explained that pancaked transmission rates (where a separate access charge is assessed every time the transaction contract path crosses the boundary of another transmission owner) restrict the size of regional power markets. The Commission added that the balkanization of electricity markets hurts consumers who pay higher transmission rates and have access to fewer generation options.").

[66] SPP had a regional tariff covering first point-to-point, and then network, service before it became an RTO. *SPP, Inc.*, 98 FERC ¶ 61,038, at 61,103 (2002). MAPP also offered a regional tariff with a regional rate for certain transactions, *Mid-Continent Area Power Pool*, 69 FERC ¶ 61,347 (1994), although that rate is being phased out given the reduction in membership resulting from members joining SPP or MISO. Other examples of joint tariffs with non-pancaked rates include the Black Hills Power, Inc./Basin Electric Power Cooperative/Powder River Energy Corporation joint OATT. The joint OATT was first filed in 2003. *See Black Hills Power, Inc.*, 106 FERC ¶ 61,119 (2004) (the three entities combined their respective transmission systems located in the Western Interconnection into a single system (Common Use System) and provide open access transmission service (including both network and point-to-point) over the Common Use System at a non-pancaked rate under the proposed Joint Tariff).

should not be defined to exclude consideration of a mechanism that facilitates achievement of the Final Rule's goals consistent with the FPA's dictates.

We therefore urge the Commission to rehear its determination not to exercise its long-established authority to order joint, non-pancaked rates where transmission systems are integrated.[67] Alternatively, the Commission should use all sources of authority to induce TPs to adopt regional rates that eliminate pancaking and foster transmission investment that meets regional needs. For example, market-based rate determinations could be tied to a TP's willingness to provide customers effective access to a broader market through participation in non-pancaked regional rates. Failure to adopt a regional tariff can also be a factor in assessing the return to be earned under individual jurisdictional transmission rates, and whether individual TP charges for services that could more efficiently be provided under a regional tariff are just and reasonable.

3. Alternatively, the Commission Should Require TPs to Address Access in the Compliance Filing, and in Conjunction with Specific Application of the Regional Cost Allocation

If the Commission declines to adopt regional tariffs as the means to address access to regionally planned and cost-allocated facilities in non-RTO regions, it should require a process to address access issues at the compliance filing stage and, in any event, when a specific cost allocation is applied to a project selected for regional cost allocation (i.e., both in the regional process for selecting the projects for regional cost allocation and in filings with the Commission once the entity to construct that project is determined).

[67] *Fort Pierce Utils. Auth. v. FERC*, 730 F.2d 778, 783-85 (D.C. Cir. 1984). We noted that many, if not all, regions would meet that test, as confirmed by findings supporting the need for enhanced regional planning and regional cost allocation (*e.g.*, Final Rule PP 10, 99, 495-500, 534).

a) Access Issues Should Be Addressed in Compliance Filings

Jurisdictional TPs' compliance filings are to include a non-RTO region's procedures for evaluating potential solutions to the region's needs (Final Rule P 149), its methods for assessing the benefits from upgrades proposed for regional cost allocation (*id.* PP 11, 624), as well as its proposed regional cost allocation methodology consistent with the Final Rule's Cost Allocation Principles (*id.* PP 558-60). As the Final Rule correctly recognizes (PP 637-41), consistent with *Illinois Commerce*,[68] costs cannot be allocated that are not roughly commensurate with benefits, and should not be allocated to those that receive no benefits or benefits that are trivial in relation to costs. But how can the reasonableness of a region's proposed regional cost allocation methodology be assessed if the Commission and stakeholders don't know how customers can obtain access to a regionally cost-allocated facility and under what terms and charges?[69] *See* Part V.B.1 above. The compliance filing provides jurisdictional TPs an opportunity to provide a structure for access (e.g., regional rates; mechanisms for including nonincumbent facilities in incumbent TP tariffs) compatible with the regional cost allocation methodology proposed.

Thus, the Commission should direct jurisdictional TPs to explain in their compliance filings how the region proposes to address access issues. As Commissioner Norris noted at the July 21 meeting,[70] "the devil is in the details," and access is too crucial a detail to ignore.

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[68] *Ill. Commerce Comm'n v. FERC*, 576 F.3d 470 (7th Cir. 2009).

[69] *See* Order 888, at 31,734 ("non-price terms and conditions cannot be designed independent of pricing and cost recovery").

[70] Comm'r John R. Norris, Statement on Transmission Planning and Cost Allocation (July 21, 2011), *available at* http://www.ferc.gov/media/statements-speeches/norris/2011/07-21-11-norris-E-6.asp.

b) Access Issues Must Be Addressed in Conjunction with Application of the Regional Cost Allocation to a Specific Upgrade

In addition, for non-RTO regions, the Commission should: (a) require access issues be addressed in the regional process for selection of a particular upgrade and the application of the regional cost allocation to that facility, and (b) require filing of the specific cost allocation as applied to the particular project selected for regional cost allocation once an entity is identified to develop it, with a description of how access will be provided and on what rates, terms, and conditions.[71] Both of these elements should be required because information on access is essential to assessing the reasonableness of the cost allocation as applied to the proposed regionally-cost-allocated upgrade, consistent with the Final Rule's Cost Allocation Principles and *Illinois Commerce*.

As the Final Rule finds (P 150), stakeholders need information to determine if their needs are being addressed in a cost effective manner and "the benefits that they will receive from a transmission facility in a regional transmission plan," especially in light of the connection to cost allocation. *See also* Cost Allocation Principle 5, *id.* P 668. In a non-RTO region, issues of access are key to assessing those benefits and the reasonableness of the proposed regional cost allocation.[72] For this likely-to-be-contentious process (Final Rule P 330) to achieve the transparency that the Final Rule found was needed to produce a reasonable cost allocation that enhances the likelihood that the selected facility will be built (*id.* P 669), it is essential that the non-RTO region's

[71] To be clear, TAPS is not asking for the filing and review of the regional plan.

[72] Discussed in Part V.B.1 (e.g., how customers can gain access to the regionally planned facility; how the ATC created is determined; who gets to sell that incremental ATC; and what happens to the revenues from such sales?).

process for selecting a project for regional cost allocation and applying that cost allocation to the project expressly address access to the facility.

In addition, for non-RTO regions, TAPS urges the Commission to require the filing of specific applications of the regional cost allocation, as soon as the constructor of the project is determined, with access issues addressed at that time (rather than waiting for the facility to be completed). The Final Rule expressly contemplates the filing of "all specific allocations" for review by the Commission (P 543), but does not address timing of such rate filings. TAPS urges that the Commission direct that such filings be made at a time that will enhance certainty, thereby facilitating construction of the facility while fulfilling the Commission's statutory obligations to ensure not unduly discriminatory transmission service at just, reasonable, and not unduly discriminatory rates.

In the absence of a regional tariff, there is no clear vehicle for recovering the allocated costs in non-RTO regions,[73] nor any assurance that the application of such cost allocation to a particular project would be just, reasonable, and not unduly discriminatory. Uncertainty is increased by the Final Rule's preference for flexible criteria for measuring benefits (P 223), which leaves a lot of room for discretion by the jurisdictional TPs tasked with crafting the regional cost allocation methodology and selecting the facilities to which that methodology would be applied.[74] Particularly given the Commission's seminal findings of the ability and incentive of jurisdictional TPs to

[73] *See also id.* P 563 (distinguishing cost recovery from cost allocation as addressed in the Final Rule), *but see id.* PP 119, 163 (distinguishing merchant transmission developer as not seeking cost recovery through regional cost allocation mechanism).

[74] *See, e.g., id.* P 331 (footnote omitted) ("Whether or not public utility transmission providers within a region select a transmission facility in the regional transmission plan for purposes of cost allocation will depend in part on their combined view of whether the transmission facility is an efficient or cost-effective solution to their needs.").

favor their own interests at the expense of competitors,[75] the Commission should expect that jurisdictional TPs will take advantage of the opportunities to use the regional selection and cost allocation process to further their own interests, while shifting costs to and limiting access by TDUs and other competitors. Thus, there is no basis to give deference to determinations made by jurisdictional TPs as they may impact TDUs and others in the region.[76]

To address this uncertainty, filings of the specific application of the regional cost allocation should be made promptly after determination of an entity to proceed with a selected regionally-cost-allocated upgrade.[77] While determination of the actual rates that flow from application of the cost allocation may be deferred until the final costs are better known, there is no reason to postpone the filing of the specific application of the regional cost allocation methodology.[78] Indeed, postponing the filing of cost allocations as applied to specific regionally cost-allocated facilities until they are ready to commence service will create significant uncertainty that undermines the Commission's objectives in

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[75] *See* Part I, *supra*; Final Rule P 254 (citing Order 888, at 31,682) ("The inherent characteristics of monopolists make it inevitable that they will act in their own self-interest to the detriment of others by refusing transmission and/or providing inferior transmission to competitors in the bulk power markets to favor their own generation. and it is our duty to eradicate unduly discriminatory practices.").

[76] The judgment and flexibility inherent in the contemplated selection process and application of the regional cost allocation methodology to selected facilities, in light of the non-RTO region access issues, mean that the non-RTO region tariff will not have sufficient specificity as to the application of the cost allocation methodology to a particular project to provide customers "the necessary predictability [that] is the whole purpose of the well established 'filed rate' doctrine." *Elec. Dist. No. 1 v. FERC*, 774 F.2d 490, 493 (D.C. Cir. 1985). The filing of the specific application of the cost allocation methodology to the upgrade selected in non-RTO regions is therefore necessary and appropriate.

[77] Depending on the circumstances and cost allocation methodology, it may be appropriate for the filing to be made by one or more of the jurisdictional TPs who have selected the project for specific application of the regional cost allocation included in their tariffs, or by the entity constructing the facility.

[78] If necessary, the Commission's regulations providing for rate filings no more than 120 days in advance of the effective date, 18 C.F.R. § 35.3, should be waived to facilitate such early filing. The focus of the time limitations on rate filings is to ensure cost data will not be highly speculative when rates are reviewed. *See Allegheny Generating Co.*, 29 FERC ¶ 61,177, at 61,370 (1984). That purpose is not undermined by early review of the specific application of the regional cost allocation in light of the explanation as to how

getting needed transmission constructed on a timely and cost effective basis. *See, e.g.*, Final Rule PP 11, 264, 501, 562. Providing for the filing of the specific application of the regional cost allocation upon determination of the entity to construct and own the facilities is consistent with the timing allowed for transmission incentives filings,[79] which was premised on the Commission's finding that "it is valuable for an applicant to obtain an order indicating it qualifies for incentive-based rates prior to making a formal Section 205 filing and prior to commencing siting, permitting and construction activities because such orders facilitate financing and investment in new facilities."[80]

Prompt public disclosure of the mechanism to provide access to regionally-cost-allocated facilities is also essential to the Commission's paramount goal of non-discriminatory open access. Allowing a subset of entities (e.g., the jurisdictional TPs that have ultimate control over the regional planning process; the entity constructing the line) to have inside information as to the mechanism that will be used to grant access creates the opportunity for discrimination and undue preference that Order 888 and its progeny have been designed to eradicate. Knowing whose tariff, and what queue, will be used to grant access could create a significant advantage. Early public resolution of access issues would eliminate that opportunity for favoritism.

Last but definitely not least, access issues need to be addressed before a proposed facility proceeds through the state permitting and siting process. It will not help the

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access will be provided to the regionally cost-shared facility.

[79] Resolution of access issues may depend on which entity constructs and owns the upgrade. However, in a non-RTO region, to facilitate access at non-pancaked rates, the constructing entity could turn the facility over to an incumbent TP for purposes of granting access under its OATT.

[80] Order 679, P 77 (footnote omitted). A number of the risk-reducing incentives, for which the constructor of a regionally cost-allocated facility may be eligible, come into play before operations, e.g., recovery construction work in progress and pre-commercial costs. *Id.* PP 115, 122 & n.82.

applicant surmount that often very tough hurdle if it cannot explain who will get access to the upgrade and how. In a non-RTO region that lacks a regional tariff for non-pancaked service on existing and new facilities, access issues cannot be ducked if the Commission expects state regulators to grant critical approvals.

VI. THE COMMISSION SHOULD NOT USE THIS RULE TO SELECTIVELY HAND OUT ABANDONED PLANT RECOVERY ENTITLEMENTS

The Final Rule (P 267) grants an incumbent TP abandoned cost recovery if it is "called upon" to: (a) complete construction of a facility abandoned by another transmission developer, or (b) construct a facility selected in a regional plan that is not sponsored by another transmission developer. This abandoned plant recovery assurance is an unjustified deviation from the case-by-case consideration required by the Commission's incentive transmission rate rule, and could have adverse unintended consequences.

For example, would this ratepayer-assured bailout encourage incumbent TPs to compensate (or over-compensate) an abandoning developer? What if the abandoning developer and the incumbent TP are affiliated? Would the availability of the abandoned plant recovery incentive cause incumbent TPs to avoid sponsoring projects (which would not assure that incentive) so the project might be assigned (with that incentive)? If the incumbent TP has an obligation to construct (as seems to be assumed in both instances identified by the Rule), why is an incentive warranted in all cases? Would providing such incentive make it easier for the incumbent TP to abandon the project, thereby inducing behavior that is exactly the opposite of what the Commission is seeking to promote—timely completion of planned facilities? These questions, and consideration of the range of potential situations that may emerge,[81] highlight the need for the Commission to look at the facts of each request for abandoned plant recovery rather than committing the public in all circumstances to foot the bill for unfinished projects that produce no benefits to consumers.

Consistent with the Final Rule's generic dismissal (P 771) of the concerns of TAPS and others regarding its incentive rate policy as outside the scope of this proceeding the Commission should not, by blanket declaration in this rulemaking, modify the process and criteria for obtaining abandoned plant recovery incentives. Indeed, the Commission has not acknowledged, must less justified, departure from the case-by-case approach adopted in its incentive rate rule.[82] To correct its error, the Commission should reject the approach adopted in Final Rule Paragraph 267 and instead make clear that requests for abandoned plant recovery shall be addressed on a case-by-case basis consistent with the Commission's incentive transmission rate rule, as it may be modified through the NOI process underway in Docket No. RM11-26.

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[81] For example, was the project undertaken by a TP as a result of planning for aspirational public policies not required by law or regulation, as authorized by the Final Rule? *See* Final Rule P 216.

[82] *See* Order 679, P 164 (affirming the use of a case-by-case approach for awarding incentive of 100% recovery of prudently-incurred costs associated with abandonment transmission projects).

CONCLUSION

As described above, the Commission should grant rehearing to ensure that Order 1000 achieves the Commission's goal of making it more likely that the right transmission will be planned and constructed, consistent with the Federal Power Act's mandate.

Respectfully submitted,

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