UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Allocation of Capacity on New Merchant Transmission Projects and New Cost-Based, Participant-Funded Transmission Projects	Docket No. AD12-9-000
Priority Rights to New Participant-Funded Transmission	Docket No. AD11-11-000

COMMENTS OF THE
TRANSMISSION ACCESS POLICY STUDY GROUP

Pursuant to the January 31, 2012 Notice of Workshop,[1] the Transmission Access Policy Study Group ("TAPS") files these comments regarding potential reforms to the Commission's policies governing the allocation of capacity on new merchant transmission projects and new cost-based, participant-funded electric transmission projects.

TAPS attended the February 28 Workshop, at which merchant developers objected to open season requirements as unduly restrictive. They requested full flexibility to design and size a transmission project and negotiate separately with each potential customer, rejecting some creditworthy customers and offering different terms to different customers, all in the name of making the project financeable. But the flexibility they seek effectively defines undue discrimination in the provision of transmission service, which since Order 888[2] this Commission has been working hard to eradicate to

[1] eLibrary No. 20120131-3047 ("Workshop Notice").

[2] 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

meet its Federal Power Act ("FPA") obligations to ensure just, reasonable, and not unduly discriminatory transmission service and support competitive wholesale markets. The incentive and opportunity to undersize upgrades undermine the Commission's efforts, through Orders 890[3] and 1000,[4] to foster efficient and cost-effective transmission expansion that meets the nation's needs for reliable and affordable electricity consistent with public policy requirements.

The Commission should resist the invitation to adopt policies that move us backwards towards the balkanized patchwork of open and closed systems that Order 888 rightly found inconsistent with the competitive wholesale markets on which the Commission largely relies to discipline wholesale power rates to just and reasonable levels. Rather, the Commission should adhere to its open access policies, and promote broader use of inclusive joint ownership approaches to transmission development that can better achieve the Commission's objectives.

TAPS urges the Commission to apply the following guidelines in adopting policies for merchant and nonincumbent participant-funded transmission projects:

FERC ¶ 61,009 (1996), *modified*, Order No. 888-A, 62 Fed. Reg. 12,274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 62 Fed. Reg. 64,688 (Dec. 9, 1997), 81 FERC ¶ 61,248 (1997), *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 Grp. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom*. *New York v. FERC*, 535 U.S. 1 (2002).

[3] 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).

[4] Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, Order No. 1000, 76 Fed. Reg. 49,842 (Aug. 11, 2011), FERC Stats. & Regs. ¶ 31,323 (2011) ("Order 1000").

- Require full participation in Order 890 and Order 1000 planning processes;
- Narrowly limit the scope of the merchant/participant-funded exception to the general rule of open access at non-pancaked rates;
- Insist that an open, competitive process play an important part in the allocation of capacity in such projects;
- Conform the obligation to expand the project, at the request of new transmission customers, to the *pro forma* OATT;
- Permit affiliate allocations only through open seasons, plus additional safeguards especially if the affiliate share approaches 100%;
- Not otherwise allow the corporate form or transaction structure to confer exclusionary advantages; and
- Heighten protections when exclusive or near-exclusive access is conferred on a single entity.

TAPS also urges the Commission to impose a very heavy burden on incumbent transmission providers ("TP") to justify merchant or participant-funded projects. Particularly in non-RTO regions—where the TP's incentive and opportunity to use control of transmission to benefit its generation function or affiliates, while disadvantaging competitors, remains extremely high—the threshold for justification should be nearly insurmountable, if not barred altogether, unless the incumbent incorporates its share of the project in its OATT.

INTEREST OF TAPS

TAPS is an association of transmission-dependent utilities ("TDUs") in more than 30 states, promoting open and non-discriminatory transmission access.[5] As load-serving entities entirely or predominantly dependent on transmission facilities owned and controlled by others, TAPS members recognize the importance of both open access and a robust transmission grid to competitive generation markets, and have long advocated

[5] Tom Heller, Missouri River Energy Services, chairs the TAPS Board. Cindy Holman, Oklahoma Municipal Power Authority, is TAPS' Vice Chair. John Twitty is TAPS' Executive Director.

policies to get needed transmission built. *See* TAPS, *Effective Solutions for Getting Needed Transmission Built at Reasonable Cost* (June 2004).[6]

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COMMENTS

I. THE COMMISSION SHOULD NOT SACRIFICE OPEN ACCESS TO FACILITATE THE FINANCING OF MERCHANT AND PARTICIPANT-FUNDED TRANSMISSION FACILITIES

In crafting policies to enable merchant and nonincumbent[7] lines to succeed, the Commission should not sacrifice open access at non-pancaked rates, which is fundamental to supporting robust competitive generation markets. During the February 28, 2012 Workshop,[8] merchant and participant-funded transmission developers

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[6] http://www.tapsgroup.org/sitebuildercontent/sitebuilderfiles/effectivesolutions.pdf.

[7] As discussed in TAPS' August 22, 2011 request for rehearing of Order 1000, the Commission has erroneously defined "nonincumbent transmission developer" to exclude most non-jurisdictional utilities, and has erroneously defined "incumbent transmission developer/provider" to exclude municipal joint action agencies and generation and transmission cooperatives (as well as transcos), thereby resulting in discriminatory treatment of non-jurisdictional utilities with no justification. Request for Rehearing of the Transmission Access Policy Study Group at 33-35, Docket No. RM10-23-000 (Aug. 22, 2011), eLibrary No. 20110822-5109 ("TAPS Order 1000 Rehearing Request"). The Commission should not rely on those flawed definitions in developing policies with respect to the allocation of capacity on new merchant transmission projects and new cost-based, participant-funded transmission projects. The Order 1000 definition of nonincumbent transmission developer may also be too broad for use in this context. *See, e.g.*, *Puget Sound Energy, Inc.*, 133 FERC ¶ 61,160, PP 1, 10-13 (2010), *reh'g pending* ("*Puget Sound*") (incumbent OATT applied to Puget-owned line outside its retail footprint).

[8] The Workshop was neither recorded nor transcribed, so our characterizations are necessarily based on

recommended relaxing or scrapping the basic open access rules governing monopoly transmission service in order to facilitate their project financing. Their proposals included: limited participation in transmission planning processes; ignoring whether the proposed facility is properly sized to accommodate future uses and provide multiple benefits; and authority to negotiate bilaterally with customers and select those that make the project most likely to be financeable—even if that results in 100% of the capacity being controlled by an anchor tenant, who is potentially an affiliate and selected through a non-transparent process. Merchants complained that open season requirements are too restrictive, noting their desire to negotiate a different deal with each customer and to select customers based on criteria that are not identified before the fact; and they argued that the only criterion that should be used to determine the size of a line, and which customers are to be granted access, is whether the result is a line that is financeable.

TAPS supports the expansion and reinforcement of the grid to deliver existing and new resources to load, including generation needed to meet public policy requirements, while continuing to meet reliability standards, consistent with Congress' directive to the Commission in FPA Section 217(b)(4), 16 U.S.C. § 824q(b)(4). We are very concerned, however, that granting transmission developers the requested ability to discriminate will subvert the Commission's statutory obligations to ensure just, reasonable, and not unduly discriminatory rates and competitive wholesale markets. Unless the proposed deviations from the *pro forma* OATT are confined to at most very narrow circumstances, the development model proposed by those transmission developers will result in the wrong transmission being built in a manner that will undermine regional transmission planning

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processes and hamstring access to competitive generation and transmission development for years to come.

A. The Commission Should Not Risk Recreating the Pre-Order 888 Patchwork of Open and Closed Transmission Systems

By compromising open access principles to spur individual participant-funded or merchant projects, the Commission invites a balkanized grid of "gated communities" where access can be restricted—turning the clock back to the "bad old days," and recreating the pre-Order 888 "national patchwork of open and closed transmission systems, with disparate terms and conditions of service" that the Commission rightly determined was inherently discriminatory. Order 888, at 31,673. In Order 888, the Commission faced that problem head-on by requiring all jurisdictional TPs to offer standardized terms of access, open to all. Indeed, in dealing with multi-state, multi-owner lines with exclusive access rights (many of which involved transmission paths far beyond an individual owner's service territory), the Commission properly required public utilities to revise those agreements, so that each jurisdictional TP could provide access over those lines through its OATT at non-pancaked rates. *Id.* at 31,691-92.

The policies urged by merchant and participant-funded transmission developers at the February 28 Workshop would roll back those reforms—which provide the foundation for the Commission's ability to rely, to a large extent, on competitive wholesale generation markets to discipline wholesale power rates to just and reasonable levels[9]—restricting access and adding new rate pancakes that the Commission has found constrain

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[9] Regional Transmission Organizations, Order No. 2000, 65 Fed. Reg. 809, 810-11 (Jan. 6, 2000), FERC Stats. & Regs. ¶ 31,089, at 30,992 (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). *See also* Order 888, at 31,651-52, 31,682-84.

markets.[10] Claims about the "market" for new transmission upgrades during the February 28 Workshop cannot change the fact that the transmission network is a natural monopoly.[11] A small wind developer that is excluded from transmission access—based on secret, but ostensibly "non-discriminatory," criteria, or because it missed the narrow open season window, if any—is unlikely to be able to reach the market at all, much less at reasonable cost. A merchant or participant-funded transmission provider's ability to exclude competitive generation, or impose burdensome terms, therefore facilitates the exercise of market power in transmission service, as well as in wholesale energy markets, thus inhibiting the competitive functioning of those markets, harming consumers, and producing unjust and unreasonable rates.[12] Transferring this control of transmission to a generator via negotiated anchor tenant arrangements does not eliminate concerns about its potential use to exclude or burden competitors, or otherwise exercise market power in generation markets. As the Commission recognized in Order 888[13]:

> The most likely route to market power in today's electric utility industry lies through ownership or control of transmission facilities. Usually, the source of market power is dominant or exclusive ownership of the facilities. However, market power also may be gained without ownership. Contracts can confer the same rights of control. Entities with contractual control over transmission facilities can withhold supply and extract monopoly prices just as effectively as those who control facilities through ownership.

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[10] Order 2000, at 31,003-05, 31,173-75.

[11] *See, e.g.*, Order 888, at 31,649.

[12] The Commission's "flexib[ility] in evaluating new proposals for transmission development and pricing . . . cannot compromise consumer protections by exceeding the bounds of the Federal Power Act or the Commission's open access requirements." *Mountain States Transmission Intertie, LLC*, 127 FERC ¶ 61,270, P 58 (2009) ("*Mountain States*") (citations omitted).

[13] Order 888, at 31,643 (quoting *Citizens Power & Light Corp.*, 48 FERC ¶ 61,210, at 61,777 (1989)).

Allowing the merchant developer the ability, through bilateral negotiations with one or more anchor tenants, to tailor the size and select the customers allowed firm access to the project will enable the tenants to exclude or burden their generation competitors, or engage in other abusive practices that the Commission thought it was eradicating through Order 888.[14]

In developing policies to facilitate the build-out of needed transmission, the Commission should be guided by its fundamental obligations to prevent undue discrimination and exercise of market power, and thereby ensure that "all wholesale buyers and sellers … have equal access to the transmission grid" as required to support robust, competitive generation markets.[15] As concluded in Order 888[16]:

> [I]t is our statutory obligation under sections 205 and 206 of the Federal Power Act (FPA) to remedy undue discrimination. To do so, we must eliminate the remaining patchwork of closed and open jurisdictional transmission systems and ensure that all these systems, including those that already provide some form of open access, cannot use monopoly power over transmission to unduly discriminate

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[14] *Id.* at 31,682-83 (finding unduly discriminatory and anticompetitive practices by "transmission monopolists" that the Commission has a duty to "eradicate," based in part on Appendix C, *id.* at 31,919-26 (detailing abuses against TAPS members, including examples of TPs purchasing and reselling energy they refused to transmit; refusing or delaying access to transmission; or offering it only on unreasonable terms)). *See also* Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Proposed Rulemaking and Supplemental Notice of Proposed Rulemaking, 60 Fed. Reg. 17,662 (proposed Apr. 7, 1995), FERC Stats. & Regs. ¶ 32,514 (proposed 1995) ("Order 888 NOPR").

[15] *New York v. FERC*, 535 U.S. 1, 10 (2002) (quoting Order 888 NOPR, FERC Stats. & Regs. at 30,049).

[16] Order 888, at 31,635. *See also* Order 888 NOPR, FERC Stats. & Regs. at 33,071 ("Unless all public utilities are required to provide non-discriminatory open access transmission, the ability to achieve full wholesale power competition, and resulting consumer benefits, will be jeopardized. If utilities are allowed to discriminate in favor of their own generation resources at the expense of providing access to others' lower cost generation resources by not providing open access on fair terms, the transmission grid will be a patchwork of open access transmission systems, systems with bilaterally negotiated arrangements, and systems with transmission ordered under section 211. Under such a patchwork of transmission systems, sellers will not have access to transmission on an equal basis, and some sellers will benefit at the expense of others. The ultimate loser in such a regime is the consumer.").

> against others. If we do not take this step now, the result will be benefits to some customers at the expense of others.

B. Without Adequate Safeguards, Merchant and Participant-Funded Transmission Development Risks Undermining FERC-Mandated Planning Processes

The developer-proposed policies are also at odds with Order 1000's focus on regional planning and allocation of the costs of transmission facilities to beneficiaries. Order 1000 correctly recognized that a participant-funded approach to transmission development is unlikely to produce the major expansions required to meet our needs. Order 1000, P 723. The Commission therefore ruled that the regional and interregional cost allocation methodologies required by Order 1000 must allocate costs based on principles other than participant funding. *Id.* PP 723-25. Although participant funding was not prohibited by Order 1000, it was envisioned as a backstop method for financing a facility, after the regional planning process has already evaluated whether the facility provides the regional benefits needed to support regional cost allocation. *Id.* P 725. Allowing developers of merchant and participant-funded transmission facilities to bypass the regional planning process, discriminate between customers, and avoid basic open access requirements—in other words, to engage in practices that the Commission has determined to be unduly discriminatory—threatens to undermine the planning processes that Order 1000 intends to be the primary vehicle for grid expansion.

Especially in light of the merchant transmission exemption from the planning processes required by Order 1000 (apart from a limited analysis of the reliability and operational impacts of interconnecting the merchant facility),[17] there is a real danger that

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[17] *Id.* PP 163-65.

greater reliance on merchant and participant-funded transmission may frustrate the Commission's purpose of getting the most efficient, cost-effective transmission built, contrary to what Order 1000 recognizes as the Commission's statutory obligation.[18] The 50-year lifespan of transmission facilities, and their impact on future development, makes it essential that the Commission's focus be on getting the *right* transmission built as Congress directed in Section 217(b)(4)—a goal TAPS strongly supports—not ensuring that particular merchant projects succeed.[19]

The Commission has consistently recognized that the AC network is a single machine that provides benefits to all users.[20] The economic incentive of both merchant/participant-funded developers and anchor tenants, however, is to undersize lines to maximize their value and to exclude the anchor tenant's generation competitors. Where a merchant transmission developer is effectively just a construction company, it could easily be co-opted by an anchor tenant that has an incentive to use control over transmission to benefit itself in generation markets, potentially limiting access to a renewable generation-rich area. Where the merchant transmission developer is an affiliate of the anchor tenant, the potential for abuse is even greater.

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[18] *Id*. P 52 (addressing planning processes that fail to promote more efficient and cost-effective development of new transmission facilities is necessary to ensure just and reasonable rates).

[19] Questions as to whether certain open access requirements might "undermine the ability of some projects to succeed" (e.g., Workshop Notice, Session 2, Questions 3 and 5) miss this central point.

[20] It is for just this reason that the Commission has long held that rolled-in rate treatment of network facilities is appropriate even where facilities would not be needed "but for" a particular customer's request. *See, e.g.*, *Northeast Tex. Elec. Coop., Inc.*, 108 FERC ¶ 61,084 (2004), *reh'g denied*, 111 FERC ¶ 61,189 (2005); *Pub. Serv. Co. of Colo.*, 62 FERC ¶ 61,013, at 61,061-62 (1993); *Midwest Indep. Transmission Sys. Operator, Inc.*, 98 FERC ¶ 61,141, at 61,412 (2002), *opinion after appeal*, 102 FERC ¶ 61,192, *clarified*, 104 FERC ¶ 61,012 (2003), *pet. for review denied sub nom. Midwest Indep. Transmission Sys. Operator, Inc. v. FERC*, 373 F.3d 1361 (D.C. Cir. 2004); *Western Mass. Elec. Co. v. FERC*, 165 F.3d 922 (D.C. Cir. 1999).

The result could be inefficient transmission expansions that are, at best, wasteful, and may block future development. Inefficient build-out of the grid requiring re-work, multiple future expansions and regulatory proceedings, and duplicative facilities would make it more costly than necessary to access new generation resources, burdening those resources and consumers. The absence of a broad range of public benefits—e.g., meeting the power supply needs of load-serving entities, meeting applicable public policy requirements, satisfying reliability standards—makes siting more difficult and raises questions about, if not eliminates, the availability of eminent domain for such merchant projects, increasing their construction costs. Even if the merchant or participant-funded transmission line's costs do not go into rate base, they are borne by businesses and consumers, putting an unnecessary drag on our economy.

Worse, transmission facility siting by merchant and participant-funded developers may use transmission corridors in ways that make it harder to expand later, both contractually (if such developers are not subject to the normal OATT obligation to expand), and physically (if the developer did not take advantage of opportunities to construct in a manner that will facilitate later upsizing and interconnections). By bypassing the regional planning process, such facilities may move ahead of, and effectively trump, right-sized upgrades that would serve multiple uses. Regulatory siting fatigue is real; and it is often harder to obtain the approvals needed to site a second line once the first line has been permitted. Indeed, siting regulators faced by multiple merchant proposals that cannot demonstrate broad public benefits may become skeptical of all transmission expansion proposals.

Once a merchant line has been approved, siting problems for future projects may be compounded. The merchant transmission owner and its customer(s) will have a strong economic incentive to block new upgrades that would reduce congestion, thereby destroying the economic value of exclusive rights over the line, or otherwise undermine the ability of the anchor tenant and other customers to restrict generation competition.

These issues are especially problematic in a dynamic AC grid. What may seem like a radial line to renewable resources at the fringe of the system now may be a more central part of the network in a decade or two. If usage and expansion are hamstrung by access limitations stemming from the merchant or participant-funded model, it may be needlessly difficult and costly to address load-serving entity and reliability needs for these areas in the future, much less provide for an effective outlet for the area's renewable resource potential.

C. Inclusive Joint Ownership Is a Better Solution That Does Not Require Sacrificing Open Access

In its comments submitted in *Priority Rights to New Participant-Funded Transmission*, Docket No. AD11-11-000,[21] TAPS urged the Commission both not to erode its open access policies, and to take steps to promote broader use of inclusive joint ownership approaches to transmission development, which can deliver better results consistent with the Commission's open access and competitive market goals.

This joint ownership approach has a proven track record. It has been successfully undertaken by CapX2020, a joint transmission-planning process in the northern Midwest,

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[21] Comments of the Transmission Access Policy Study Group Following Up on March 15 Technical Conference (May 5, 2011), eLibrary No. 20110505-5101; *see also* Statement of Terry Wolf on Behalf of Missouri River Energy Services and the Transmission Access Policy Study Group (Mar. 16, 2011), eLibrary No. 20110316-4012 ("Wolf Statement").

consisting of eleven investor-owned, municipal, and rural cooperative utilities in Minnesota, North Dakota, South Dakota, and Wisconsin that have jointly planned needed transmission upgrades and have opportunities to jointly own those facilities.[22] 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.[23] These facilities, estimated to cost about $1.7 billion,[24] are designed to meet the load-serving and reliability needs of all eleven participating utilities, and to provide the common infrastructure to reach new supply sources.

CapX participants worked hard to inform the public of the need for the projects and collaborated with local government officials, regulators, and landowners to work out the most acceptable configuration and routes for the projects. The facilities have been well-received by the state regulators responsible for granting siting approval. CapX energized the first segment (Monticello to St. Cloud) of the Fargo-St. Cloud 345 kV line on December 21, 2011.[25] CapX is beginning to plan its later phase projects, which will

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[22] *See* CapX2020 frequently asked questions, http://www.capx2020.com/faq.html (last visited Mar. 26, 2012).

[23] *Id*.

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

[25] Press Release, CapX2020, CapX2020 Transmission Line Between Monticello and St. Cloud Energized and in Service (Dec. 21, 2011), *available at* http://www.capx2020.com/monticello/REVISED%20press%20release_monti-st.%20cloud%20energized_12.22.2011_with%20partners.pdf.

be focused primarily on enabling area utilities to meet their renewable energy needs under state law. The cost estimates for these facilities range between $4-7 billion.[26]

A comparison of one of the CapX projects, the Brookings Line, to a merchant transmission proposal for the same area highlights the differences in grid build-out likely to result from the two different development models. In 2008, while the Brookings Line was still being studied, Outland Renewable Energy, LLC proposed an alternative sponsor-funded line with endpoints almost identical to those of the Brookings Line. Both of the projects were designed to transmit significant wind generation from southwest Minnesota to Midwest load centers; but the Brookings Project met multiple needs by including five substations and multiple interconnections to other systems along its route.[27] In response to comments from wind generators who were concerned that the line be sufficiently robust to accommodate future generation, the decision was also made to build the entire Brookings Line double-circuit-capable, to assure adequate capacity in the future. In other words, the goal of the CapX project was to make the best use of the corridor for the benefit of the region and consumers, rather than attempt to maximize the value of the line by restricting its capacity and its potential uses and benefits.

Not only will the Brookings Line provide more and broader public benefits than the Outland Line, but there was neither a need to grant certain customers priority rights (while excluding others), nor to otherwise compromise open access principles to get it

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[26] Wolf Statement at 8-9 n.4.

[27] In fact, in *Midwest Independent Transmission System Operator, Inc.*, 131 FERC ¶ 61,165, P 17, *clarified*, 133 FERC ¶ 61,011 (2010), the Commission rejected MISO's proposal to assign 100% of the costs of the Brookings Line to generator interconnection customers, because it concluded that the line was to serve multiple needs in addition to interconnection.

built. The transmission capacity created by the line will be offered under the Midwest ISO Tariff, and no new transmission rate pancake will be created.

CapX and other joint ownership development efforts demonstrate that the Commission is *not* faced with a choice between sacrificing open access and failing to get needed transmission built. Before compromising the transmission access principles that are the foundation of electricity market restructuring, the Commission should fully explore other approaches, such as encouraging joint ownership development.

II. PRINCIPLES TO GUIDE COMMISSION POLICIES ON PRIORITY RIGHTS TO MERCHANT AND PARTICIPANT-FUNDED PROJECTS

TAPS suggests that the Commission insist upon the following essential ingredients in evaluating merchant/participant-funded projects[28]:

A. Full Participation of Merchant/Participant-Funded Transmission in the Planning Process

At the Workshop, merchant transmission developers declared right-sizing a "non-starter," given their need to structure a project to be financeable. They pointed to Order 1000's determination that their involvement in the transmission planning process could be limited to providing sufficient information to enable public utility TPs to assess potential reliability and operational impacts on other systems, rather than subjecting the merchant projects to full evaluation (unless the merchant voluntarily chooses to do so).[29] TAPS urges the Commission to make clear that merchant and participant-funded transmission should in all cases be subjected to full evaluation by the Order 890 and Order 1000 planning processes, so the need for the line, its appropriate size, and whether

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[28] Additional requirements and restrictions apply where an incumbent TP proposes to build such a project.

[29] Order 1000, PP 163-165.

it should be included in non-pancaked regional or zonal rates with full open access can be considered.[30]

Specifically, merchant and participant-funded projects should be required to participate in those planning processes to enable assessment of the need for the project and determine if there are right-sized alternatives that better meet identified needs. Both Order 890 and Order 1000 require non-discriminatory consideration of nonincumbent proposals,[31] with Order 1000 providing additional protections, including substantially eliminating any Federal right of first refusal for incumbent TPs.[32] Participation of the merchant project in the planning process would give the region an opportunity to select the merchant facility in the regional plan, subject to regional cost sharing, if appropriate.[33] If the planning process evaluation finds that the merchant or participant-funded project does not meet identified needs, will impede grid development, or develops alternative proposals that better meet the range of needs, that determination should be

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[30] TAPS raised this issue in its comments on the Order 1000 NOPR (*see* Comments of the Transmission Access Policy Study Group at 71-72, Docket No. RM10-23-000 (Sept. 29, 2010), eLibrary No. 20100929-5452), and the issue has been raised in a number of rehearing applications. *See, e.g.*, Request for Rehearing and Motion for Clarification of the American Public Power Association at 2, 12-17, Docket No. RM10-23-000 (Aug. 19, 2011), eLibrary No. 20110819-5113; Request for Clarification and Rehearing of National Rural Electric Cooperative Association at 4, 10-11, Docket No. RM10-23-000 (Aug. 22, 2011), eLibrary No. 20110822-5100.

[31] *See* Order 1000, PP 315 (describing requirements under Order 890), 328 (describing Order 1000's enhanced requirements).

[32] *Id.* PP 313, 318-19.

[33] For example, in 2003, a merchant company was granted negotiated rate authority for the proposed Chesapeake Transmission Line, a 230 kV line connecting the Chalk Point, Maryland Substation and the Vienna, Maryland Substation. Letter Order, *Chesapeake Transmission, LLC*, 105 FERC ¶ 61,088 (2003). In 2005, the merchant developer withdrew the transmission interconnection request for this line. PJM, Merchant Transmission Queues: Withdrawn, http://www.pjm.com/planning/merchant-transmission/trans-queue-withdraw.aspx (last visited Mar. 26, 2012). In October 2007, based on forecasted load growth, PJM approved a transmission line over the same pathway as part of its regional expansion plan, but at a much larger size (two 500 kV HVDC). While PJM recently put this project on hold, it continues to be considered in terms of how best to meet regional needs. PJM, Mid-Atlantic Power Pathway, http://www.pjm.com/planning/rtep-upgrades-status/backbone-status/mapp.aspx (last visited Mar. 26, 2012).

available for consideration in the siting and permitting process, and the developer should bear a heavy burden when seeking approvals from this Commission for negotiated rates or limitations on open access requirements.[34]

Requiring full participation of merchant projects in Order 890 and Order 1000 planning processes would enable assessment as to whether the upgrade wisely uses available corridors, minimizes environmental impacts, efficiently expands capacity, addresses multiple needs, and effectively reduces congestion. The dynamic, integrated nature of the AC network means that once a new line is connected, it affects and is affected by everything else going on in the system and changes thereto. The particular characteristics and specific location of a new merchant line will affect operations elsewhere on the grid (not necessarily for the better), and will inherently alter and limit future planning options available to meet regional needs. While the transmission capacity of an HVDC line is less susceptible to influencing, and influence by, the surrounding AC system, its terminals are the equivalent of interconnecting a large generator into the AC grid, which must be able to integrate the resulting output or inflow. To efficiently design, site, and build needed infrastructure, merchant HVDC lines must be fully considered as part of the planning process.

The planning process can take a long-term view of needs and assess whether a "gated community" of merchant or participant-funded facilities is likely to hamstring development of the transmission system in the long term. Thus, it can shed light on whether a merchant project is likely to remain a marginal facility located on the fringe with few additional demands for service for many, many years to come, or whether it is

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[34] *See* Workshop Notice, Session 1, Question 3.

likely to be the sole link to an area of significant additional development or would likely be looped into the network, raising additional concerns. A mere reliability and operational "impact" analysis would not provide this information.

Similarly, the planning process can identify corridors where there is heightened concern about undersizing and exploitation of exclusive usage rights. As discussed above, siting fatigue can turn any project into an essential facility because of the difficulty of getting a second line sited in an area. Where available rights-of-way are limited—whether due to the difficulty of obtaining regulatory approvals, existing land use patterns, or other reasons—undersizing is particularly problematic.

Participation in the planning process also enables open, transparent communication to identify interest in a project without sacrificing open access principles. It can provide the "two-way information exchange" that merchant developers who attended the February 28 Workshop stated they need to make their lines financeable. Moreover, some of those developers asserted that there is no reason to worry about merchant and participant-funded transmission, because those development models will be used only when rolled-in development is unavailable. Requiring merchant and participant-funded developers to participate fully in the Order 890 and 1000 planning processes simply helps assure that result.

In short, to avoid reducing the Order 890 and 1000 planning processes—which the Commission rightly recognizes as key to efficiently meeting the nation's transmission needs—to a mechanism for planning around ad hoc merchant projects that trump regionally-planned projects, the Commission should require merchant and participant-funded transmission projects to fully participate in those planning processes. Otherwise,

our nation will be saddled with transmission that is inefficient, both in terms of the delivered price of electricity and the utilization of scarce resources and political capital in the often difficult transmission siting process.

B. Merchant/Participant-Funded Projects Should Be a Narrow Exception to the General Rule of Open Access at Non-Pancaked Rates

Because TAPS is concerned about policies that grant priority rights to new merchant or participant-funded transmission (instead of requiring access to be provided under the *pro forma* OATT at non-pancaked rates), the Commission should apply such policies narrowly and on a case-by-case basis.

The Commission's prior decisions regarding merchant and participant-funded transmission have primarily involved DC lines or controllable AC lines,[35] which are more susceptible to defined rights of access. Radials to remote generation pockets might be another specialized use for merchant and participant-funded projects, if full vetting through the planning process provides confidence that the restricted access project will adequately meet anticipated needs and will not interfere with efficient development of the AC grid in the future. Any exception to the Commission's policy disfavoring balkanization of the grid should not be extended beyond those limited situations.

C. An Open, Competitive Process Needs to Be an Important Part of the Procedures for Allocating Transmission Capacity

The Commission should not allow presubscription of most or all the capacity of a transmission line by a single, or even multiple, users. Unless a substantial share of the

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[35] *See, e.g., TransEnergie U.S., Ltd.*, 91 FERC ¶ 61,230 (2000); *Neptune Reg'l Transmission Sys., LLC*, 96 FERC ¶ 61,147, *reh'g denied in part*, 96 FERC ¶ 61,326 (2001), *modified in part*, 103 FERC ¶ 61,213 (2003); *Sea Breeze Pac. Juan de Fuca Cable, LP*, 112 FERC ¶ 61,295 (2005); *Chinook Power Transmission, LLC*, 126 FERC ¶ 61,134 ("*Chinook*"), *modified*, 128 FERC ¶ 61,074 (2009).

capacity of all new facilities is available through open access, we risk reducing competition in wholesale electricity markets by giving anchor customers exclusive control over an essential facility for participating in those markets.

Customers should have an opportunity to secure, through open season or another open, transparent and non-discriminatory process, a substantial portion of the capacity at the same negotiated rates and on the same terms offered to any presubscribed "anchor tenant."[36] Any such open process should have clear guidelines, including establishing upfront the criteria to be applied to ensure non-discriminatory treatment. Such a process is critical to transparency, and the Commission's statutory obligations of ensuring just, reasonable, and not unduly discriminatory rates. This Commission has worked too hard for too long to ensure open access transmission service; it should not undermine that effort by inviting discrimination among customers as the merchant developers request.

An open, competitive process will also help identify projects that are not appropriately sized. If there are more creditworthy offers than capacity, the developer should be required to disclose those offers when seeking Commission approvals, and bear a high burden in demonstrating that it could not go forward with a larger project and providing a non-discriminatory basis for excluding each such competitor.

Contrary to suggestions made by some at the Workshop, the Commission cannot rely on Section 206 complaints to protect excluded customers from the abuse invited by allowing merchants free rein to negotiate individually with and discriminate among customers to achieve a "financeable project." An individual generation developer or

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[36] *See, e.g.*, *Chinook* P 61. The merchant and participant funded developers' claimed need to reward "first movers" does not justify allowing "second class citizen" status to open season customers. The first mover already has the advantage of locking in the capacity and terms it finds satisfactory.

transmission customer is unlikely to have the information, incentive, or resources to pursue the filing and litigation of what is likely to be a fact-intensive complaint, which the Commission has no obligation to resolve on a time schedule that makes its decision an effective means to gain access.[37] Indeed, in requiring open access on standardized terms, Order 888 recognized that a case-by-case approach to access was insufficient to support competitive generation markets.[38]

D. Merchant/Participant-Funded Project Expansion Obligations Must Conform to the Pro Forma *OATT*

While merchant and participant-funded transmission projects are required to post unused (e.g., short term or non-firm) capacity on the OASIS for availability under an OATT,[39] the treatment of long-term firm requests that would require expansion of the project is less well-defined. Under the *pro forma* OATT, a TP's obligation to study the request, determine the cost of the required facilities, and offer transmission at rates determined consistent with Commission policy—i.e., the higher of embedded or incremental cost—is clear,[40] as are rights to interconnect.

In contrast, although the Commission has imposed OATT expansion obligations on a participant-funded line,[41] it has expressly declined to decide whether merchant

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[37] *See, e.g., Wis. Pub. Power Inc. v. Wis. Pub. Serv. Corp.*, 83 FERC ¶ 61,198, *reh'g granted and denied in part*, 84 FERC ¶ 61,120 (1998) (addressing a denial of service requested on June 9, 1997 for the period May 1, 1998 through April 30, 2001, challenged by complaint filed December 3, 1997 requesting expedited consideration). *PECO Energy Co*., 98 FERC ¶ 61,308 (affirming Commission request for additional information clarifying what is still being requested in connection with the June 17, 1997 Section 211 application for denial of an August 23, 1996 request for service commencing February 1, 1997, which was denied on March 24, 1997), *reh'g denied*, 100 FERC ¶ 61,095 (2002).

[38] *See* Order 888, at 31,646-47.

[39] *See, e.g., Chinook* P 39; *Mont. Al. Tie, Ltd*, 116 FERC ¶ 61, 071, PP 16, 33 (2006), *order accepting tariff sheets*, 119 FERC ¶ 61,216, P 6 (2007) ("MATL 2007 Order").

[40] *See, e.g., Pro Forma* OATT §§ 19, 27. *See also* Order 890, PP 883-84.

[41] *See Northeast Utils. Serv. Co. & NSTAR Elec. Co.*, 127 FERC ¶ 61,179, P 27 ("*Northeast Utilities*"),

projects should be required to expand their facilities upon request.[42] While the Commission has approved merchant OATTs in which the merchant transmission operators voluntarily offered to expand the system if capacity on the lines is insufficient to meet transmission requests, these commitments are conditioned on the merchant finding the expansion "economically feasible"[43] or economically justified.[44]

TAPS urges the Commission not to limit the expansion obligation of merchant or participant-funded transmission providers to situations when such TPs find it "economic." Once a merchant/participant-funded project goes into service, it has the same natural monopoly attributes as other transmission facilities. Especially given the potential for the merchant and participant-funded TP to benefit from congestion (which increases the value of the transmission facility) and to be influenced by the views of its anchor tenant(s) that have a strong interest in restricting access by competitors, it is crucial that the Commission step in to limit the degree to which a merchant/participant-funded TP has discretion to say "No."

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order denying reh'g, 129 FERC ¶ 61,279 (2009) ("*Northeast Utilities Reh'g*"); *Northern Pass, LLC*, 134 FERC ¶ 61,095, P 3 (2011) ("*Northern Pass*"), *reh'g denied*, 136 FERC ¶ 61,090 (2011) (subjecting an incumbent participant-funded project to OATT expansion requirements).

[42] *Chinook* P 58 n.38; *see also CSC New England Power Pool*, 109 FERC ¶ 61,155, PP 88-89 (2004) (finding that the New-England Power Pool OATT does not impose an obligation to expand on the owners of the Cross Sound Cable merchant transmission project).

[43] MATL 2007 Order P 7. Although MATL had originally proposed to eliminate Section 15.4, the *pro forma* OATT section providing an obligation to build if transmission capacity is insufficient to meet a customer's transmission request, its amended compliance filing included a qualified obligation to build after "discussions with Commission Staff." Montana Alberta Tie Line Amendment to Compliance Filing at 4, Docket No. ER05-764-004 (Apr. 13, 2007), eLibrary No. 20070418-0113. Under the amended filing, MATL restored OATT Section 15.4, but appears to have subjected its obligation to expand to meet individual transmission and interconnection requests to subjective determinations under its Attachment K. *See, e.g*., MATL, LLP OATT, Attach. K § 3.4(d) ("if the results of the Open Season are acceptable to the Transmission Provider") (effective Sept. 30, 2010). *See also id.*, Attach. K §§ 4.9.2, 9.

[44] *Wyo. Colo. Intertie*, 127 FERC ¶ 61,125, PP 22, 49 (2009) (relying on market signal as to whether expansion is justified).

E. Participation by Affiliates Should Be Permitted Only Through Open Seasons, and With Additional Safeguards

The Commission should be especially alert to the problems created by affiliate transactions, which require additional safeguards.[45] The competitive risks created by allowing merchant and participant-funded transmission projects with priority rights of access are exacerbated when the transmission owner is affiliated with a generation developer. It clearly invites abuse to permit a merchant developer to "negotiate" the size, rates, and access to a project with itself. As described above, the Commission has recognized that transmission market power can be leveraged into generation market power, thus impeding competition in wholesale electricity markets. In an affiliate situation, the merchant developer becomes an arm of the generation function which has every incentive to structure the project to advantage itself, while disadvantaging other customers that might require access to the facility.

For these reasons, affiliates should not be permitted to acquire priority rights to merchant or participant-funded capacity except through a fully transparent and competitive open season process. Further, whenever an affiliate is in the mix, the Commission needs to more carefully assess the openness and quality of the open season process. The affiliate relationship facilitates abuse in the open season context, e.g., if the affiliate has greater advance notice of the open season, or the open season is timed or otherwise designed to work well for the affiliate's generation plans.

Finally, where an affiliate secures 100% or near 100% of the project's capacity through an open season, even closer scrutiny by the Commission and heightened

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[45] *See Chinook* P 49 (recognizing the need to apply a higher level of scrutiny when affiliates of the merchant transmission developer are anchor customers due to the absence of arms' length negotiations).

protections are required to avoid possible abuse, including those discussed below. Exclusionary access rights to a 50-year facility that could become a bottleneck burdening competition and balkanizing the grid for years to come should not be conferred based on a "blue light special" designed with the affiliate in mind. The merchant and its affiliate amount to a vertically-integrated transmission provider to which Order 888's protections were directed and should apply with full force.

F. The Commission Should Not Otherwise Allow Corporate Form or Subcontracting to Confer Exclusionary Advantages

To the extent the Commission adopts policies enabling merchant and participant-funded transmission projects, it must ensure that market participants cannot abuse these procedures to evade open access and planning requirements just by modifying their corporate structure or by subcontracting certain functions.

Attendees at the Workshop generally agreed on the need to apply the same rules to merchant developers as to nonincumbent participant-funded projects, to avoid elevating form over the substance of the transaction. The Commission should similarly avoid giving undue weight to the form of the transaction, and should not permit subterfuge of its open access policies. It should therefore make clear it will scrutinize merchant/participant-funded arrangements that confer priority transmission rights to ensure that they do not confer advantages that would not be available if the customer constructed the facility itself. For example, the Commission's policies and precedent on access to generator lead lines require generator tie-line owners to make capacity available under an OATT to a requesting customer to the extent the generator cannot demonstrate that it has "specific expansion plans" for its generation, including definite dates of

service.[46] Generation developers should not be able to evade these restrictions by creating a merchant transmission affiliate or hiring a transmission construction company to build a tailor-made transmission facility, and then securing most or all of the line's capacity as an anchor tenant. Thus, in addition to holding the merchant transmission developer to applicable restrictions,[47] the anchor tenant's priority rights should be subject to the same limitations as a gen-tie owner.

Likewise, the Commission should carefully examine a merchant/participant-funded project to ensure that it does not become the vehicle for jumping the queue, or granting priority access rights to an incumbent TP for capacity that would otherwise be made available through the incumbent's OATT if the line were owned (in whole or part) by the incumbent.[48]

G. Heightened Protections Are Required When Exclusive or Near-Exclusive Access Is Conferred on a Single Entity

If open season results in allocation of 100% or near 100% of a line's capacity to a single customer (or worse, if this result is achieved, over TAPS objection, by presubscription) heightened scrutiny is required as to the adequacy of the open season

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[46] Only "a transmission owner that filed specific expansion plans with definite dates and milestones for construction, and had made material progress toward meeting its milestones, ha[s] priority over later transmission requests." *Milford Wind Corridor, LLC*, 129 FERC ¶ 61,149, P 22 (2009); *Aero Energy, LLC*, 116 FERC ¶ 61,149, P 28 (2006), *final order directing interconnection and transmission service*, 118 FERC ¶ 61,204, *order denying reh'g*, 120 FERC ¶ 61,188 (2007).

[47] *See, e.g., SunZia Transmission, LLC*, 131 FERC ¶ 61,162, PP 24-26 (2010) (firm transmission service rights conferred not by ownership, but on a not unduly discriminatory basis at rates that are just and reasonable).

[48] *See, e.g., Puget Sound* (rather than grant requested priority rights as a gen-tie, the Commission required an incumbent TP to include transmission line located beyond its footprint in its existing OATT, subject to the limits on reservations for native load, where the line is to be used to import generation for native load). Thus, the definition of nonincumbent transmission developer as including a public utility TP's lines outside its retail distribution service territory or footprint (Workshop Notice at 4 n.7) may be overly broad in this context.

procedures and whether the project is otherwise a means to use exclusive control over transmission to gain an advantage in generation markets.

As noted above, the exclusive, or near-exclusive, holder of priority rights to a project has a strong incentive and ability to exclude competitors. Such access arrangements transform the merchant transmission provider into the instrument of the customer. Such arrangement effectively puts the customer in a position to use its control over access to what may well be an essential facility to gain a generation market advantage, inviting the same kind of abuses that led to Order 888. These concerns, which are even greater where an affiliate is involved, require heightened scrutiny and protections to avoid subverting open access.

III. INCUMBENT PARTICIPANT-FUNDED/MERCHANT PROJECTS SHOULD BE VIEWED WITH SUSPICION AND BEAR A VERY HEAVY BURDEN OF JUSTIFICATION

At the Workshop there was clear consensus that rules governing incumbent non-rate-based projects (whether termed "participant-funded" or "merchant") should be quite different from those governing nonincumbent projects. An incumbent that proposes to exclude a project from rate base, and allow access to it on (pancaked) rates, terms, and conditions different from the TP's OATT, raises red flags that open access requirements are being subverted. In addition to the requirements discussed in Part II above, such projects should be closely examined on a case-by-case basis, with the proponent bearing a very high burden to demonstrate that the proposed development does not end-run or subvert the OATT, planning process, or transmission queue, and does not constitute either undue preference (for the incumbent or its affiliates) or undue discrimination (against customers subjected to "and" pricing). As the Commission has rightly recognized, when an incumbent TP seeks "merchant" status in the development of a

transmission project, grant of such status can "concentrate . . . control over transmission . . . and potentially increase [] market power."[49] For this reason, the Commission often establishes different rules for incumbent TPs and their affiliates.[50]

At the Workshop, there was a general recognition that the standard for surmounting this high threshold to justify participant-funded lines should be different in RTO and non-RTO regions. We therefore address the two situations separately below.

A. Incumbent Participant-Funded Projects in RTOs Should Be the Rare Exception

In an RTO area, satisfaction of that high threshold should be difficult, but not necessarily an impossible feat. The Commission has already approved one such project.[51] Such proposals should be required to meet the criteria applicable to nonincumbents, including those discussed in Part II.[52] In particular, the incumbent developer should have to demonstrate that the project went through the RTO's full Order 890 and Order 1000 planning processes, and that the RTO chose not to include the incumbent project as a regionally or zonally funded upgrade, but determined that allowing for a participant-funded project is reasonable in terms of long-term planning and access issues. The required independence of the RTO,[53] its regulatory responsibility for planning and

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[49] *Mountain States* P 62.

[50] For example, in *Puget Sound Energy, Inc*., 138 FERC ¶ 61,121, PP 13-19 (2012), the Commission recently allowed simultaneous exchanges that do not involve the marketing function of a public utility TP without prior Commission approval, but refused to generically authorize those that do, noting the potential for circumvention of transmission service requirements.

[51] *Northern Pass* PP 41-42; *Northeast Utilities Reh'g* P 12.

[52] Such a project should also meet other applicable requirements. For example, the Commission required that, consistent with the incumbent utility's open access obligations, available or otherwise unscheduled capacity must be posted on an OASIS (*Northern Pass* P 72) and that the utility retained the obligation to expand its transmission system upon request. *Northeast Utilities* P 27.

[53] 18 C.F.R. § 35.34(j)(1).

directing expansion of the grid to enable it to provide efficient, reliability, and non-discriminatory transmission system,[54] and the express regulatory prohibition against an RTO charging customers multiple access fees for the recovery of capital costs for transmission service over facilities that the RTO controls,[55] should limit such projects to the rare and well-justified exception to the RTO's otherwise applicable treatment of transmission additions for cost allocation and other purposes.

It also goes without saying that any such project must be subject to the RTO's operational control,[56] and closely scrutinized to ensure that the project confers no preferential treatment of affiliates, disadvantage to other customers, or other subversion of the RTO's OATT, transmission queue, or open access principles. Participant-funded projects that risk balkanization of the grid are particularly ill-deserving of transmission rate incentives, especially return on equity premiums.[57] While the cost of these incentives may not be rolled into RTO transmission rates, they will still be reflected in the costs borne by consumers (e.g., by increasing the offers reflected in the LMP).[58]

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[54] 18 C.F.R. § 35.34(k)(7).

[55] 18 C.F.R. § 35.34(k)(1)(ii).

[56] *Northern Pass* P 72.

[57] The Commission approved such incentives in one case (*id.* P 56) to reward the "risks" associated with such project, while classifying the project as participant-funded because the risks were shifted to the customer. *Northeast Utilities* P 41; *Northern Pass* P 4.

[58] The adverse impact of excessive and undue incentives was highlighted in a recent joint letter submitted by TAPS as well as a number of state commissions, agencies and attorneys general, consumer-owned utilities, and national and regional environmental, consumer, and energy policy groups, in connection with the Commission's Notice of Inquiry regarding Promoting Transmission Investment through Pricing Reform. Joint Letter, Docket No. RM11-26 (Mar. 5, 2012), eLibrary No. 20120305-5110.

B. The Presumption Against Incumbent Participant-Funded Projects in Non-RTO Regions Should Be Nearly Insurmountable

In non-RTO areas, there should be a very strong presumption against merchant or participant-funded projects by incumbent TPs, unless the incumbent makes the capacity available through its OATT. The project should be subject to extremely close scrutiny on a case-by-case basis, with the incumbent bearing a very high burden to demonstrate that the line should not be included under the OATT, and that restricting access and pricing such access on a participant-funded basis is "consistent with or superior to" the OATT.[59]

Barring entirely, or establishing a very strong presumption against, incumbent participant-funded projects in non-RTO regions is well justified.[60] To the extent access to the project capacity is not made available on non-pancaked rates pursuant to the incumbent's OATT, such projects represent a "back to the future" effort to reinstate the balkanized patchwork of open and closed systems that Order 888 set out to eliminate. As noted above, Order 888 expressly required a jurisdictional TP to revise its contracts with third parties to permit the jurisdictional TP to place its share of the capacity in multi-owner lines under the TP's OATT, thereby providing access to customers at non-pancaked rates.[61] Unless the incumbent's share of the project is incorporated in the incumbent's OATT,[62] participant-funded treatment amounts to application of "and"

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[59] *See* Order 888, at 31,770.

[60] *See Mountain States* P 64 ("concerns . . . are further exacerbated by the lack of an independent operator, such as an ISO or RTO.").

[61] *See* Order 888, at 31,691-92. Significantly, this requirement is not limited to lines within the incumbent's footprint. *See also Puget Sound Energy, Inc.*, 133 FERC ¶ 61,160 (2010).

[62] For example, the proposed SunZia transmission line is a joint project between merchant entities and incumbent transmission providers. While the merchant owners sought negotiated rate authority, the incumbent TPs will be making "their shares of the Project available under their existing OATTs." *SunZia Transmission, LLC*, 135 FERC ¶ 61,169, PP 11, 23 (2011).

pricing, contrary to the Commission's reaffirmation of "or" pricing in Order 890.[63] It also runs counter to general principles requiring roll-in of networked facilities.[64]

Such presumption or a complete ban is also justified by the incumbent TP's ability and incentive to use its control over transmission to gain an advantage for itself and its affiliates, while burdening competitors. For example, the Commission should reject incumbent TP projects that attempt to treat upgrades required to meet customer needs on a timely basis as projects subject to participant funding, while upgrades needed to serve the TP's own load or generation needs are included in the Order 890/1000 planning process or otherwise rolled in. Alternatively, particularly where the TP constitutes the overwhelming majority of its transmission load, participant funding may provide a convenient means for the TP to jump the queue for the benefit of its generation function. Either way, there is a significant opportunity for the incumbent to exploit its control over transmission.

In denying negotiated rate authority in *Mountain States*, the Commission recognized these improper incentives and the opportunity for abuse[65]:

> Petitioners' request for negotiated rate authority on the MSTI Project establishes an undesirable incentive vis-à-vis NorthWestern's obligation to expand its system at cost-based rates pursuant to its OATT. Despite this obligation, the affiliate relationship between NorthWestern and MSTI creates the incentive for NorthWestern to withhold capacity and/or to delay the timely expansion of its facilities in response to requests for service under its OATT as a means of favoring its affiliate project. . . . In addition to this practical concern as to NorthWestern's obligation to expand, conveying negotiated rate authority on MSTI could

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[63] Order 890, PP 883-84.

[64] *See* note 20, *supra*.

[65] *Mountain States* P 63 (footnotes omitted).

> also provide an incentive for the combined affiliates to impede the timely completion of service requests on NorthWestern while expediting requests for service on MSTI, if the combined affiliates are able to recoup a potentially higher return on their investment through negotiated rates on MSTI. Therefore we find that negotiated rate authority . . . could undermine or supplant NorthWestern's obligation to expand its system at cost-based rates, which is an important component of open access.

Participation in the Order 890 and Order 1000 planning process is necessary, but not sufficient, to protect against discriminatory application of participant funding by incumbents. In non-RTO areas, such processes do not significantly restrict an incumbent TP's ability to use its control over transmission to advantage itself or saddle customers with "and" pricing. 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.[66] 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."[67] 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 (PP 254, 256), and that a regional

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[66] Order 888, at 31,862.

[67] Standardization of Generator Interconnection Agreements and Procedures, Order No. 2003, 68 Fed. Reg. 49,846, 49,903-04 (Aug. 19, 2003), FERC Stats. & Regs. ¶ 31,146, P 696 (2003), *modified*, 68 Fed. Reg. 69,599 (Dec. 15, 2003), *clarified*, 69 Fed. Reg. 2,135 (Jan. 14, 2004), 106 FERC ¶ 61,009 (2004), *order on reh'g*, Order No. 2003-A, 69 Fed. Reg. 15,932 (Mar. 26, 2004), FERC Stats. & Regs. ¶ 31,160 (2004), *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).

transmission planning process can provide an opportunity for such undue discrimination (*see, e.g., id.* P 83).

Nevertheless, Order 890 left planning decisions to the jurisdictional TP, with TDUs permitted only the opportunity to provide input.[68] Order 1000 not only reaffirms that TDUs are entitled only to the opportunity for "consultation" and to offer "input,"[69] but enhances the capability of TPs to benefit their generation function, by giving them the right to make decisions as to which upgrades go into the regional plan for regional cost allocation. *Id.* P 68 & n.57; *see also id.* P 331. Such choices have enormous implications, because the economic feasibility of TDU power supply alternatives may well turn on those decisions.[70]

Allowing incumbent TPs discretion to participant fund selected upgrades, subjecting disfavored customers to "and" pricing, would enhance the ability of the TP to discriminate in its own favor. Consistent with the Commission's statutory obligation to eliminate undue discrimination, it should not invite additional opportunities for abuse. Thus, incumbent participant funded projects in non-RTO regions should be barred, or subjected to a nearly insurmountable burden to demonstrate that the treatment is just, reasonable, and not unduly discriminatory. (In no case should any rate incentives be allowed.)

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[68] Order 890, P 495 & n.289.

[69] Order 1000, PP 68 & n.57, 153, 203, 207-09, 211, 331, 705.

[70] TAPS has sought rehearing of Order 1000's failure to provide for balanced decision-making. *See* TAPS Order 1000 Rehearing Request at 7-14.

CONCLUSION

For the reasons discussed above, and in TAPS May 5, 2011 follow up comments in Docket No. AD11-11 and Terry Wolf's Written Statement for the March 15, 2011 Technical Conference in that docket, the Commission should not adopt measures that are likely to erode fundamental open access policies, result in the proliferation of undersized, single-purpose merchant transmission facilities with restricted access, and rate pancakes that will balkanize the grid and impair competitive wholesale markets. Instead, it should be guided by open access policies and regional planning requirements, and take steps to promote broader use of inclusive joint ownership approaches to transmission development, which can deliver better results consistent with the Commission's statutory obligations and competitive market goals.

Respectfully submitted,

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