

resource (“DNR”) is arbitrary and capricious, unjust and unreasonable, and unsupported by sufficient evidence.²

- B. If the Commission does not clarify or grant rehearing on the point that a “make whole” damage remedy does not constitute a “penalty” for purposes of determining whether undesignation of a network resource is required, the Commission should clarify that sales to third parties from Designated Network Resources should be permitted to include a provision allowing interruption by seller to serve Network Load or Native Load without liability, but allow such sales to be firm for all other purposes.
- C. The Commission should permit sellers to un-designate DNRs during day-of or real-time operations, irrespective of whether the firm scheduling deadline is the day before service commences. In the alternative, the Commission should not require sellers to un-designate resources during day-of or real-time operations.
- D. The Commission should clarify that Network Resources supporting a forward, third-party sale need not be un-designated until the pre-scheduling deadline. To the extent that the Commission requires that a DNR supporting a forward, third-party sale be un-designated at the time a contract is executed, and not at the time power is scheduled, the rule is unjust and unreasonable, arbitrary and capricious, and unsupported by sufficient evidence.
- E. The Commission should grant rehearing of the requirement that the control area from which power in a power purchase will originate be identified at the time the purchase is designated as a Network Resource. Requiring that the control area be identified at the time of designation is not necessary to properly calculate available transmission capacity (“ATC”), and is unjust and unreasonable, arbitrary and capricious, and unsupported by sufficient evidence. The rule also constitutes an improper exercise of jurisdiction over transmission in bundled retail sales.
- F. The Commission should clarify that Transmission Providers and Network Customers are permitted to purchase short-term firm point-to-point (“PTP”) service on their transmission systems in order to serve bundled Native or Network load. In the alternative, the Commission should grant rehearing on this issue. Prohibiting Transmission Providers and Network Customers from using short-term firm PTP service to serve native or network load is unjust and unreasonable, arbitrary and capricious, and unsupported by sufficient evidence.

² See 16 U.S.C. §§ 824d, 824e; *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *National Fuels Gas Supply Corp. v. FERC*, 468 F.3d 831 (D.C. Cir. 2006).

- G. The Commission should revise its rules to permit the Transmission Provider and Network Customers to use firm Network Capacity without having to distinguish between power from a DNR and power from a non-DNR. Requiring the Transmission Provider or Network Customer to distinguish between power from a DNR and power from a non-DNR to use firm network capacity is unjust and unreasonable, arbitrary and capricious, and unsupported by sufficient evidence.
- H. The Commission should not require the Transmission Provider to serve as a middleman between the assignor and assignee in a capacity reassignment transaction. This requirement is unjust and unreasonable, arbitrary and capricious, and unsupported by sufficient evidence.
- I. The Commission should further clarify that the transactional and reporting requirements associated with assignment of transmission capacity apply to the assignment of long-term transactions and not to the short term resale of transmission capacity scheduling rights.
- J. The Commission should revise its rules governing posting of information related to system impact and facilities studies, and hold that Transmission Providers are only required to post information on employees and employee-hours devoted to study processing if the Commission first determines that delays in processing study requests are not excused by extenuating circumstances. Requiring that Transmission Providers track and post this information before the Commission has made such a determination is unjust and unreasonable, arbitrary and capricious, and unsupported by sufficient evidence.
- K. The Commission should revise the rule imposing operational penalties for delays in processing system impact and facilities studies, and hold that operational penalties will only be imposed if the Commission first determines that the delays in processing study requests result from a lack of due diligence on the part of the Transmission Provider. Imposition of such penalties without a determination that delays were a result of a lack of due diligence is unjust and unreasonable, arbitrary and capricious, and unsupported by sufficient evidence.
- L. The Commission should not count transmission requests submitted as part of a utility's Integrated Resource Planning process in the determinations required under Order No. 890. Including such requests in the percentage calculations with respect to study completions is unjust and unreasonable, arbitrary and capricious, and unsupported by sufficient evidence.
- M. Conditional firm service should have a curtailment priority below that of secondary Network Service. Granting conditional firm service a curtailment priority equal to that of secondary network service is unjust

and unreasonable, arbitrary and capricious, and unsupported by sufficient evidence.

- N. The Commission should not require a Transmission Provider to offer planning re-dispatch service to customers that have a viable parallel path over which to take transmission service. Imposing such a requirement under such circumstances is unjust and unreasonable, arbitrary and capricious, and unsupported by sufficient evidence.
- O. The Commission should hold that operators of hydro-based systems are not required to offer planning re-dispatch from hydro units. Imposing such a requirement on hydro operators is unjust and unreasonable, arbitrary and capricious, and unsupported by sufficient evidence.
- P. The Commission should revise its pricing policy for planning re-dispatch service, and hold that a Transmission Provider offering planning re-dispatch service is able to recover both the embedded transmission costs associated with the service, and the incremental generating costs – including opportunity costs – incurred to provide re-dispatch. Requiring that a Transmission Provider recover either its embedded transmission costs or the incremental costs of providing planning re-dispatch service, but not both, is unjust and unreasonable, arbitrary and capricious, and unsupported by sufficient evidence.
- Q. The Commission should limit Transmission Provider liability for outages in all instances except where the Transmission Provider is grossly negligent or engages in intentional misconduct. The Commission’s refusal to include such a provision in the revised *pro forma* Open Access Transmission Tariff (“OATT”) is unjust and unreasonable, and arbitrary and capricious.
- R. The Commission should clarify that the planning requirements implemented by Order No. 890 do not supersede the requirements of a transmission provider’s Network Operating Agreements with its network customers.
- S. The Commission should clarify what constitutes a “request for service” for purposes of posting service requests made and rejected.

II. Requests for Clarification and/or Rehearing

- A. **The Commission should clarify that a “make whole” damage remedy does not constitute a “penalty” for purposes of determining whether un-designation of a network resource is required. In the alternative, the Commission should grant rehearing on this point.**

Order No. 890 requires that a DNR be undesignated in order to support a third-party sale unless “the third-party power purchase agreement allows the seller to interrupt power sales to the third party in order to serve the designated Network load” and the interruption is “permitted without penalty, to avoid imposing financial incentives that compete with the Network Resource’s obligation to serve its Network load.”³ The Commission does not specifically define what it means by “penalty” in this context.⁴ The Commission should clarify that a standard “make whole” remedy for interruption to serve native or network load is not a “penalty” in this context, and that a contract with a make whole remedy for interruption to serve native load would not require the seller to undesignate a DNR. In the alternative, the Commission should grant rehearing on this point.

In discussing the criteria for designation of Network Resources, Order No. 890 at paragraph 1453 notes differences between, and contrasts, “make whole” liquidated damage provisions and “penalties:”

In contrast to this “make whole” type of LD provision, other types of LD provisions establish penalties at a fixed-dollar amount, cap penalties at some level, or are otherwise not equivalent to a general “make whole” type provision.

The requirement that sales from a DNR be recallable for service of Native or Network load without any financial consequences (such as a standard economic hold harmless provision) would constitute an unnecessary regulatory intrusion into wholesale electricity markets. The demand for such a product is now and will likely remain low, at

³ Order No. 890 at P 1539.

⁴ Order No. 890 indicates that a contract with a make whole liquidated damages (“LD”) provision is sufficiently firm to be a DNR. Order No. 890 at P 1692; *see also* Order No. 890 at P 1455. By contrast, whether undesignation is required in the context of a rule depends on whether a “make whole” LD provision constitutes a “penalty.” Order No. 890 at 1539.

least in the Western Interconnection, largely because its non-firm nature triggers extra reserve requirements under the WECC's rules.⁵ Thus, a restriction on sales from a DNR to Non-Firm Sales poses a significant risk of reducing rather than increasing competition in wholesale markets.

In addition to posing a risk of distorting market outcomes, such a limitation is unnecessary to address the reliability concerns on which it is based. The Commission justifies the restriction on the ground that it will "avoid imposing financial incentives that compete with the Network Resource's obligation to serve its Network load."⁶ Although clearly the product of good intentions, this concern is misguided. The standard hold harmless provision does not improperly steer or influence the market. The provision merely keeps both parties in a financially neutral position with respect to an allowed interruption of power delay. Indeed, LSEs understand their obligations to provide reliable service to their Native or Network load and are subjected to vigorous reliability oversight at the state (and sometimes local) level. Furthermore, the Commission now has reliability enforcement authority under Section 215 of the FPA. As a result, there are other, more effective avenues under which reliability concerns can be addressed than the use of the DNR rules, particularly when the DNR rules that the Commission proposes to adopt threaten to distort market operations and reduce market liquidity.

For these reasons, The Washington Investor-Owned Utilities strongly urge the Commission to clarify that a "penalty" for the purposes of determining whether un-

⁵ WECC rules require that an LSE procuring non-firm power carry reserves equal to 100 percent of the non-firm purchase.

⁶ Order No. 890 at P 1539.

designation of a DNR is required does not include a “make whole” remedy payable to the buyer.⁷

- B. If the Commission does not clarify or grant rehearing on the point that a “make whole” damage remedy does not constitute a “penalty” for purposes of determining whether undesignation of a network resource is required, the Commission should clarify that sales to third parties from Designated Network Resources should be permitted to include a provision allowing interruption by seller to serve Network Load or Native Load without liability, but allow such sales to be firm for all other purposes.**

For the reasons set forth in Section II.A above, the Commission should permit third party sales from Designated Network Resources without undesignation to include make whole provisions for seller’s interruption of such sales. If the Commission does not permit make whole provisions for interruptions of third party sales from Designated Network Resources, the Commission should permit third party sales from designated Network Resources without undesignation to include a provision for interruption by the seller only to serve its Native Load or Network Load, provided such interruption is without liability, and should permit the sale to be “firm” for all other purposes.

Allowing interruption without liquidated damages or any other liability to serve Native Load or Network Load by definition does not provide any penalty for or incentive against such interruption. The Commission objectives of avoiding financial incentives that compete with the network resource’s obligation to serve its network load⁸ and ensuring “that the network resource is available to serve the network load on an

⁷ Indeed, requiring that a DNR be un-designated unless the sale is recallable for Native or Network load without financial consequence is arbitrary and capricious, *see Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), and unjust and unreasonable. It is also unsupported by the evidentiary record in Order No. 890, which is focused primarily on increasing transparency in ATC calculations and regional planning, and eliminating undue discrimination in various aspects of transmission pricing. *See National Fuels Gas Supply Corp. v. FERC*, 468 F.3d 831 (D.C. Cir. 2006).

⁸ Order No. 890 at P 1539.

uninterruptible basis”⁹ are certainly met by a provision allowing interruption without liability to serve Native Load or Network Load. Broader limitation of third party sales from designated Network Resources without undesignation is not warranted by the Commission objectives.

- C. The Commission should permit sellers to un-designate DNRs during day-of or real-time operations, irrespective of whether the firm scheduling deadline is the day before service commences. In the alternative, the Commission should not require sellers to un-designate resources during day-of or real-time operations**

The Commission also risks unintended and potentially substantial market disruptions with its requirement that “network customers not be permitted to make firm third-party sales from any designated Network Resource without (1) undesignating that resource for the period of the third-party sale pursuant to pro forma OATT section 30.3 and (2) providing notice of such undesignation before the firm scheduling deadline (10 a.m. the day before service commences).”¹⁰ Few LSEs may be willing to un-designate DNRs on a speculative basis by that deadline due to the need to balance load and resources. As a result, the primary product available in real-time will be non-firm contracts that are recallable for service of Native or Network load without a financial remedy. As explained above, there is little interest in the WECC for such a non-firm product given that reliance on non-firm resources increases reserve obligations and costs. Robust real-time markets in the region rely upon the availability of power that is more firm than the type contemplated by the Commission’s rules on un-designation. If these kinds of products are not available, the liquidity and competitiveness of the real-time market are likely to be diminished. At the same time, costs to LSEs are likely to increase

⁹ Order No. 890 at P 1692.

¹⁰ Order No. 890 at P 1557.

because they will want to avoid going into real-time operations with a supply portfolio that exceeds anticipated load so as to reduce exposure to expensive reserve requirements.

For these reasons, The Washington Investor-Owned Utilities strongly urge the Commission to reconsider any requirement that DNRs be un-designated by the day-ahead scheduling deadline. Because resources generally cannot be designated later than the day-ahead scheduling deadline, there is little point in requiring that DNRs be un-designated after that deadline for any sales made in the hourly market. As long as a seller satisfies its WECC reserve obligation, the Commission's reliability concerns would be addressed, and there would be no concerns raised by allowing real-time sales from DNRs that would qualify as firm under WECC rules. Such an approach would also avoid the potentially significant market disruptions likely to occur under the existing rule.

The potential for those market disruptions also highlights the legal infirmities in the Commission's current approach – that is, the lack of a rational basis, the lack of a sufficient record, and the fact that the rule is unjust and unreasonable. The Commission should grant rehearing, and hold that real-time sales are not subject to the rules governing designation and un-designation so long as the seller has met all of its reserve obligations under WECC rules.

In the alternative, the Commission should grant rehearing, and permit sellers to un-designate DNRs during day-of or real-time operations, at or slightly before the scheduling deadline for the product being sold. Order No. 890 at Paragraph 1557 states that the deadline for giving notice of an undesignation of a network resource is “before the firm scheduling deadline (10 a.m. the day before service commences).” This language is ambiguous or internally inconsistent if the transmission provider offers

hourly firm service with a scheduling deadline other than 10 a.m. of the day before service commences. The Commission should clarify that the transmission provider that offers hourly firm service may establish a time limit for the undesignation of Network Resources that is later than 10 a.m. of the preschedule day but that is, in the transmission provider's determination, a reasonable time before the deadline for submitting hourly firm transmission schedules.

D. The Commission should clarify that Network Resources supporting a forward, third-party sale need not be un-designated until the pre-scheduling deadline

The Commission should clarify that a seller need not un-designate a DNR used to support a forward, third-party sale until power provided under the sale is scheduled. There is no reason to require that a seller un-designate a DNR in a forward sale (*e.g.*, a contract executed in January for June delivery) at the time the contract is executed. In the alternative, FERC should grant rehearing on this issue. Forcing sellers to un-designate a resource at the time a contract is executed will require sellers to prematurely determine the resources from which they will make such sales, instead of allowing them to make that determination based on circumstances present at the time of delivery. Sellers require adequate flexibility to satisfy contractual obligations based on conditions presented at the time delivery is made. Mandating that this decision be made well in advance of delivery would diminish the ability of many sellers – particularly marketers – to participate effectively in the forward power markets, and thus would reduce liquidity and competition in those markets. In any event, there has been no basis presented for mandating that this decision be made well in advance of delivery. If the Commission's

goal is to ensure that DNRs are not counted twice, this goal can be easily achieved by requiring that sellers un-designate resources by the power scheduling deadline.

E. The Commission should grant rehearing of the requirement that the control area from which power in a power purchase will originate be identified at the time the purchase is designated as a Network Resource

Order No. 890 revises Section 29.2(v) of the OATT to require that, at the time an off-system purchase is designated as a Network Resource, the entity designating the resource provide certain information to the Transmission Provider, including an “identification of the control area(s) from which the power will originate.”¹¹ The requirement to identify the originating control area at the time of designation appears well-intentioned, but – in a region, like the Western Interconnection, with a number of liquid trading hubs that border multiple control areas – the rule is likely to cause unnecessary market disruptions without any corresponding benefits. Accordingly, the Commission should grant rehearing, and eliminate this requirement.

The market disruptions likely to result from the rule are a function of the use of liquid trading hubs as points of delivery for many transactions in the Western Interconnection. Indeed, in many forward purchases, LSEs take delivery of the power at one of these hubs – for example, the Mid-Columbia hub or Palo Verde – and undertake responsibility for moving the power from the hub to their load. Many such purchases are from marketers that aggregate resources originating in multiple control areas. For these purchases, it is impossible for the purchaser (and often the seller, for that matter) to identify with any precision the control area or areas from which the power will originate

¹¹ Order No. 890 at P 1476.

at the time the transaction is executed. Indeed, the identification of the originating control area or control areas may not be possible, if at all, until the scheduling deadline.

The requirement to identify the control area or areas from which off-system power is originating at the time of a resource designation would effectively prohibit LSEs in the Western Interconnection from using these off-system purchases – from marketers delivered at liquid trading hubs interconnected with multiple control areas – as designated resources. LSEs would be required instead to procure forward power from specific resources at identifiable locations around the West, in order to ensure that they will be able to designate the resource, and thus reserve the associated transmission capacity.

There is no need for the control area identification rule. The Commission can meet its objectives even in its absence. The control area identification requirement appears to be based upon the incorrect premise that it needed to identify the control area from which power originated in order to ensure that the Transmission Provider has sufficient information to calculate ATC accurately.¹² However, the identification of the originating control area is not necessary to accomplish this goal, particularly in a region like the West that has numerous liquid trading hubs that are directly interconnected to multiple control areas. It is the point of delivery, not the originating control area, which is the crucial piece of information for ATC calculation purposes. As long as the Transmission Provider is able to identify the point of delivery for the transaction, it will have all the information it needs to accurately calculate ATC – that is, it will know the amount of power that is purchased, the point at which it will be integrated into the Transmission Provider’s system and the amount it needs to decrement its ATC.

¹² See Order No. 890 at P 1475 (“Network customers should not be permitted to designate off-system resources which are so vaguely defined that the effects on ATC cannot be determined.”).

Accordingly, it is unnecessary to identify the control area for the Transmission Provider to accurately calculate ATC.¹³

For these reasons, The Washington Investor-Owned Utilities urge the Commission to revise Section 29.2(v), and eliminate the requirement to identify the originating control area at the time a Network Resource is designated.¹⁴ For the same reasons, the existing requirement to identify the originating control area lacks a rational basis, is unsupported by sufficient evidence, and is unjust and unreasonable. The requirement also constitutes a direct restriction on the ability of a utility to serve its bundled retail load, and thus violates the limitation on the Commission's jurisdiction over transmission in bundled retail transactions.¹⁵ The Commission should grant rehearing, and eliminate the requirement to identify the control area from which a power purchase will originate at the time the purchase is designated as a Network Resource.

F. The Commission should clarify that Transmission Providers and Network customers are permitted to purchase short-term firm point-to-point service on their transmission systems in order to serve bundled Native or Network load. In the alternative, the Commission should grant rehearing on this issue.

Section 1.23 of the *pro forma* OATT (formerly Section 1.22) states, in relevant part:

A Network Customer may elect to designate less than its total load as Network Load but may not designate only part of the load at a discrete Point of Delivery. Where a Eligible Customer has elected not to designate a particular load at discrete points of delivery as Network Load, the

¹³ For example, if a Network customer purchases power at the Mid-Columbia hub for delivery to a neighboring load, the Transmission Provider has all the information that it needs to calculate ATC – it simply determines the effect of the transaction on the transmission path from the Mid-Columbia hub to the load.

¹⁴ It should also be noted that any reliability concerns that the Commission might have about a lack of control area information at the time of designation is alleviated by the fact that the tagging information provided with a schedule for a designated resource contains all information needed to ensure reliability.

¹⁵ See *Northern States Power Co. v. FERC*, 176 F.3d 1090 (8th Cir. 1999); see also Order No. 890 at PP 92-94.

Eligible Customer is responsible for making separate arrangements under Part II of the Tariff for any Point-to-Point Transmission Service that may be necessary for such non-designated load.

This provision was first adopted by the Commission in Order No. 888, and FERC has consistently interpreted it to mean that “Order Nos. 888 and 888-A do not permit a Network customer to take a combination of both Network and PTP transmission service to serve the same discrete load.”¹⁶ This restriction arose out of (1) the principle that Network service should be sufficient to serve a customer’s full Network load; and (2) concerns regarding a Transmission Customer’s underpayment of load ratio share if it is permitted to purchase long-term PTP service to serve a portion of its load. The cases addressing this point developed primarily in the context of transmission-dependent wholesale loads (primarily small municipal utilities) with behind-the-meter generation or pre-existing PTP arrangements that sought to avoid having to pay Network costs associated with load being served by that behind-the-meter generation or pre-existing transmission contract.¹⁷

Order No. 890 addresses the issue from this perspective, and holds that FERC “is not persuaded to require Transmission Providers to allow netting of behind the meter generation against transmission service charges to the extent customers do not rely on the transmission system to meet their energy needs.” The Commission states further that “Transmission Customers ultimately must evaluate the financial advantages and risks and

¹⁶ *Duke Power Co.*, 81 FERC ¶ 61,010 at 61,047 (1997); see also *MidAmerican Energy Co.*, 83 FERC ¶ 61,084 at 61,414-15 (1998).

¹⁷ See *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,259-61 (1997)

choose to use either Network integration or firm PTP transmission service to serve load.”¹⁸

Because this rule developed primarily in the context of transmission-dependent customers seeking to avoid payments for a share of the Transmission Provider’s integrated transmission system, its applicability to the Transmission Provider itself has not been entirely clear. Furthermore, Order No. 890 adds language to Section 30.4 of the OATT that appears to permit a Transmission Provider or Network customer to take PTP service to deliver power from remote Network Resources to loads in certain instances. The relevant part of Section 30.4 reads:

For all Network Resources not physically connected with the Transmission Provider’s Transmission System, the Network Customer may not schedule delivery of energy in excess of the Network Resource’s capacity, as specified in the Network Customer’s Application pursuant to Section 29, unless the Network Customer supports such delivery within the Transmission Provider’s Transmission System by either obtaining Point-to-Point Transmission Service or utilizing secondary service pursuant to Section 28.4.

The Commission should clarify the ambiguity over use of PTP service to serve Native or Network load by holding that a Transmission Provider or Network customer may use short-term firm PTP service to serve Native or Network load. A Network customer, including the Transmission Provider itself, should rarely have to use PTP service for load-serving purposes. Nonetheless, there would appear to be at least two circumstances, underscored by developments since Order No. 888-A, in which the use of PTP to serve Native or Network load is needed and appropriate.¹⁹

¹⁸ Order No. 890 at P 1619.

¹⁹ It is important to emphasize that the Transmission Provider and/or the Network Customer will be paying a full load ratio share for their network service and nothing related to this clarification regarding the use PTP transmission would reduce that obligation.

- (1) The need to import power when it is unclear whether or not the power will be used to serve Native or Network load; and
- (2) The need to import power reliably from non-DNRs – particularly those backing up wind, other intermittent resources, or other energy constrained resources (such as hydro) – in order to serve Native or Network load.

The first of these circumstances arises where the Transmission Provider or Network customer is uncertain whether an import of a wholesale purchase will be used to serve Native or Network load. Even if a Transmission Provider or Network customer intends that such a purchase serve Native load, it may be difficult for the Transmission Provider to accurately determine whether the cost of the purchase is higher or lower than the marginal cost of serving its Native load. This has become a particular concern for Transmission Providers and Network customers in the aftermath of the Commission's decision in *MidAmerican Energy Company*, 112 FERC ¶ 61,346 (2005), where the Commission approved an audit report finding that MidAmerican had improperly used Network service to support off-system sales.²⁰ If a Transmission Provider or Network customer is uncertain about whether an off-system purchase might be deemed to support an off-system sale, and not Native or Network load, it should not be forced to choose between violating the Commission's prohibitions on the use of Network service or the prohibition against using PTP service for Native load. Under such circumstances, it is legitimate for the Transmission Provider or Network customer to use PTP service to move the power into its system, even if the power is ultimately determined to have served Native or Network load.

²⁰ More recently, the Commission approved several civil penalty orders based on the same types of findings. See *In re SCANA Corporation*, Docket No. IN07-3-000, issued January 18, 2007; *In re PacifiCorp*, Docket No. IN07-5-000, issued January 18, 2007.

The second circumstance is one in which the Transmission Provider or Network customer is forced to rely on secondary Network service in order to move power from a non-DNR to serve its Native or Network load. This can happen, for example, if an intermittent resource designated as a Network Resource is unavailable during a particular hour, and the Transmission Provider or Network customer must rely on a backup resource. Short-term firm PTP service has a higher priority than secondary Network Service. Accordingly, it is possible that another customer could obtain the capacity instead by purchasing firm PTP service. Thus, the Transmission Provider or Network customer may not be comfortable with relying solely on secondary Network service to obtain the necessary transmission capacity.

This is a particular problem when the DNR is a wind, another intermittent resource, or an energy-constrained resource such as hydro. During periods when those resources are unavailable, the Transmission Provider or Network customer will have to replace the generating capacity associated with the intermittent resource with capacity from a dispatchable unit. The Transmission Provider or Network customer may be particularly uncomfortable relying solely on secondary Network service to move power from the backup resource, especially if the amount of backup capacity is large or the capacity is needed during peak hours. In these circumstances, there is no reason to prohibit the Transmission Provider or Network customer from competing on an equal footing for that capacity with all other eligible customers. The Transmission Provider or Network customer should be permitted to secure the capacity through a purchase of short-term PTP service, just like any other eligible customer. Indeed, issuing this

clarification not only makes economic sense, but also will allow LSEs to rely more heavily on renewable resources to serve their loads.

Accordingly, the Commission should clarify that the Transmission Provider or a Network customer may use short-term firm PTP to serve Native or Network load. In the alternative, the Commission should grant rehearing of the prohibition on using PTP service to serve Native or Network load, and permit the purchase of short-term firm PTP service for Native or Network load. The restriction on use of PTP service in the contexts outlined above unfairly prohibits the Transmission Provider or Network customers from competing for scarce transmission capacity in order to serve Native or Network load. Prohibiting Transmission Providers and Network Customers from using firm PTP to serve Native or Network Load places Transmission Providers and Network Customers at a significant disadvantage vis-à-vis PTP customers, and thus constitutes a distinct devaluing of Network service in comparison with PTP service.²¹

G. The Commission should revise its rules to permit Network Customers to use firm Network Capacity without having to distinguish between power (i) from a DNR and (ii) power from a non-DNR that does not use a transmission path different than the DNR would use

Order No. 890 effects a significant change in the manner in which Network service reservations may be used. Prior to the issuance of Order No. 890, the Commission had not addressed whether the firm transmission path reserved for a DNR was available only for power from that DNR, or whether that firm transmission path was available for any power – including economy purchases – procured by the Network

²¹ The Commission’s new rule with respect to the use of capacity reserved for a DNR by non-DNR power – addressed in Section II.F. of this rehearing request – also significantly lessens the value of firm Network service in relation to firm PTP service. When combined with a prohibition on the use of short-term firm PTP service to serve Native or Network load, that prohibition makes Network service clearly less valuable than firm PTP service.

customer, as long as the use did not exceed the amount of the firm Network reservation. Order No. 890, however, strongly suggests that – contrary to the established rules in place since the adoption of Order No. 888 - a Network customer may not use power from a non-DNR over Network capacity on the same path reserved for power from a DNR.

The Commission adds new language to Section 30.4 of the *pro forma* OATT stating:

For all Network Resources not physically connected with the Transmission Provider’s Transmission System, the Network Customer may not schedule delivery of energy in excess of the Network Resource’s capacity, as specified in the Network Customer’s Application pursuant to Section 29, unless the Network Customer supports such delivery within the Transmission Provider’s Transmission System by either obtaining Point-to-Point Transmission Service or utilizing secondary service pursuant to Section 28.4.

The Commission emphasizes that the “intent of the language added to section 30.4 of the *pro forma* OATT was to clarify that Network customers are subject to unreserved use penalties when they schedule delivery of off-system non-designated purchases using transmission capacity reserved for designated Network Resources.”²² The Commission subsequently makes clear that it will impose penalties for this type of unreserved use.²³ It is this language in Order No. 890 that appears to reverse the Commission’s long-standing policy.

The Washington Investor-Owned Utilities submit that such a new prohibition on using a reserved firm path for Network capacity to deliver power from a non-DNR

²² Order No. 890 at P 839.

²³ See Order No. 890 at P 859.

improperly and unnecessarily devalues firm Network service as compared with firm PTP service.²⁴

Whether the megawatts using the transmission capacity reserved for the designated Network Resource are coming from that resource or from a replacement power source is largely irrelevant and does not adversely affect other transmission system users, so long as the replacement power does not use a transmission path that would not have been used by power from the designated Network Resource and the quantity does not exceed the designated output of the designated Network Resource.²⁵ Thus, whether the megawatts using the reserved transmission capacity are coming from a DNR or a non-DNR is largely irrelevant, and does not affect the use of the grid – the Transmission Provider’s or Network customer’s use of legitimately-reserved Network capacity to move non-DNR megawatts causes no harm to any other customer as long as the quantity does not exceed the amount of the reservation. The new interpretation suggested by paragraph 859 of Order No. 890 deprives Network Customers of one of the essential attributes of Network Service and gives rise to compliance and penalty hazards that serve no useful purpose.

By imposing this prohibition on the Transmission Provider and Network customers, and thus requiring them to properly account for DNR and non-DNR

²⁴ This is particularly true in the event that the Transmission Provider or Network customers are unable to use short-term firm PTP service to serve Native or Network load (an issue addressed in Section II.E. of this rehearing request), and if conditional firm PTP service is given a curtailment priority equal to secondary Network service. Indeed, if the Transmission Provider or Network customer is prohibited from using short-term firm PTP service to serve Native or Network load, and must account for whether the megawatts flowing over properly-reserved Network capacity are coming from either a DNR or a non-DNR, then the Transmission Provider or Network customer may well be better off using long-term firm PTP service to meet its load obligations. The same is true if conditional firm PTP service is given an equal curtailment priority with secondary Network service. The Transmission Provider or Network customer would likely be better off with long-term firm PTP service under that circumstance.

²⁵ See OATT § 14.7; WEQ-001-4.16.

megawatts flowing over the reserved path, the Commission is effectively degrading the value of Network service in a manner that renders it less valuable than PTP service. Under the Commission's traditional formulations of Network and PTP service, the concern has been to ensure that PTP service is as good as Network service. Requiring that the Transmission Provider and Network customers properly account for primary and secondary uses of the same reserved firm path for Network capacity in fact renders Network service less valuable than PTP service. Indeed, the Commission imposes no restrictions on the resource used to provide the megawatts flowing over a capacity reserved in a long-term firm PTP reservation.²⁶ By contrast, the rule adopted by the Commission in Order No. 890 requires that the megawatts flowing over reserved Network transmission capacity be sourced only from the DNR. This requirement furthers no legitimate goal of the Commission, and unnecessarily degrades the quality of Network service given the threat of both operational and civil penalties if the Transmission Provider or Network customers do not perform the accounting correctly.

Furthermore, the operational penalties for such "deficiencies" – which, under Order No. 890, are distributed to all non-offending Transmission Customers – simply provide an unwarranted windfall for other Transmission Customers, who are not harmed. In addition, the Commission has pointed to no record evidence or other need for the prohibition on using primary Network service for non-DNR power.

Accordingly, the prohibition on using legitimately-reserved Network capacity to deliver economy energy purchases or other non-DNR power lacks a rational basis or a

²⁶ Furthermore, the PTP customer is even permitted to change receipt and delivery points on a non-firm basis, as long as there is available transmission capacity to support the change. This is what secondary Network service is supposed to be; secondary Network service should not cover the use of firm Network reservations by megawatts from a non-DNR.

sufficient evidentiary record. The Commission should grant rehearing, and eliminate the requirement.

H. The Commission should not require the Transmission Provider to serve as a middleman between the assignor and assignee in a capacity reassignment transaction

Order No. 890 requires “that all sales or assignments of capacity be conducted through or otherwise posted on the Transmission Provider’s OASIS on or before the date the reassigned service commences,”²⁷ and that “reassignments must . . . be accomplished by the assignee executing a service agreement with the Transmission Provider that will govern the provision of reassigned service.”²⁸ The effect of this requirement will be that the “assignee will pay the Transmission Provider for service at the negotiated rate and the Transmission Provider will bill or credit the assignor with any the difference between the negotiated rate and the assignor’s original rate.”²⁹ In addition to requiring that the Transmission Provider serve as a middleman between the assignor and assignee, the rule also requires that the Transmission Provider to report to the Commission all capacity reassignments in its Electric Quarterly Reports.

The requirement that the Transmission Provider serve as a middleman between the assignor and assignee poses a significant and unjustified burden on the Transmission Provider, and unnecessarily complicates the settlement process in reassignment transactions. The Transmission Provider will now be required to collect from the assignee the rate negotiated by the assignee and the assignor, and then to either collect from or pay to the assignor the difference between the negotiated rate and the Transmission Provider’s rate. Thus, the Transmission Provider must assume the

²⁷ Order No. 890 at P 815.

²⁸ *Id.* at P 816.

²⁹ Order No. 890 at n.496.

administrative responsibilities, as well as the extra costs, associated with billing and settlement that should rest solely with the assignor and assignee. Not only does this give rise to the possibility that the Transmission Provider will have to subsidize the administrative costs of its Transmission Customers, it also requires the Transmission Provider to devote to this requirement limited resources that would be better used in other areas more central to the Transmission Provider's core responsibilities. It is appropriate for the Transmission Provider to enter into a transmission service agreement with an assignee if the original customer is transferring all rights and obligations, financial and other, to the assignee associated with a long-term transaction. To the extent the terms of the assignment differ in any way from the original long-term transaction, such as a transmission rate different than specified in the original service agreement, any such terms and conditions should only be dealt with pursuant to an arrangement between the assignor and assignee. The Transmission Customer should have no role as a middleman in any such instance.

Furthermore, to the extent that there is a dispute between the assignor and assignee over the rate to be paid, the resolution of such a dispute becomes much more complicated given the involvement of the Transmission Provider in its role as middleman. To the extent that the Transmission Provider is unable to recover the rate owed to it while such a dispute is pending, the Transmission Provider is adversely affected – unnecessarily – by its status as a middleman between the assignor and assignee.

Finally, the requirement that the Transmission Provider charge the assignee the rate negotiated by the assignor and assignee raises filed rate doctrine issues. The

Transmission Provider's rate is a cost-based rate, while Order No. 890 lifts the cost cap that previously constrained rates in capacity reassignment transactions. To the extent that the capacity reassignment rate is different from the Transmission Provider's rate – and particularly if it is higher than the Transmission Provider's rate – the collection of the negotiated rate by the Transmission Provider would appear to constitute a violation of the filed rate doctrine.

For these reasons, the requirement that the Transmission Provider serve as a middleman for the rate payments between the assignor and the assignee in a capacity reassignment transaction is arbitrary and capricious. The Commission should grant rehearing, and eliminate the requirement that the Transmission Provider collect the negotiated rate from the assignee, and settle with the assignor the difference between the negotiated rate and the Transmission Provider's rate. Transmission Providers should not be required to serve as a middleman between an assignor and assignee, but may appropriately take on a bi-lateral contractual relationship with an assignee for a long-term transaction where all rates, terms and conditions of the agreement between the Transmission Provider and assignee are the same as the original rates, terms and conditions of the agreement between the Transmission Provider and assignor.

I. The Commission should further clarify that the transactional and reporting requirements associated with assignment of transmission capacity apply to the assignment of long-term transactions and not to the short term resale of transmission capacity scheduling rights

There are essentially two types of capacity reassignment transactions – short-term resales of capacity scheduling rights by the Transmission Customer to a third party, and long-term assignment transfers of capacity to a third party. In its development of business standards for Transmission Providers, NAESB is distinguishing between these

two types of assignments. It is both unnecessary and unduly burdensome to require that Transmission Providers serve as a middleman in short-term resales of capacity rights. The rule would insert the transmission provider into the plethora of financial arrangements between assignors and the assignees. The Transmission Provider should not have to in effect monitor the parties' business arrangement and adjust its own operations to compensate. The Commission should modify its requirements and allow Transmission Providers to continue to bill the assignor for the assigned capacity scheduling rights. The assignee then would pay the assignor for the assigned capacity scheduling rights at the ir agreed-upon rate, just as in any business assignment..

J. The Commission should revise its rules governing posting of information related to system impact and facilities studies

Order No. 890 requires “Transmission Providers to submit a notification filing with the Commission in the event the Transmission Provider processes more than 20 percent of non-affiliates’ studies outside of the 60-day due diligence deadlines in the *pro forma* OATT for two consecutive quarters.”³⁰ Furthermore, beginning the “quarter following a notification filing, the Transmission Provider will be required to post: (1) the average, across completed system impact studies, of the employee-hours expended per completed system impact study; (2) the average, across completed facilities studies, of employee-hours expended per completed facilities study; (3) the number of employees devoted to processing system impact studies; and (4) the number of employees devoted to processing facilities studies.”³¹

The Transmission Provider is permitted to submit with its notification filing an explanation demonstrating that the delays in processing studies were due to “extenuating

³⁰ Order No. 890 at P 1319.

³¹ *Id.* at P 1320.

circumstances.”³² Nonetheless, unless and until the Commission determines that such extenuating circumstances were present, the Transmission Provider is required to calculate and post this additional information regarding employees and employee-hours devoted to study processing.

The Commission should grant rehearing of this requirement, and hold that Transmission Providers are only required to post information on employees and employee-hours devoted to study processing if the Commission first determines that delays in processing study requests are not excused by extenuating circumstances. The requirement to track the information on employees and employee-hours is a significant additional burden on Transmission Providers that already are responsible for tracking and posting other information relating to ATC and transmission requests, and ensuring that such requests are processed in compliance with the Commission’s requirements. Furthermore, the automatic triggering of this tracking and posting requirement does not account for two additional factors – the fact that the 60-day window for completing studies “is a target and not a deadline,”³³ and the fact that customers will sometimes ask that additional time be taken in the processing of studies. Indeed, there are numerous reasons why a Transmission Provider, acting in good faith and with due diligence, might process transmission requests and studies in a timeframe that is longer than the 60-day aspirational window set forth in the OATT. The Commission should not impose the requirement to track and post employees and employee-hours devoted to study processing unless it first determines that the delays in processing study requests are a result of a lack of good faith and due diligence on the part of the Transmission Provider.

³² *Id.*

³³ Order No. 890 at P 1315.

K. The Commission should revise the rule imposing operational penalties for delays in processing system impact and facilities studies

Order No. 890 further specifies that Transmission Providers that have submitted an informational filing after completing 20 percent of non-affiliates' studies outside of the 60-day due diligence deadlines in the *pro forma* OATT will also be subject to operational penalties "if the Transmission Provider continues to be out of compliance with the deadlines prescribed in the pro forma OATT for each of the two quarters following its notification filing and the Commission determines that no extenuating circumstances exist to excuse the Transmission Provider's non-compliance."³⁴ The "Transmission Provider will be deemed to be out of compliance if it completes 10 percent or more of non-affiliates' system impact studies and facilities studies outside of the deadlines prescribed in the *pro forma* OATT."³⁵

The Commission should grant rehearing, and revise this rule to ensure that operational penalties will only be imposed if the Commission first determines that the delays in processing study requests result from a lack of due diligence on the part of the Transmission Provider.

As noted above, the 60-day guideline is simply that – a timeframe in which the Transmission Provider should try to finish a system impact or facilities study – and not a firm deadline. There are numerous legitimate reasons why a Transmission Provider might not process a study within the 60-day guideline set forth in the OATT, including requests by the Transmission Customer to delay the study process. There is no basis for an automatic imposition of an operational penalty in the absence of a Commission

³⁴ *Id.* at P 1340.

³⁵ *Id.*

determination that delays in the studies performed are a result of a lack of good faith and due diligence on the part of the Transmission Provider.

Furthermore, the Commission should also grant an express exception for circumstances in which the Transmission Provider and Transmission Customer expressly agree to a study schedule providing for a study period longer than the 60-day period specified in the OATT. Indeed, there are numerous reasons why a customer might want to delay the performance of a study, and the Transmission Provider should not be penalized for accommodating such requests.³⁶ Such arrangements should place those studies outside of the calculations used to determine whether an operational penalty is even warranted.

L. The Commission should not count transmission requests submitted as part of a utility's Integrated Resource Planning process in the determinations required under Order No. 890

In calculating whether a Transmission Provider has performed a particular percentage of studies outside of the 60-day aspirational window outlined in the OATT, the Commission should not count studies associated with transmission requests made as part of a Transmission Provider's IRP process. The transmission requests associated with such studies are made, often years in advance, for three reasons: (1) to ensure that transmission for service of long-term load is available and can be discussed in the public domain; (2) to allow operational personnel to confer with one another on IRP issues in a public forum while adhering to the Commission's standards of conduct; and (3) to ensure that the utility will be able to reserve transmission capacity necessary to serve the utility's Native load reliably and in a cost-effective manner. There is no need for the studies

³⁶ For example, a customer might want to delay studies if it is waiting for operational permits, or if it is bidding on an RFP that is to take place in the future.

associated with such requests to be performed within the 60-day window specified in the OATT. To the extent that plans are adjusted over the course of the IRP process, those changes may alter or possibly eliminate specific needs to study availability, system impacts, and needed upgrades. For these reasons, the Commission should grant clarification or, in the alternative, rehearing, and ensure that studies associated with transmission requests made as part of a Transmission Provider's IRP are not counted in the calculation of percentages of studies performed outside of the 60-day window specified in the OATT.

M. Conditional firm service should, during the hours or system conditions in which it is conditions, be subject to curtailment before secondary network service

The Commission should grant rehearing of the adoption in Order No. 890 of “a secondary Network curtailment priority to apply for the hours or specific system conditions when conditional firm service is conditional.”³⁷ During those hours or system conditions, conditional firm service is conditional precisely because providing firm service would “(1) degrade or impair the reliability of service to Native load customers, Network customers and other Transmission Customers taking firm point-to-point service or (2) interfere with the Transmission Provider's ability to meet prior firm contractual commitments to others.”³⁸ If a conditional firm customer is curtailed during contingency hours on a priority basis equal to the curtailments of Native or Network load using secondary Network service, the result would be a degradation of reliability of service to Native load or Network customers – whose capacity reservations caused the conditional firm customer to have to take conditional firm service in the first place. Given the

³⁷ Order No. 890 at P 1074.

³⁸ *Id.* at P 946.

Commission's concern that conditional firm service not degrade the reliability of service to existing Network customers, this result contradicts the Commission's stated goals, and thus lacks a rational basis.

Furthermore, Native load and Network customers should have a higher curtailment priority than conditional firm customers during conditional hours because the Native load and Network customers have a responsibility to pay for all of the embedded costs of the grid, minus those paid for by point-to-point customers. In the Pacific Northwest, where the large transmission system operated by the Bonneville Power Administration ("BPA") provides numerous transmission paths parallel to those operated by jurisdictional utilities, point-to-point service is often discounted in order to allow jurisdictional providers to compete with the service offered by BPA. Thus, point-to-point customers – which will include any conditional firm customers – do not, and likely will not on a prospective basis, pay for the share of the embedded costs contemplated by the full point-to-point rates set forth in the OATTs of many jurisdictional Transmission Providers in the Pacific Northwest. These cost shortfalls are made up by Native load and Network customers. Under these circumstances, it is particularly anomalous to require Native load and Network customers to share curtailment priority with conditional firm customers during contingency hours. The Commission should grant rehearing, and provide that Native load and Network customers using secondary service have a higher curtailment priority than conditional firm point-to-point customers during hours when conditional firm service is conditional.

N. The Commission should not require a Transmission Provider to offer planning re-dispatch service to customers that have a viable parallel path over which to take transmission service

Order No. 890 adopts the requirement that Transmission Providers offer long-term PTP customers “planning re-dispatch service” – that is, re-dispatch used “to create additional transmission capacity to accommodate a request for firm transmission service.”³⁹ Planning re-dispatch service must be offered to customers unless it would “(1) degrade or impair the reliability of service to Native Load customers, Network Customers and other Transmission Customers taking firm point-to-point service or (2) interfere with the Transmission Provider’s ability to meet prior firm contractual commitments to others.”⁴⁰

The requirement to offer planning re-dispatch service could impose unnecessary burdens on jurisdictional Transmission Providers in the Pacific Northwest, where BPA operates a large transmission system that overlays the transmission systems operated by the region’s jurisdictional utilities and directly competes with those utilities for Transmission Customers. Indeed, BPA’s transmission lines constitute a viable, and in many cases preferable, alternative to use of the lines owned by jurisdictional utilities because they allow a Transmission Customer to reach any part of the Pacific Northwest on a single transmission system, and at a single transmission rate.

In circumstances where a Transmission Customer has a viable alternative parallel transmission path over which there is sufficient ATC to move its power, it would be unreasonable to require that a jurisdictional utility offer planning re-dispatch service. The mandate to offer planning re-dispatch service would simply increase overall costs of

³⁹ Order No. 890 at P 901.

⁴⁰ Order No. 890 at P 946.

providing transmission service without any purpose. The Transmission Customer would be able to move its power much more easily by simply purchasing service over the alternative parallel path.

Accordingly, the Commission should clarify that, in instances where a viable, parallel path is available to a Transmission Customer to move its power, a Transmission Provider is not required to offer planning re-dispatch service.

O. The Commission should hold that operators of hydro-based systems are not required to offer planning re-dispatch from hydro units

Order No. 890 recognizes the “difficulty of predicting, over prolonged periods, whether hydroelectric resources will be available to provide redispatch.”⁴¹ It also acknowledges that “Transmission Providers operating hydro-based systems must predict both system load growth and water availability in order to determine whether resources will be available in the next few years to provide redispatch,” and recognizes “that certain circumstances may in fact limit long-term redispatch on these systems due to increased prediction risks.”⁴² Nonetheless, the rule requires “that all Transmission Providers, including those operating hydro-based systems, are required to make a determination, regarding whether planning redispatch service can be provided consistent with system reliability based on the specific facts of a particular request for service.”⁴³

The Commission should clarify that utilities operating hydro-based systems are not required to offer planning re-dispatch service from hydropower generating units. In the alternative, the Commission should grant rehearing on this issue. The Commission is correct that predicting water availability in conjunction with system load growth poses a

⁴¹ Order No. 890 at P 948.

⁴² *Id.*

⁴³ *Id.*

significant obstacle to the provision of planning re-dispatch service. However, in Order No. 890 the Commission fails to recognize that there are additional difficulties for hydro-based systems in providing such re-dispatch service from their hydro units, including the recreational, flood control, fish mitigation and other non-power related requirements associated with hydro resource operations. Additionally, in particular, the pricing of re-dispatch service is particularly difficult because it is based largely on opportunity costs across a multitude of time periods. The Commission has never clearly identified how opportunity cost pricing should be conducted, particularly for hydro-based systems. Even if a utility were permitted to use opportunity cost pricing in the provision of planning re-dispatch service from a hydro unit, the use of such pricing would pose the risk of pricing disputes with PTP customers. To the extent that a utility providing planning re-dispatch service from a hydro unit is not permitted to recover its legitimate opportunity costs – which are not just related to the time period wherein redispatch occurs, but also to the multitude of potential future time periods where the resource operator would have generated or not generated - it will not be able to recover its legitimate costs of providing the service. A Transmission Provider, on behalf of its bundled retail native load customers, must be able to recover its legitimate costs from the recipient of the planning redispatch service.

Requiring that a utility even study planning re-dispatch from hydro units gives rise to the possibility of disputes brought by Transmission Customers over whether the service can legitimately be provided without compromising either reliability or firmness of service to existing customers. In light of the practical and pricing difficulties associated with the service, hydro-based utilities should not be put in such a position.

The Commission should hold that utilities are not required to offer planning re-dispatch service to firm PTP customers from hydropower units.

P. The Commission should revise its pricing policy for planning re-dispatch service

The Commission should revise its pricing policy for planning re-dispatch service. Order No. 890 provides planning re-dispatch customers the “option of paying (1) the higher of (a) actual incremental costs of redispatch or (b) the applicable embedded cost transmission rate on file with the Commission or (2) a fixed rate for redispatch to be negotiated by the Transmission Provider and customer and subject to a cap representing the total fixed and variable costs of the resources expected to provide the service.”⁴⁴ The Commission does “not adopt proposals suggested by several Transmission Providers to allow for recovery of the embedded cost transmission rate and the full costs of redispatch.”⁴⁵ This ruling is based on the assertion that “planning redispatch is a means of creating additional transmission capacity, not a generation service”⁴⁶

The assertion that planning re-dispatch is solely a transmission service, and does not include a generation component, is incorrect. By its very nature, re-dispatch service, of any type, involves the use of generating capacity to move power across a constrained path. The service involves both generating service and transmission service. Requiring that a Transmission Provider recover only embedded transmission costs or incremental generating costs, but not both, forces the Transmission Provider to under-recover its costs, and gives the Transmission Customer either free use of the transmission system, or free use of the generating resources used to provide the re-dispatch service. For hydro-

⁴⁴ *Id.* at P 1024.

⁴⁵ *Id.* at P 1028.

⁴⁶ *Id.*

based systems, this problem is exacerbated to the extent that the Transmission Provider is unable to recover opportunity costs associated with providing re-dispatch service from a hydropower unit.

For these reasons, the Commission should grant rehearing on this issue, and hold that a Transmission Provider offering planning re-dispatch service is able to recover both the embedded transmission costs associated with the service, and the incremental generating costs – including opportunity costs – incurred to provide re-dispatch.

Q. The Commission should limit Transmission Provider liability for outages in all instances except where the Transmission Provider is grossly negligent or engages in intentional misconduct

In Order No. 890, the Commission again refuses to adopt a generic liability limitation for Transmission Providers for outage liability. Even though it has approved such limitations for various RTOs and ISOs in instances other than the Transmission Provider’s gross negligence or intentional misconduct, the Commission reaffirmed its approach to liability in Order No. 888, where it “declined to adopt a uniform federal liability standard and decided that, while it was appropriate to protect the Transmission Provider through force majeure and indemnification provisions from damages or liability when service is provided by the Transmission Provider without negligence, it would leave the determination of liability in other instances to other proceedings.”⁴⁷ The Commission concludes that Transmission Providers should continue to rely “on state laws that protect[] utilities or others from claims founded in ordinary negligence.”⁴⁸

The Commission should grant rehearing, and adopt a uniform liability provision for the *pro forma* OATT that limits Transmission Provider liability except in instances

⁴⁷ Order No. 890 at P 1671.

⁴⁸ *Id.*

where the Transmission Provider is grossly negligent or engages in willful misconduct. Given the enactment of mandatory reliability standards under Section 215 of the FPA, traditional tort liability is not necessary to provide appropriate incentives for utilities to exercise due care in the operation of their transmission systems. The threat of significant civil penalties and other remedial actions, as well as state oversight, is sufficient to ensure that Transmission Providers appropriately operate their systems.

Furthermore, the presence of mandatory reliability standards increases the threat that utilities will be required to incur significant liability for outages. They make it easier for potential plaintiffs to succeed in civil actions against Transmission Providers found to have violated the federal reliability standards. The state protections on which FERC urges utilities to rely do not appear to be sufficient to protect a Transmission Provider against outage liability. Those protections have arisen in the context of claims by retail customers.⁴⁹ It is not clear whether those protections would be sufficient in suits by users of the interconnected transmission system in states other than the one in which the Transmission Provider is located.

Moreover, under much state law, limitations of liability such as those sought here are effected by contract. The Commission sets the form of contract between the Transmission Customer and Transmission Provider through the *pro forma* OATT. If in doing so, the Commission denies the modification of the *pro forma* OATT sought here to provide limitations of liability, the Commission will be taking the arbitrary and capricious action of stating that Transmission Providers should rely on state law for

⁴⁹ See *Strauss v. Belle Realty Co., et al.*, 482 N.E.2d 34 (N.Y. 1985); *Cochran v. Public Serv. Elec. Co.*, 117 A. 620 (N.J. 1922); *Vaughan v. Eastern Edison Co.*, 719 N.E.2d 520 (Mass. App. 1999); *Gin v. Yachanin*, 600 N.E.2d 836 (Ohio App. 1991); *Arenado v. Florida Power & Light Co.*, 523 So.2d 628 (Fla. Dist. Ct. App. 1988); *Kentucky Agricultural Energy Corp. v. Bowling Green Municipal Utilities Board, et al.*, 735 F.Supp. 236 (W.D. Ky. 1989).

appropriate limitation of liability (which to a substantial extent rely on contractual mechanisms) at the same time the Commission is preventing the inclusion of provisions in the *pro forma* OATT to effectuate appropriate limits on liability.

Granting liability limitations except in instances of gross negligence or intentional misconduct is appropriate given that outage liability is not necessary to ensure that utilities operate their transmission systems reliably, and given the liability protections allowed by the Commission for utilities in various RTOs and ISOs. A lack of liability protection in the OATT thus increases rates for consumers without any corresponding benefits.

Finally, the Commission has approved liability limitations for a number of RTOs and ISOs.⁵⁰ However, it has not approved similar limitations for utilities located outside of RTOs and ISOs, and has provided no good explanation for the difference in treatment between RTO and ISO utilities, and those outside of RTO and ISO areas.⁵¹ This disparate treatment of otherwise similarly-situated utilities is unwarranted given that the policy concerns justifying liability limitations for utilities in RTOs and ISOs are identical to those confronting utilities in non-RTO or ISO areas.

For these reasons, the Commission should grant rehearing, and include in the *pro forma* OATT a provision that limits Transmission Provider liability except in instances where the Transmission Provider is grossly negligent or engages in willful misconduct.⁵²

⁵⁰ See *Midwest Independent System Operator, Inc.*, 110 FERC ¶ 61,164 (2005); *Southwest Power Pool, Inc.*, 112 FERC ¶ 61,100 (2005); *PJM Interconnection, L.L.C.*, 112 FERC ¶ 61,264 (2005); *ISO New England, Inc., et al.*, 106 FERC ¶ 61,280, order on reh'g, 109 FERC ¶ 61,147 (2004).

⁵¹ See *Southern Co. Services, Inc.*, 113 FERC ¶ 61,239 (2005).

⁵² See, e.g., the Initial Comments of the Edison Electric Institute on the Notice of Proposed Rulemaking dated August 7, 2006, which set proposed limitations of liability that the Commission should include in the *pro forma* OATT in the above-captioned dockets and the Edison Electric Institute's renewed request that the Commission accept liability limitation provisions, particularly in light of the adoption of the Energy Policy Act of 2005.

R. The Commission should clarify that the planning requirements implemented by Order No. 890 do not supersede the requirements of a transmission provider’s Network Operating Agreements with its network customers

Order No. 890 appears to impose a requirement that a Transmission Provider engage in both a local planning process and a regional planning process. It lays down guidelines that will govern each utility’s individual transmission planning processes. It also states that ‘in addition to preparing a system plan for its own control area on an open and nondiscriminatory basis, each Transmission Provider will be required to coordinate with interconnected systems to (1) share system plans to ensure that they are simultaneously feasible and otherwise use consistent assumptions and data and (2) identify system enhancements that could relieve congestion or integrate new resources.’⁵³ Utilities that provide network service currently engage in local planning and coordination activities with their network customers under the terms of their Network Operating Agreements. The Commission should clarify that the planning requirements under new Attachment K do not supersede or otherwise supplant the planning and coordination activities undertaken by a transmission provider under these Network Operating Agreements.

S. The Commission should clarify what constitutes a “request for service” for purposes of posting service requests made and rejected

Order No. 890 requires the Transmission Provider to post on OASIS “(1) the number of affiliate versus non-affiliate requests for transmission service that have been rejected and (2) the number of affiliate versus non-affiliate requests for transmission service that have been made.”⁵⁴ It is not clear, however, what the Commission means by

⁵³ Order No. 890 at P 523.

⁵⁴ Order No. 890 at P 413.

“requests for transmission service.” Conceivably, it could refer only to requests for transmission service by affiliated merchant or trading entities. It could also refer to requests for transmission service by the Transmission Provider’s merchant function, including requests to designate or un-designate Network Resources and requests to procure secondary Network service to serve Native load. The Commission should clarify the scope of this requirement, in order to allow the Transmission Provider to post the correct information on its OASIS.

III. Conclusion

The Washington Investor-Owned Utilities respectfully request that the Commission grant the rehearing and clarification requests identified in this pleading.

Respectfully submitted,

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