UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Long-Term Firm Transmission Rights in Organized Markets	Docket No. RM06-8-000
Long-Term Transmission Rights in Markets Operated by Regional Transmission Organizations and Independent System Operators	Docket No. AD05-7-000

REPLY COMMENTS OF THE TRANSMISSION ACCESS POLICY STUDY GROUP

EXECUTIVE SUMMARY/OVERVIEW

In contrast to the February 2, 2006 Notice of Proposed Rulemaking ("NOPR"), which reflects a serious effort to implement in organized markets new Section 217(b)(4) of the Federal Power Act,[1] many comments appear designed to frustrate Congress' express intent. Instead of providing a framework for long-term rights that support investment in baseload and renewable generation that often cannot be sited close to load, but which are essential to the fuel diverse and affordable energy essential to our economic and social well-being, these commenters ask the Commission to accept as compliant rights that will not be capable of serving this crucial purpose and will be priced in a manner that no load serving entity can afford. These commenters propose long-term rights that are neither "long-term" nor "rights," and a planning process essentially unchanged from the plainly inadequate status quo.

---

[1] Pub. L. No. 109-58 § 1233, 119 Stat. 594, 958 (2005) (to be codified at 16 U.S.C. § 824q)("EPAct 2005").

For example, Cinergy, questioning whether Section 217(b)(4) requires creation of any instruments extending beyond a year, proposes 2-5 year rights, with no assurance of renewal, or participant funded rights defined to make them a null set, as well as fleeting—nothing lasts beyond the planning horizon. Even while in place, a Cinergy-styled "long-term right" would provide no protection against congestion or planning risk; if during its limited term, issues of simultaneous feasibility arose (*e.g.*, due to the RTO's failure to plan, or the TO's failure to construct, required facilities), the long-term right holder would shoulder the full risk.[2] Others offer variations on the same theme—rights defined to be short-lived, useless, and prohibitively expensive.[3] Or, like EEI,[4] they turn the statute inside out, subordinating long-term rights to the short-term rights regimens now in place; *e.g.*, limiting availability of long-term rights to incremental, participant funded capacity,[5] or requiring payment of opportunity costs for any short-term rights displaced by a long-term right.[6] Others point to "regional flexibility" and emphasize

---

[2] *See* Comments of Cinergy Services, Inc. ("Cinergy") at 21, 23, 30.

[3] *See, e.g.*, EEI's revision to Guideline 3, which limits the term of participant-funded rights to the planning horizon (Comments of Edison Electric Institute ("EEI") at 20-21), and EEI's other revisions, which would grant RTOs broad flexibility to design long-term rights that do not provide an effective hedge (EEI at 19, 21-23); Comments of Morgan Stanley Capital Group, Inc. ("Morgan Stanley") at 9-10 (recommending that long-term rights have terms of 3-5 years). Midwest ISO Transmission Owners ("MISO TOs")(at 8-9) would require the long-term right holder to bear an increased share of the transmission revenue requirement *and* pay for the rights based on their congestion hedge value, at the same time they would directly assign any shortfall.

[4] *See* EEI revisions to Guidelines 2, 4, and 5 (Comments at 19, 21-23).

[5] *See* Cinergy at 26, Exh. CIN-1, Prepared Direct Testimony of Richard Tabors ("Tabors") at 26; Comments of BP Energy Company ("BP Energy") at 4-5; Comments of Suez Energy North America, Inc. ("Suez Energy") at 6-7. *See also* Comments of Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., LIPA, New York Power Authority, New York State Electric & Gas Corporation, Orange and Rockland Utilities, Inc. and Rochester Gas and Electric Corporation ("Central Hudson") at 6-8; Comments of Constellation Energy Group, Inc. ("Constellation") at 9, 13-15; MISO TOs at 9-10; and Comments of the New York Independent System Operator, Inc. ("NYISO") at 10, 21, which recommend subordinating the availability and terms of long-term rights to existing uses and existing market rules.

[6] *See* Suez Energy at 5.

Guideline 8's balance requirement as the means to achieve through the RTOs' not-necessarily-balanced stakeholder process the same end: continuation of the short-term-right-focused *status quo*, with long-term rights made unusable for their intended purpose, if provided at all.

Through the lens of many commenters, Section 217(b)(4)'s directive to the Commission to facilitate planning and expansion to meet the reasonable needs of load serving entities fares no better than its long-term rights command. Some commenters correctly view this provision as calling for a revamped planning process and transmission pricing methodology sufficient to create the robust grid required to reduce the mounting congestion charges that choke off effective access to competitive markets, as well as to support long-term rights.[7] But many can't or won't see beyond existing RTO planning and expansion processes and associated pricing practices that have brought us to where we are today[8]—a grid widely recognized as inadequate, with congestion growing. By treating transmission capacity and associated rights as a "zero sum game"[9] and underfunding as the result of "inevitable" congestion,[10] commenters assume a static grid, rather than the robust grid EPAct plainly envisions.[11]

---

[7] *See, e.g.*, Comments of American Electric Power Service Corporation ("AEP") at 6-7, 12-13; Initial Comments of Ameren Services Company, Inc. ("Ameren") at 16-17; Comments of National Grid USA ("National Grid") at 27-29; Comments of National Rural Electric Cooperative Assoc. ("NRECA") at 19-21. *See also* Part III, *infra*.

[8] *See, e.g.*, Comments of the Midwest Independent Transmission System Operator, Inc. ("MISO") (at 15, 19) proposing to treat the upgrades required to maintain the feasibility of long-term rights as an element of their economic planning process, *i.e.*, one supported (if at all) by participant funding), and expressing concerns about planning that would over-fund FTRs. MISO at 15, 24-25.

[9] *See* Comments of Exelon Corporation ("Exelon") at 5.

[10] *See* Cinergy, Tabors at 17.

[11] *See also* EPAct 2005 Sections 216 and 219, 119 Stat. 946 (to be codified at 16 U.S.C. 824p) and 119 Stat. 961 (to be codified at 16 U.S.C. 824s).

In short, many commenters are asking the Commission to implement Section 217(b)(4) in a manner that effectively enshrines RTOs' existing short-term right regimes and planning processes (with artificial bifurcations between so-called economic and reliability upgrades), which have produced what PJM concedes to "disappointing results" and a "minimalist grid".[12] These commenters treat LSE needs to meet ongoing service obligations through long-term power supply arrangements supported by long-term rights as the marginal use, getting in the way of short-term market efficiency and flexibility.

These commenters ignore Congress' unmistakable message for the organized markets singled out for this prompt rulemaking:[13] we need to *change* the way we plan and fund the grid, so that it meets the needs of load serving entities, and we need to refocus on the long-term rights that play a critical role in supporting the generation and transmission infrastructure required for this capital intensive industry and to provide long-term economic value to consumers. If those who claim that existing planning and short-term rights regimes meet the statutory directives were correct,[14] Congress would not have enacted Section 217 or added this organized markets rulemaking to the Commission's heavy "to do" list for this first year after EPAct 2005 was enacted.

---

[12] *See* Written Remarks of Audrey Zibelman, Executive Vice President, PJM Interconnection, L.L.C., at 5, for the April 22, 2005 Transmission Investment Technical Conference, Docket Nos. AD05-5-000 & PL03-1-000 (comments dated Apr. 21, 2005), quoted more fully in TAPS Initial Comments at 20-21.

[13] The rulemaking required by EPAct 2005 Section 1233(b), 119 Stat. 960, within a year of enactment is limited to organized electricity markets. TAPS supports requests for initiation of a rulemaking to ensure implementation of Section 217(b)(4), especially its planning and expansion directive, in regions not covered by organized markets (*see, e.g.*, Comments of the Electric Power Supply Association ("EPSA") at 7 & n.8, NRECA at 19-20; Comments of Reliant Energy, Inc. ("Reliant") at 17), and has included detailed suggestions in our initial and reply comments in *Preventing Undue Discrimination and Preference in Transmission Services*, (the Order 888 Reform NOI proceeding), Docket No. RM05-25.

[14] *See*, *e.g.*, Cinergy at 10, Tabors at 21; ISO NE at 11-13.

Efficiency arguments that seek to defeat long-term rights, or frustrate their intended purpose, have no place in this rulemaking. By permitting reliance on financial rights, Section 217(b)(4) preserved the operational efficiencies claimed to be realized by organized markets.[15] Arguments about the flexibility benefits of today's exclusive reliance on short-term rights amount to objections to the policy choice Congress has made—to require the Commission and RTOs to support long-term power supply arrangements needed by LSEs. Marginal customer treatment of LSEs that have long supported the grid and seek long-term rights to support investment in baseload generation highlight how far RTOs have departed from a competitive business model; no rational business would turn away, or charge premium prices to, long-term customers in order to enhance the availability of its product for short-term uses by other customers. Order 888 certainly gave primacy to the long-term firm rights required to support the baseload generation that drove planning and expansion. It is no "subsidy"[16] to bring long-term rights to support major generation investment back into the mix, and to restore the transmission planning obligations and accountability that Order 888 imposed,[17] and

---

[15] The "Dispatch-Contingent" aspect of TAPS' proposal does not make the rights "physical" and, particularly if limited to baseload and renewable resources, should not influence dispatch.

[16] *See e.g.*, Cinergy at 5-6, 30.

[17] *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. 21,540 (May 10, 1996), *reprinted in* [1991-1996 Regs. Preambles] FERC Stat. & Regs. ¶ 31,036, *clarified*, 76 F.E.R.C. ¶ 61,009 (1996)**,** *modified*, Order No. 888-A, 62 Fed. Reg. 12,274 (Mar. 14, 1997), *reprinted in* [1996-2000 Regs. Preambles] FERC Stat. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 62 Fed. Reg. 64,688 (Dec. 9, 1997), 81 F.E.R.C. ¶ 61,248, *aff'd in part and remanded in part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom, New York v. FERC*, 535 U.S. 1 (2002), *order on reh'g*, Order No. 888-C, 82 F.E.R.C. ¶ 61,046 (1998).

Order 2000[18] and the SMD NOPR[19] promised to enhance, but that somehow got lost in the RTO market creation process.

Nor should the Commission be distracted by long-term right opponents' parade of horribles. Most objections are addressed by TAPS' proposed ten-year rights, with a rolling right to renew through the end of the resource commitment, limited to where they are needed most (baseload and renewable generation that cannot be located close to load and therefore cannot otherwise be protected from congestion risk)[20] and made "Dispatch-Contingent FTRs" (tailored to hedge congestion from specified generation to load without creating opportunities for windfalls or excessive risk).[21] For example, concerns that long-term right holders will oppose transmission upgrades[22] and engage in gaming[23] do not apply to baseload/renewable long-term rights, especially if Dispatch-Contingent FTRs. Concerns about financial feasibility have no place with regard to resources whose simultaneous operation and delivery should be assumed in planning the robust and adequate grid Congress expects, leaving plenty of room for other uses.

---

[18] *Regional Transmission Organizations*, Order No. 2000, 65 Fed. Reg. 809 (Jan. 6, 2000), *reprinted in* [1996-2000 Regs. Preambles] FERC Stat. & Regs. ¶ 31,089, *order on reh'g*, Order No. 2000-A, 65 Fed. Reg. 12,088 (Mar. 8, 2000), *reprinted in* [1996-2000 Reg. Preambles] FERC Stat. & Regs. ¶ 31,092, *petitions for review dismissed per curiam for want of standing sub nom. Public Utility District No. 1 v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

[19] *Remedying Undue Discrimination through Open Access Transmission Service and Standard Electricity Market Design*, Notice of Proposed Rulemaking, 67 Fed. Reg. 55,451 (Aug. 29, 2002), [1999-2003 Proposed Regs.] FERC. Stat. & Regs. ¶ 32,563 ("SMD NOPR").

[20] *See* Comments of the Transmission Access Policy Study Group in Docket No. AD05-7-000 (filed June 27, 2005) ("TAPS Staff Paper Comments"). TAPS' proposal preserves the value of existing investments in accordance with the Commission's April 28, 2003 *Wholesale Power Market Platform White Paper*, " filed in Docket No. RM01-12-000, *available at* http://elibrary.ferc.gov/idmws/search/fercadvsearch.asp, Accession No. 20030429-3008.

[21] Acceptable alternatives include a priority right to an annual allocation process in which the availability of shorter-term FTRs sufficient to cover the LSE's full resource commitment is assured.

[22] *See* Cinergy at 3, 6-7; EEI at 13.

[23] *See*, *e.g.*, Comments of NSTAR Electric & Gas Corporation ("NSTAR") at 10-11 (sham transactions;

The Commission should not accept commenters' invitation to gut Section 217(b)(4)'s dual commands. It should maintain and strengthen its guidelines and demand full compliance, so that Congress' important goals can be achieved.

I. OVERARCHING ARGUMENTS

A. Attacks on the NOPR's Interpretation of Section 217(b)(4) are Without Merit

The NOPR correctly interprets Section 217(b)(4)'s long-term rights provision and its purpose:

> We interpret the intent of section 217(b)(4) of the FPA to be that the Commission ensure the availability in organized electricity markets of long-term firm transmission rights that provide price stability to load-serving entities with long-term power supply arrangements used to satisfy their service obligations.

NOPR P 48.

> In proposing this rule, the Commission seeks to provide increased certainty regarding the congestion cost risks of long-term transmission service in organized electricity markets that will help load-serving entities and other market participants make new investments and other long-term power supply arrangements.

NOPR P 4. The NOPR (at PP 86-92) separately addresses Section 217(b)(4)'s planning and expansion directive. The Commission thus correctly reads Section 217(b)(4) as containing two distinct directives, one with regard to planning and expansion of the grid to meet the reasonable needs of LSEs, the other with regard to enabling LSEs to secure long-term transmission rights for LSEs' long-term power supply arrangements.

---

overstating load growth; creating false congestion).

Long-term rights opponents offer interpretations that read the meaning out of the statute. Cinergy treats the statute like an anagram, rearranging the words to create something that bears no resemblance to what Congress intended. It objects to the NOPR's view that the reference to "meet[ing] such needs" in the long-term rights directive refers back to the first clause's "reasonable needs of load-serving entities to satisfy the service obligations of the load-serving entities," claiming that long-term rights directive is not about meeting LSE power supply needs by providing a long-term hedge for transmission costs. Instead, it argues that the "real thrust" of Section 217(b)(4) is "the means 'to meet' those 'reasonable needs,' *i.e.*, through FERC's exercise of its authority 'in a manner…that facilitates the planning and expansion of transmission facilities.'"[24] It thus collapses Section 217(b)(4)'s two directives into one that focuses solely on transmission expansion, claiming that the provision was designed to create incentives for *customers* to fund transmission expansions.[25]

Cinergy's attempt to transform Section 217(b)(4) into a participant funding provision for non-TO LSEs cannot be squared with the provision's treatment of all LSEs the same, with no distinction between transmission owners and customers.[26] While Cinergy may like to rearrange the words in Section 217(b)(4) to read long-term rights and long-term power supply out of the provision, that is not what it says.

---

[24] Cinergy at 10.

[25] Cinergy's Comments at 30, relying on the affidavit of *economist* Richard Tabors (Exh. CIN-1 at 25-26) for this statutory interpretation. *See also* Tabors at 6 ("Section 219 seeks to provide incentives for investment by transmission owners. Section 217(b)(4) speaks of facilitating expansion of transmission to enable LSEs to serve their loads. In other words, it links the expansion directly to the load-serving activity. I read Section 217(b)(4) as directing the Commission to find ways to provide transmission *customers* such as LSEs, with an incentive to pay for transmission upgrades to be used for serving load.")(emphasis in original) and 32 ("EPAct 2005 did not explicitly require the creation of long-term instruments").

[26] Further, as noted in TAPS Initial Comments in this proceeding (filed Mar. 13, 2006) ("TAPS Initial

Others use the fact that the planning and long-term rights directives are contained in the same provision to limit long-term rights to expansion capacity. According to Constellation, "Section 217(b)(4) requires the Commission to take steps to ensure that systems are planned and expanded to provide long term FTRs."[27] In arguing that "[t]he plain meaning of the statutory language is forward looking, *i.e.*, to allocate new capacity made available by future transmission expansion to LSEs needing such capacity and/or rights to hedge congestion," BP Energy (at 2) misquotes the statute to combine the two clauses.[28] But creative rewriting cannot alter the provision's two independent clauses, one focused on planning and one focused on long-term rights. Nothing in the long-term rights clause restricts such rights only to capacity created through new expansion accomplished through the planning and expansion clause. Such a reading sells short not only the long-term rights directive, but also the planning provision, which is not limited to supporting long-term rights and should be read to require, in addition, planning to support reasonable access to the competitive market.

Cinergy attempts (at 10-14) to restrict "long-term" to one year, consistent with service definitions in the Order 888 pro forma Open Access Transmission Tariff ("OATT"). As it observes, all RTOs already have annual ARRs/FTRs.[29] If Cinergy were

---

Comments") at 17 n.15, EPAct 2005 § 1242 created additional hurdles for participant funding.

[27] Constellation at 8.

[28] BP Energy purports to quote Section 217(b)(4) as stating that "the Commission shall exercise its authority in a manner that '<u>facilitates the planning and expansion of transmission facilities to meet the reasonable needs</u> of load serving entities to secure firm transmission rights (or equivalent tradable or financial rights) on a long term basis…'" (emphasis as shown and noted by BP Energy at 2). BP Energy omits (without ellipses) the words that break the provision up into two independent clauses (*i.e.*, ", and enables load-serving entities" [to secure]).

[29] Cinergy's argument (at 14-15) that Section 217(b)(4)'s command is satisfied by "firm" service without any hedge overlooks the Commission's recognition that in organized markets, the attributes of firm transmission service can only be achieved through a financial right. SMD NOPR at P 145 (2002).

correct, the statute and this expedited rulemaking would be unnecessary. Its reading fails the basic requirement prohibiting constructions of a statute that make it meaningless.[30]

Others latch on to "reasonable needs of load serving entities" as limiting Commission authority to alter current FTR regimens or the capacity now available for short-term rights.[31] According to MISO, these terms justifying removing "long-term" from "long-term rights" by continually subjecting such rights to planning and congestion risk, apparently in the same manner as today's annual FTRs.[32] ISO-NE argues that LSEs' "reasonable needs" are already satisfied by its existing market rules,[33] although conceding that the lack of a long-term hedge is a problem "for entities desiring to build remote generation and deliver its output to its load"— *i.e.*, the problem impeding development of baseload and renewable generation that often cannot be constructed close to load. Others use the phrase to severely restrict the capacity available to long-term rights, with Cinergy taking the extreme position that it justifies restricting long-term rights holders to expansion capacity so as not to "injure" short term uses.[34]

---

[30] *See U.S. v. Branson*, 21 F.3d 113, 116 (6th Cir. 1994) (a "statute should not be construed in a manner that renders it meaningless") (internal citations omitted). *See also* 2A Norman J. Singer, *Statutes and Statutory Construction* §§ 46.06 (6th ed. 2000) (noting that a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant"), § 45.12 ("'the law favors rational and sensible construction' … an interpretation which emasculates a provision of a statute is not preferred.")

[31] *But see* Ameren at 13, "[t]he Commission must steer clear of confusing so-called 'reasonable' limits on the amount of capacity allocated to long term FTRs with the 'reasonable needs' of LSEs referenced in Section 217(b)(4)," which focuses on LSE power supply needs, given load and load growth.

[32] "A 'perfect' hedge clearly exceeds an LSE's 'reasonable' needs. The availability of long-term FTRs should be subject to the realities of the transmission system (*i.e.*, subject to feasibility assessments) as well as subject to unforeseen conditions that may result in revenue shortfalls." MISO at 12.

[33] Comments of ISO New England Inc. ("ISO-NE") at 16-17.

[34] "Section 217(b)(4) … expressly limits the scope of the Commission's authority to facilitating the 'reasonable needs' of load-serving entities, and it is unreasonable *per se* for the Commission to grant a preference that will directly injure other market participants…." Cinergy at 35.

These commenters fundamentally miss the point of Section 217(b)(4). Congress made a choice in favor of long-term rights and the fuel diverse generation that will not be built by load serving entities without them. The clear intent was to address the truly long-term arrangements that are poorly served by annual FTRs by restoring the long-term transmission rights that have historically characterized our industry, but were lost in the transition to new LMP markets.

For the same reason, claims that it is discriminatory to give a priority to LSE long-term power supply arrangements are wrong. The FPA prevents *undue* discrimination. Given Congress' specific policy decision that LSE needs for long-term rights must be met to support investment in fuel diverse generation our nation needs to remain competitive, to avoid continued over-dependence on gas, and to ensure resource adequacy, a priority for such long-term use is "due discrimination," fully consistent with the Act.[35] If a preference for long-term firm rights were "undue," the Order 888 OATT would be unlawful: A transmission provider may not turn down a long-term firm request to maintain capacity available for those wishing to make more flexible short-term or non-firm use of the system.[36] Nor would any rational competitive business. As Ameren explains (at 16):

> …LSEs that are allocated long-term FTRs are providing value in return for those rights. Their long-term power supply arrangements and the long-term FTRs they receive are matched by long-term use of the transmission system, providing the desired steady, long-term revenue stream to

---

[35] For this reason, Cinergy does not advance its position by citing Section 217(i) (Cinergy at 15); there is no inconsistency between the Act's undue discrimination requirement and the NOPR's interpretation of Section 217(b)(4) and proposed guidelines.

[36] *See* TAPS Initial Comments at 28 nn. 31-32, describing the Order 888 OATT's reservation and curtailment priorities for long-term firm transactions.

> transmission owners that allows them to invest in upgrades and expansions to the system.

By increasing the lower-cost energy available to the market, baseload and renewable generation made possible by long-term rights should lower LMPs, broadly benefiting consumers and enhancing the competitiveness of RTO markets.

It is certainly no less discriminatory to insist (as do MISO TOs,[37] Cinergy,[38] and others) that the available capacity of the network be reserved for short-term transactions, with those seeking a long-term hedge limited to expansion capacity produced by participant funding. EEI would similarly subordinate long-term rights to existing uses and existing cost allocation methodologies. *See* EEI's revisions to Guidelines 4 and 5 (at 21-23). By protecting short-term rights that do not necessarily support LSEs' long-term power supply commitments to meet their service obligations, these proposals simply shift the preference to one that is plainly "undue" because it reverses Congress' instruction.[39]

Those seeking to freeze today's short-term right regimens, and marginalize long-term rights, fail to take account of other provisions of Section 217 that make plain that existing short-term allocation schemes cannot take precedence over Section 217(b)(4)'s long-term rights directive. Section 217(c) expressly protects approved transmission right allocation methodologies in organized markets from the impact of Section 217(b)(1)-(3)'s statutory preservation of existing generation-to-load firm transmission rights,[40] but

---

[37] *See* MISO TOs at 9.

[38] *See* Cinergy at 34-36. *See also* discussion of Guideline 3 below regarding Cinergy's nullification of the one path it identifies for long-term rights—participant funding.

[39] *See* Ameren at 13: "To do anything else would result in LSEs' long term FTR requests being pro-rated for the benefit of short-term FTR requests, which would not constitute 'enabling' LSEs to secure long-term FTRs to meet their service obligations as required by the EPAct."

[40] As described in TAPS Initial Comments at 36-37, the Commission must take the policy of protecting

provides no shield against the impact of implementation of Section 217(b)(4). Section 1233(b)'s requirement for this expeditious rulemaking to implement Section 217(b)(4) in organized markets hardly signals a Congressional intent not to change a hair on RTO FTR allocation methodologies and planning policies. Congress' intent to give preeminence to LSE long-term rights is further confirmed by Section 217(d), which provides (emphasis added):

> The Commission may exercise authority under this Act to make transmission rights *not used* to meet an obligation covered by subsection (b) available to other entities in a manner determined by the Commission to be just, reasonable and not unduly discriminatory or preferential.

Thus, there is no statutory basis for deviation from the course the NOPR charted. The Commission should adhere to and strengthen its guidelines.[41]

B. RTO Deference/Regional Flexibility

Many commenters seek RTO deference and regional flexibility to preserve the *status quo*, or advocate relaxing the NOPR guidelines so minor changes to the *status quo* would satisfy the final rule.[42] EEI proposes to remove Section 40.1(d)'s requirement that

---

existing rights into account in considering MISO-proposed changes to its allocation methodology.

[41] As discussed in TAPS Initial Comments (at 17), Guideline 3 needs clarification to ensure that participant funding is not the sole source of long-term rights in expansion capacity; Guideline 8 (*id.* at 27-28) should be revised to eliminate the opportunity to frustrate Congress' directives; and a pricing guideline should be added to ensure that pricing promotes, rather than thwarts, Section 217(b)(4)'s intent. Further, the Commission should take stronger measures to ensure that Section 217(b)(4)'s planning and expansion directive is satisfied (TAPS Initial Comments at 33-35).

[42] *See, e.g.*, Comments of the California Independent System Operator Corporation ("California ISO") at 7-11; Central Hudson at 8; Cinergy at 31-32; Comments of Dominion Resources Inc. ("Dominion Resources") at 2; Comments of DTE Energy Company ("DTE") at 2-4; EEI at 10-17; Exelon at 6-7; ISO-NE at 10-13; MISO at 1-2, 8; MISO TOs at 11; Comments of the National Assoc. of Regulatory Utility Commissioners ("NARUC") at 3-6; NSTAR at 11-12; Comments of the New England Power Pool Participants Committee ("NEPOOL Participants") at 1; Comments of Northeast Utilities at 2-3; NYISO at 6, 12-13, 16; Comments of PJM Interconnection L.L.C. ("PJM") at 7-8. Some opponents of long-term rights even seek to protect the *status quo* by suggesting that their RTOs may already have NOPR-compliant participant-funded long-term rights systems in place. *See, e.g.*, NSTAR (at 12-13) describing ISO-NE's

RTOs "*must make available* long-term firm rights that satisfy the following guidelines" (emphasis added), and to substitute instead a less obligatory: "*should to the extent they find reasonable given their existing arrangements* make available…." (emphasis in original).[43] EEI's change would fundamentally alter the role of the guidelines and would give primacy to existing RTO preferences rather than the statutory command. EEI seeks to perform the same magic trick on many of the guidelines themselves, deleting the NOPR's "must" language and proposing circular re-writes that would peg all RTO obligations to terms, rules, and conditions established by the RTO, and would allow "existing uses of the system" and "any other stakeholder-approved allocation methodology" to trump availability of long-term rights.[44] These arguments fundamentally miss the point of Section 217(b)(4), which recognized a basic deficiency in the design of organized markets and directed the Commission to correct the problem.

In fact, the NOPR's guidelines should be strengthened. Many who argue for broad regional deference strongly oppose long-term rights and seek to maintain the current short-term focus of organized market rules by pushing long-term power supply arrangements to the margin.[45] With the possible exception of PJM,[46] the RTOs oppose

---

Qualified Upgrade Awards. *But see* Comments of Central Vermont Public Service Corp. ("CVPSC") (at 2-5) stating that CVPSC critically needs long-term rights and supports the NOPR; that ISO-NE's FTR regime is not consistent with the NOPR; and that ISO-NE cannot be allowed to satisfy the NOPR by simply extending the term of its existing FTRs/ARRs.

[43] EEI at 18.

[44] EEI at 21-23.

[45] *See*, *e.g.*, Central Hudson et al. at 6-8; Cinergy, Tabors at 12, 14-15; Constellation at 9, 13-15; MISO TOs at 9-10; and NYISO at 10, 21.

[46] PJM generally supports the NOPR's guidelines; and it agrees with the NOPR that long-term rights must be tied to adequate planning/expansion processes. However, PJM seeks to leave Guideline 5 open, noting that its long-term rights proposal "is still under development" and that "[t]he Commission should not attempt to pre-judge the merits of such proposals or unduly restrict the results of the stakeholder process on this issue." (PJM at 12).

key NOPR guidelines that are essential to providing meaningful long-term rights. They basically tell the Commission that they do not plan to adopt those elements if FERC provides them with the "flexibility" they want.

Today, none of the RTOs offers long-term rights sufficient to support long-term power supply arrangements, and most have made few moves toward developing them. Indeed, MISO—which has been under Commission instructions to incorporate long-term rights into its market design since August 2004[47]—has done virtually nothing to make such rights a reality. Absent clear, binding guidance from the Commission, opponents of long-term rights may be able to dominate RTO stakeholder processes (and especially working groups that are not even balanced by sector) to undermine Congress' intent and the implementation of the NOPR.[48] And they will pressure RTOs—some of which have already stated that they do not want to modify their existing non-compliant systems—to adopt approaches that negate the value of long-term rights. "Regional flexibility" is certainly necessary to a point; but a show of hands cannot transform a proposal inconsistent with Section 217(b)(4)'s mandate into one that is compliant. The Commission must make clear that it will not tolerate regional "variations" or foot-dragging that undermine the intent of Section 217(b)(4) and the guidelines.

---

[47] *See Midwest Independent Transmission System Operator, Inc.*, 108 F.E.R.C. ¶ 61,163, PP 209, 650 ("TEMT Order"), *Order on Rehearing*, 109 F.E.R.C. ¶ 61,157, P 196 (2004) ("TEMT Rehearing Order"), *Order on Rehearing and Compliance Filings*, 111 F.E.R.C. ¶ 61,043 (2005), *appeal pending sub nom. Wisconsin Public Power Inc. v. FERC*, Nos. 05-1198, *et al.* (D.C. Cir. filed June 16, 2005).

[48] For example, ISO-NE's Long Term Transmission Rights Working Group is headed by Northeast Utilities, which filed initial comments opposing the NOPR's proposal to require long-term rights.

Contrary to commenters who argue that clear, binding guidelines will undermine consensus by "limit[ing] stakeholder discussions,"[49] giving RTOs too much flexibility will make it harder to reach consensus on crucial details of long-term rights implementation, trapping regions in endless meetings as stakeholders and RTOs who oppose long-term rights develop new and different ways to defeat them. If the contorted statutory readings and recommendations offered by long-term rights opponents are any indication, weak guidelines that provide only vague, advisory "goals," or leave fundamental decisions in the hands of RTOs, will be treated as an invitation to second-guess Congress' determination in favor of long-term rights. To succeed, strong guidelines must be crafted and enforced, so that RTOs and stakeholders are directed to find ways to make meaningful long-term rights work—not devise ways to undermine Congress' and the Commission's intent.

II. PROPOSED GUIDELINES[50]

A. Guideline 1

TAPS agrees with the PPC Members[51] (at 4) that the source-to-sink requirement should not be interpreted to bar long-term rights where the ultimate source and/or sink lies outside the RTO boundary, and would be defined as an interface or system border.

---

[49] *See*, *e.g.*, National Grid at 6.

[50] Although TAPS is not here separately responding to the relatively limited and unpersuasive comments on the NOPR's definitions, we note that EEI's proposed modification to the definition of load serving entity is consistent with neither the statute nor EEI's explanation of its proposed change. *See* EEI at 17, 22. We also note that Comments of Wisconsin Electric Power Company ("WEPCO") (at 7) agrees with TAPS that long-term power supply arrangements should be limited to baseload generation, to the exclusion of peaking; TAPS would also include renewable resources.

More generally, TAPS' reply is not comprehensive, and our failure to address particular comments should not be deemed agreement.

[51] Comments of PPC Members (certain members of the PJM Public Power Coalition) ("PPC Members").

The tortured and ever-evolving seams between RTOs require such accommodation when long-term rights are allocated, and over time as RTO boundaries change. *See* TAPS Initial Comments at 12-13. The same reasons mandate rejection of Northeast Utilities' proposal[52] to restrict availability of long-term rights to LSEs within an RTO's footprint.

B. Guideline 2

The basic purpose of long-term rights is to provide delivered price stability sufficient to support commitments by LSEs to generation ownership and long-term power purchase contracts. Proposals that only provide a hedge subject to pro-rationing of the long-term right based on changes in simultaneous feasibility, or that require long-term right holders to pay the directly-assigned revenue shortfall or participant fund new upgrades during the term of their resource commitments, do not meet this threshold requirement.[53] Such long-term rights would expose LSEs to virtually the same risks as short-term rights, and are plainly insufficient to support investment in the next generation of baseload and renewable resources. To make long-term rights work, once the right has been granted, the cost of maintaining the long-term right—including at renewal—should be rolled-in.

Many objections to Guideline 2 simply do not apply to long-term rights that are limited to baseload and renewable resources, as TAPS recommends. As PJM

---

[52] *See* Comments of Northeast Utilities ("Northeast Utilities")at 4.

[53] *See*, *e.g.*, Constellation at 17 ("expansion for the benefit of long-term FTR holders is not cost-free. For example, if expansion is required to support these long-term FTRs, then the costs of the expansion should be allocated to the long-term FTR holders"); Cinergy at 21 ("[a]ny transmission congestion costs caused by an LSE exercising its long-term transmission rights secured under FPA § 217(b)(4) in a Transmission Organization with Organized Electricity Markets based on LMP should be borne by the LSE that caused the costs"); MISO TOs at 8 ("the Commission should look at ways of assigning responsibility for shortfalls to those that benefit [from long-term rights]); MISO at 15 (proposing that cost recovery for congestion revenue shortfalls "be made part of 'economic' transmission system upgrades," for which MISO may envision only contingent RTO responsibility, subject to participant funding).

acknowledges, it is reasonable to expect the grid to accommodate customers' baseline usage:

> At some baseline level of usage of the transmission system it is reasonable to expect long term transmission right to be fully funded (absent significant transmission system outages), as the transmission system should be designed and constructed to meet the baseline requirements of all of its users.

PJM at 7. Deliveries to load of baseload resources—the types of units around which the grid has historically been planned—should be treated as part of this "baseline level" for purposes of fully funding long-term rights.[54] The grid must be designed to accommodate 24x7 deliveries of baseload resources (that are designed to run much or all of the time) and renewable resources (*e.g.*, wind, run-of-the-river hydro, and geothermal plants that owners cannot control). If it cannot do so, that is a sure sign of a more fundamental problem: a grid so severely underbuilt that it cannot support LMP markets.

Guideline 2 is needed to hold RTOs and member TOs accountable for meeting this minimal standard, and to assure that holders of long-term rights—especially TDUs that have no ability to control whether and when transmission upgrades are made—are not left holding the bag. Even the OMS, no friend of long-term rights, apparently recognizes that full funding of long-term rights for baseload resources is needed.[55]

TAPS' proposal would *not* completely insulate long-term right holders from congestion revenue shortfalls: long-term right holders would not be directly assigned the

---

[54] Comments of the Organization of MISO States ("OMS") notes that if long-term rights were available just for baseload resources, "MISO could almost ensure [that those] rights would be simultaneously feasible." OMS at 19.

[55] *See* OMS at 15 (emphasis added): "Full funding of a firm transmission right for *non*-base loaded generation sources goes beyond the requirements of providing transmission customers with the assurance of being hedged against congestion costs."

shortfall, but *all* users of the grid, including holders of long-term rights, would share revenue shortfalls on a *pro rata* basis. This approach would preserve most of the value of the hedge, but allocate revenue shortfalls in the same manner as redispatch (and the cost of network upgrades, *e.g.*, to maintain existing rights) would be shared under the Order 888 OATT. Maintaining this symmetry should help ensure that TOs and other market participants who decide not to hold long-term rights do not have a financial disincentive to plan and build the network facilities necessary to support the "baseline requirements" of all users, and to continue to fund those baseline upgrades on a rolled-in basis.[56] It would also address MISO's concern (at 12) that fully funding long-term rights would improperly exempt their holders from sharing costs as they would under the Order 888 OATT (*e.g.*, redispatch).[57]

Viewed in the context of TAPS' proposal and Section 217(b)(4), arguments that full funding is "discriminatory" or a "subsidy" make no sense.[58] Opponents' subsidy arguments rest on the incorrect assumption that stable delivered prices, and transmission capacity sufficient to support long-term rights for baseload and renewable resources, are extravagant luxury items. To the contrary, all load in an RTO pays its load ratio share of

---

[56] By mirroring the cost allocation methodology for rolled-in network upgrades, this treatment of revenue shortfalls should also help address the concern of commenters who argue that full funding of long-term rights will somehow block cost effective decisions to tolerate congestion revenue shortfalls, as opposed to building transmission upgrades necessary to ensure that all FTRs are simultaneously feasible. *See*, MISO at 15. *Cf.* California ISO at 26 (noting in response to Guideline 4 that "building transmission specifically to insure the value of … LT FTRs may not be the most cost effective nor equitable way to guarantee these rights").

[57] MISO and others exaggerate the degree to which holders of long-term firm transmission rights are subject to curtailment or redispatch costs under Order 888. MISO at 12; Cinergy (Tabors at 10-11); Joint Initial Comments of the Midwest Stand-Alone Transmission Companies ("MSATs") at 8-9. Under Order 888, all network resources are subject to redispatch on a least-cost basis to maintain firm service, with the increased cost shared on a load-ratio basis; TLRs of firm service are extremely rare. *See* TAPS Staff Paper Comments at 7; TAPS Initial Comments at 31.

[58] *See*, *e.g.*, Cinergy at 19-21; MISO at 13-14; National Grid at 15.

the RTO's transmission revenue requirement; long-term firm, price-stable deliveries to load for baseload and renewable resources required for fuel diversity and resource adequacy must be part of the standard, no-frills-added transmission service that any LSE is entitled to expect in return. The need, due to the structure of LMP-based organized markets, to create a separate instrument (*i.e.*, long-term financial transmission rights) to fulfill this function does not transform it into an extra-cost add-on that must be self-supporting.

Concerns that full funding would blunt the siting price signal provided by LMPs[59] also do not apply to TAPS' proposal, which is limited to the types of long-lived, capital-intensive units that by their nature often cannot be sited close to load. New nuclear units will not be built at load centers. New coal baseload resources must be sited near rail, water, and high voltage transmission, and must take account of air quality attainment areas, local political acceptance, potential citizen opposition, and a variety of other factors that severely limit where units can be located.[60] Renewable resources typically can be located only at the fuel source.[61] Destroying the price stability needed to finance these units, for the sole purpose of creating a price signal that will not move these resources closer to load, makes no sense. By limiting long-term rights to baseload and

---

[59] *See*, *e.g.*, ISO-NE at 17 n.18.

[60] *See*, *e.g.*, Transcript of the technical conference, *Promoting Regional Transmission Planning and Expansion to Facilitate Fuel Diversity Including Expanded Uses of Coal-Fired Resources*, Docket No. AD05-3-000 (May 13, 2005) ("Coal Transmission Technical Conference") at 49 (Jeff Wright, Director of the Infrastructure Division of the Office of Economic Projects,); and at 195-200 (Jacob Williams, Vice President for Generation Development, Peabody Energy).

[61] *See* Notice, Agenda and Staff Paper for the December 1, 2004 Technical Conference on Wind Energy, *Assessing the State of Wind Energy in Wholesale Electricity Markets*, Docket No. AD04-13 (November 22, 2004) at 12-13 *available at* FERC's eLibrary, Document Accession No. 20041122-3000 ([M]any of the best resource areas are located far from load centers…. While fossil fuel-fired counterparts locate near load centers to avoid transmission constraints, wind resources must be sited where the wind blows. Nationally,

renewable resources, TAPS' proposal would preserve LMP price signals where they should matter—siting of peaking resources and selection of short-term power supply arrangements.[62]

TAPS' proposed Dispatch-Contingent FTRs—providing a hedge only when the baseload or renewable resource is dispatched—would address commenters' concerns: (1) that long-term right holders would have an economic incentive to maximize the dollar value of those rights by opposing construction of generation or transmission that would reduce congestion;[63] and (2) that the value of the long-term right would exceed some legitimate hedge value, because FTR payments would be made in hours when the underyling resources are not run.[64]

TAPS' proposal for allocating congestion revenue shortfalls to all users is superior to the other methods recommended by commenters.[65] If it is not adopted, however, the Commission should not permit allocation to a group narrower than all RTO load, or all long- and short-term FTR holders.[66] Proposals to directly assign congestion revenue shortfalls to particular long-term right holders,[67] or to assign such costs only to

---

strong wind sites are located an average distance of 500 miles from major metropolitan centers….").

[62] Cinergy (at 22, 25), Comments of Xcel Energy Services, Inc. ("Xcel") (at 5), and NYISO (at 20-21) also claim that long-term rights would decrease the impetus for the holder to participant fund upgrades. But that assumes that there is otherwise wind in those sails. For the reasons discussed in TAPS Initial Comments at 17-22 and under Guideline 3 below, that boat is going nowhere in any event: participant funding is not a viable means of achieving or maintaining a robust grid.

[63] AEP at 5; Cinergy at 6.

[64] MISO at 12-13; OMS at 15.

[65] For example, TAPS' proposal fosters broad support for cost-effective upgrades required to reduce such shortfalls.

[66] *See*, *e.g.*, Reliant at 7.

[67] Cinergy at 21. *See also* MSATs at 9 (suggesting that LSEs holding LTRs purchase third-party insurance to hedge risks of under-funding of long-term rights).

the group of long-term right holders,[68] amount to pro-rationing of the long-term right and would not satisfy the basic price stability goal of long-term rights.

Finally, the Commission should reject EEI's re-write of Guideline 2, which leaves funding of long-term rights to the regions. EEI's circular language, which makes any hedge subject to unspecified "rules" and "terms" established by the RTO, renders the guideline meaningless and effectively places no requirement on RTOs.

C. Guideline 3

As discussed in Part I.A, the efforts of Cinergy and others to restrict long-term rights to expansion capacity created by participant funding is fundamentally at odds with the language and spirit of Section 217. Long-term rights should be available from existing capacity (as the NOPR recognizes at P 58-61), as well as from expansion capacity funded other than by an ineffective participant funding model. *See* TAPS Initial Comments at 17-18. Comments submitted on Guideline 3 confirm how ill-suited participant funded upgrades would be as the sole source of long-term rights that use expanded grid capacity (much less the sole source of long-term rights, as Cinergy and others propose[69]).

NOPR Guideline 3 proposes that participant funded upgrades would have a term equal to the lesser of the life of the facility or term requested by the funding party, consistent with Order 2003.[70] EEI's revised Guideline 3 would cut that back to the

---

[68] *See e.g.*, MISO TOs at 8 (arguing that revenue shortfalls should be assigned to "those that benefit" from the long-term rights program).

[69] *See, e.g.*, NSTAR at 11.

[70] *See Standardization of Generator Interconnection Agreements and Procedures,* Order No. 2003, 68 Fed. Reg. 49,846 (Aug. 19, 2003), III FERC Stat. & Regs. ¶ 31,146 ("Order 2003"), *order on reh'g,* Order No. 2003-A, 69 Fed. Reg. 15,932 (Mar. 26, 2004), III FERC. Stat. & Regs. ¶ 31,160 ("Order 2003-A"), *order on reh'g*, Order No. 2003-B, 70 Fed. Reg. 265 (Jan. 4, 2005), III FERC Stat. & Regs. ¶ 31,171 ("Order

RTO's planning horizon as "defined within the transmission organization's planning process," explaining: [71]

> Transmission upgrades provide increased transfer capability under specific assumptions about the grid which are generally defined within the transmission planning analysis in which the upgrade is studied. Accordingly, it may be appropriate to restrict the duration [of] the rights conferred to the length of the transmission plan studied and to define any additional rights in subsequent studies.

NationalGrid would do the same for similar reasons:[72]

> Given that any transmission upgrade is likely to be an upgrade of a previous upgrade and is also likely to be subject to subsequent upgrades, there is no good basis for assuming that the transmission customers will continue to support the transmission system in the same proportions over time as system conditions and transmission cost allocation rules change, and there is really no basis for fixing the term of rights based on the life of any particular upgrade as it eventually becomes part of the "base case" for all future upgrades.

In addition to cutting short the term of participant funded rights,[73] Cinergy would define them so as to render them a nullity even for the limited period they are recognized. Cinergy would restrict the right to the least amount by which the upgrade increased transfer capacity along the *entire* source-to-sink path.[74] In its example, a

---

2003-B"), *order on reh'g*, Order No. 2003-C, 70 Fed. Reg. 37,661 (June 30, 2005), III FERC Stat. & Regs ¶ 31,190 ("Order 2003-C"); Order 2003 at ¶ 720.

[71] *See* EEI at 20-21.

[72] NationalGrid at 19.

[73] *See* Cinergy at 29; Tabors at 19-20, proposing to phase out rights with repayment. Cinergy and its economist apparently assume Order 2003's crediting mechanism. While Order 2003-B's crediting mechanism applies outside RTOs (with a 20-year repayment limit) (Order 2003-B at PP 35-36), the Commission allows RTOs to deviate from that standard (Order 2003-A at 691-92). For example, in PJM there is no repayment; for MISO the Commission has recently approved crediting for 50% of the upfront investment costs. TAPS Initial Comments at 17-22.

[74] Cinergy at 28-29.

customer funding a 100 MW upgrade would receive only a 10 MW right if that was the smallest increment to the transfer capability created by the upgrade somewhere along the source-to-sink path. Presumably if some portion of the path was not affected by the upgrade, the customer would receive no rights at all. MISO appears to largely concur with Cinergy's approach.[75] It's hard to see how this regimen would provide the incentive for customer investment Cinergy claims, much less support LSE investment in baseload generation.

Reliant takes the opposite approach, recommending allocation of existing capacity to complete the source-to-sink path.[76] But that approach fails to address the fact that the amount of capacity created by a required upgrade is unlikely to bear any relationship to the LSE's generation investment, unless the generation is so poorly located that upgrades are required in the amount of the entire facility;[77] ironically, generation with the "best" location in terms of available grid capacity would receive the least participant-funded long-term transmission rights, discouraging such siting. Further, as OMS correctly notes, there is a disconnect between the aggregate deliverability standard used for assessing upgrades (which requires deliverability to the "MISO market") and the RTO's ability to grant a source-to-sink FTRs to the LSE, even under the current annual FTR system.[78]

---

[75] *See* MISO at 16 ("[T]o the extent that point-to-point FTRs are to be given for such expansion, care must be taken to ensure that the source, sink and MW level are consistent with the geographic area in which the transmission expansion provides increased capacity.")

[76] Reliant at 9.

[77] Assume an LSE was proposing to make a 300 MW commitment in a generator at a location with sufficient capacity for delivery without congestion of 250 MW of output, but which required an upgrade to create 50 MW additional transfer capability. Under a participant funding approach, it would be entitled to only a 50 MW long-term right, which is hardly sufficient to support a 300 MW investment.

[78] OMS at 17-18. OMS concludes: "[T]he current MISO policy of granting CFTRs to those who fund transmission upgrades based upon only the deliverability of generation to the MISO has the unintended consequence of restricting FTR availability to others." *Id.* TAPS would argue that the "aggregate

These comments not only demonstrate the ineffectiveness of participant-funded rights to meet the needs of LSEs seeking a long-term hedge to support investment in and financing of baseload and renewable generation, they lay bare the fallacy of relying on participant funding to support needed expansion of an integrated, dynamic AC system, where upgrades are "lumpy," with benefits that are difficult to assign and which change over time. *See* TAPS Initial Comments at 21. AEP's Comments describe the inherent difficulty in assigning beneficiaries, question the distinction between reliability and economic upgrades, and urge reliance on regional rates to fund beneficial upgrades, as do other commenters.[79] *See also* Midwest Stand-Alone Transmission Companies Comments at 3 (the "highly dubious" distinction between reliability and economic upgrades is counter-productive to planning transmission facilities to honor long-term rights).[80] TAPS strongly agrees. Particularly given Cinergy's acknowledgement of the failure of current mechanisms to produce a robust grid,[81] its insistence that we put more eggs (including Congressionally mandated rights) in that broken basket[82] flies in the face of EPAct's clear direction to this Commission to improve our transmission infrastructure. These

---

deliverability" policy is destined to produce a grid incapable of supporting the needs of LSEs and a competitive market, with consumers burdened with ever-increasing congestion costs. It makes no sense for an RTO not to plan for simultaneous delivery of baseload generation intended to operate much or all of the time.

[79] AEP at 6-7. *See also* National Grid at 15-17 (participant funding should not be mandated in all regions).

[80] The inherent blurring of the two is illustrated by the New York State Department of Public Service Comments at 5 (stressing need for clear rules for awarding long-term rights for developers of new transmission to avoid creating "impediments to the develop of new transmission, including transmission needed for reliability in the future").

[81] *See* Cinergy, Tabors at 5 ("the Commission's past and current initiatives to facilitate construction of needed transmission … have thus far failed to produce the significant transmission investments that are generally regarded as being needed") and 20 (noting the "lack of transmission investment seen to date").

[82] *See* Cinergy, Tabors at 25-26 (long-term rights should not be available from transmission expansion resulting from a reliability need or RTO planning process; only participant funding).

comments demonstrate the wisdom of TAPS' request that the Commission clarify Guideline 3 to leave no doubt that long-term rights from expansion capacity are not restricted to rights created by participant funding.[83]

D. Guideline 4

TAPS' rights of ten-year duration, with a rolling right to renew up to the end of the resource commitment,[84] are consistent with the 10-year minimum term recommended by PJM and AEP.[85] TAPS would also support Ameren's and WEPCO's proposals to structure long-term rights as annual FTRs with assured rollover rights.[86]

TAPS strongly opposes proposals to limit the term of long-term rights to the planning horizon or 2-5 years, or to structure long-term rights as annual rights, without assured renewal.[87] Exposing LSEs to substantial new costs and uncertainties after 5 or 10 years (or 1 year!) completely defeats the purpose of long-term rights. The justifications offered for these unreasonably short terms do not apply to TAPS' proposal, which is restricted to baseload and renewable resources and should not tax the capacity of a properly planned and maintained transmission grid.

---

[83] *Accord*, NRECA at 12.

[84] By requiring long-term right holders to give 10-years notice of intent to renew, TAPS' proposal would address the concern of MISO TOs (at 11) that as-of-right renewals would provide insufficient time for planning.

[85] PJM at 6; AEP at 8.

[86] Ameren at 3, 9-12; WEPCO at 4-6. Although the term element of their proposals would be acceptable to TAPS, we are concerned that Ameren's proposal—which is not limited to selected types of resources—may make it difficult to obtain new long-term rights for baseload and renewable resources. To prevent over-subscription, TAPS has recommends long-term rights be limited to baseload and renewable resources.

[87] EEI at 5, 20-21; Cinergy at 21; Morgan Stanley at 9-10; NYISO at 16-17.

Long-term congestion hedges must also be available for *existing* baseload and renewable resources—not just *new* resources, as some commenters recommend.[88] The grid was planned and built to accommodate delivery of existing resources; and before the recent emergence of organized markets, the loads they served were assured through long-term firm transmission rights that they would be delivered at stable prices free from directly-assigned congestion charges. To the extent RTOs with organized markets have eroded that assurance,[89] that aberration should not be set in stone. Even if economic theory might suggest that there is no need to provide long-term rights for existing resources because those costs are already sunk, it is inequitable and inconsistent with long-established Commission policy to ignore the past investments and expectations of LSEs, and deprive them of the opportunity to obtain long-term hedges for their existing baseload and renewable resources.[90] Particularly as to MISO, the proposed categorical exclusion of existing rights is inconsistent with Section 217(c).[91]

---

[88] Cinergy at 37; Suez Energy at 3, 6-7, 11.

[89] Some RTOs (*e.g.*, PJM) have maintained full protection for historical uses. To the extent other RTOs faithfully follow PJM's approach, existing right protection in the form of new "long term rights" may not be necessary.

[90] *See, e.g.*, *Midwest ISO, Inc.*, 102 F.E.R.C. ¶ 61,196, P 64 (2003), *clarified on reh'g*, 102 F.E.R.C. ¶ 61,338 (2003) ("We continue to believe that customers under existing contracts, both real or implicit, should continue to receive the same level and quality of service under a standard market design"); "White Paper" filed in Docket No. RM01-12-000 at 5, 10 and App. A at 7-9, *available at* http://elibrary.ferc.gov, Accession No. 20030429-3008. SMD NOPR at 145 (proposing that "customers under existing contracts … receive Congestion Revenue Rights that match their current use of the system"). *See also* Comments of FirstEnergy Service Company ("FirstEnergy") at 7 ("[t]he absence of long-term transmission rights that are linked to actual supply arrangements is inconsistent with long established Commission policy to ensure 'a mechanism for achieving price certainty under the new congestion management system'" (*citing* SMD NOPR at 111)).

[91] The Commission is required to consider the policy of protecting existing rights when evaluating MISO proposals to change its methodology for allocating transmission rights. *See* TAPS Initial Comments at 36-37.

Finally, many long-term rights opponents seek to stretch the regional flexibility that proposed Guideline 4 would allow, with some recommending further relaxation. For example, EEI would take the "must" out of Guideline 4.[92] Although regions should be given the latitude to determine precisely how the rights will be configured (*e.g.*, the specific combination of initial and as-of-right renewal terms that will be used to provide the long-term hedge), Guideline 4 must assure that an effective, long-term hedge is available for the life of the LSE's resource commitment. As discussed above in Part I.B, it is simply too dangerous to grant RTOs broad flexibility to defeat the intent of Section 217(b)(4).

E. Guideline 5

Opponents of proposed Guideline 5 improperly seek to freeze the short-term bias of today's organized markets.[93] For example, EEI's revisions to Guideline 5 would again delete the NOPR's "must" language and subordinate long-term rights to any "stakeholder-approved allocation methodology."[94] As discussed in Part I.A, efforts to dilute Guideline 5 should be rejected. TAPS would certainly prefer a robust grid that can accommodate all FTR requests, both long-term and short-term. Where capacity is limited, however, transmission rights must be made available first to those LSEs willing to make long-term commitments. Guideline 5 opponents would improperly deny such requests, and instead reserve transmission capacity for possible (but not assured) use by

---

[92] *See* EEI at 21-22. *See also* CAISO at 23-26; ISO-NE at 18-21; MISO at 16-18; Morgan Stanley at 10-11; National Grid at 21-22; OMS at 18-20.

[93] *See*, *e.g.*, Cinergy at 34-39; Constellation at 11-12; MISO at 18-20; National Grid at 22-24; Reliant at 11-13; Xcel at 9-10.

[94] EEI at 23.

undetermined short-term transactions—an approach that undermines transmission planning, would be contrary to Order 888, and stands Section 217(b)(4) on its head.

Arguments that Guideline 5 would discriminate against LSEs in retail choice regimes should also be rejected. While some retail choice states may currently prohibit or discourage long-term transactions by LSEs, those rules are subject to change—particularly when price volatility produces high electric rates.[95] In any event, state rules should not dictate federal policy as articulated in Section 217(b)(4). Even if Congress had not clearly instructed that long-term rights must be made available in wholesale markets, experience has shown that the short-term focus of current retail choice regimes will not support the next generation of baseload plants.[96] It is bad policy to force all LSEs in all states to share that fate (denying all consumers the benefits of low cost energy), simply because some states may have concluded that is the right decision for those serving retail load within their state. For example, comments filed by the Vermont Public Service Board and Vermont Department of Public Service (at 4) describe Vermont's decision not to restructure, its statutory 20-year plans based on "least-cost integrated planning, and the resulting urgent need for long-term rights (at 5-6):

> Vermont's electric utilities are subject to present requirements to engage in long-term, least-cost planning to serve load. The least-cost method of fulfilling their service obligations may well involve the long-term energy

---

[95] During the California Market Meltdown, major changes were made to California's organized markets to reduce dependence on volatile spot markets. More recently, high fuel prices and large projected increases in electricity prices have led several retail choice states to propose dramatic changes to their current approaches to obtaining power supply and setting retail rates. *See, e.g.*, *Ill. Auction Flap Goes to Springfield*, THE ELECTRICITY DAILY, Feb. 24, 2006; *N.J. Commission Reconsiders Power Auctions*, THE ELECTRICITY DAILY, Mar. 21, 2006; *Analysis: Maryland Furor Continues*, THE ELECTRICITY DAILY, Mar. 24, 2006.

[96] *See* AEP's Mike Morris at the Coal Transmission Technical Conference, Tr. at 230 (capital-intensive generation like new clean coal and nuclear units will not be financed absent PUC-assured rate recovery).

> purchases or investment in new generating facilities, including baseload or renewable generation that may be difficult to site near load centers. Presently, LSEs' inability to hedge the congestion costs that may be incurred as a result of such arrangements is a significant impediment to the fulfillment of their long-term, least cost planning and service obligations. Every day that this situation persists harms Vermont's electric consumers.

F. Guideline 6

Beyond the proposed guideline (to which few object), the comments make clear that issues regarding assignability may depend on how long-term rights are defined.

G. Guideline 7

The Commission's proposal not to require auctions for initial allocations of long-term rights received significant support, including from those who are not necessarily big fans of long-term rights.[97] In contrast, EEI asks that mandatory auctions not be foreclosed, and others urge they be required. The auction advocates' comments demonstrate the wisdom of the NOPR's approach and the inappropriateness of permitting mandatory auctions in the long-term rights context.

For example, MISO argues that it would be difficult for an RTO, even with all the information and expertise it has available and its control over planning and expansion, to value the congestion hedge provided by a long-term right.[98] By advocating allocation through auction, it essentially assigns this same task to LSEs who have far less information or control over the planning and expansion process.[99] Against this backdrop,

---

[97] *See*, *e.g.*, OMS at 23. *See also* Reliant at 15 (recommending that there be a simple mechanism for those allocated ARRs to bypass the auction).

[98] *See* MISO at 24.

[99] *Id.* at 22.

Cinergy's claim that auctions are the best means of determining initial value is suspect.[100] Morgan Stanley's argument that auctions are required to make sure long-term rights go to those who value them most[101] reveals a long-term rights auction for what it is—an opportunity to gouge LSEs and the consumers Congress was intending to protect.[102] Affording LSEs the opportunity to outbid all comers (perhaps repeatedly, if some commenters' views of the length of long-term rights are permitted to prevail) does not meet even MISO's interpretation of Section 217(b)(4) (requiring the Commission to "assist entities relying on the system to serve load in securing long-term transmission rights"),[103] much less Section 217(b)(4)'s mandate to "enable" LSEs "to secure" long-term rights.

H. Guideline 8

Comments submitted on Guideline 8 bear out TAPS' concern (Initial Comments at 27-30) that if this guideline is retained as drafted, it will be used to frustrate Congress' intent. Many treat Guideline 8's call for "balanc[ing] any adverse economic impact between participants receiving and not receiving the [long-term] right" as establishing today's short-term rights and inadequate planning as the baseline for measuring adverse impacts—*e.g.*, arguing against any reduction in the capacity now reserved for short-term

---

[100] Cinergy at 41-42. Contrary to its suggestion (*id.*), Section 217(c)'s reference, in defining the scope of the RTO exemption from subsections 217(b)(1)-(3), to auction methodologies now used in some regions for short-term rights provides no basis to conclude Congress thought auctions were an appropriate method for "enabling" load serving entities to "secure" long-term rights as required by Section 217(b)(4).

[101] *See* Morgan Stanley at 6.

[102] As explained in the Reply Comments of New England Public Systems, filed today in this proceeding (at footnote 23), auction clearing prices for monthly FTRs in New England have varied wildly and often do not correspond to the actual congestion value of the hedge provided by the FTR.

[103] *Id.* at 9.

rights;[104] seeking opportunity costs or requiring mitigation for any reduction in short-term right availability caused by introduction of long-term rights;[105] or requiring direct assignment of any upgrade costs required for initial allocation of long-term rights or maintenance of their feasibility.[106] These comments put today's market rules on a pedestal, subordinating the long-term rights and LSE-focused planning required by Section 217(b)(4) and—before organized markets cut short the rights and diluted the planning—by Order 888. Those seeking long-term rights should not have to hold harmless those who benefit from RTOs' recent detour into a short-term-focused regimen ill-suited to the capital-intensive investment required for the affordable electric supplies our economy demands.[107] *See also* Part II.I below.

Guideline 8 is used to justify reducing or eliminating the hedge provided by long-term rights. For example, MISO argues that "balance" requires that RTOs not assure even the amount of the long-term right (much less its funding) in violation of Guideline 2, and seeks flexibility to reduce the amount of the long-term right with changes in system conditions that reduce their feasibility.[108] In other words, MISO sees Guideline 8 as authorizing transformation of the statutory command for re-introduction of long-term

---

[104] *See* MISO Transmission Owners at 3, 9-10. OMS seems to be concerned about reserving capacity for speculators with no load serving obligations. OMS at 13.

[105] *See* Suez Energy at 5; Constellation at 15.

[106] *See*, *e.g.*, Constellation at 17; Cinergy at 21.

[107] TAPS very early identified long-term rights as essential to making LMP markets work for LSEs and their customers. *See*, *e.g.*, TAPS comments in *Remedying Undue Discrimination through Open Access Transmission Service and Standard Electricity Market Design*, Docket No. RM01-12-000, "Comments … on Working Paper" at 25-27 (April 10, 2002); "Overview of TAPS Position and Principles to Guide Consideration and Implementation of SMD" at 16-17 (November 15, 2002); "Comments … on Crucial Deferred Issues" at 3, 67-73 (January 10, 2003).

[108] MISO at 23.

rights into endorsement of what amounts to the current annual rights, subject to annual availability.

MISO and others also propose to meet the balance requirement by narrowly limiting the capacity dedicated to long-term rights. Particularly with the uneven and often sorry state of today's grid, limitation of long-term rights to a fixed amount or percentage of grid capacity is an arbitrary, inadequate, and short-sighted response to Section 217(b)(4)'s dual directives. *See* TAPS Initial Comments at 28-29. The proposals by AEP, WEPCO, and perhaps PJM[109] to limit long-term rights to each LSEs' minimum peak load, adjusted for load growth, should cover baseload resources in many instances. However, TAPS' proposal is a better approach to implementing Section 217(b)(4): (1) TAPS' focus on baseload and renewable resources avoids implementation issues associated with load growth estimates and the "lumpiness" of generation investment;[110] and (2) by linking long-term rights to specific resources (and making them Dispatch Contingent), TAPS' proposal is narrowly tailored to provide long-term rights where they are needed most and avoids potential gaming problems (*e.g.*, selecting an FTR to maximize FTR revenue, not offset LMP differentials for use of a long-term resource).[111]

---

[109] *See* AEP at 11-12; WEPCO at 6. PJM (at 7) states that "the transmission system should be designed and constructed to meet the baseline requirements of all of its users," and "[a]t some baseline level of usage of the transmission system it is reasonable to expect long term transmission right to be fully funded." PJM's Comments do not define the term "baseline"; however, we understand that the closest analog in PJM's Long-Term Transmission Rights ("LTTR") proposal is a "baseload" definition similar to AEP's and WEPCO's minimum peak load concept. PJM's LTTR proposal would allow long-term rights to be allocated up to an LSE's baseload amount in the first stage of its LTTR allocation process.

[110] Baseload unit participation opportunities often come in chunks larger than a small utility's annual load growth. TAPS' focus on generation type sidesteps implementation issues associated with load growth estimates, and it accommodates the renewable resources required for fuel diversity and increasingly by state mandates.

[111] Because these rights have value to hedge congestion experienced only when the unit runs, upgrades that reduce congestion would not increase the holder's exposure to payment obligations when congestion reverses; Even if the long-term FTR were structured as a obligation, the characteristics of the baseload and

In short, TAPS supports implementation of Section 217(b)(4) in a manner that achieves Congress' purpose, without *undue* impact on others. But the proposal to "balance" the inevitable impacts threatens to vitiate the legislative directive; changing the market rules and planning process will have impacts, but should also yield the benefits Congress intends—restoring the ability of LSEs to invest in the baseload generation that will reduce costs to consumers. Thus, Guideline 8 should be removed. If, nevertheless, some "reasonableness" guideline is retained, it should be reworded as "avoidance of undue impacts," to recognize that some impacts are "due" and reasonable.

I. The Comments Highlight the Need for a Guideline Providing that Pricing of Long-Term Rights Should Support and Not Frustrate Section 217(b)(4)'s Directive

TAPS' Initial Comments (at 30-33) urged the Commission to include an additional guideline providing that the pricing of long-term rights should support and not frustrate Section 217(b)(4)'s directive to enable LSEs to secure such rights. The comments filed by other parties illustrate the need for such a guideline.

As described above, some commenters would price long-term rights based on the expected value of congestion over their term. Others would restrict long-term rights to participant funded rights, with the long-term right holder also exposed to the cost of upgrades required to maintain those rights and/or directly assigned the revenue shortfall. Still others would require the long-term right holder to pay opportunity costs or otherwise mitigate the impact on short-term right holders, or would require long-term right holders to bear a greater share of the embedded grid costs. Each of these proposals, while

---

renewable generation would largely make such concerns beside the point. Because the long-term right holder would shoulder its share of underfunding (which should be spread broadly to all grid users, or at least all FTR holders), it would benefit from upgrades that reduce under-funding of FTRs.

problematic in its own right,[112] shares the flawed premise that the long-term right holder should be treated as the "marginal customer" receiving "premium" service, and should bear any costs (including opportunity costs) arguably attributable to changing the current short-term focused market rules and inadequate planning process to include such rights in the mix. As discussed in Part II.B above, the long-term rights that Section 217(b)(4) restores are an essential part of the transmission service required by LSEs that have long supported the system, not a fancy, unnecessary "accessory." If anything, it is the flexibility demanded by short-term rights advocates that is the "premium" service.

Thus, TAPS agrees with commenters such as Ameren, WEPCO, and NRECA, who argue that long-term rights should be available at no extra charge beyond an LSEs' load ratio share of the grid's embedded cost.[113] Especially if long-term rights are limited to baseload and renewable resources for which the grid should be planned in any event (assuming the RTO and the TOs are doing its job), it is unreasonable to impose any additional cost burden on long-term right holders. All consumers (not just the customers of the LSE in question) should benefit from the resulting lower LMPs.

At the very least, the Commission should make clear that it will not accept proposals, such as those summarized above, that would defeat the purpose of long-term rights by pricing them out of the reach of any rational LSE. Congress' instruction to the Commission to "enable" LSEs to "secure" long-term rights prohibits such an approach.

---

[112] *See* TAPS Initial Comments at 30-33. For example, as discussed under Guideline 7 above, MISO argues that it would be very difficult for RTOs to calculate expected congestion value, but has no trouble relegating that function (through auction) to LSEs with far less information and control over the planning process. MISO TOs (at 8-9) argue for requiring the long-term right holder to pay the expected congestion value *and* a greater share of the grid's embedded cost. If Congress intended to leave LSEs to such speculation (not to mention undue burdens), it would not have needed to enact Section 217(b)(4); LSEs could, in August 2005, purchase instruments reflecting expected congestion from financial institutions.

To facilitate implementation proposals consistent with the statutory mandate, TAPS reiterates its request for an additional guideline requiring pricing of long-term rights to support and not frustrate Section 217(b)(4)'s directive to enable LSEs to secure such rights.

III. PLANNING AND EXPANSION

TAPS agrees with PJM, Ameren, National Grid, AEP, ELCON *et al.*, NRECA, and Reliant that long-term rights should be connected to transmission planning. The efforts of Cinergy and others to defend the current disconnect miss the point, as well as the opportunity to restore the crucial link between transmission planning and the real needs of LSEs. Although professing great concern for transmission planning and expansion,[114] Cinergy does not propose *any* improvements to RTO planning processes that are producing a minimalist grid unable to support robust electricity markets.

TAPS' proposal to restrict long-term rights to baseload and renewable generation addresses concerns about financial feasibility inappropriately driving planning.[115] RTO failure to plan for simultaneous delivery of all baseload generation would seem destined to create the growing congestion now being experienced. As discussed above, the inability of the grid to support firm deliveries from such resources would indicate that the network is insufficient to support properly functioning LMP-based markets.

---

[113] *See* Part I.A, quoting Ameren's Comments at 16.

[114] *Id.* at 30. As discussed in Part I.A above, Cinergy radically and incorrectly interprets Section 217(b)(4) as a mechanism to create customer-focused incentives for funding transmission expansion.

[115] *See, e.g.*, OMS at 19 (noting that MISO would almost certainly be able to ensure the simultaneous feasibility of long-term rights for baseload generation, provided other types of resources were not given priority over baseload units). *Cf.* Xcel Energy Services at 5; Constellation at 17.

As OMS recognizes, basic changes to existing RTO transmission planning processes will be needed to integrate long-term rights.[116] These changes are overdue. As explained in TAPS' Staff Paper Comments (at 37-38), in the Order 888 world, the transmission provider had a clear obligation to plan and expand the system to accommodate new firm transmission service requests and new network resources, as well as maintaining existing uses.[117] The OATT's accountability mechanism, however, got lost in the transition to LMP markets. Indeed, the vigor with which most TOs disavow any responsibility or authority for transmission planning and expansion[118] would be almost comical were it not for the fact that most RTOs rely on bottoms-up planning processes that largely aggregate TO plans or rule on proposals submitted by others.[119]

Requiring RTOs to plan to maintain the simultaneous feasibility of long-term rights as part of the base plan—not just plan to deliver aggregate resources to aggregate loads—is the key to restoring accountability.[120] PJM appears to agree: its long-term

---

[116] OMS at 9-10.

[117] *See e.g.*, OATT § 28.2.

[118] *See, e.g.*, MISO TOs at 5-6 (MISO TOs do not control construction of transmission; instead MISO plans and directs construction, and States control much of the permitting and certification, and this Commission "asserts control over at least a portion of the cost recovery"); Cinergy at 24 (responsibilities are too fragmented to hold TOs responsible); National Grid at 16 (TOs "do not have the tools, functional responsibility, or information to manage congestion costs"). *See also* MISO at 14 (noting comments from a market participant that "transmission owners have limited control as to whether transmission facilities are constructed"). *Contra* Xcel Energy Services at 5 ("[t]he establishment of an organized wholesale market does not (or should not) lessen the obligation of a transmission owner to invest in the new transmission required (or requested) to reliably serve loads").

[119] *Compare* Ameren (Comments at 12 and 16-17), a MISO TO, noting that "in Midwest ISO each transmission owner plans its own system and Midwest ISO plans the overall Midwest ISO system," and stating that RTOs should use long-term rights as a mechanism to direct TO planning, "so that the expansion plans the transmission owners submit to the RTO incorporate any expansions necessitated by the long-term supply arrangements."

[120] *Compare Louisville Gas and Electric Co.*, 114 F.E.R.C. ¶ 61,282 PP 83-85 & nn. 51-52 (2006) (all existing long term rights (network, point-to-point, and grandfathered) are to be included the Base Case Model; annual reliability assessments include identification of upgrades necessary to satisfy planning criteria or the Base Case Model).

rights proposal links those rights and the planning process to ensure their continuing feasibility;[121] and PJM recognizes that "the transmission system should be designed and constructed to meet the baseline requirements of all of its users"[122] (which PJM defines in terms of baseload uses).[123] MISO correctly recognizes that long-term rights feasibility should be included in RTO transmission planning, but relegates it to "economic" planning status for which MISO may envision only contingent RTO responsibility, subject to participant funding.[124]

TAPS would welcome additional improvements to the transmission planning process that will produce a robust grid capable of accommodating all uses. We support inclusion of other uses in the planning process, in addition to the long-term rights for baseload and renewable resources recommended by TAPS.[125] TAPS also agrees with NRECA, Constellation, Reliant, EPSA, and others who argue that a rulemaking is needed to address long-term rights and transmission planning outside organized markets.[126]

CONCLUSION

For the reasons discussed above and in TAPS' Initial Comments, the final rule should maintain and strengthen the NOPR's guidelines to ensure incorporation of long-term rights into short-term-focused RTO markets, and enhancement of the RTO planning

---

[121] PJM at 15-16.

[122] *Id.* at 7.

[123] *See* n.109, *infra*.

[124] MISO at 25. MISO also advocates "efficient transmission planning processes that would minimize under or over collection of congestion funds due to infeasible allocation of FTRs." *Id.* at 25. It is unclear what this proposal means, or how is transmission planning is related to avoiding the potential "over collection" of congestion funds envisioned by MISO.

[125] *See*, *e.g.*, AEP at 13; National Grid at 27-30.

[126] TAPS Reply Comments in *Preventing Undue Discrimination and Preference in Transmission Service*, Docket No. RM05-25-000 (Jan. 23, 2006) at 26-35, provide detailed recommendations on how joint

and expansion process, consistent with Congress' dual directives, thereby supporting investment in generation and transmission that will broadly benefit consumers.

Respectfully submitted,

/s/ Cynthia S. Bogorad

Robert C. McDiarmid
Cynthia S. Bogorad
William Huang

Attorneys for
Transmission Access Policy Study Group

Law Offices of:
Spiegel & McDiarmid
1333 New Hampshire Avenue, NW
Washington, DC 20036
(202) 879-4000

April 3, 2006

---

transmission planning processes should be structured.

Submission Contents