

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Preventing Undue Discrimination and
Preference in Transmission Service

Docket Nos. RM05-17 and
RM05-25

**POST-TECHNICAL-CONFERENCE COMMENTS
OF TRANSMISSION ACCESS POLICY STUDY
GROUP AND AMERICAN PUBLIC POWER
ASSOCIATION REGARDING DESIGNATION OF
SYSTEM POWER CONTRACTS AS NETWORK
RESOURCES**

Pursuant to the August 1, 2007 notice allowing interested parties to submit follow-up comments on the subjects discussed at the July 30, 2007 technical conference in the above-captioned proceeding, the Transmission Access Policy Study Group (“TAPS”) and the American Public Power Association hereby submit comments regarding the vital issue of network resource eligibility of system power contracts (“SPCs”) entered into by network customers for purchase from within the host transmission system (“on-system SPCs”). TAPS and APPA are gravely concerned by the interpretation of Order 890¹ reflected in the comments of a number of the speakers, including various members of the Commission staff (“FERC Staff”), at the technical conference regarding this issue.² If adopted by the Commission, the regime assumed by these speakers would essentially eliminate on-system SPCs – which have traditionally

¹ Preventing Undue Discrimination and Preferences in Transmission Service, Order No. 890, 72 Fed. Reg. 12,266 (Mar. 15, 2007), III F.E.R.C. Stat. & Regs. ¶ 31,241 (to be codified at 18 C.F.R. pts. 35 and 37) (“Order 890”), *reh'g granted*, Nos. RM05-17-001 and RM05-25-001 (Apr. 12, 2007), *compliance deadlines extended*, 72 Fed. Reg. 19,112 (Apr. 17, 2007), 119 F.E.R.C. ¶ 61,037 (2007), and 120 F.E.R.C. ¶ 61,103 (2007).

² Most of the discussion giving rise to TAPS’ and APPA’s concerns occurred during the last half-hour of the morning session.

been an important means by which transmission-dependent load-serving entities acquired their wholesale power – as a workable power-supply option. TAPS and APPA fear that there remains confusion between SPCs – which are by their nature backed by an identifiable portfolio of generating capacity (*i.e.*, the “system” in the system sale) – and seller’s choice contracts, which have no such portfolio identified in advance. In both types of sales, the moment-to-moment power sources serving the customer will be selected by the seller (through least-cost dispatch by the SPC seller, and most likely through purchases by the seller’s choice provider), but this similarity should not obscure the more fundamental differences. It is essential that concerns regarding seller’s choice contracts as network resources be addressed in a manner that recognizes these differences and does not impair network customers’ ability to continue their long-standing reliance on SPCs.

As discussed below, the complications and restrictions for use of on-system SPCs as designated network resources posited at the technical conference are utterly divorced from the reality of both historical practice and current markets.³ If applied to all transmission users, including use by the transmission providers themselves (or their merchant affiliates) to meet native load, this regime would create an administrative nightmare for virtually all load-serving entities. If the regime were applied only to network customers and not the transmission providers themselves, it would deal a lethal

³ TAPS and APPA assume that the rules for designating SPCs will apply to OATTs under which network customers are required to designate network resources, including all RTO OATTs that have not eliminated such provisions. While, as discussed below, the regime apparently envisioned by Staff would be unworkable even in traditional markets, the regime appears to be quite disconnected from the financial and operational attributes of RTOs with all-encompassing centralized markets (*i.e.*, NYISO, NE ISO, PJM, and Midwest ISO, but excluding Southwest Power Pool).

blow to the bedrock principle of comparability and would fly in the face of Commission directives in Order 890 that transmission providers must designate network resources used to serve their own retail loads and post such designations on OASIS in the same manner as network customers.

A. Background

Among other things, Order 890 issued certain clarifications regarding the eligibility of certain types of purchased-power contracts to be designated network resources (“DNRs”). The Commission summarized a number of the existing rules, including that “a network customer can designate as a network resource a system purchase that is not backed by a specific generator.” Order 890 at P 1433. It went on to note that, in the NOPR, “the Commission proposed that a network customer would continue to be able to designate network resources from system purchases not linked to a specific generating unit,” provided the power purchase agreement has the necessary indicia of firmness. *Id.* at 1434. Still recapping the NOPR, Order 890 contrasted seller’s choice contracts and SPCs, indicating that seller’s choice contracts could not be designated as network resources because the customer would not be able to specify “the source of supply, control area location, transmission arrangements, and delivery point(s) to the transmission provider’s transmission system.” *Id.* at 1435. However, a “system purchase” could be designated as a new network resource by “identify[ing] the resource as a system purchase as well as the control area from which the power will originate.” *Id.*

In its remaining discussion of network resource eligibility in Order 890, the Commission did not deviate from these conclusions as they relate to on-system SPCs. It did, however, more clearly specify the information to be provided when designating an off-system network resource (whether purchased or owned), finding that it was sufficient

to identify the control area from which the power would come and the point of delivery to the host transmission system, in lieu of identifying the particular generators supplying the off-system resource. *Id.* at PP 1475-76, 1481. Further, in response to a request by Entergy, the Commission “clarif[ied] that a customer may not designate as a network resource a *seller’s choice* power purchase agreement which is sourced by generating units internal to the transmission provider’s control area, since evaluating the effect on ATC would be problematic.” *Id.* at P 1483 (emphasis added).

On June 26, 2007, the Commission issued an order providing guidance on the timing of network resource designation and undesignation (particularly as it relates to undesignation for purposes of making short-term third-party sales), and establishing a technical conference to explore that timing issue. *Preventing Undue Discrimination and Preference in Transmission Service*, 119 F.E.R.C. ¶ 61,322 (2007). In addition, the June 26 order noted the above-quoted clarification regarding on-system *seller’s choice* contracts. *Id.* at P 5. Notwithstanding that the Commission’s Order 890 ruling was limited to on-system “seller’s choice” contracts being ineligible as DNRs, the June 26 order concluded that “good cause exists to include in the technical conference the issue of eligibility of on-system seller’s choice contracts *and system sales*.” *Id.* at P 8 (emphasis added).

The technical conference announced in the June 26 order took place on July 30, 2007, the morning session of which was devoted to the issue of network resource eligibility of on-system seller’s choice contracts and system power contracts. During this session, it became apparent that many of the speakers, including several Commission staffers, believe that a network customer seeking to designate an on-system SPC would

have to go well beyond simply identifying the contract itself as its network resource, as the Commission has indicated would be sufficient.⁴ In their view, the network customer would not only have to identify each of the generators in the fleet supplying the SPC (which should be manageable with the cooperation of the seller), but also *how much* capacity it would get from each generator in the fleet. The discussion at the technical conference further assumed that if changes to these specific quantities are needed over time, the individual resources would have to be undesignated and designated, perhaps even in something close to real time.

For example, in this view, a customer that enters into an on-system SPC with Seller X would, at the time it designates this contract, have to quantify the amount of capacity to be used out of each of Seller X's on-system generators to serve the customer's load (*e.g.*, 2 MW from Unit A, 3 MW from Unit B, 1 MW from Unit C, 5 MW from Unit D, etc.). Further, in operating time, if Seller X's Unit A goes off-line and is unavailable, the customer would have to designate a larger portion of one of Seller X's other units (or some other resource) to make up the difference, or else rely on secondary service for that portion of the customer's load that would have been served by Unit A, or possibly even be subject to penalties for improper use of network service. Of course, if the customer is going to designate additional capacity from, say, Unit B, Seller X will at the same time

⁴ Preventing Undue Discrimination and Preference in Transmission Service, 71 Fed. Reg. 32,636 (proposed June 6, 2006), IV F.E.R.C. Stat. & Regs. ¶ 32,603 (to be codified at 18 C.F.R. pts. 35 and 37) ("890 NOPR"), *corrected*, 71 Fed. Reg. 37,109 (June 29, 2006), *reply comment period extended*, 71 Fed. Reg. 39,251 (July 12, 2006) at P 408 ("When a network customer is designating a system purchase as a new network resource the source information required in section 29.2(v) should identify that the resource is a system purchase and should identify the control area from which the power will originate."). In Order 890, the Commission did not change this standard with respect to on-system SPCs. Its pronouncement in Order 890 (P 1483) disqualifying on-system resources related to seller's choice contracts, not SPCs.

have to undesignate the same amount of capacity from Unit B, assuming it had the unit fully allocated to existing DNRs.

A possible reason for the approach discussed at the technical conference is that, while we believe Order 890 itself (and the NOPR before it) to be quite clear that SPCs (whether on-system or off-system) may be designated as network resources simply by identifying the contract itself and the originating control area as the source, the language of the *pro forma* tariff has been modified in an apparently inconsistent manner. The redlined OATT shows deletion of the following language from the end of the on-system provisions of Section 29.2(v): “Description of purchased power designated as a Network Resource including source of supply, Control Area location, transmission arrangements and delivery.” Given the discussion in Order 890 itself, it would seem that this deletion was inadvertent. Perhaps it is this deletion that prompted much of the discussion at the technical conference.

B. The Commission Must Reject the DNR Treatment of On-System SPCs Discussed at the Technical Conference, and Confirm the Approach It Previously Adopted

1. Imposing Undue Complications for Designating and Utilizing SPCs Would Deprive Network Customers of a Crucial Power Supply Option, and Undermine Commission Policy Favoring Long-Term Contracts

SPCs, particularly purchases from the host transmission provider (or its affiliate), have historically been a core power-supply element for transmission-dependent utilities. In the old days before open-access transmission and market-based rates, these were the traditional purchases made by wholesale customers on a bundled basis, at regulated, cost-based rates. Indeed, until the Commission started requiring unbundling of transmission and generation services under wholesale contracts, these contracts provided a service

virtually identical to the service the transmission owners provided to their retail native loads.

While the pricing and regulatory trappings have changed, and other options may now be available, TDUs still rely heavily on SPCs, and often find them to be the most economical way to serve their loads. This is especially true with respect to smaller TDUs, whose total demands are not large enough (and whose staff is too minimal) to support creation of their own generation portfolios through construction of baseload generation, participation in jointly-owned units and firm power purchases from other entities. These entities often look to full-requirements SPCs as a relatively no-muss-no-fuss option to meet their power-supply needs using a resource portfolio comparable to that used by larger systems to serve their retail loads, thus enabling TDUs to stay competitive in the provision of for retail service. TDUs large and small are attracted to, and may pay a premium for, the ease of administration of an SPC and the inherent risk-reduction benefits of the diverse generating fleet standing behind the contract, and the high degree of firmness resulting from the inclusion of reserves. Indeed, in this respect SPCs are the equivalent of how the transmission provider (or its merchant affiliate) uses its own resources to meet its retail and other native loads.

The discussion at the technical conference was largely dominated by speakers from the Western Interconnection who spoke vehemently about the need to preserve the availability of SPCs and/or seller's choice contracts in the west. In addition, the speaker from Bonneville Power Administration suggested that its predominantly hydroelectric system uniquely precludes it from designating particular generators as serving any particular loads. TAPS and APPA urge the Commission to recognize that SPCs are an

important, widely used approach to serving wholesale loads in the Eastern Interconnection, and that suppliers selling system power from largely thermal generating fleets would face problems similar to those described by Bonneville. We believe that entities doing business in the Western Interconnection were more motivated to participate in the technical conference discussion given that Order 890 itself had ruled that *seller's choice* contracts could not be used as DNRs, and the speakers at the technical conference suggested that seller's choice contracts are used almost exclusively in the west.

In contrast, on-system SPCs – which the Commission did *not* seek to rule out as DNRs in Order 890 – are relied on by TDUs throughout both the Eastern and Western Interconnections. There is every bit as much of a need to ensure that customers in the Eastern Interconnection can utilize on-system SPCs (as easily as the transmission providers can serve their own loads from a fleet of resources) as in the west. And while Bonneville's system dispatch may have particular legal implications that other systems don't have to worry about, all sellers under SPCs use least-cost system dispatch methods that are essentially incompatible with the bureaucratic regime discussed at the technical conference; indeed, such system dispatch is the basic building block underlying a system power contract. Thus, treatment of SPCs for network customers must be *both* administratively workable and comparable to how transmission providers themselves use their resources, for both the Eastern and Western Interconnections.

The posited requirements for designating on-system SPCs as network resources discussed at the technical conference are, quite frankly, unworkable. Such micromanagement would eliminate the above-described core advantages of SPCs, and create an administrative nightmare for buyer and seller alike. SPCs are vital to network

customers throughout the country, just as the transmission provider's flexibility in use of its entire generating fleet is vital to its ability to serve its native/retail load reliably and economically. Indeed, it is this very flexibility that is at the core of network service. The bureaucratic nightmare of designating and undesignating individual generators underlying an on-system SPC (or the transmission provider's fleet used to serve native load), both at the time of the DNR application and in real time, would make on-system SPCs virtually unusable, and network service would be much less valuable than it is intended to be. Further, this process (if adopted) would destroy the value of a highly reliable product that is backed by reserves, by making actual use of those reserves subject to separate resource designation.

Making SPCs harder to use is antithetical to the Commission's policy of encouraging and facilitating use of long-term contracts. *See, e.g., Wholesale Competition In Regions With Organized Electric Markets, Advance Notice of Proposed Rulemaking, 72 Fed. Reg. 36,276 (proposed July 2, 2007), IV F.E.R.C. Stat. & Regs. ¶ 32,617, P 83 (to be codified at 18 C.F.R. pt. 35) comment period extended, 72 Fed. Reg. 44,437 (Aug. 8, 2007).* If the Commission were to adopt the regime discussed at the technical conference, it would make it harder for network customers to use their long-term transmission rights, contrary to its obligation under Federal Power Act Section 217(b)(4), 16 U.S.C. § 824q(b)(iv), and (absent provisions to grandfather existing SPCs) would essentially abrogate existing rights by making them unusable, in violation of FPA Section 217(b)(1)-(3). Because many existing SPCs are relatively low-cost sources of supply (particularly those that have been in effect for a number of years), network customers

would likely see significant cost increases if they were no longer able to use them due to overly burdensome and unwarranted designation requirements.

In practical terms, if the Commission endorsed the regime that appears to have been assumed by participants in the technical conference, it would motivate LSEs to seek off-system SPCs in lieu of on-system SPCs, because Order 890 made it easier to designate an off-system SPC – in describing the source for such a contract, the customer need only identify the point of delivery to the host transmission system and the control area from which the system purchase is sourced. However, the price of avoiding unnecessary and unworkable resource designation requirements would be pancaked transmission costs required to move the power to the transmission system on which the customer is located. Further, this would essentially eliminate the host transmission provider (or merchant affiliate) as a possible supplier, and potentially the only supplier in a load pocket, where import constraints result in there being essentially *no* off-system SPC suppliers who can reach the customer.

The other alternative would be for the on-system seller to be the network customer and thereby take on (or possibly avoid⁵) the headache of all the designating/undesignating. But this would be practical only if the network customer desires a *full-requirements* SPC; if it seeks to use other resources in combination with the SPC (as many TDUs do), this is not an option. Further, there may be other reasons why the TDU would wish to be the network customer – for example, it may own transmission facilities for which it should get credits under OATT Section 30.9.⁶ TDUs should not be

⁵ See Part I.B.2 *infra*.

⁶ Under the Commission's policy, credits are to be provided only where the owner of the transmission assets is the network customer itself.

placed in the position of choosing between the two evils of unmanageable resource designation requirements and forgoing these and other benefits of being the network customer.

2. If Applied Only to Network Customers, the Postulated Designation Requirements Would Blatantly Violate Comparability

The discussion at the technical conference was unclear as to whether the unwieldy requirements would apply only to network customers using SPCs, or also to the use by transmission providers (and their merchant affiliates) of the same fleet of generators for service to their native loads. Although some of the comments appeared to indicate that the rules would apply equally, one suggestion was made during the technical conference that a way to alleviate customers' concerns might be to treat network customers with on-system SPCs – at least if they are full-requirements contracts – as part of the transmission provider's "native load."⁷ The implication of this suggestion is that the transmission provider would not have to jump through the same hoops in designating its fleet of generators for service to its native load as were being discussed for on-system SPCs.

TAPS and APPA are alarmed at this implication. Placing more stringent requirements on a network customer's contractual use of the same resource fleet than on the transmission provider itself would flagrantly violate the requirement of comparability that is the very bedrock on which the OATT is based and which Order 890 seeks to

⁷ Purchases under SPCs may be for the customer's full requirements, a fixed MW quantity, or partial requirements (all needs after the customer's other resources have been taken into account). The quantity purchased should not make a difference in the treatment of SPCs. We believe that it would be appropriate to consider the purchaser to be part of the supplier's native load under all such permutations, not just full requirements SPCs.

strengthen.⁸ In great part, the rates, terms and conditions of service of the *pro forma* OATT rest upon the “seminal case” of *American Electric Power Service Corp.*⁹ and the Commission’s “broadened” analysis of comparability and undue discrimination. Order 888 at 31,647.¹⁰ In particular, the *AEP* expanded comparability analysis required an assessment of “the transmission provider[’s] use [of] its system for serving its native load customers,” 67 F.E.R.C. ¶ 61,168, 61,490 (1994), “in order to insure that the tariff services are comparable to those services AEP provides to itself.” *Id.* See also Order 888 at 31,647 (AEP comparability standard entails inquiry into the ways transmission provider uses its system including “e.g., to integrate load and resources when serving retail native load.”). *Id.*

Application of this “refocused analysis” and “broadened” comparability standard led directly to a core obligation of the *pro forma* OATT, *i.e.*, the requisite provision of network transmission service. Indeed, Section 28.3 of the OATT defines network service in terms of service comparable to the transmission provider’s own use of its system.

The Transmission Provider will provide firm transmission
service over its Transmission System to the Network

⁸ The proffered “solution” would also give the host transmission provider/merchant a competitive advantage not available to others who might be in a position to sell system power from a combination of generators located within the same control area. TAPS and APPA aren’t sure whether there currently are any such competitive suppliers, but surely none will develop to compete with the transmission provider for on-system SPCs if the Commission were to adopt this policy.

⁹ *American Elec. Power Serv. Corp.*, 64 F.E.R.C. ¶ 61,279 (1993), *reh’g granted*, 67 F.E.R.C. ¶ 61,168 (1994), *clarified*, 67 F.E.R.C. ¶ 61,317 (1994) (“*AEP*”).

¹⁰ Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,539 (May 10, 1996), [1991–1996 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,036 (“Order 888”), *clarified*, 76 F.E.R.C. ¶ 61,009 (1996), *modified*, Order No. 888-A, 62 Fed. Reg. 12,274 (Mar. 14, 1997), [1996–2000 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,048, *order on reh’g*, Order No. 888-B, 62 Fed. Reg. 64,688 (Dec. 9, 1997), 81 F.E.R.C. ¶ 61,248 (1997), *order on reh’g*, Order No. 888-C, 82 F.E.R.C. ¶ 61,046 (1998), *aff’d in part and remanded in part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff’d sub nom. New York v. FERC*, 535 U.S. 1 (2002).

Customer for the delivery of capacity and energy from its designated Network Resources to service its Network Loads on a basis that is comparable to the Transmission Provider's use of the Transmission System to reliably serve its Native Load Customers.

To like effect, and with particular (if not dispositive) significance as regards the regimen for designating SPCs as network resources discussed at the technical conference, Section 28.2 of the OATT (emphasis supplied) requires the “*Transmission Provider, on behalf of its Native Load Customers ... to designate resources and loads in the same manner as any Network Customer under Part III of this Tariff.*”

The importance of network service in permitting the efficient integration and utilization of transmission customer resources cannot be overstated. “[O]rdering network transmission service [is] ... in the public interest ... and fully consistent with the purposes of the FPA. As the Supreme Court stated: ‘[t]he principal purpose of [the FPA] was to encourage the orderly development of plentiful supplies of electricity ... at reasonable prices.’” *Florida Mun. Power Agency v. Florida Power & Light Co.*, 65 F.E.R.C. ¶ 61,125, 61,615 (1993) (quoting *NAACP v. FPC*, 425 U.S. 662, 669-70 (1975)). “[N]etwork transmission service will allow [the transmission customer] greater flexibility to economically dispatch their generation resources. This flexibility should give them the opportunity to benefit ratepayers by using their generation resources more efficiently.” *Id.*¹¹

¹¹ In Order 890, the Commission reiterated its commitment to the AEP comparability standard, and in particular the necessary and critical comparison between the transmission service the transmission provider uses itself to serve its retail load as compared to the jurisdictional service it provides under the OATT. “[N]etwork service is comparable to the service that the transmission provider uses to serve its own retail native load” Order 890 at P 770. *See also, e.g., id.* at PP 494-95, 903, 917, 980, 1632.

Network customers must be permitted to use network service and call upon SPCs in the same manner that the transmission provider uses its system resources to serve its native load. The proposed approach to designating and undesignating customer system purchases would violate the Commission's comparability standard completely and thwart and defeat the fundamental objective of encouraging "the orderly development of plentiful supplies of electricity ... at reasonable prices." *Id.*

The Commission should not backslide or retrench on the "seminal" *AEP* comparability standard. It is no overstatement to say that wholesale restructuring is built on the bedrock of *AEP*. TAPS and APPA are all the more concerned regarding the suggestion at the technical conference that different standards might apply to network customers' use of on-system SPCs and the transmission provider's own use of the same generating fleet, in light of the Commission's recent decision in *Alabama Municipal Electric Authority v. Alabama Power Co.*, 119 F.E.R.C. ¶ 61,286, P 36 (2007). The Commission's statement therein that "[c]omparability ... only encompasses a comparison of the transmission components of unbundled wholesale and unbundled retail rates," suggests a dangerous and irreconcilable departure from the *AEP* standard and the comparability underpinnings of Orders 888 and 890. *Id.* The truncated comparability analysis in *Alabama Municipal* omits the all-important comparison between the transmission provider's use of its system to serve its *bundled* retail native load as compared to its provision of jurisdictional OATT transmission service. In order to properly assess network customers' use and designation of SPCs as DNRs, the requisite analytic standard is clear and must "include a focus on the rates, terms, and conditions, of a utility's own uses of the transmission system," which includes the transmission

provider's use of its system "to integrate load and resources when serving retail native load." Order 888 at 31,647.

3. The Unduly Burdensome Requirements Discussed at the Technical Conference Are Neither Necessary Nor to be Found Anywhere in Order 890

TAPS and APPA are convinced that the concept of requiring designation of particular amounts from particular generators in order to qualify an on-system SPCs as a DNR is wholly unnecessary and was not contemplated by the Commission itself in Order 890. We are not aware of any party having argued against the eligibility of on-system SPCs as DNRs (or requiring overly burdensome designation processes as a condition thereof), and no such arguments are reflected in the Commission's summary of comments received on the NOPR. To the contrary, it appears that network customers and transmission providers have readily been able to handle the designation of on-system SPCs throughout more than a decade of OATT administration. Given the absence of any indication of a problem with these types of contracts, the Commission and its Staff should follow the adage "if it ain't broke, don't fix it."

Order 890 itself makes no mention of changing the rules for designating on-system SPCs (although, somewhat mysteriously, the tariff changes attached to Order 890 appear to have inadvertently done so, as discussed in Part A *supra*). Throughout the NOPR and Order 890, the Commission's discussions of DNR eligibility focused principally on two distinct issues, relating to "Firm LD" products and seller's choice contracts. As noted above, SPCs are not the same as seller's choice contracts. An SPC is backed by a specific portfolio or fleet of generating resources (*i.e.*, the "system" from which the power will be produced), which can be identified generally at the time the SPC

is designated as a network resource. In contrast, a seller's choice contract is not backed by any particular generation that can be identified up front.

Because the generators that will be used to serve the buyer under a seller's choice contract are not known at the time the contract would be designated as a network resource, advocates of seller's choice contracts urge that it should be sufficient to designate particular generating resources through the scheduling process (presumably on a day-ahead or even real-time basis). Whether or not this is a sensible solution to the problem of seller's choice contracts, it has no application in the context of SPCs. The identification of the contract itself (plus the originating control area,¹² and if necessary for study purposes a list of the generators constituting the system) should suffice to specify the source when designating an SPC as a network resource.¹³ Because this information can and should be provided at the time of designation, and thus used to study the deliverability of the SPC, there is no need to specify in each day or hour which generators will actually be dispatched to provide service under the SPC, as there would be under a seller's choice contract whose source cannot be identified up front. The acceptance of a customer's SPC at the resource designation stage means that the transmission provider has concluded that the system can accommodate the resource, and thereafter the transmission provider has the obligation to maintain and construct the system to enable the customer to continue to use the resource.¹⁴

¹² We do not here address the issue of whether the source control area information could be omitted from resource designations of SPCs (or seller's choice contracts) in the Western Interconnection because of its hub-and-spoke configuration. However that issue is resolved, it can be taken into account very easily. We simply reiterate here the Commission's current rule.

¹³ See n.4, *supra*. Note that the quoted language in the NOPR is not limited to off-system SPCs.

¹⁴ This latter point was specifically made by Charlotte Glassman at the technical conference.

Indeed, in rejecting Entergy's proposal to allow on-system seller's choice contracts to be utilized as DNRs through just such a process (Order 890 at P 1483), the Commission appears to have (correctly) ruled out any obligation of customers under SPCs to comply with such burdensome requirements. Whether or not the Commission wishes to reconsider accepting Entergy's proposed solution for on-system seller's choice contracts, the unique concerns regarding seller's choice contracts should not be addressed in a manner that makes it more difficult for network customers to use on-system SPCs.

Unfortunately, it appears that at least some Commission staffers (as well as other speakers at the conference), while well intentioned, fail to appreciate the distinction between seller's choice contracts and SPCs. Thus, the discussion at the technical conference conflated SPCs and seller's choice contracts, and suggested that the same restrictions should apply to both. This is a serious and unwarranted departure from Order 890.

Finally, we note that at the technical conference, EEI proposed to allow a customer to designate on-system network resources (not specifically limited to SPCs but apparently intended to include them) without identifying specific generators, so long as the customer and all of the relevant generators are in an "unconstrained transmission area."¹⁵ While it may be a valuable contribution to the question of how to deal with on-system seller's choice contracts, to the extent it is aimed at SPCs, EEI's proposal appears to be motivated by the same confusion about the scope of P. 1483, *i.e.*, EEI appears to assume that the Commission's language there applied to *both* SPCs and seller's choice

¹⁵ Charlotte Glassman, Presentation at the Order 890 Technical Conference, 4 (July 30, 2007), *available at* eLibrary Accession No. 20070730-4017.

contracts, despite the narrowness of the actual language. EEI's proposal need not be considered by the Commission in the context of on-system SPCs because, as discussed above, the Commission has already determined that those contracts may properly be designated as network resources without identifying specific quantities from specific underlying generators, whether the purchase is on-system or off-system and whether there are internal constraints or not.¹⁶ While the *pro forma* tariff does not now appear to require it, TAPS and APPA would not object to a requirement that every network customer – as well as the transmission providers and merchant affiliates – seeking to designate an on-system SPC (or generation fleet) list the generators in the portfolio that stands behind it, but this should not translate to a requirement to assign particular generators or amounts to serve the contract. The locations of the generators (which presumably the transmission provider knows anyway) ought to be enough to permit the transmission provider to determine whether the SPC can be delivered to the customer and thus whether the DNR can be accepted.

C. Conclusion

For designating SPCs as DNRs, whether on-system or off-system, the Commission has properly found that it is sufficient that the network customer identify the contract itself and the originating control area as the source. After that, the only need for designations/undesignations would arise if a customer seeks to temporarily or permanently stop using the contract (or some MW portion thereof), just as would be the case with any other DNR. Not only is this approach simpler, clearer, and less

¹⁶ Note, however, that the *pro forma* tariff language appears to be out of synch with the text of Order 890 in this regard; again, we assume that the deletion of the last item regarding on-system DNRs in Section 29.2(v) was an inadvertent redlining error.

burdensome than the regime that was discussed at the technical conference, it would avoid seriously undermining comparability, long-term contracts, and the value of network service that are implicated by many of the ideas put forth in the technical conference discussion. Rather than adopting the unduly burdensome approach discussed at the technical conference, the Commission should simply clarify its intent with respect to on-system SPCs and restore the last bullet of the on-system provisions of Section 29.2(v) in order to eliminate the confusion that apparently underlies such proposals.

Respectfully submitted,

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