

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

Preventing Undue Discrimination and  
Preference in Transmission Service

Docket Nos. RM05-25 and  
RM05-17

**TAPS SUPPLEMENTAL POST-TECHNICAL  
CONFERENCE COMMENTS, MOTION FOR  
CLARIFICATION OR RECONSIDERATION, AND  
RESPONSE TO E.ON'S MOTION**

Pursuant to Rule 212, 18 C.F.R. § 385.212, of the Commission's Rules of Practice and Procedure, and pursuant to the Commission's August 1, 2007 Notice<sup>1</sup> allowing interested parties to submit comments on subjects discussed at the July 30, 2007 technical conference, the Transmission Access Policy Study Group ("TAPS") submits these late supplemental comments and motion for clarification or reconsideration to highlight our increasing concerns about what we believe to be the unintended consequences of certain aspects of Order 890.<sup>2</sup> Pursuant to Rule 213, 18 C.F.R. § 385.213, TAPS also answers the November 1, 2007 Request for Clarification filed by E.ON U.S. LLC ("E.ON").

Specifically, we focus on the adverse impacts of Order 890's new definition of Non-Firm Sales that may be made from a network resource without undesignation. If not clarified or reconsidered, the definition threatens to undermine the robustness and liquidity of short-term markets (particularly the RTO markets the Commission has worked hard to promote), and reliability. Clarification and/or reconsideration of the Non-

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<sup>1</sup> Notice Allowing Post-Technical Conference Comments (Aug. 1, 2007), *available at* eLibrary Accession No. 20070801-3020.

<sup>2</sup> Preventing Undue Discrimination and Preference in Transmission Service, Order No. 890, 72 Fed. Reg. 12,226 (Mar. 15, 2007), III F.E.R.C. Stat. & Regs. ¶ 31,241 (to be codified at 18 C.F.R. pts. 35 and 37), *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),

Firm Sales definition would also alleviate some of the controversy regarding undesignation and associated deadlines.

## I. BACKGROUND

The Order 888 OATT had previously barred only “firm” sales from network resources. *See* Section 30.4. Order 888-B provided that “a network customer that seeks to engage in firm sales from its current designated network resources may terminate the generating resource (or a portion of it) as a network resource and request ... that the same generation resource be designated as a network resource effective with the end of its power sale.”<sup>3</sup>

Order 890 changes Section 30.4’s description of permissible sales from a network resource from an undefined term, “non-firm sales,” to a new defined term, “Non-Firm Sales.” Order 890 explains (P 1539, emphasis added):

The Commission generally adopts the NOPR proposal to continue to require network customers and the transmission provider’s merchant function to undesignate network resources or portions thereof in order to make *certain firm, third-party sales* from those resources. In particular, network customers and the transmission provider’s merchant function may only enter into a third-party power sale from a designated network resource if the third-party power purchase agreement allows the seller to interrupt power sales to the third party in order to serve the designated network load. Such interruption must be permitted *without penalty*, to avoid imposing financial incentives that compete with the network resource’s obligation to serve its network load.

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*effective date deferred in part*, 120 F.E.R.C. ¶ 61,222 (2007) (“Order 890”).

<sup>3</sup> 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-B, 62 Fed. Reg. 64,688 at 64,703 (Dec. 9, 1997), 81 F.E.R.C. ¶ 61,248 at 62,093 (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) (“Order 888-B”).

However, new Section 1.29 replaces “penalty” with “liability,” defining Non-Firm Sale as “An energy sale for which receipt or delivery may be interrupted for any reason or no reason, without *liability* on the part of either the buyer or seller” (emphasis added). Order 890 does not clearly address whether “liability” means financial or other consequences less burdensome than a “penalty” in the event the seller exercises its right (for any or no reason) to interrupt the sale. But Order 890 (P 1692) suggests that there are sales not sufficiently firm to be designated as a network resource, but which cannot be considered a Non-Firm Sale; it notes as to non-“make whole” LD contracts, “[t]he very existence of an LD provision indicates that interruption of service will result in liability and, thus, such contracts cannot *automatically* be considered Non-Firm Sales for purposes of section 30.4.” Order 890, P 1692 (emphasis added). However, the above-quoted passage also leaves open the possibility that some LD contracts might qualify as Non-Firm Sales.

At the July 30 technical conference,<sup>4</sup> E.ON’s representative discussed (among other things) the application of the Order 890 Non-Firm Sales definition to sales into the Midwest Independent Transmission System Operator, Inc.’s (“MISO”) markets. E.ON’s representative viewed sales into MISO’s real-time market as interruptible for any or no reason, without liability, and therefore permissibly made from a network resource without undesignation. However, he concluded that sales into MISO’s day-ahead market would be considered something other than a Non-Firm Sale because of the associated liability to pay the cover price (*i.e.*, the real-time LMP) in the event of non-delivery.

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<sup>4</sup> This technical conference was not transcribed, but an audio recording is available for webcast or download. Audio recording of Technical Conference on Preventing Undue Discrimination and Preference in Transmission Service, No. RM05-17-002 (July 30, 2007), <http://www.capitolconnection.gmu.edu/ferc/ferc.htm> (follow links under July 30, 2007).

Such sales would therefore trigger the requirement to undesignate the network resources from which the sale is made. He indicated that E.ON was moving away from participation in MISO's day-ahead market because of uncertainties about redesignation if the (undesignated) resource sold into MISO's day-ahead market were needed in real time to serve native load (*e.g.*, due to a real-time contingency).

At the technical conference, Staff's reaction to E.ON's concerns focused on the opportunity (*if* the transmission provider could accommodate it) to redesignate in real time the undesignated resource needed to serve native/network load. No one questioned E.ON's assumption that undesignation was required to sell into the MISO day-ahead market.

On September 7, 2007, the Commission issued an order which "grant[ed] an extension of the effective date of the minimum lead time for undesignating network resources adopted in Order No. 890."<sup>5</sup>

On November 1, 2007, E.ON filed a Request for Clarification, again highlighting the change effected by Order 890's Non-Firm Sales definition. These comments focused on the exclusion of reserve sharing transactions (which it describes available for preventive purposes, as well as in emergencies) that pre-Order 890 would have been considered permissible sales from a network resource without undesignation. E.ON's request highlights difficulties posed by such undesignation requirement both as to timing and the inability to identify the resource supplying the "system" sale,<sup>6</sup> and (among other things) seeks an exemption for reserve sharing transactions.

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<sup>5</sup> Preventing Undue Discrimination and Preference in Transmission Service, Notice Granting Extension of Effective Date, 120 F.E.R.C. ¶ 61,222, P 3 (Sept. 7, 2007).

<sup>6</sup> See the August 13, 2007 Post-Technical-Conference Comments of Transmission Access Policy Study Group and American Public Power Association Regarding Designation of System Power Contracts as

## II. SUPPLEMENTAL COMMENTS, MOTION FOR CLARIFICATION OR RECONSIDERATION, AND ANSWER TO E.ON'S REQUEST FOR CLARIFICATION

As TAPS has gained greater understanding of the practical impacts of Order 890's Non-Firm Sale definition, we have become increasingly concerned that the new definition, while well-intended as a means to encourage undesignation in order to free up ATC, may have adverse unintended consequences that merit consideration. If not clarified or reconsidered, Order 890's use of a Non-Firm Sales definition that expands the category of less-than-firm sales for which network resources must be undesignated could adversely affect the liquidity and robustness of RTO markets, and discourage transactions that enhance reliability and reduce costs to consumers outside RTO markets.

As noted above, at the July 30 technical conference, E.ON's representative asserted that participation in MISO's day-ahead market triggered the need to undesignate network resources under Order 890's new requirements, and expressed concerns about the impact of such undesignation (*e.g.*, if E.ON needed the resource in real time for reliability). E.ON's assertion about applicability of undesignation requirements to sales into MISO's day-ahead market was not challenged.

Sales into MISO's day-ahead energy market are plainly not "firm." MISO's day-ahead market accommodates virtual traders (who have no resources) and failure to deliver energy in real time results in no "*penalty*" as that term is typically understood. A day-ahead seller's decision not to deliver creates an obligation to pay the real-time LMP (and potentially RSG charges in certain circumstances). But does that obligation amount

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Network Resources, asking the Commission to continue to allow designation of on-system system power contracts as network resources, without disaggregation and identification of the underlying resources. Undesignations should similarly reflect the "system" nature of such sales. *Available at* eLibrary Accession No. 20070813-5079.

to a “*liability*” that would exclude a sale into MISO’s day-ahead market from “Non-Firm Sales” that may be made from a network resource without undesignation?

As E.ON’s technical conference testimony suggests, requiring undesignation of network resources where a sale is made into a day-ahead market discourages sales into those markets. Where a seller located outside the RTO boundaries has a choice as to whether to sell into an RTO or bilaterally outside the RTO, it may seek to sell elsewhere to avoid undesignation, depriving RTO markets of economic supply. While (as Staff noted at the technical conference) there may be a theoretical potential for real-time redesignation of the undesigned resource in the event it is needed to serve native or network load, that real-time redesignation is unlikely to be timely processed and accepted, particularly in situation where it would be most needed—a constrained grid. Transmission dependent network customers, whose resources are often remote from their load, will be reluctant to take that risk to their ability to reliably meet network load. In addition, such customers may be concerned that the long-term network resource designations on which they depend to serve their network load may be inadvertently compromised by administrative error by the customer or the transmission provider in the temporary undesignation/redesignation process, particularly if this is daily occurrence. Thus, if “*liability*” as used in the Non-Firm Sale definition is interpreted to include obligations of the kind sellers into organized markets must bear if they chose not to deliver, the definition will discourage sales into organized markets that the Commission seeks to facilitate because they are “critical to addressing issues of market power and bid insufficiency.” *Southwest Power Pool, Inc.*, 121 F.E.R.C. ¶ 61,029, P 2 (2007) (rejecting

SPP filing burdening external generation participation in its Energy Imbalance Service Market).

Assuming E.ON is correct that the obligations associated with a sale into a day-ahead RTO market constitutes a “liability” disqualifying the sale from being considered a Non-Firm Sale that can be made from a network resource without undesignation, application of Section 1.29’s Non-Firm Sales definition to network resources *designated within an RTO* would be needlessly destructive of RTO markets. For example, strict application of a “without liability” definition of Non-Firm Sales might (absurdly) require undesignation of MISO-designated network resources for sales into MISO’s day-ahead market pursuant to MISO’s “must offer” requirement for network resources.<sup>7</sup> That cannot be what’s intended. Even assuming that (to avoid the above absurdity) the undesignation requirement would not be triggered by day-ahead sales into the same RTO in which a resource had been designated as a network resource, presumably it would apply to sales into neighboring RTOs, *e.g.*, from MISO into PJM and vice versa. In this way, the definition would be creating new barriers to precisely the type of cross-border sales the Commission is trying to encourage. *See, e.g., Wisconsin Pub. Serv. Corp., v. Midwest Indep. Transmission Sys. Operator, Inc.*, 120 F.E.R.C. ¶ 61,269, P 58 (2007) (describing initiatives that allow jointly-owned resources to be sold into either RTO’s day-ahead or real-time market, to help border prices converge). These adverse impacts seem particularly unjustified in organized markets that use centralized dispatch where temporary resource undesignations and redesignations would appear to have no effect on

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<sup>7</sup> *See* MISO Transmission and Energy Markets Tariff (“TEMT”) § 69.2, whose “Network Resource Must Offer Requirement” is not limited to the network customer’s network load. *Compare* proposed MISO TEMT § 30.4, which would bar operation of MISO-designated network resources to the extent the output exceeds the network customer’s network load, plus “Non-Firm Sales.” *See* MISO’s October 11, 2007

RTO dispatch or ATC. The added paperwork and risk associated with requirements to constantly undesignate and redesignate resources designated within an RTO in order to make day-ahead sales into that RTO or sales into neighboring RTO markets seems particularly pointless and burdensome.

Outside organized markets, strict application of the new Non-Firm Sales definition also can have adverse impacts on bilateral markets and reliability. E.ON's request for exemption of reserve sharing from undesignation requirements highlights reliability concerns associated with interpreting the Non-Firm Sales definition to require undesignation for sales previously viewed as not firm and therefore permissibly made from a network resource under Section 30.4. However, it may not go far enough, particularly for TDUs that are often excluded from reserve sharing arrangements and must rely on other transactions to serve the same purpose.

Further, outside RTO organized markets, TDUs may have limited options in the event of a real-time contingency or unforeseen load increase that requires recall of a less-than-firm sale. In such regions, network customers (particularly TDUs with remote resources) are likely to be even less inclined to assume reliability and other risks (described above) associated with temporary undesignation/redesignation of network resources. To ensure that they may call on their network resources to reliably meet network load in the event of a contingency, such customers will likely steer away from transactions beneficial to consumers and the marketplace that are not "firm," but which entail some financial consequences in the event of recall.

Particularly if “without liability” is interpreted to mean something broader than “without penalty,” the Non-Firm Sales definition will sweep in many sales, some of which are long-standing, that have previously been considered non-firm and permissible from a network resource without undesignation. TAPS recommends clarification (or, if necessary, reconsideration) of “Non-Firm Sales” definition so that it covers transactions that permit interruption for any or no reason, but may entail some financial consequences for interruption (*e.g.*, payment of real-time LMPs or equivalent), although no added “penalty” for interruption. Such clarification would be consistent with the language used to describe the undesignation requirement in Order 890, P 1539, and would restrict undesignation requirements to “certain firm, third party sales” (*id.*). Such clarification would go a long way toward ameliorating the adverse market and reliability impacts of more restrictive application of the Non-Firm Sales definition, and limiting the controversy regarding the timing requirements for undesignation.

At minimum, the Commission should clarify what transactions are considered Non-Firm Sales. It should explain precisely what is intended by the term “without liability” as used in new Section 1.29 and how that term compares with “without penalty” used in the Order 890 Preamble (P 1539), so that transmission providers and network customers, both inside and outside organized markets, can understand what is required for compliance with the OATT.

Respectfully submitted,

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