

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Preventing Undue Discrimination and
Preference in Transmission Service

Docket Nos. RM05-17-001 and
RM05-25-001

**REQUEST FOR REHEARING AND CLARIFICATION OF THE
AMERICAN PUBLIC POWER ASSOCIATION,
NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION,
TRANSMISSION ACCESS POLICY STUDY GROUP
AND TRANSMISSION DEPENDENT UTILITY SYSTEMS**

Pursuant to Commission Rule 713, 18 C.F.R. § 385.713, and Section 313 of the Federal Power Act, 16 U.S.C. § 825*l*, the American Public Power Association (“APPA”), National Rural Electric Cooperative Association (“NRECA”), Transmission Access Policy Study Group (“TAPS”) and Transmission Dependent Utility Systems (“TDU Systems”) submit this request for rehearing and clarification of Order 890-A,¹ the Commission’s December 28, 2007 order on rehearing of Order 890.² This joint rehearing/clarification request urges clarifications and corrections to the experimental lifting of price caps on reassigned transmission capacity, which the Commission adopted in Order 890-A (at P 390).³

¹ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890-A, 73 Fed. Reg. 2984 (Jan. 16, 2008), 121 F.E.R.C. ¶ 61,297 (2007) (to be codified at 18 C.F.R. pts. 35, 37) (“Rehearing Order” or “Order 890-A”).

² *Preventing Undue Discrimination and Preference in Transmission Service*, 72 Fed. Reg. 12,226 (Mar. 15, 2007), 118 F.E.R.C. ¶ 61,119 (2007) (“Final Rule” or “Order 890”).

³ Having each sought rehearing of Order 890 and previously filed comments in this proceeding, APPA, NRECA, TAPS and TDU Systems are not repeating here a description of their respective organizations and interests.

I. IDENTIFICATION OF ERRORS AND STATEMENT OF ISSUES

A. Identification of Errors

Pursuant to Rule 713(c)(1), 18 C.F.R. § 385.713(c)(1), APPA, NRECA, TAPS and TDU Systems identify the following errors:

1. The Commission erred by not limiting Order 890-A's experimental lifting of price caps on reassigned transmission capacity to reassignments of short-term (*i.e.*, less than one year) transmission service.
2. The Commission erred by not defining the data to be collected and the parameters and procedures for the Staff study of the experimental lifting of price caps on reassigned transmission capacity.
3. The Commission erred by eliminating the requirements that holders of market-based rate ("MBR") authority report in their own Electronic Quarterly Reports ("EQRs") their own resales of transmission capacity.

B. Statement of Issues

Pursuant to Rule 713(c)(2), 18 C.F.R. § 385.713(c)(2), APPA, NRECA, TAPS and TDU Systems provide the following statement of issues:

1. Whether the Commission failed to limit the consumer harm associated with the lifting of price caps on reassigned transmission capacity by not restricting the experiment to reassignments of short-term transmission capacity. *Interstate Natural Gas Ass'n v. FERC*, 285 F.3d 18, 29-30 (D.C. Cir. 2002).
2. Whether the Commission should prescribe the parameters, procedures and data to be collected in the Staff report on the experimental lifting of price caps so that there is a full record, along with opportunity for public comments, to support any further Commission action. 5 U.S.C. §§ 706(2)(A), (D), (E) (2000).
3. Whether the Commission should require holders of market-based rate ("MBR") authority to continue reporting in their own EQRs the transmission capacity reassignments they make. *California ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004), *cert. denied*, 127 S. Ct. 2972 (2007).

II. ORDER 890-A'S CAPACITY REASSIGNMENT RULINGS SHOULD BE REVISED TO LIMIT CONSUMER HARM AND TO ENSURE ADEQUATE DATA AND EVIDENCE TO ASSESS THE EXPERIMENT AND POTENTIAL MARKET MANIPULATION

A. The Commission Should Better Define the Experimental Lifting of Price Caps to Protect Consumers and Provide Meaningful Study Results

APPA, NRECA, TAPS and TDU Systems continue to believe that the Commission's decision to lift price caps on reassigned transmission capacity, including reassignments by a transmission provider's merchant function or marketing affiliate, is not supported by substantial evidence that price caps have discouraged development of a secondary transmission market, and that it will harm consumers by making transmission artificially scarce and overpriced. Indeed, the Commission's decision cannot be reconciled with abundant evidence of the existence of serious transmission congestion in large swaths of the country,⁴ creating transmission-constrained regions in which market power may be exercised. While Order 890-A's limiting the lifting of the price cap to an experimental period ending October 1, 2010 (Order 890-A at P 390; *Pro Forma* OATT § 23.1) shortens the period consumers are harmed by the Commission's decision, more needs to be done to protect them and to ensure that the experiment produces results on which the Commission can rationally make future decisions. The Commission should

⁴ See, e.g., U.S. Dep't of Energy, National Electric Transmission Congestion Study (Aug. 2006) (available at http://nietc.anl.gov/documents/docs/Congestion_Study_2006-9MB.pdf); Consortium for Electric Reliability Technology Solutions, U.S. Dep't of Energy Transmission Bottleneck Project Report (Mar. 19, 2003) (available at http://www.oe.energy.gov/DocumentsandMedia/current_transmission_bottlenecks_report.pdf); Office of Electricity Delivery and Energy Reliability, Draft National Interest Electric Transmission Corridor Designations, 72 Fed. Reg. 25,836 (May 7, 2007); 2006 State of the Market Report, Southwest Power Pool, Inc. (June 21, 2007) (available at http://www.spp.org/publications/2006%20SOM_FINAL_%206_21_07.pdf) PJM Interconnection, LLC, 2006 State of the Market Report at 270 (Table 7-2) (available at <http://www2.pjm.com/markets/market-monitor/downloads/mmu-reports/2006-som-volume-ii-section7.pdf>).

confine the experiment to just short-term reassignments, consistent with *Interstate Natural Gas Association of America v. FERC*, 285 F.3d 18 (D.C. Cir. 2002) (“*INGAA*”), and prescribe the parameters and procedures for the required Commission staff report.

First, in *INGAA*, the authority on which the Commission relies for support for its decision here, the D.C. Circuit upheld the Commission’s experimental lifting of the price cap for short-term sales. 285 F.3d at 29-30. The experiment adopted in Order 890-A should similarly apply only to short-term sales (*i.e.*, less than one year). Long-term firm point-to-point transmission service is particularly important to LSEs looking to secure economic and reliable power supply. While the Commission states that “any primary capacity that is not scheduled is made available to other customers on a non-firm basis, frustrating any attempts to withhold capacity,” Order 890-A at P 393, such non-firm releases will not help those LSEs needing long-term firm service. Further, by extending the experiment to long-term sales, including reassignments by the transmission provider’s merchant function or affiliates, the Commission discourages needed transmission construction. If the secondary market is clearing at prices above the transmission provider’s rate ceiling, the parent corporation will have incentives to put as much capacity in the hands of the merchant function or affiliates as possible and to avoid new transmission construction, thus reducing or eliminating any price-restraining primary capacity and producing higher revenues for the parent corporation for sales of monopoly transmission service.⁵ Such a result would reduce the access of LSEs to the long-term

⁵ APPA, NRECA, TAPS and TDU Systems find no solace in the Commission’s observation that the “*pro forma* OATT places an affirmative obligation on transmission providers to expand their system in order to accommodate requests for service.” Order 890-A at P 405. That obligation has existed since 1996, yet the Commission in Order 890 found that it had not succeeded in overcoming transmission providers’ incentives to avoid transmission investment, especially in favor of their own generation. Order 890 at P 424. While APPA, NRECA, TAPS and TDU Systems hope that the Final Rule’s reforms to the transmission planning

firm transmission service they require to meet their service obligations, in violation of FPA Section 217(b)(4). 16 U.S.C. § 824q(b)(4). The experiment's goals of determining whether lifting the price cap encourages development of a secondary market and whether there is competition in such a market can be met through lifting the price cap for short-term reassignments only.

Second, the Commission should prescribe the parameters, procedures and data to be collected in the Staff report so the experiment produces evidence that can provide an informed basis for further decisions about the price cap. In Order 890 (at P 820), as reiterated in Order 890-A (at P 390), the Commission required its Staff to monitor EQRs for evidence of potential market power exercise and to prepare "within six months of receipt of two years of quarterly reports, a report summarizing its findings." Order 890 at P 820. The Commission, however, did not otherwise provide guidance about what information that report should include or the issues it should address. Order 890-A is similarly lacking in guidance about the hypotheses to be examined and the data to be collected. For the Commission's experiment to produce useful data, the Commission should prescribe the following:

- Given the Commission's hypothesis that the price cap is limiting development of a secondary capacity market, the Staff report should examine data on the amount of reassignments before and during the experiment to see whether there is an increase in reassignments associated with the lifting of price caps.
- The Staff report should examine prices both offered and accepted for reassigned capacity, so that the Commission can determine the level of market interest in such

process will result in and accelerate transmission construction, the Commission at present has no factual basis to conclude that entry in the form of expanded transmission capacity will be "timely, likely and sufficient" to defeat price increases due to transmission market power. *See* Federal Trade Commission and U.S. Department of Justice Horizontal Merger Guidelines, § 3.0 (finding entry effective at defeating market-power if "timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the competitive effects of concern"), available at <http://www.ftc.gov/bc/docs/horizmer.htm>.

reassigned capacity, whether or not prices increased, the cause of price changes, and whether or not those prices remained within a zone of reasonableness.

- The Staff report should examine the Commission's conjecture that competition among secondary market resellers will be sufficient to protect consumers from excessive rates. For example, on a path-by-path basis, the Staff report should review the number of sellers offering comparable competing transmission service resales, the identity of these sellers, and the kinds of products offered.
- The Staff report should address the kinds of products resold, *e.g.*, length of reassignments and whether purchasers of reassigned capacity requested changes in points of receipt/delivery, so that it may properly analyze competitiveness of the resale markets.
- The Staff report should look specifically at reassignments by the transmission provider's merchant function or marketing affiliates, especially to determine if their reservations increased, whether they reassigned the capacity reserved, to whom and the price at which the reassignments occurred. The Staff report should also indicate whether the transmission provider's interactions with the affiliated entities making such sales were covered by the Commission's Standard of Conduct provisions.
- The Staff report should assess whether those needing transmission capacity were able to obtain it, whether in the reassignment market or by accessing primary capacity, including through conditional firm service or planning redispatch. For example (and assuming the experiment continues to apply to longer-term transmission service resales), the report should look to see whether power marketers or others buy up long-term paths to LSEs, thus forcing the LSEs to look to short-term markets or other less than long-term, firm services to secure needed transmission.

To the extent the EQR data or other Commission sources do not provide the information identified above, the Commission will need to institute data reporting and collection requirements.

Finally, the fact that Staff will be monitoring the EQRs and other data with the goal of preparing a report at the end of the two-year period does not alleviate the obligation of the Commission to actively monitor resale of transmission capacity to ensure that rates for customers remain just and reasonable during this period and that there are no market power abuses. The Commission must explicitly establish up front its intent to continue to exercise its obligations under FPA sections 205 and 206 throughout

this period, so that resellers are on notice that they cannot charge unjust and unreasonable rates. Should the Commission discover evidence of unjust and unreasonable rates at any time, the Commission must be prepared to address this as it occurs, including if necessary by terminating the experiment prior to October 1, 2010.

Once the Staff issues its report, the Commission should notice it and provide an opportunity for public comment. The underlying data must also be made public, though any truly sensitive information could be subject to appropriate confidentiality protections. If the Commission believes that further extension of the experiment is merited, it should employ full notice and comment rulemaking procedures to ensure a complete record is developed to support any further Commission action.

B. The Commission Should Continue Requiring Holders of Market-Based Rate Authority to Report Capacity Reassignments

Responding to rehearing requests from the Electric Power Supply Association and Powerex, the Commission in Order 890-A stated: “To the extent a reseller has a market-based rate tariff on file, the provisions of that tariff, including a price cap or reporting obligations, will not apply to the reassignment since such transactions no longer take place pursuant to the authorization of that tariff.” Order 890-A at P 433. APPA, NRECA TAPS and TDU Systems fear the Commission’s elimination of this reporting obligation has created a dangerous gap in the information trail that the Commission and the public rely upon to determine whether public utilities may be exercising market power.

A principal concern associated with the lifting of the price cap is that MBR sellers will use transmission capacity reassignment to support attempts to exercise market power in sales of transmission, electricity, or both. Until now, both an MBR seller’s electricity sales and transmission reassignments were reported in its own EQRs. In Order 890-A,

however, FERC clarifies that the MBR seller's transmission resales will appear in EQRs filed by the transmission provider regarding resales under its OATT, not in the MBR seller's EQRs. Order 890-A at P 431. Further, in Order 890 and 890-A, the Commission said that the transmission provider should "aggregate and summarize in an EQR the data contained in the service agreements for reassigned capacity." Order 890-A at P 410; *see also* Order 890 at P 817. Taken together, these changes to the reporting process could create unintended, adverse consequences.

First, because an MBR seller no longer needs to report its own transmission reassignments and because the transmission provider will report reassignments only on an aggregate, summary basis, the EQR data will not permit monitoring to detect patterns or conduct that suggest efforts to manipulate or exercise market power in transmission markets. For example, if the transmission provider's EQR does not identify transactions on a seller-specific or path-specific basis, effective monitoring will be stymied.

Second, by separating the data on the MBR seller's electricity sales from the data on the same seller's transmission reassignments, the Commission creates difficulties in determining whether an MBR seller is manipulating transmission resales to favor its MBR sales, because there is no assurance that the Commission or the public could determine whether a particular capacity reassignment supported an MBR sale. It is not clear that the transmission provider's EQR data will be sufficiently granular or detailed to allow the Commission or the public to understand the context in which a capacity reassignment took place. While such monitoring might be possible for the transmission provider's own reassignments and MBR sales, if part of the same EQR (though given the

aggregation and summary requirement that is far from certain), it will not be possible for the vast majority of holders of MBR authority.

Accordingly, the Commission should grant rehearing and retain the requirement that all holders of MBR authority report both their electricity sales and their capacity reassignments in the same EQR. Such reporting must be sufficiently detailed to allow monitoring of specific transmission paths, specific sellers and specific transactions.

CONCLUSION

The Commission should grant rehearing and clarify its Rehearing Order to: (1) limit consumer harm; (2), ensure adequate data and evidence to assess the experimental lifting of price caps on reassigned transmission capacity; and (3) monitor for potential market manipulation.

Respectfully submitted,

/s/ Mark S. Hegedus

Susan N. Kelly, Vice President of Policy
Analysis and General Counsel
Allen Mosher, Senior Director of Policy
Analysis and Reliability
AMERICAN PUBLIC POWER ASSOCIATION
1875 Connecticut Avenue, NW
Suite 1200
Washington, DC 20009-5715
(202) 467-2900
Fax: (202) 467-2910
Email: skelly@appanet.org
amosher@appanet.org

Robert C. McDiarmid
Cynthia S. Bogorad
Margaret A. McGoldrick
Mark S. Hegedus
SPIEGEL & MCDIARMID LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036
(202) 879-4000
Email:
robert.mcdiarmid@spiegelmc.com
cynthia.bogorad@spiegelmc.com
margaret.mcgoldrick@spiegelmc.com
mark.hegedus@spiegelmc.com

Attorneys for Transmission Access Policy
Study Group

Wallace F. Tillman, General Counsel
Richard Meyer, Senior Regulatory
Counsel
Jay A. Morrison, Senior Regulatory
Counsel
David L. Mohre, Executive Director,
Energy & Power Division
NATIONAL RURAL ELECTRIC
COOPERATIVE ASSOCIATION
4301 Wilson Boulevard
Arlington, VA 22203-1860
(703) 907-5500

Sean T. Beeny
Phyllis G. Kimmel
MILLER, BALIS & O'NEIL, P.C.
1140 19th Street, N.W., Suite 700
Washington, D.C. 20036
(202) 296-2960
Email: sbeeny@mbolaw.com
pkimmel@mbolaw.com

Attorneys for the National Rural Electric
Cooperative Association

Sean T. Beeny
Phyllis G. Kimmel
Kevin J. Conoscenti
MILLER, BALIS & O'NEIL, P.C.
1140 19th Street, N.W., Suite 700
Washington, D.C. 20036
(202) 296-2960
Email: sbeeny@mbolaw.com
pkimmel@mbolaw.com
kconoscenti@mbolaw.com

Attorneys for Transmission Dependent
Utility Systems

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