

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Promoting a Competitive Market for
Capacity Reassignments

Docket No. RM10-22-000

**COMMENTS OF THE TRANSMISSION ACCESS
POLICY STUDY GROUP**

In the Order 890¹ rulemaking series, the Commission temporarily suspended, until October 1, 2010, the price caps on reassignment of transmission capacity, whether by the Transmission Provider's ("TP's") affiliates or unaffiliated entities. On April 29, 2010, based on the Staff study of transmission resale transactions during the first two and a half years of this experimental period,² the Commission issued a Notice of Proposed Rulemaking ("NOPR"), proposing to change the OATT to permanently eliminate the reassignment price caps, rather than allowing them to resume effectiveness on October 1, 2010 under the terms of the Order 890 OATT.³

The Transmission Access Policy Study Group ("TAPS") appreciates the opportunity to comment on this NOPR. For the reasons set forth below, the study results do not support a finding that it is unjust and unreasonable to limit the price for resale of

¹ Preventing Undue Discrimination and Preference in Transmission Service, Order No. 890, 72 Fed. Reg. 12,266 (Mar. 15, 2007), FERC Stats. & Regs. ¶ 31,241 (2007), *order on reh'g and clarification*, Order No. 890-A, 73 Fed. Reg. 2984 (Jan. 16, 2008), FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 73 Fed. Reg. 39,092 (July 8, 2008), 123 FERC ¶ 61,299 (2008), *order on reh'g and clarification*, Order No. 890-C, 74 Fed. Reg. 12,540 (Mar. 25, 2009), 126 FERC ¶ 61,228 (2009), *order on clarification*, Order No. 890-D, 74 Fed. Reg. 61,511 (Nov. 25, 2009), 129 FERC ¶ 61,126 (2009).

² Staff Report on Capacity Reassignment, Docket No. RM05-17 (Apr. 18, 2010), eLibrary No. 20100419-4000 ("Staff Report").

³ Promoting a Competitive Market for Capacity Reassignments, 75 Fed. Reg. 24,828 (proposed May 6, 2010), FERC Stats. & Regs. ¶ 32,658 (2010).

transmission capacity to the highest of (i) the original rate paid by the Reseller; (ii) the TP's maximum rate on file at the time of the reassignment; or (iii) the Reseller's opportunity cost capped at the TP's cost of expansion. Rather, to the extent the study (which covered an atypical period of economic downturn and reduced demands) shows anything, it demonstrates that elimination of the cap is not necessary to spur expansion in capacity assignments. Further, because of the limited sample and anomalous, uncongested conditions underlying it, the study provides no sound basis for a Commission determination that elimination of the reassignment cap will not result in the exercise of market power over monopoly transmission assets or act as a disincentive to construction, especially if market-rate assignments may be made by the TP's affiliate or retail/merchant function.

TAPS urges the Commission not to modify the *pro forma* tariff to permanently lift the price caps on resale of transmission capacity. If, despite the study results, the Commission wants to further pursue market-based capacity reassignment, it should do so only as a continuation of the experiment, with the requirement of another Staff study at the end of an additional three-year period to better analyze the effect of lifting the cap under, hopefully, more typical economic conditions.

If the Commission nonetheless elects to permanently allow market-based reassignment of transmission capacity on the basis of the limited study, such reassignment should be available only for parties unaffiliated with the TP. In any event, market-based reassignment of transmission capacity should not be available to entities to the extent they lack market-based rate authority in the area in which the transmission reservation is located.

Finally, TAPS urges the Commission not to use this narrowly focused rulemaking proceeding as a vehicle for fundamentally altering the nature of point-to-point service. The Commission's suggestion of enhancing the ability of point-to-point customers to redirect service on a firm, or nearly firm, basis is not limited to the context of transmission resales. Rather, it would benefit all point-to-point customers, whether they seek to make assignments or not. The Commission has not formulated a basis for concluding that the existing OATT provisions, which already afford substantial flexibility to point-to-point customers, are no longer just and reasonable and therefore require modification. Any modification of the type suggested in the NOPR would upset the delicate balance struck in Order 888⁴ between point-to-point and network service, and would further cut into the value of non-firm point-to-point service. Among other things, it would unfairly restrict the availability of secondary network service used by network customers and TPs in serving their native load – *i.e.*, the load-serving entities that bear the residual cost of the transmission system – to economically and reliably meet their load's service requirements. Further, leaving aside the questionable merits of the concept, it is improper to propose such a major change to long-established and fundamental OATT provisions almost as an afterthought in this reassignment-focused proceeding.

⁴ 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), FERC Stats. & Regs. ¶ 31,036 (1996), *clarified*, 76 FERC ¶ 61,009 (1996), *modified*, Order No. 888-A, 62 Fed. Reg. 12,274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 62 Fed. Reg. 64,688 (Dec. 9, 1997), 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in part and remanded in part sub nom. Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

A more promising and appropriate alternative to spurring reassignment would be to enhance transparency and competition by at least studying whether the secondary market is promoted by reseller posting on the OASIS of capacity available for reassignment. Alternatively, the Commission could consider requiring posting of capacity available for reassignment, rather than continuing to make such posting optional.

I. INTERESTS OF TAPS

TAPS is an informal association of transmission-dependent utilities in more than 33 states, promoting open and non-discriminatory transmission access.⁵ As entities entirely or predominantly dependent on transmission facilities owned and controlled by others, TAPS members have a vital interest in the availability of transmission service at just, reasonable and not unduly discriminatory rates. TAPS members recognize the importance of a robust transmission grid, and are concerned about policies that may provide a strong disincentive to the grid expansion grid that the Commission is seeking to foster.

⁵ TAPS is chaired by Roy Thilly, CEO of WPPI Energy. Current members of the TAPS Executive Committee include, in addition to WPPI, representatives of: American Municipal Power-Ohio; Blue Ridge Power Agency; Clarksdale, Mississippi; ElectriCities of North Carolina, Inc.; Florida Municipal Power Agency; Illinois Municipal Electric Agency; Indiana Municipal Power Agency; Madison Gas & Electric Co.; Missouri River Energy Services; Municipal Energy Agency of Nebraska; Northern California Power Agency; Oklahoma Municipal Power Authority; Southern Minnesota Municipal Power Agency; and Vermont Public Power Supply Authority.

Communications regarding these proceedings should be directed to:

Roy Thilly, CEO
WPPI ENERGY
1425 Corporate Center Drive
Sun Prairie, Wisconsin 53590
Tel: (608) 837-2653
Fax: (608) 837-0274
E-mail: rthilly@wppienergy.org

Robert C. McDiarmid
Cynthia S. Bogorad
Margaret A. McGoldrick
SPIEGEL & MCDIARMID LLP
1333 New Hampshire Ave, NW
Washington, DC 20036
Tel: (202) 879-4000
Fax: (202) 393-2866
E-mail: robert.mcdiarmid@spiegelmc.com
cynthia.bogorad@spiegelmc.com
margaret.mcgoldrick@spiegelmc.com

II. COMMENTS

A. *The Study Does Not Support a Finding that Reassignment Caps are Unjust and Unreasonable; At Best, It Demonstrates the Need for Continued Study*

The OATT, as revised through the Order 890 rulemaking process, provides for automatic reinstatement of the Order 888-established caps on the price for transmission reassignments effective October 1, 2010. *See* OATT § 23.1. The Order 888 caps are relatively flexible. They permit resale of transmission capacity at the highest of (i) the original rate paid by the Reseller; (ii) the TP's maximum rate on file at the time of the reassignment; or (iii) the Reseller's opportunity cost capped at the TP's cost of expansion. To justify modification of the tariff to permanently eliminate those caps on or after October 1, 2010, the Commission must find the existing caps to be unjust and unreasonable. Further, to permit market-based rates, the Commission remains bound by the requirement that market-based rates be supported by "empirical proof" that "existing competition would ensure that the actual price is just and reasonable." *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1510 (D.C. Cir. 1984). "[U]ndocumented reliance on market forces" does not suffice. *Id.* at 1508. While *Farmers Union* allows

pricing flexibility, market pricing is permitted only where the competitive market provides the safeguard to ensure that rates will be just and reasonable. Specifically, the Commission must find that a seller “lacks market power (or has taken sufficient steps to mitigate market power), coupled with strict reporting requirements to ensure that the rate is ‘just and reasonable’ and that markets are not subject to manipulation.”⁶

As the NOPR recounts, P 7, Order 890-A lifted the Order 888 reassignment price cap until October 1, 2010 to permit study, allowing for a determination after review of Staff’s study as to “whether it would be appropriate to continue to allow reassignments of capacity above the price cap beyond that date.” Staff’s study of the first two and a half years of the market-based capacity reassignment experiment does not demonstrate that the Order 888 price caps are unjust and unreasonable, and therefore must be removed. Specifically, the Staff Report does not bear out the Commission’s expectation (recounted in P 4 of the NOPR, citing Order 890, P 808) that elimination of the caps is necessary to promote a robust reassignment market. Further, the Staff Report fails to demonstrate that removal of the price caps will not have adverse effects in terms of allowing the exercise of market power or deterring needed construction.

Although the NOPR (P 13) points to the “strong growth” in capacity reassignments during the study period and (P 14) “proposes to find that the Staff Report supports the Commission’s decision to lift the price cap beyond October 1, 2010,” the Staff Report shows that elimination of the price caps was not a significant contributor to the growth in capacity reassignments. Although the Report notes that the cap was lifted on an experimental basis to encourage the development of the secondary market and that

⁶ *Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1013 (9th Cir. 2004), *cert. denied*, 551 U.S. 1140 (2007).

substantial growth was observed, the Staff Report concluded that elimination of the cap was *not* responsible for that growth (at 9):

[I]t does not appear that the removal of the price cap was primarily responsible for the observed growth in the secondary market. The number and volume of reassignments above the cap were relatively small. There were only 134 out of almost 35,000 transactions reassignments above the price cap.

Thus, Staff's own conclusion precludes a finding, necessary to support modification of the OATT under Section 206, that the Order 888 cap on reassignments is unjust and unreasonable. If the number and volume of capacity assignments substantially increased during the study period, as Staff found, but most were within the cap on reassignment prices that would have applied absent the Order 890 experiment, the cap is plainly not a substantial barrier to reassignments, contrary to Commission expectations (as expressed in Order 890 at P 809).

Further, Staff's Report appears to have compared the resale price during the study period solely to the tariff rate. *See* Staff Report, App. E ("Number of Transactions Above the Tariff Rate"). It is likely that even fewer transactions would have exceeded the more generous Order 888 reassignment cap (which includes, among its "highest of" alternatives, the assignor's opportunity costs capped at the TP's cost of expansion). Thus, the Staff Report provides no evidence that the Order 888 price cap, if applicable during this period, would have in fact restricted *any* transactions, thus preventing a finding that the Order 888 reassignment price cap is unjust and unreasonable.

Nor can removal of the cap be supported by Staff's finding (*id.* at 9) that "based on the study period data, the removal of the cap does not seem to be causing problems." This observation is essentially irrelevant to the Section 206 inquiry. It is not sufficient

under Section 206 to find that a proposed alternative to the existing tariff terms is just and reasonable. The Commission must first find that the existing terms are no longer just and reasonable. The Staff's finding that the removal of the cap has not caused "problems" to date thus does nothing to support the conclusion that a change in the tariff is warranted.

But even if the only question were whether it would be just and reasonable to eliminate the cap, given the atypical conditions reflected in the study and its limited results, the Staff Report does not provide sufficient basis for the Commission to find that the ability to price resales above the cap will not create the opportunity for market power exercise if applied on a permanent basis. As recounted in the Staff Report (*id.*), "Prices were depressed below the tariff rate due to availability of primary capacity or low market price spreads between the points." At page 3, Staff further reported that the pricing of transmission capacity resales reflects "uncongested system with little scarcity." These atypical, uncongested conditions resulting from the economic downturn cannot provide the basis to determine that eliminating caps would not allow excessive rates or the exercise of market power in more normal times. Specifically, nothing in the Staff Report demonstrates that market forces will limit the ability of assignors to exercise market power (as assumed by the Commission, *see* NOPR P 4) when (unlike conditions observed in the study period) primary capacity is unavailable on a congested system.

Examination of the Staff Report, including its appendices, highlights its inability to support a finding that the Order 888 reassignment cap is unjust and unreasonable. For example, most of the transactions, and most of the increase in transactions highlighted by the Staff Report and the NOPR, were on the Bonneville Power Administration ("BPA") transmission system. *See* Staff Report at 4, Table 1 (showing a total of 31,781 resale

transactions in 2009, 26,442 of which were on the BPA system, compared to 2,929 total and 1,204 BPA-specific in 2008). But footnote 8 of the Staff Report suggests that the increase in BPA system transactions may be more apparent than real because of reporting changes (emphasis added):

Portland General Electric, the largest filer for BPA, began submitting data in Q4 2008 and did not report transactions that occurred prior to December 2008. *Based on data available, it is unclear whether BPA transactions increased over time or whether the increase was solely due to Portland General Electric's reporting.*

In any event, *none* of the BPA transactions were above the tariff rate, so elimination of the cap was not responsible for any increase in BPA transactions.

Further, the resales shown in the Staff Report involve only a small group (26) of TPs, and two entities (Central Vermont Public Service and BPA) together account for 96% of the transactions. As in the case of BPA, *none* of the CVPS transactions were above the tariff rate. As in the case of BPA, the Staff Report raises questions as to the CVPS data.⁷ This data provides no basis to assume that the study experience will be representative if the cap is removed on a permanent basis.

The 134 transactions made over the entire study period that were priced above the tariff rate hardly attest to the need to eliminate the Order 888 reassignment cap to spur reassignment. Closer review of this data raises more questions than answers. For example, of these 134 transactions, 32 were affiliate transactions involving a single holding company (discussed in Section B below) and 86 were MAPP transactions. *See* Staff Report, App. E. Nearly all of the MAPP transactions occurred in the last quarter of

⁷ “[T]he large number of CVPS transactions may be due, in part, to reporting conventions.” Staff Report at n.7.

the study period, which coincides with a major change in MAPP. MAPP Schedule F, the deeply discounted multi-TP flow-based rate for short-term transactions within the MAPP region, terminated for new transactions on September 1, 2009.⁸ During the quarter when 79 of the 86 above-tariff MAPP transactions are shown to have occurred,⁹ a transmission customer could obtain non-pancaked regional service only by assignment and redirects of preexisting point-to-point reservations.¹⁰ The only alternative would have been making potentially multiple point-to-point reservations under individual TP tariffs, at pancaked rates. The above-MAPP-Schedule-F rate reflected in the Staff Report may well have been below the (potentially pancaked) individual TP tariff rates then applicable to any new reservations. Data reflecting the aberrational transition during the wind-down of MAPP Schedule F does not provide a sound basis for future reassignment policy.

Aside from those 118 above-tariff-rate transactions identified in the Staff Report Appendices as pertaining to a single holding company and MAPP, there were only 16 other above-tariff-rate reassignments reported during the more than two-year study period. These few above-tariff-rate transactions plainly cannot support a finding that the

⁸ See MAPP's September 1, 2009 certification under Section 2.1 of the MAPP Schedule F that the minimum Transmission System size threshold was not satisfied so that no new reservations would be made effective September 1, 2009. See <http://toinfo.oasis.mapp.org/oasisinfo/MAPP%20Xmsn%20Extent%2020090901.pdf>.

⁹ The remaining seven occurred in the immediately preceding quarter, which includes the first month after MAPP ceased confirming new reservations under Schedule F.

¹⁰ MAPP further explained in its August 17, 2009 notice (available at [http://toinfo.oasis.mapp.org/oasisinfo/MAPP_Schedule_F_OATT_Transmission_Reservations_081709\(2\).pdf](http://toinfo.oasis.mapp.org/oasisinfo/MAPP_Schedule_F_OATT_Transmission_Reservations_081709(2).pdf)) that "Commencing September 1, 2009 and coinciding with the integration of the MidAmerican Energy Company, Muscatine Power & Water, and Cedar Falls Utilities transmission systems into the Midwest ISO, no new transmission service will be granted under the MAPP Schedule F except for a Redirect on a non-firm hourly basis of existing confirmed, firm Monthly Service or with respect to the Resale of an existing reservation. Only Redirects utilizing service points valid under MAPP Schedule F RTC Transmission Owing Member footprint as of September 1, 2009 will be considered valid for a Redirect Request i.e. WAPA (IS), DPC, & MPC. All MAPP Schedule F reservations will terminate the earlier of the end date on the reservation or 00:00:00 CD April 1, 2011."

Order 888 reassignment cap is a significant impediment to the secondary capacity market.

In addition, while the Staff Report shows only a small number of reassignments above the tariff rates, it provides no information from which the Commission can conclude that this is due to the robustness of competition in the reassignment market. The Staff Report does not examine prices both offered and accepted for reassigned capacity, so that the Commission can determine the level of market interest in such reassigned capacity, whether prices increased, the cause of price changes, and whether those prices remained within a zone of reasonableness.¹¹ Nor does the Staff Report examine the Commission's conjecture (noted in the NOPR P 4) that competition among secondary market resellers will be sufficient to protect consumers from excessive rates. For example, it provides no insights, on a path-by-path basis, as to the number of sellers offering comparable competing transmission service resales, the identity of these sellers, and the kinds of products offered.

Thus, the Staff Report provides no meaningful support for the conclusion that the Order 888 reassignment cap is unjust and unreasonable, and is impeding the efficient use of transmission service. To the contrary, the apparent increase in the number of reassignments during the period, despite the very small number of transactions priced above the tariff rate (134 out of more than 35,000 transaction during the two and a half year study period), must have been due to factors other than the elimination of the cap,

¹¹ For example, the Staff Report (at 8) concludes that at least "where receipt and delivery points were in locations with reported price indices, the value of capacity reassignments *rarely* exceeded the price differentials between relevant energy markets" (emphasis added), but does not evaluate whether all transactions remained within the zone of reasonableness, *e.g.*, the PSNH affiliate transactions that, even on a weighted average basis, are 95% above the tariff rate. *See id.*, App. G.

e.g., the greater transparency provided by posting reassignments on the TP's OASIS, and permitting the posting of capacity available for resale on the TP's OASIS. Nor does the Staff Report demonstrate that market power cannot be exercised if the cap is removed permanently and otherwise satisfy the requirements for sales at market-based rates. Thus, the study does not support the NOPR's proposal to eliminate the reassignment price cap on a permanent basis.

If, recognizing the deficiencies in the study, the Commission wants to pursue further the potential benefits and hazards of eliminating the cap, the Commission should continue to study for an additional three-year period (which hopefully will extend beyond the current economic downturn) to measure the impact of removal of the cap under more realistic conditions. Only by extending the study period can the Commission obtain the empirical proof required to rely on market-based pricing for transmission service.

B. The Commission Should at Minimum Continue the Cap for Transmission Provider Affiliates and Retail/Merchant Functions

If, despite the arguments above, the Commission removes the Order 888 reassignment cap on a permanent basis, it should maintain the cap for TPs and their affiliates and retail service/merchant functions. This limitation, which is consistent with the NOPR leading up to Order 890,¹² would at least deny market-based rates for those capacity reassignments where there is the greatest opportunity for abuse and greatest potential to undermine the Commission's grid expansion policy. Such restriction would also be consistent with the limited data in the Staff Report.

¹² Preventing Undue Discrimination and Preference in Transmission Service, 71 Fed. Reg. 32,636 (proposed June 6, 2006), FERC Stats. & Regs. 32,603, *corrected*, 71 Fed. Reg. 37,109 (June 29, 2006), *reply comment period extended*, 71 Fed. Reg. 39,251 (July 12, 2006) ("Order 890 NOPR").

In Order 890 (P 809), the Commission moved away from the Order 890 NOPR's proposed exclusion of TPs and their affiliates from the scope of permissible market-based resales, concluding that "retaining the price caps for this portion of the market would continue to impair development of the secondary market. ... [T]here are no significant market power concerns to justify retaining the price caps for any transmission customer," and "continued regulation of rates for primary capacity will act as a further check to ensure rates for reassigned capacity remain just and reasonable." But the Staff Report does not bear out Order 890's findings, much less show any pressing need for allowing market-based assignments by TPs and their affiliates, where there is the greatest opportunity for exercise of market power, affiliate abuse, and frustration of the Commission's policy to promote transmission expansion. Indeed, the TP's ability to effectively circumvent the tariff restrictions by assignment to affiliates, that can then resell at market-based rates, raises questions as to whether permitting such reassignments would undermine the Commission's essential finding that the OATT mitigates the vertical market power of an MBR seller that owns, operates or controls transmission. *See* 18 C.F.R. § 35.37(d).¹³

The NOPR states (P 14):

During the study period, there were 32 transactions of reassigned capacity by an affiliate of a transmission provider reassigned for more than the tariff rate. However, the percentage of such over-cap reassignments (0.5 percent) was in line with that of over-cap reassignments by non-affiliates (0.4 percent), leading us to believe that affiliate abuse is not an issue. For these reasons, the Commission proposes to find that the Staff Report supports the

¹³ *See also* Part C below, which discusses how these market power concerns are heightened where the seller lacks MBR authority in the area of the reassigned transmission reservation.

Commission's decision to lift the price cap beyond October 1, 2010 on all capacity reassignments.

See also id. P 16 (“With regard to affiliate abuse, the Staff Report finds that less than one percent of transactions performed by affiliates during the study period were transacted above the tariff rate during the study period.”).

As discussed above, the atypically uncongested conditions noted by Staff, and the small and rather lopsided sample, preclude grounding any forward-looking policy judgment on the Staff Report. But, even with its deficiencies, the Staff Report provides some warning signs as to the incentive and ability of TPs, through their affiliates or retail service/merchant functions, to use assignments to obtain market-based prices for their transmission service in more typical times.

As reported by Staff (Staff Report at 8) and as shown by Appendix K, only ten TPs were involved in affiliate assignment transactions, and four of those entities are subsidiaries of the same holding company (Northeast Utilities). For that holding company, 62% of the transactions were above the tariff rate, with 100% of the transactions of one subsidiary falling in that category with a weighted average markup of 95% above the tariff rate. *See id.*, Apps. G and K. The Northeast Utilities affiliate transactions were all monthly transactions (*see id.*, App. I), and represent 97% of the total volume of above-tariff resales (*see id.*, App. F). The only reason these transactions reflect a small percentage of the total number of affiliate transactions is that CVPS is shown as having 5,934 affiliate transactions below the tariff rate. *See id.*, Apps. D and K.¹⁴ As reported by Staff, “[a]ll reassignments for CVPS and subsidiaries of Northeast

¹⁴ As noted in footnote 7 above, Staff (Staff Report at n.7) acknowledged that the large number of CVPS transactions may be due in part to reporting conventions.

Utilities were for capacity on the Phase I/II HVDC facility, which connects New England and Quebec.” *Id.* at 7-8 (footnote omitted). Although, as Staff Reports, “CVPS had numerous transactions for firm and non-firm service with hourly, daily and longer terms all with the same resale price of \$3.00/MWh” (*id.* at 8), Northeast Utilities affiliate transactions for capacity over the same HVDC facilities had a weighted average markup of 58% above the tariff rate. *Id.*

Putting aside CVPS’s affiliate transactions, 41% of the remaining 78 affiliate transactions during the study period were above the tariff rate. And putting aside transactions pertaining to the Phase I/II HVDC facilities connecting New England and Quebec, only 26 affiliate transactions occurred during the two and a half year study period.

Thus, the Staff Report plainly does not support Order 890’s finding (P 809) that “retaining the price caps for this portion of the market would continue to impair development of the secondary market.” Indeed, the pattern of affiliate pricing reveals more about corporate strategy selected by a few entities and general conditions during this atypical period, than confirming the Commission’s assumption that the rates for primary capacity or competition in the reassignment market will restrain prices. Absent a showing that competition will keep market-based rates just and reasonable, reliance solely on market monitoring will not suffice to render market-based rates lawful. *Lockyer*, 383 F.3d at 1013.¹⁵ In short, nothing in the Staff Report supports the

¹⁵ While the NOPR (P 17) says that the Commission will monitor such activity (*see also* Order 890, PP 815-17), it proposes no remedy in the event it finds that resellers are engaged in such behavior. The Commission can and should avoid such capacity laundering by retaining the price cap for a TP’s merchant function or affiliates.

assumption that allowing TPs and their affiliates to assign at market prices will not result in arbitrage of cost-based transmission rates for monopoly transmission service into market-based rates.

The NOPR also ignores the incentives for a TP to sell primary capacity to its merchant function or affiliates to get around the rate ceiling on primary capacity. As the Commission recognizes, transmission revenues or losses, whether incurred by the TP, its merchant function, or its affiliates, all go to or come from the same corporate bottom line. Order 890, P 811. If the secondary market is clearing at prices above the TP'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, thus reducing or eliminating any price-restraining primary capacity and producing higher revenues for the parent corporation for sales of monopoly transmission service.¹⁶ Order 890-B's assumption (P 78), noted in the NOPR P 9, that the customer may always take service from the TP directly, just as if the price cap had not been lifted, is cold comfort if the available capacity has been reassigned to the TP's affiliate, so no primary capacity is available. While such issues were not apparent during the uncongested conditions Staff found to be applicable during the study period, the study provides no demonstration that TPs will not take advantage of this opportunity in more congested times.

¹⁶ Order 890 assumed that the costs associated with hoarding capacity would encourage its resale. *Id.* But if withholding capacity successfully and profitably raises prices in the secondary market, the alleged disincentive will be weak or non-existent. Further, the Commission has concluded that TPs have incentives to over-designate CBM (a form of hoarding) due to "considerations (such as the reduction of power supply costs and limiting the generation supply options of competitors) that involve the transmission provider's merchant arm rather than its transmission function." *Wis. Pub. Power Inc. SYSTEM v. Wis. Pub. Serv. Corp.*, 83 FERC ¶ 61,198 at 61,858, *order on reh'g*, 84 FERC ¶ 61,120 (1998). *See also* Order 890 NOPR P 163 (recognizing that the Commission has "addressed instances when transmission providers had taken advantage of their ability [through CBM reservations] to preserve interface capability to serve their own load while limiting the ability of competing suppliers to access customers on their systems").

Finally, removal of the price cap for assignments by TP affiliates would give TPs a strong incentive *not* to construct transmission at a time when the Commission is promoting policies aimed at encouraging transmission expansion. The NOPR's assumption that market-based reassignment will produce more accurate price signals to stimulate construction (NOPR P 4; *see also* Staff Report at 9) misses the fundamental point that if TPs can exploit constraints through market-based resales by affiliates, the TP will have a strong incentive not to expand the system, resulting in actions at odds with the Commission's planning and expansion objectives. Just as with LMP, where the beneficiary of congestion revenues has little incentive to add generation or transmission facilities that would lower LMP and the resulting congestion revenue, a corporation that can earn increased revenues on transmission capacity resold by its merchant function or unregulated affiliates will likewise be loath to kill the goose laying the golden egg by building new transmission that would lower those prices.

As noted in the NOPR at P 9, Order 890-B (P 78) concluded that "the fact that a transmission provider's affiliate may profit from congestion on the system does not relieve the transmission provider of its obligation to offer all available transmission capacity and expand its system as necessary to accommodate requests for service." That obligation has existed since 1996, yet Order 890 found that it had not succeeded in overcoming TPs' incentives to avoid transmission investment, especially in favor of their own generation. Order 890, P 424. Further, as shown in the Staff Report, the vast bulk of reassignments are short term. *See* Staff Report, App. I. The limited construction obligation recognized by Order 890-B does not address the disincentives created by allowing market-based reassignment by TP affiliates and/or merchant functions when it

comes to considering economic upgrades identified in the Order 890 planning process. As to the long-term transactions that would trigger the tariff's construction obligation, there is no factual basis to conclude that entry in the form of expanded transmission capacity will be "timely, likely and sufficient" to defeat price increases on affiliate reassignments due to transmission market power.¹⁷ Thus, the TP's construction obligation under the OATT is insufficient to fully blunt the disincentive to construct that would result from allowing the TP's parent corporation to profit from market-rate reassignments. The resulting disincentives would also reduce the access of load-serving entities to the long-term firm transmission service they require to meet their service obligations, in violation of the Commission's obligations under FPA Section 217(b)(4), 16 U.S.C. § 824q(b)(4), to facilitate planning and expansion of the grid to meet the reasonable needs of load-serving entities.

Finally, the Commission must reexamine its Order 890-B statement in light of post-Order 890-B developments. Specifically, continued concerns about the failure to adequately expand the transmission grid have prompted the Commission's recent NOPR proposing significant additional reforms to enhance planning and cost allocation.¹⁸ Even this new NOPR proposes to adhere to Order 890's determination to leave to TPs the decisions as to what upgrades go into the plan, and what upgrades included in the plan ultimately are to be built. *See* Planning and Cost Allocation NOPR, n.59, citing Order

¹⁷ *See* Federal Trade Commission and U.S. Department of Justice Horizontal Merger Guidelines, § 3.0, which recognizes the market-power-defeating effect of entry that "would be 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>.

¹⁸ Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 75 Fed. Reg. 37,884 (proposed June 30, 2010), 131 FERC ¶ 61,253 (proposed 2010) ("Planning and Cost Allocation NOPR").

890 PP 438 and 454. Assuming that determination is not altered, the focus of the Commission's efforts to promote planning and expansion to reduce congestion and create a robust grid would be undermined if the Commission were to allow TPs to benefit financially, through market-based reassignments by affiliates, from maintaining a "bare bones" grid.

Thus, allowing TPs, through their affiliates, or their retail service or merchant functions,¹⁹ to secure market-based rates for capacity reassignment would be a mistake, plainly not required to remove significant barriers to reassignments, that could undermine Commission policy objectives, as well as fundamental principles of non-discriminatory transmission service.

C. In Any Event, Sellers without Market-Based Rate Authority for Generation Sales Should Not be Permitted to Resell Transmission in the Mitigated Area at Market-Based Rates

Even if, over TAPS' objections, the OATT is modified to permit reassignment of capacity at market-based rates (including by TP affiliates), resales at market-based rates should not be permitted by sellers that lack market-based rate authority where the transmission reservation is in the mitigated area.

Under the Commission's MBR rules, a seller that fails one or both of the MBR screens is rebuttably presumed to have market power. Such a seller may choose to, or if it fails more in-depth tests will be required to, adopt cost-based mitigation, relinquishing market-based rate authority at least in the area where the tests are failed. *See* 18 C.F.R.

¹⁹ The NOPR, P 16, asks how resales by a transmission provider's retail service function (that is not a separate affiliate) should be treated. While TAPS submits that TP affiliates should not be permitted to reassign transmission capacity at market-based rates, the nexus to the TP is even stronger when the reassignment is made by its retail service or wholesale merchant function that is not even a separate affiliate.

§§ 35.37 and 35.38. Restrictions on MBR authority occur most often in a seller's "home" control area – often defined by the seller's transmission system, although the mitigated area may be larger or smaller. The Commission has recently reaffirmed the importance of effective enforcement of those limitations.²⁰

To the extent a seller lacks market-based authority over generation sales because of market power concerns, it is hard to conceive of any basis to permit such seller, or its affiliates or merchant/retail functions, to resell transmission reservations in the area where it lacks MBR authority. Failure to pass the Commission's MBR tests often results from transmission limitations that restrict the alternative suppliers that can economically reach wholesale purchasers in the seller's "home" control area where it owns the transmission system. While the Commission's MBR rules assume that the vertical market power resulting from a TP's ownership and control over transmission is mitigated by the TP's open access tariff (*see* 18 C.F.R. § 35.37(d)), allowing the TP's merchant function and its affiliates to reassign transmission capacity in the mitigated area at market-based rates would circumvent the tariff limitations. Further, permitting such sellers to resell, at market-based rates, transmission capacity in the mitigated area that purchasers could use to substitute (by enabling them to access alternative sources outside the mitigated area) for generation purchases from the mitigated seller, allows such sellers to reap, through transmission reassignments, the monopoly rents that they are otherwise foreclosed on generation sales.²¹

²⁰ Market-Based Rates For Wholesale Sales of Electric Energy, Capacity And Ancillary Services By Public Utilities, Order No. 697-D, 75 Fed. Reg. 14,342 (Mar. 25, 2010), FERC Stats. & Regs. ¶ 31,305 (2010).

²¹ Concerns about exercise of market power by sellers that lack market power in their "home" area may well extend to their reassignment, at market-based rates, of transmission paths on neighboring systems that are needed by such "home area" wholesale purchasers to access alternative supplies.

In permitting MBR reassignments on a temporary basis, the Order 890 rulemaking orders appear to have overlooked this significant loophole. It should be closed in any extension of the current experiment or in the event the Commission chooses to permanently lift the cap for the bulk of resale transactions.

D. The Commission’s Suggestion of Enhancing the Flexibility of Firm Point-to-Point Service As a Means to Spur Capacity Reassignments Is Both Substantively and Procedurally Unsound

At P 15 of the NOPR, the Commission solicits comments “as to whether there are any other reforms that it should undertake to create a more efficient and vibrant secondary market for transmission capacity.” Among other things, the Commission inquires whether there could be “reforms to the redirect process that would enable all firm customers to use their firm capacity more flexibly and thereby facilitate capacity reassignment by making point changes by the buyer of reassigned capacity more efficient?” *Id.*

1. **The Desire to Stimulate Transmission Resales Cannot Justify a Fundamental Change in the Nature of Point-to-Point Service**

There are few respects in which the NOPR’s suggested modification to firm point-to-point (“PTP”) service is well defined. However, one thing is clear – the Commission contemplates enhancing the flexibility of service for “*all* firm [PTP] customers.”²² Whatever modification the Commission has in mind would have effects on use of the transmission system well beyond stimulating resales of unused PTP reservations. The greater flexibility accorded *all* firm PTP customers would, as discussed

²² While the language as stated in the NOPR is not expressly limited to firm *point-to-point* customers, the “redirect” process relates solely to PTP service and is not available to network customers. Order 890, P 1612. We therefore understand that any expansion of redirect rights would benefit PTP customers only.

below, come at the cost of other users of the transmission system, including customers with stand-alone non-firm PTP reservations, and network customers and TPs utilizing secondary network service. Yet, the NOPR does not even suggest that the Commission has any basis to conclude that the existing flexibility accorded to firm PTP customers has become unjust and unreasonable.

Indeed, the current OATT provides considerable flexibility to PTP customers. Under Section 22.2, a customer's request to change its Receipt and Delivery Points on a firm basis is "treated as a new request for service in accordance with Section 17 hereof, except that such Transmission Customer shall not be obligated to pay any additional deposit if the capacity reservation does not exceed the amount reserved in the existing Service Agreement." The customer would thus be required to abide by most (but not all) of the application procedures for new service (*i.e.*, making the request on OASIS, abiding by queue rules, and paying for any needed studies). However, it would not lose its priority to use its existing Receipt and Delivery Points while the request is pending.

Moreover, if capacity on the new path is available and the service is granted, the customer does not have to pay an additional charge for the new service (assuming no increase in the total reservation). In other words, the customer is essentially permitted to terminate (or suspend) its existing service and take firm service over the new path in lieu of – rather than in addition to – the service it originally purchased. It is difficult to see what part of this process could be relaxed to permit more flexible use of firm PTP reservations, without jeopardizing the reliability of the transmission system and/or providing existing PTP customers a wholly unwarranted queue preference for changes to their firm service points.

In addition, the Commission has already afforded assignees of PTP reservations even greater flexibility in changing firm service points than is afforded the original customer. Section 23.2 provides:

If the Assignee requests a change in the Point(s) of Receipt or Point(s) of Delivery, or a change in any other specifications set forth in the original Service Agreement, the Transmission Provider will consent to such change subject to the provisions of the Tariff, provided that the change will not impair the operation and reliability of the Transmission Provider's generation, transmission, or distribution systems. The Assignee shall compensate the Transmission Provider for performing any System Impact Study needed to evaluate the capability of the Transmission System to accommodate the proposed change and any additional costs resulting from such change.

Thus, while the TP may (quite reasonably) require the assignee to pay for a system impact study to analyze the feasibility of the requested modifications, the TP must grant the request unless it would "impair the operation and reliability" of its system. Again, it is difficult to conceive of any greater flexibility that could be afforded to PTP customers seeking to change their service points on a firm basis, without compromising reliability or disrupting established queue protocols.

Section 22.1 of the current OATT also allows firm PTP customers to use alternate service points on a non-firm basis, without additional payment. However, this redirect service "will not displace any firm or non-firm service reserved or scheduled by third-parties under the Tariff or by the Transmission Provider on behalf of its Native Load Customers." OATT § 22.1(a).

The Commission's reference in the NOPR, P 15, to the "system of secondary firm point priorities" in the natural gas industry, and its citation (n.21) to Orders 636²³ and 637²⁴ suggests that what the Commission has in mind here is not necessarily making it easier for firm PTP customers to obtain fully firm changes in their service points, but improving the relative priority of redirects under Section 22.1 to put them ahead of, rather than behind, non-firm PTP and secondary NITS. The Commission does not suggest any rationale for abandoning its long-standing rule (which dates back to *AES*²⁵ and was expressly confirmed in Order 888²⁶) that secondary network service should have top priority among non-firm uses, because the network customers and TP native loads who use secondary network service pay their load-ratio shares of the total costs of the transmission system. Network customers and the TPs' native loads must – and are entitled to – rely on secondary network service in order to serve their loads effectively, efficiently and reliably (*e.g.*, to replace a designated network resource in the event of a

²³ Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Wellhead Decontrol, Order No. 636, 57 Fed. Reg. 13,267 (Apr. 16, 1992), FERC Stats. & Regs. ¶ 30,939 (1992), *order on reh'g*, Order No. 636-A, 57 Fed. Reg. 36,128 (Aug. 12, 1992), FERC Stats. & Regs. ¶ 30,950 (1992), *reh'g denied and clarification*, Order No. 636-B, 57 Fed. Reg. 57,911 (Dec. 8, 1992), 61 FERC ¶ 61,272 (1992), *reh'g denied*, 62 FERC ¶ 61,007 (1993), *aff'd in part and remanded in part sub nom. United Distrib. Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996), *order on remand*, Order No. 636-C, 62 Fed. Reg. 10,204 (Mar. 6, 1997), 78 FERC ¶ 61,186 (1997), *order on reh'g*, Order No. 636-D, 83 FERC ¶ 61,210 (1998).

²⁴ Regulation of Short-Term Natural Gas Transportation Services, and Regulation of Interstate Natural Gas Transportation Services, Order No. 637, 65 Fed. Reg. 10,156 (Feb. 25, 2000), FERC Stats. & Regs. ¶ 31,091 (2000), *clarified*, Order No. 637-A, 65 Fed. Reg. 35,706 (June 5, 2000), FERC Stats. & Regs. ¶ 31,099 (2000), *reh'g denied*, Order No. 637-B, 65 Fed. Reg. 47,284 (Aug. 2, 2000), 92 FERC ¶ 61,062 (2000), *aff'd in part and remanded in part sub nom. Interstate Natural Gas Ass'n of Am. v. FERC*, 285 F.3d 18, (D.C. Cir. 2002), *order on remand*, 101 FERC ¶ 61,127 (2002), *order on reh'g*, 106 FERC ¶ 61,088 (2004), *aff'd sub nom. Am. Gas Ass'n v. FERC*, 428 F.3d 255 (D.C. Cir. 2005).

²⁵ *AES Power, Inc.*, 69 FERC ¶ 61,345 at 62,300 (1994), 74 FERC ¶ 61,220 (1996).

²⁶ Order 888 at 31,750.

unit outage). In addition, as the Commission made clear in Order 888 (at 31,696), network customers do not have the option to assign their service.

Giving PTP redirect service a priority superior to secondary network service would significantly diminish the flexibility and value of network service, and enhance the flexibility and value of PTP service. The basic pricing of PTP and network service was established in the Order 888 rulemaking with specific recognition that the two services had comparable flexibility. Order 888 at 31,737-38. In considering any reform to the PTP redirect process, the Commission must take care not to destroy the careful balance struck in Order 888. Indeed, in the Order 890 rulemaking, the Commission has already eroded the value and flexibility of network service, by introducing “conditional firm” PTP service, under which a customer’s non-firm use (*i.e.*, in periods specified in the service agreement during which the firm service is unavailable) enjoys priority over all other forms of non-firm service, including secondary network service.²⁷ Any further shift in the fundamental balance between PTP and network services would require the Commission to reevaluate the justness and reasonableness of the relative pricing of the services, an undertaking that hardly seems to be justified for the Commission’s stated purpose of stimulating resales of PTP service.

The NOPR likewise does not identify any change in circumstances that would justify putting PTP redirect on a firmer footing than stand-alone non-firm PTP reservations, especially for “all firm [PTP] customers.” In Order 888-A (at 30,281,

²⁷ The Commission, in Order 888 (at 31,747), expressed the view that “having intermediate categories of firmness under point-to-point or network service would, we believe, unnecessarily complicate the priority system.” The introduction of conditional firm service has begun to erode the priority system established in Order 888. The objective of stimulating transmission resales does not warrant further erosion.

footnote omitted), the Commission expressly rejected the argument that PTP redirect should have a priority more favorable than non-firm PTP and secondary network service:

Non-firm point-to-point customers pay for non-firm service as their service. Firm point-to-point customers, on the other hand, contract and reserve a specified amount of service over designated points of receipt and delivery. The Commission permitted these firm point-to-point customers to use secondary non-firm service (from points of receipt/delivery other than those designated in their service agreement) on an as-available basis at no additional charge. Because the firm point-to-point customers taking secondary non-firm are accorded this scheduling flexibility at no additional charge, they are properly accorded a lower priority than stand alone, non-firm transmission. In contrast, network customers are responsible for paying for a percentage of total system transmission costs in order to serve their designated network loads whether the energy is from designated network resources or from non-designated resources on an as-available basis. Because the network customer pays a load-ratio share of total transmission costs, it receives a higher priority. Significantly, if any firm point-to-point customer wants to avail itself of the higher priority associated with economy energy purchases under the network tariff, it is free to do so by undertaking the cost responsibilities associated with network service.

The Commission's apparent analogy to the natural gas industry's secondary firm point priorities established in the Order 636 rulemaking is inapposite. In gas transportation, there is no distinction between PTP and network customers as there is for firm electric transmission service under the OATT. Thus, the introduction of a new "secondary firm" priority in gas transportation would potentially benefit all firm shippers on a gas pipeline – *i.e.*, all firm shippers might at some point seek to avail themselves of the new flexibility. Here, in contrast, only firm PTP customers would benefit from the enhancement in flexibility of redirecting service points, and conversely network customers (and TPs serving native load) would have their flexibility diminished. Order

636's innovation did not upset existing priorities among levels of non-firm service; it simply slotted in a new priority level between fully firm and fully interruptible. But here, the Commission would be rearranging the order of priorities among existing gradations of non-firm service, which order has been in place since Order 888.

The Commission has not even postulated a rational basis for finding, as is required under Section 206, that the existing tariff provisions establishing the flexibility afforded firm PTP customers to alter their service points on either a firm or non-firm basis, and the priority of redirect PTP service, have become unjust and unreasonable, and that the tariff therefore must be modified. Accordingly, these tariff provisions must be left unchanged.

2. This Rulemaking is Not an Appropriate Vehicle for Making Fundamental Changes to the Nature of PTP Service

Even if the proposal were better formed and had substantive merit, this proceeding is not an appropriate vehicle for modifying the redirect process for point-to-point reservations in order to create new rights for "all firm customers," *i.e.*, without regard to whether the firm customers seek to assign their capacity rights. The relatively narrow purpose of this rulemaking docket is, as stated in the docket caption, promoting a competitive market for capacity reassignments. As is clear from the Commission's press release and the bulk of the NOPR itself, the focus is on eliminating the price cap on resales of point-to-point service, to make permanent the experiment introduced in the Order 890 rulemaking.

The increase in flexibility of firm natural gas transportation reservations referenced in the NOPR (P 15 & n.21) was the product of a rulemaking proceeding that clearly was of a more global nature. Order 636, among other things, required the

functional unbundling of gas sales and transportation service, and instituted open-access transportation service. It was thus comparable in scope to Order 888. The natural gas industry recognized the Order 636 rulemaking as introducing comprehensive changes to the nature of gas transportation, and participated accordingly. Here, in contrast, the Commission's proposal is tucked away in a proposed rule narrowly focused on lifting the price caps on resales of transmission capacity. If the Commission truly believes it is appropriate to make fundamental changes to the nature of point-to-point service, it should propose such changes in a way that will provide adequate notice to the electric industry, rather using the current rulemaking as a Trojan horse for reform whose reach would go well beyond the stated purpose of stimulating reassignment of point-to-point service.

E. Requiring the Posting of Available Capacity on TP OASIS Merits Consideration as a Possible Additional Reform

While the Staff Report concluded that "it does not appear that the removal of the price cap was primarily responsible for the observed growth in the secondary market" (Staff Report at 9), the Report does not evaluate what other factors might have been responsible for the perceived growth since the Order 890 rulemaking, so that the Commission could build on that success in crafting additional reforms. Examining the other reassignment-related changes required by the Order 890 series suggests that the required use of the TP's OASIS for posting assignments, as well as the permissive use of the TP's OASIS for posting available capacity, may well be contributing to the perceived increase. This suggests that the Commission consider, as an additional reform, moving further in this direction by requiring the posting of capacity available for reassignment on the TP's OASIS.

In addition to temporarily removing the Order 888 reassignment price cap, the Order 890 rulemaking orders made another significant change in the way assignments were made. Specifically, the Commission modified the pre-Order 890 reassignment provision that merely provided for the reseller to notify the TP of the reassignment prior to commencement of service,²⁸ by adding the following additional provision:

23.3 Information on Assignment or Transfer of Service:

In accordance with Section 4, all sales or assignments of capacity must be conducted through or otherwise posted on the Transmission Provider's OASIS on or before the date the reassigned service commences and are subject to Section 23.1. Resellers may also use the Transmission Provider's OASIS to post transmission capacity available for resale.

The new provision thus requires posting of reassignments on the TP's OASIS, while making it optional to the reseller as to whether it wants to post capacity available for reassignment on the TP's OASIS.

The Staff Report does not examine the degree to which this new provision contributed to the expansion of assignments. In particular, it provides no way to assess whether the posting of reassignments spurred interest in such assignments. Further, there is no indication as to whether reassignments were more common where resellers availed themselves of the option to post available capacity, as opposed to instances where resellers did not post available capacity.

²⁸ See Section 23.1 of the Order 888-A tariff, *available at* <http://www.ferc.gov/legal/maj-ord-reg/land-docs/rm95-8p4-000.txt>.

Since issuance of Order 890, the Commission has recognized the value of bulletin boards to facilitate contract formation.²⁹ During any possible extension of the current experiment of lifting the price cap, the Commission should build on its insights as to the transparency and efficiency of bulletin boards, by studying whether reassignments are more prevalent where customers voluntarily post capacity available for reassignment on the TP's OASIS.³⁰

Alternatively, the Commission could go a step further and propose to modify Section 23.3 to *require* resellers to post capacity available for reassignment on the TP's OASIS, at least for certain types of transactions. Under Section 284.8 of its rules (adopted in Order 636), the Commission requires a natural gas shipper that wishes to release firm capacity to “notify the pipeline of the terms and conditions under which the shipper will release its capacity” (18 C.F.R. § 284.8(c)), and the pipeline “must provide notice of offers to release or to purchase capacity, [and] the terms and conditions of such offers” (18 C.F.R. 284.86(d)). Of course, if the Commission were to move in a similar direction for resales of PTP transmission service, it would need to consider how such a requirement could be included in a way that would support the secondary market, rather than burdening reassignments, especially with regard to hourly service where time may be quite limited.³¹

²⁹ Wholesale Competition in Regions with Organized Electric Markets, Order No. 719, 73 Fed. Reg. 64,100 (Oct. 28, 2008), FERC Stats. & Regs. ¶ 31,281 (2008), *on reh'g*, Order No. 719-A, 74 Fed. Reg. 37,776 (July 29, 2009), FERC Stats. & Regs. ¶ 31,292 (2009), *on reh'g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009).

³⁰ For example, the data collected on reassignments could be expanded to include information on whether the reseller posted on the TP's OASIS the availability of the capacity before making the assignment, to see how often that was the case.

³¹ Similarly, under Rule 284.8(h), the Commission has provided certain exceptions to the prior posting requirement for firm shippers' capacity releases.

CONCLUSION

The Final Rule should consider and reflect TAPS Comments as expressed above.

Respectfully submitted,

/s/ Margaret A. McGoldrick

Robert C. McDiarmid
Cynthia S. Bogorad
Margaret A. McGoldrick

Attorneys for
Transmission Access Policy Study
Group

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

July 6, 2010