

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

**Transmission Planning and Cost Allocation)
By Transmission Owner and Operating)
Public Utilities)**

Docket No. RM10-23-000

**COMMENTS OF
THE UNITED STATES DEPARTMENT OF ENERGY,
WESTERN AREA POWER ADMINISTRATION**

Pursuant to the Notice of Proposed Rulemaking for Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities (NOPR) issued by the Federal Energy Regulatory Commission (Commission) on June 17, 2010 in Docket No. RM10-23-000, Western Area Power Administration (Western), an agency of the United States Department of Energy (DOE), submits these comments. Western submits these comments as a Federal Power Marketing Administration (PMA), and not on behalf of DOE as a whole.

I. DESCRIPTION OF WESTERN

Western is a Federal PMA that markets Federal power and owns and operates transmission facilities throughout 15 western and central states, encompassing a geographic area of 1.3 million square-miles. Western was established pursuant to section 302 of the DOE Organization Act.¹ Western's primary mission is to market Federal power and transmission resources constructed with congressional authorization. The Federal generation marketed by Western resulted from the construction of power plants by the Federal generating agencies, principally the Department of the Interior's Bureau of Reclamation and the U.S. Army Corps of

¹ 42 U.S.C. § 7152(a).

Engineers. The power and transmission requirements of project use loads, which are designated by Congress and carry out purposes such as pumping of irrigation water, by law, must be met first for the life of those projects. Power in excess of these requirements is available for marketing by Western to its preference customers. Western's statutory obligation to market Federal hydropower from a particular Federal project extends for the life of that project.

Western owns and operates over 17,000 miles of high-voltage transmission lines, and has entered into long-term transmission contracts for widespread distribution of Federal hydro generation to project use and preference customers comprised of non-profit public entities such as electric cooperatives, Native American tribes, municipal utilities, and Federal and state government entities.

Western's transmission system resides within both the Midwest Reliability Organization (MRO) and the Western Electricity Coordinating Council (WECC). Western has four Regional offices located in Phoenix, Arizona (Desert Southwest Region), Loveland, Colorado (Rocky Mountain Region), Folsom, California (Sierra Nevada Region), and Billings, Montana (Upper Great Plains Region), as well as the Colorado River Storage Project Management Center located in Salt Lake City, Utah (collectively, Regions), and a Corporate Services Office located in Lakewood, Colorado.

Western's Regions have reserved sufficient transmission capacity on the systems they manage to meet their existing statutory obligations regarding project use and preference power deliveries. Those obligations are accounted for in each project's marketing plan, which is, in turn, implemented through existing contracts for the provision of hydroelectric capacity and/or

energy.² In addition, Western's transmission system is used by third parties for network and point-to-point transmission service purposes.

Western is not a public utility subject to the Commission's jurisdiction under sections 205 and 206 of the Federal Power Act (FPA).³ Western is, however, a transmitting utility subject to FPA sections 210-213,⁴ and has provided open access transmission service since its inception in 1977 and first filed an Open Access Transmission Tariff (OATT) in 1997.

II. COMMENTS

A. Executive Summary

Western generally supports the Commission's objective of ensuring the continued development of transmission facilities needed to satisfy reliability standards and reduce congestion. However, Western is concerned with certain aspects of the NOPR's proposed reforms, and makes recommendations herein for the purpose of mitigating those concerns.

Among other things, Western believes that the regional and local planning processes established in Order No. 890⁵ are working effectively, particularly in the western part of the country. Therefore, while room for improvement exists, Western does not believe that the current status requires wholesale changes in the form contemplated by the NOPR. To the extent the Commission does provide further guidance to the industry through this NOPR, Western submits these comments for the Commission's consideration related to interregional planning,

² The majority of these contracts do not terminate until December 31, 2020, at the earliest.

³ 16 U.S.C. §§ 824d and 824e.

⁴ 16 U.S.C. §§ 824i-824l.

⁵ *Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008) *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009), *order on reh'g*, Order No. 890-D, 129 FERC ¶ 61,126 (2009).

merchant developer participation in transmission planning, allocation of transmission project costs, jurisdiction over non-public utilities, the right of first refusal, and compliance deadlines.

B. Interregional Transmission Planning and Other Agreements

1. Summary of the NOPR's Proposal

The Commission proposes to require each transmission provider to coordinate with the transmission providers in each of its neighboring transmission planning regions within its interconnection to address transmission planning issues through its regional transmission planning process. This coordination between transmission planning regions must be reflected in an interregional transmission planning agreement to be filed with the Commission. The NOPR provides general principles under which such agreements would be developed, but does not specify any significant detail on the matter.⁶

2. Western's Comments

A number of the NOPR's proposed regional planning provisions will already be met in the WECC through the DOE-funded Regional Transmission Expansion Planning Process, and in the Eastern Interconnection through the Eastern Interconnection Planning Collaborative process. In addition, Western also participates in the regional transmission planning processes currently in place through the Mid-Continent Area Power Pool, WestConnect, and Northern Tier Transmission Group, all of which were recognized in the NOPR.⁷

Through participation in these existing regional transmission planning processes, stakeholder involvement in the annual planning processes is promoted through local planning and through Western's coordination with regional transmission planning efforts. These existing planning processes utilize open and transparent stakeholder peer review to identify and evaluate

⁶ NOPR at P 114-120.

⁷ NOPR at n. 11 and 56.

needed solutions to meet the committed and proposed uses of the transmission system. Through the planning attachment filed by Western in its September 30, 2009 Order No. 890 compliance filing, Western has facilitated even greater coordination among these regional planning groups. Thus, Western urges the Commission to take note of these positive developments while crafting the Final Rule in this proceeding.

On another matter, Western's experience indicates that the NOPR's proposed interregional planning agreements and/or any resultant cost-sharing study and other agreements between transmission providers within a planning region should recognize Western's non-public utility status and its Federal statutory obligations and requirements. Accordingly, Western requests that the Commission affirmatively acknowledge in the instant proceeding that Western and other non-public utility transmission providers will need to modify such agreements to provide for their status and statutory requirements before they may be executed, or in the alternative, not require specific agreements be executed between the responsible parties. While the instant proceeding is not the appropriate forum to determine the requisite modifications, it is appropriate for the Commission to recognize the need for flexibility in any such agreements, and to ensure the Final Rule explicitly informs the regional planning groups of that need.

C. Merchant Transmission Developer Requirements to Participate in Regional Transmission Planning

1. Summary of the NOPR's Proposal

The NOPR proposes to allow a merchant transmission developer to forego participation in the regional transmission planning process if it does not seek to use the regional cost allocation process. As an example, the NOPR indicates that because a merchant transmission developer assumes all financial risk for developing its project and constructing the proposed facilities, it is unnecessary to require such a developer to participate in a regional transmission

planning process for purposes of identifying the beneficiaries of its project or securing eligibility to use a regional cost allocation method. However, according to the NOPR, a developer that does not seek to use the regional cost allocation process would still be required to comply with all reliability requirements applicable to facilities in the transmission planning region in which its project would be located. In addition, such a developer would not be prohibited from participating—and would be encouraged to participate—in the regional transmission planning process.⁸

2. Western's Comments

Western believes that it is essential to the development of a reliable and economically efficient transmission system that merchant transmission developers are required to participate in the regional planning process with all other parties, regardless of their desire to participate in a potential regional cost allocation. Irrespective of the sponsoring developer and any regional cost allocations, each proposed transmission project in a region will have an impact on the reliability and operation of the regional grid. If merchant transmission developers do not participate in the regional planning process, that process will be required to attempt to identify the impacts of the merchant transmission developers' transmission facilities on the reliability and operation of the impacted transmission providers' systems, all without sufficient information or adequate coordination.

This lack of coordination between the parties proposing and constructing transmission facilities in a region will create reliability and operational problems, unknown impacts to the transfer capability of each transmission provider's system, and the potential for overbuilding transmission in a region, resulting in duplicative facilities and unnecessary costs. Moreover,

⁸ NOPR at P 99.

allowing merchant transmission developers to propose and construct transmission projects in a vacuum could adversely impact the ability of a transmission provider to make necessary transmission facility additions in the same area that it needs to maintain the reliability of its transmission system, and to meet its transmission service obligations (e.g., load growth) with its own transmission facilities. This is due to the fact that, for example, significant opposition to duplicative facilities in a proximate area is often demonstrated by local permitting agencies and by parties involved in the National Environmental Policy Act review process.

D. Allocation of Transmission Project Costs

1. Summary of the NOPR's Proposal

The NOPR proposes to require that every transmission provider have in place a method, or set of methods, for allocating the costs of new transmission facilities included in the transmission plan produced by the transmission planning process in which it participates. If the transmission provider is a RTO or ISO, then the method or methods would be required to be set forth in that RTO's or ISO's OATT; in other transmission planning regions, each transmission provider located within the region would be required to set forth in its OATT the method or methods for cost allocation used in its transmission planning region.

The NOPR defines principles for the development of intraregional and interregional cost allocation methodologies, but does not provide significant detail on their development. If the transmission providers in a transmission planning region, in consultation with customers and other stakeholders, cannot agree on a cost allocation method that satisfies the NOPR's principles, the Commission proposes to use the record in the relevant compliance filing proceeding as a basis for applying the principles to develop a cost allocation method that meets the Commission's requirements. The NOPR indicates that the Commission may allocate costs of a

transmission facility to a beneficiary identified through an appropriate process, such as a Commission-approved transmission planning process, even if that beneficiary has not entered a voluntary arrangement with the utility that is seeking to recover the costs of that facility.⁹

2. Western's Comments

Western is supportive of a regional transmission planning process that allows for the *voluntary* coordination and cost allocation of transmission facility additions, and does not support a mandatory coordination and cost allocation process. Western is concerned that the NOPR does not provide sufficient detail regarding the Commission's proposal to allocate the costs of new transmission to the beneficiaries of the projects, or that perhaps those intentions could be misinterpreted. Western believes that the Commission should clarify that "beneficiaries" of a project include only the direct beneficiaries of the project, and to the extent that costs can be allocated to such beneficiaries, that only the costs associated with the least-cost method of achieving the benefits are allocated to those beneficiaries. Entities should be making direct use of the proposed new facilities in order to be defined as beneficiaries. Western, like other transmission providers, must maintain the reliability of its transmission system to accommodate the transmission service it provides under its OATT, and therefore needs to make transmission additions. However, those transmission additions are made only as necessary, scoped sufficiently for the specific need, and selected under a least-cost approach.

Western has voluntarily participated in joint transmission projects in the past to the extent that the joint project also addresses Western's demonstrated need and if Western's costs are comparable to the costs it would have incurred by constructing its own facilities. Western believes that the existing and evolving/improving planning processes already taking place under

⁹ NOPR at P 147 and 156-178.

the Commission's Order No. 890 are addressing the needs for coordination, and efficiently accommodating the planning and installation of transmission facility additions required by transmission providers to meet their transmission service obligations. Transmission facilities have been and continue to be successfully built in Western's regions to achieve these requirements and reliably serve load.

Consequently, Western sees no need for a transmission planning process that mandates the allocation to transmission providers of the costs of a regional transmission project, especially one that does not provide direct benefits to those transmission providers or their customers, or that wasn't required to meet their own transmission service needs. Based upon Western's experience, cost allocation of transmission projects is best achieved on a voluntary agreement basis by the participants. The voluntary approach provides the correct mechanism for fairly and equitably allocating the costs of transmission facilities among the transmission providers with demonstrated need for those facilities, based upon their direct benefits from the project. The voluntary cost allocation approach also provides the best incentive for participation by non-public utility transmission providers.

Further, as a Federal PMA, Western has unique statutory requirements, such as the Anti-Deficiency Act,¹⁰ the Reclamation Project Act of 1939,¹¹ and the Flood Control Act of 1944¹² that run contrary to Western being assessed an allocation of third-party transmission facilities on a non-voluntary basis, as proposed in the NOPR. In addition, requiring Western to incorporate a

¹⁰ 31 U.S.C. § 1341(a)(1).

¹¹ 43 U.S.C. § 485h(c).

¹² 16 U.S.C. § 825(s).

mandatory cost allocation share into its rates runs contrary to the Commission's jurisdiction and review of Western's rates under its delegated rate making authority.¹³

E. Section 211A and Reciprocity

1. Summary of the NOPR's Proposal

The NOPR indicates that if the Commission finds on the appropriate record that non-public utility transmission providers are not participating in its proposed regional transmission planning and cost allocation processes, the Commission may exercise its authority under FPA section 211A on a case-by-case basis to require such participation. The Commission has also proposed to use the *pro forma* reciprocity provisions to require non-public utility participation.¹⁴

2. Western's Comments

Western intends to voluntarily participate in coordinated transmission planning throughout its various Regions as it has done in the past. However, as it has done before, Western will adopt the *pro forma* OATT revisions directed by the Commission in the instant proceeding only to the extent those revisions are consistent with Western's statutory mission. Western requests that the Commission clarify its intent regarding use of FPA section 211A and the *pro forma* reciprocity provisions in any final rule in this proceeding.

Western does not believe it was the Commission's intention, but the NOPR could be construed as appearing to expand its authority over non-public utilities through the use of FPA section 211A and the reciprocity provisions of Order Nos. 888¹⁵ and 890 of the *pro forma*

¹³ See, Delegation Order No. 00-037.00, Effective December 6, 2001 (Delegation Order), Department of Energy Order No. RA6120.2, U.S. Department of Energy – Western Area Power Administration (Central Valley Project), 122 FERC ¶61,214 (2008), U.S. Department of Energy - Western Area Power Administration (Parker-Davis Project), 82 FERC ¶ 62,164 (1998), and U.S. Department of Energy – Western Area Power Administration – (Salt Lake City Area Integrated Projects), 56 FERC ¶ 61,397 (1991).

¹⁴ NOPR at P 43.

¹⁵ *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, FERC Stats. &

OATT. Section 211A does not provide the Commission with authority to require unregulated transmitting utilities to comply with the NOPR's proposals. In pertinent part, section 211A provides that the Commission can by rule or order "require an unregulated transmission utility to provide transmission services . . . on terms and conditions (not relating to rates) that are comparable to those under which the unregulated transmitting utility provides transmission services to itself and that are not unduly discriminatory or preferential."¹⁶ The plain language of the statute only gives the Commission authority to ensure that an unregulated utility is offering the same service it is providing itself. If the unregulated utility is offering the same planning and cost allocation principles to third parties that it is providing itself, the unregulated utility is meeting the requirements of section 211A. To infer that this language permits the Commission to order a non-public utility to participate in a regional and interregional planning process or cost allocation schemes appears to go beyond a plain reading of the language.

In addition, the NOPR indicates that a non-public utility transmission provider's reciprocity status as outlined in Order Nos. 888 and 890 will be conditioned upon adoption of the NOPR's requirements – i.e., "transmission providers that are not public utilities would have to adopt the requirements . . . as a condition of maintaining the status of their safe harbor tariff or otherwise satisfying the reciprocity requirement of Order No. 888."¹⁷ This condition appears to go beyond the reciprocity requirement. The reciprocity language of the current *pro forma* OATT requires that if a transmission customer receiving service under the OATT is capable of providing transmission service, they do so on similar terms and conditions on facilities that are

Regs. ¶ 31,036, at 31,691-92 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant 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).

¹⁶ 16 U.S.C. 824j-1(b)(2).

¹⁷ NOPR at P 181, citing Order No. 888, FERC Stats & Regs. ¶ 31,036 at 31,760-63.

owned, controlled or operated by the transmission customer.¹⁸ Therefore, while these principles state that a non-public utility cannot be required to provide transmission service on terms and conditions similar to that of a public utility from which the non-public utility does not receive transmission service, they do not pertain to planning or cost allocation principles.

F. Right of First Refusal to Construct, Own and Propose Cost Recovery for New Projects

1. Summary of the NOPR's Proposal

With respect to transmission facilities that are included in a regional transmission plan, the NOPR proposes to require removal from a transmission provider's OATT or agreements provisions that establish a right of first refusal for an incumbent transmission provider.¹⁹ The NOPR also proposes to require each transmission provider to amend its OATT to describe how the regional transmission planning process it participates in provides for the sponsor (whether an incumbent transmission provider or a non-incumbent transmission developer) of a facility that is selected for inclusion in the regional transmission plan to have a right, consistent with state or local laws or regulations, to construct and own that facility.²⁰

2. Western's Comments

Western is concerned that the NOPR lacks detail as to what provisions constitute a right of first refusal that needs to be removed from the OATT or any agreements. Thus, for the sake of clarity among industry stakeholders, Western requests that the Commission provide in the Final Rule specificity as to what provisions would contain such a right, or, at the least, provide

¹⁸ See, e.g., section 6 of the *pro forma* OATT.

¹⁹ For its limited purposes, the NOPR defines a right of first refusal to be "the right of an incumbent transmission owner to construct, own, and propose cost recovery for any new transmission project that is: (1) located within its service territory; and (2) approved for inclusion in a transmission plan developed through the Order No. 890 planning process." NOPR at n. 21.

²⁰ NOPR at P 20, 79, and 93, and n. 23.

examples sufficient for each transmission provider to make its own determination with a reasonable assurance of compliance regarding which provisions it believes are problematic.

Another of Western's concerns with the removal of an explicit or implicit right of first refusal for the incumbent transmission provider to construct a transmission facility is that if a proposed transmission project is in proximity to, or crosses, a transmission provider's service territory, a transmission provider should have the right to contribute, if desired, along with the sponsor of the transmission project to the funding of that project. Further, the transmission provider should have the right to obtain a commensurate ownership or capacity share in that project to the extent that the transmission provider needs to construct the same or similar transmission facilities to meet its obligations to provide transmission service under its OATT.

Additionally, as discussed previously, Western believes that if a third party is allowed to construct a transmission facility in an incumbent transmission provider's service territory without any requirements for coordination, it could create impediments that prevent transmission providers from constructing needed transmission additions to provide for its own transmission service commitments using its own facilities. Accordingly, Western requests that the Commission clarify in the Final Rule that a non-incumbent transmission developer granted the right to construct and own transmission facilities must coordinate the construction of those facilities with the incumbent transmission provider or providers.

Western notes that at times it has been—and in the future likely will be—required by congressional mandate to construct transmission facilities. Western anticipates that such facilities typically will not be included in a regional transmission plan insofar as they are relatively limited in size and scope; however, Western cannot guarantee this will always be the case. To the extent that Western is mandated to construct facilities that warrant inclusion in a

regional transmission plan, Western must retain the unfettered ability to construct those facilities. Therefore, Western cannot agree to waive or remove a right of first refusal pertaining to those facilities. Although Western's OATT currently does not explicitly state such a right, it is implicitly provided for in Western's OATT Attachment K – Authorities and Obligations, and Western likely will add an explicit statement of such a right to its OATT if and when it submits a compliance filing, to comply with any final proposal from the instant proceeding.

Finally, to avoid confusion among the industry, Western requests that the Commission adopt different terminology in its discussion of this issue, since the phrase "right of first refusal" is widely used by both the Commission and the industry to address competing transmission requests. Therefore, Western proposes that a phrase such as "first right of participation" instead be adopted in the Final Rule when elaborating on this concept.

G. Compliance Timelines

1. Summary of the NOPR's Proposal

With the exception of the proposed requirements regarding interregional transmission planning agreements and an interregional cost allocation method or methods, the NOPR proposes to require each public utility transmission provider to submit a compliance filing within six months of the effective date of the Final Rule in the instant proceeding as necessary to demonstrate that it meets the NOPR's proposed requirements. With respect to the proposed requirements regarding interregional transmission planning agreements and an interregional cost allocation method or methods, the NOPR proposes to require each public utility transmission provider to submit a compliance filing within one year of the effective date as necessary to demonstrate that it meets the NOPR's proposed requirements.²¹

²¹ NOPR at P 179.

2. Western's Comments

Although Western is not subject to the Commission's FPA section 205 filing requirements, Western nonetheless is troubled by the six-month and one-year compliance timelines proposed in the NOPR for public utility transmission providers to respectively comply with its intraregional and interregional planning process and cost allocation requirements. As the Commission itself knows well, the industry—in particular, the Western Interconnection—is a broad mix of public and non-public utility transmission providers situated throughout states that have disparate generation portfolio standards, environmental policies, siting requirements and processes, and other significant differences that would require mitigation in order to comply with the Final Rule in the instant proceeding. In spite of this, the NOPR's proposed timelines expect public utility transmission providers to develop within six months a compliance filing that mitigates such issues within a planning region, and then mitigate within only another six months such issues among neighboring planning regions. Western believes that this is unreasonable timeframe and will not allow sufficient time for transmission providers and affected stakeholders to craft the best practicable solutions to the NOPR's proposals.

For the above reasons, Western recommends that the Commission not require public utility transmission provider to submit compliance filings within a certain period, but instead require the submittal of periodic status reports regarding intra- and interregional efforts. Then, the Commission can decide on a case-by-case basis whether a region or regions are proceeding in a timely manner given the specific circumstances at hand, and can direct appropriate remedies if and when needed.

As a less preferable alternative, Western recommends that the Commission modify the NOPR's proposed compliance filing timelines as follows: (1) with the exception of the

interregional transmission planning agreements and an interregional cost allocation method or methods, each public utility transmission provider should instead be required to submit a compliance filing within one year of the effective date of the Final Rule as necessary to demonstrate that it meets the proposed requirements set forth in the NOPR; and (2) with respect to interregional transmission planning agreements and an interregional cost allocation method or methods, each public utility transmission provider should instead be required to submit a compliance filing within two years of the effective date of the Final Rule as necessary to demonstrate that it meets the proposed requirements set forth in the NOPR. Such modifications would allow more time for affected stakeholders to develop better solutions than they otherwise could have given the NOPR's proposed timelines.

III. CONCLUSION

For the foregoing reasons, Western respectfully requests that the Commission consider these comments in its development of the Final Rule in the instant proceeding.

Respectfully submitted,

/s/

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Dated: September 29, 2010

CERTIFICATE OF SERVICE

I hereby certify that I have this 29th day of September 2010, served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

/s/

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