

TRANSMISSION CONTROL AGREEMENT ISSUES FOR THE RRG

ISSUE NO. TCA-1 REFERRED TO THE RRG

Statement of Position: The regional preference provisions applied to RTO transmission service contained in the IndeGO TCA should be removed. (Enron)

Arguments in Favor (by Enron):

The regional preference would render the NW RTO proposal insufficient to comply with the requirements of Order No. 2000 for the following reasons.

- First, it would totally undermine the primary purpose of Order No. 2000, to remedy undue discrimination and anticompetitive effects.
- Second, it would fail to comply with the Order No. 2000 requirement that the RTO have exclusive and independent authority to file changes to its transmission tariff including the rates terms, and conditions for service over facilities it operates. The regional preference requirement would deprive the RTO of the exclusive and independent authority to change tariff rates reflecting different congestion pricing methods and to change tariff terms and conditions to allow service to parties outside the scope of regional preference.
- Third it would not allow the RTO to identify a region of appropriate scope and configuration as required by Order No. 2000.

Arguments in Opposition (by BPA):

The language on priority to Federal transmission capacity for regional loads (whether Federal or nonFederal) should be retained. This provision states that, where capacity over Federal facilities is insufficient to serve all competing requests for new service, regional load shall receive preference. This priority does not apply to curtailments or redispatch of existing service.

1. The Energy Policy Act of 1992 established this priority.
2. If the language is deleted but BPA elects to join the RTO, BPA would still be exposed to a FERC order under section 211 of the Federal Power Act or to a court order to implement this priority, and the RTO would be required to provide service to BPA to implement the order.
3. Congestion management methods to be implemented by the RTO will minimize the likelihood of having to actually implement this priority.

ISSUE NO. TCA-2 REFERRED TO THE RRG

Statement of Position: Transmission owners should not have a requirement to revisit RTO rates every five years or delay imposing rate increases for 120 days. (PPC)

Arguments in Favor (ITC):

Mandatory Rate Reopener Every Five Years

The IndeGO TCA provides that rates charged by Transmission Owners must be revised at least once every five years. Section 14.4.1. This requirement limits the rights available to Transmission Owners under the Federal Power Act (FPA). The FPA does not require rate revisions at any particular time, but leaves it up to the transmission owner to file at any time for rate revisions. The FPA is balanced, in that customers are free at any time to challenge the rates charged by transmission owners through a FERC complaint, if the customers conclude that the rates are improper.

As part of a comprehensive deal that addresses cost shifts and other issues in the region, transmission owners may potentially agree to certain limitations on their rights under the FPA, if such limitations are balanced and part of a fair whole. However, it is unreasonable to expect transmission owners to agree to a limitation on their FPA rights without any comparable benefit to transmission owners. No such benefit has been provided here.

Timing Limitations On Effectiveness Of Rate Filings

The IndeGO TCA provides that rate changes submitted by transmission owners will not go into effect until the following October 1, and that if a change is not submitted at least 120 days prior to October 1, it will not go into effect until the following October 1. Section 14.4.2. This requirement limits the rights available to Transmission Owners under the Federal Power Act (FPA). The FPA allows an owner to file for new rates at any time. Under the FPA and FERC precedent, many rate filings are suspended for a nominal period of one day, and then go into effect immediately thereafter, subject to refund. Other rate filings are suspended for at most five months. The FPA is balanced in that customers may at any time file a complaint concerning rates, and the Commission can establish a refund date after which any excessive rates will be refunded.

As part of a comprehensive deal that addresses cost shifts and other issues in the region, transmission owners may potentially agree to certain limitations on their rights under the FPA, and such limitations are balanced and part of a fair whole. However, it is unreasonable to expect transmission owners to agree to a limitation on their FPA rights without any comparable benefit to transmission owners. No such benefit has been provided here.

Arguments in Opposition (BPA):

The 5-year limitation on transmission owner rates charged to the RTO should be retained. This requirement to revise rates at least once every five years provides protection to the RTO and its customers that transmission owner charges continue to be reasonable. Without this limitation, the RTO and/or its customers would have to initiate a complaint at FERC to test the reasonableness of an owner's rates and would have to shoulder the burden of proof. BPA currently has a statutory requirement to revise its rates at least once every 5 years.

The requirement that (1) revised transmission owner rates to the RTO become effective no earlier than October 1 of any year and (2) transmission owners file with FERC or have their governing bodies finally determine the new rate at least 120 days prior to October 1 should be retained (although it might be acceptable to allow a change every six months – i.e., on March 1 as well). These limitations (1) reduce RTO workload and increase efficiency by coordinating all transmission owner rate changes into one change; and (2) promote user friendliness and customer orientation by assuring RTO customers of some constancy in rates.

ISSUE NO. TCA-3 REFERRED TO THE RRG

Statement of Position: End user access to the RTO transmission system should be made available only (a) if there is a state retail access program requiring such service, (b) if such end users are DSIs with rights to such service under federal law, or (c) if the former (pre-RTO) retail service provider of such end user voluntarily agrees to allow such service. (Puget)

[Notes: The reference to "state retail access program" also would apply to a retail access program provided by Tribes of competent jurisdiction. In addition, the Paul Murphy recommends that the issue be clarified with respect to DSI customers, to read:

"End user access to the RTO transmission system should be made available only (a) if there is a state retail access program requiring such service, (b) if such end user is an "existing direct service industrial customer" of BPA as defined in section 5(d)(4)(A) of the Northwest Power Act (16 U.S.C. §839c(d)(4)(A)) or a successor in interest to such DSI customer so as to qualify for service under section 5(d) unless such service is prohibited by federal law, or (c) if the former (pre-RTO) retail service provider of such end user voluntarily agrees to allow such service. (Puget)"]

Arguments in Favor (Puget Sound):

Argument presented too extended for this one-page summary. See separate Puget Sound memorandum below.

Arguments in Opposition (PacifiCorp):

- The requested provision would give the Participating Transmission Owners greater protection from retail competition than currently provided without an RTO: The provision would not be limited to the Executing Transmission Owner's ("ETO") specifying the circumstances under which retail customers could take service from its own Transmission Facilities. In addition, the provision also would represent an agreement barring any current ability of retail customers to bypass the ETO's Transmission Facilities and take service from the Transmission Facilities of any other Participating Transmission Owner ("PTO").
- PacifiCorp considers the potential antitrust exposure of executing one of a series of agreements, mutually providing that each PTO's Transmission Facilities may not be used by retail customers to bypass the Transmission Facilities of any other PTO, to be too great for PacifiCorp to execute such a TCA.

To: Marcus Wood
From: Stan Berman
Date: July 27, 2000
Re: Disputed TCA Matters re Retail Access for Presentation to the RRG

At the July 25-26 meetings of the TCA workgroup, we agreed that I would provide a short description of the issues relating to several TCA matters that were not resolved in our workgroup. The following retail access matter is disputed and requires resolution.

RETAIL ACCESS

In the RTO Principles set forth by the Filing Utilities in their March 17, 2000 document, it was agreed that retail access issues would be left for determination by the respective states. In states where retail access had been ordered, the RTO would provide such access. Otherwise, it would be left to the state to determine when and in what circumstances retail access would be provided. The principle reads as follows:

Retail Access: The RTO proposal shall accommodate the requirements for retail access as ordered at the state level. The RTO proposal also shall protect and maintain the rights of states to make determinations about retail access. The RTO proposal shall not alter the rights of a transmission facility owner to control retail access to its transmission facilities, in accordance with applicable law.

This principle is consistent with the Federal Power Act (FPA), which does not permit FERC to order transmission service to end use customers except in certain explicitly defined circumstances. FPA 212(h). Essentially, the Federal Power Act provides that FERC can order access for wholesale customers, but that only states can order access to retail customers. Absent an order from the state, FERC cannot order the service to retail customers. In recognition of this limitation on its authority to order transmission access, FERC limited the Eligible Customers under its Order 888 Open Access Tariff to the following:

Eligible Customer: (i) Any electric utility (including the Transmission Provider and any power marketer), Federal power marketing agency, or any person generating electric energy for sale for resale is an Eligible Customer under the Tariff. Electric energy sold or produced by such entity may be electric energy produced in

the United States, Canada or Mexico. However, with respect to transmission service that the Commission is prohibited from ordering by Section 212(h) of the Federal Power Act, such entity is eligible only if the service is provided pursuant to a state requirement that the Transmission Provider offer the unbundled transmission service, or pursuant to a voluntary offer of such service by the Transmission Provider. (ii) Any retail customer taking unbundled transmission service pursuant to a state requirement that the Transmission Provider offer the transmission service, or pursuant to a voluntary offer of such service by the Transmission Provider, is an Eligible Customer under the Tariff.

FERC's Eligible Customer definition was written in contemplation of access provided by vertically integrated utilities, where the Transmission Provider is also the distribution utility that served the retail customers in its region. The terminology is confused in an ISO/RTO situation, because the Transmission Provider is now the RTO. If the provision is left unchanged, it creates the implication that an independent RTO can open retail access throughout the system, without regard to the individual considerations that states would give to the situation.

In other regions, this issue has been dealt with by making it clear in the eligible customer definition that it is the utilities who formerly controlled the system, rather than the ISO, that decides whether an end use customer may obtain retail access, absent a state program requiring retail access. Obviously, if there is a state retail access program, that state program controls. The tariffs also have explicit provisions making clear that the tariff would not usurp the state's role (or other governing body where appropriate) in determining whether retail access is appropriate. FERC has accepted these routine adjustments of the definitions in various tariffs without comment, as these adjustments merely implement federal law and FERC policy. An example of a limitation clarifying these issues can be found in the California ISO Tariff which provides:

Section 2.1.2 Eligibility of Customers for Direct Access or Wholesale Sales

The eligibility of an End Use Customer for Direct Access will be determined in accordance with the Direct Access eligibility and phase-in procedures (if any) adopted by the Local Regulatory Authority. Any dispute as to whether an End Use Customer meets the eligibility criteria must be resolved by the Local Regulatory Authority prior to the ISO providing Direct Access to that End Use Customer.

As in other regions, it is important that the RTO-West documents, including the TCA, do not permit the RTO to usurp the authority of the state to determine whether retail access can be provided, absent an agreement with the utility that serves the retail customer. Accordingly, the Tariff and TCA should

provide that access will be provided only to end use customers if such access is pursuant to a state retail access program, or if such access is voluntarily agreed to by the utility that formerly provided retail service to that end use customer. In addition, because of the unique situation of the DSIs in the Northwest, it is appropriate to explicitly protect their right to retail access, allowing access to an end user if such end user is an “existing direct service industrial customer” of BPA as defined in section 5(d)(4)(A) of the Northwest Power Act (16 U.S.C. §839c(d)(4)(A)) or a successor in interest to such DSI customer so as to qualify for service under section 5(d) unless such service is prohibited by federal law.

In the recent BPA transmission rate case, a settlement was reached on the definition of Eligible Customer that essentially implements the ideas discussed above. That settlement provides that the definition of Eligible Customer is as follows:

1.11 Eligible Customer

(i) Any electric utility (including the Transmission Provider and any power marketer), Federal power marketing agency, or any person generating electric energy for sale for resale is an Eligible Customer under the Tariff. Electric energy sold or produced by such entity may be electric energy produced in the United States, Canada or Mexico. However, with respect to transmission service that the Commission is prohibited from ordering by Section 212(h) of the Federal Power Act, such entity is eligible only if the service is provided to such entity’s customer that qualifies as an Eligible Customer pursuant to subsections (ii) or (iii) below.

(ii) Pursuant to a voluntary offer by the Transmission Provider, a retail customer of a distribution utility taking unbundled transmission service pursuant to a state retail access program (or taking unbundled transmission service as offered by its distribution utility) or any Federal entity eligible under law to purchase Federal power is an Eligible Customer under the Tariff.

(iii) A direct service industry to which the Bonneville Power Administration is authorized to sell power under the Pacific Northwest Electric Power Planning and Conservation Act shall be an Eligible Customer under the Tariff.

While the wording of this provision might have to be altered slightly to address the somewhat different circumstances of the RTO from BPA, and the complications relating to the creation of the ITC from several former vertically integrated utilities, this language in concept satisfies the concerns addressed above, limiting access to situations when it is required by the state, the customer is a Federal DSI, or a retail customer reaches an agreement with its former retail provider.

In contrast, the IndeGO documents allow any end user to obtain retail access, whether or not there is a state retail access program in place, and whatever the terms or limitations on that state retail access program. The current IndeGO documents do not honor the Filing Utilities principle that states should determine whether retail access should be available. FERC cannot order the imposition of a tariff with such terms, and transmission owners in states without a retail access program cannot be required to accept such terms.