

I. Work product of the Ad Hoc RTO Legal Committee.

The legal committee has prepared an “ISO Matrix” and a “Transco Matrix.” The attached matrices show:

A. Legal structures. The horizontal axis of each matrix shows the different types of Regional Transmission Organization (“RTO”) legal structures that are legally feasible. The only constraints imposed on the legal structures to be included were (1) the legal structure must be one that permits participation in some form by the various types of transmission owners; (2) the resulting RTO must be able to meet the characteristics and functions as set out in Order 2000 issued by the Federal Energy Regulatory Commission; and (3) the structure must not have legal “fatal flaws” that would prevent either the implementation or the effective operation of the resulting RTO.

B. Legal issues. The vertical axis of each matrix lists major legal issues that policymakers may want to consider in connection with the selection of an RTO legal structure. Relevant issues include both issues affecting BPA and issues affecting other potential RTO members. The matrix thus allows the reviewer to compare how each of the issues is impacted by each of the structural options.

The purpose of the matrices is to allow policymakers to compare the various alternatives as to RTO legal structure on a side-by-side basis. In so doing, the legal committee has not attempted to make policy judgments as to preferable legal structures or to analyze matters unrelated to the choice of RTO legal structure (such as rate design or congestion management alternatives). The intention is to address only legal issues and to leave policy considerations to policymakers.

The RTO legal committee was an ad hoc group in which the following attorneys participated:

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II. RTO legal structures.

A. ISO and Transco alternatives. When we use the terms ISO and Transco, we mean the following:

(1) An ISO would be an entity that performs all of the functions prescribed for an RTO, but which is prohibited by its charter documents from owning transmission poles and wires. The owners of such transmission facilities would enter Transmission Control Agreements with the ISO. Under the Transmission Control Agreements, the transmission owners would continue to own, maintain and in most respects operate their transmission facilities, but would authorize the ISO to exercise all RTO control functions with respect to such facilities.

(2) A Transco differs from an ISO in that it would be permitted to finance and own transmission poles and wires. Individual transmission facility owners would have the option of transferring their transmission facilities to the Transco or of participating in the Transco structure through Transmission Control Agreements. Transmission facility owners that participated through Transmission Control Agreements would continue to own, maintain and in most respects operate their transmission facilities, but would authorize the Transco (which would perform ISO functions with respect to such facilities) to exercise all RTO control functions with respect to such facilities.

Organizational diagrams of an ISO and of a Transco are attached.

B. ISO legal structure alternatives. The ISO legal structure alternatives are:

(1) Non-profit corporation: This entity would be a non-profit corporation organized under state law. As a non-profit corporation, it would have no stockholders and would not pay profits. All financing would be with debt. The entity would be governed by a Board of Directors or a Board of Trustees selected by the corporation's members. The entity's organizing documents would specify the classes of members. IndeGO, for example, was structured as a Utah non-profit corporation.

(2) Non-Profit Cooperative: This entity would be a non-profit, non-stock cooperative corporation organized under state law. All financing would be with debt. The entity would be governed by a Board of Directors selected by the cooperative's members. The entity's organizing documents would specify the classes of members. An example of a cooperative owner would be one of the current electric generation and transmission cooperatives.

(3) Federal Wholly Owned: This entity would be a federal agency or corporation established pursuant to a new federal law. The control of such organization would be by a person or persons appointed by the President or another member of the executive branch of the United States government. Debt would be issued either to the Federal government or to outside investors through private capital markets.

We also considered the following ISO legal structures, which we determined were not legally feasible: a for-profit corporation, a municipal corporation, a for-profit cooperative corporation and an interstate compact agency. We did not include a for-profit corporation ISO or a for-profit cooperative corporation ISO because we were unable to define a plausible equity financing approach for an RTO entity that lacked a major asset base or substantial debt. We attach as Appendix 1 a memorandum summarizing why the other named legal structures were found to be not feasible.

C. Transco legal structure alternatives. The Transco legal structure alternatives are:

(1) For-profit state-chartered corporation: This entity would be a stock corporation organized under state law. Financing would be carried out through the issuance of debt and of stock. Transmission assets could be acquired from existing transmission owners through cash purchase (using the proceeds of debt and stock offerings) and, in the case of non governmental transmission owners, through the exchange of Transco stock for transmission assets. This entity would be governed by a Board of Directors elected by the holders of the Transco voting stock. Entities that continued to own generation assets, or that continued to own transmission assets and entered Transmission Control Agreements with the Transco, would be ineligible to own more than a *de minimis* amount of the Transco voting stock.

(2) Non-profit corporation: This entity would be the same type entity as the non-profit corporation described under the ISO legal structure alternatives.

(3) Non-Profit Cooperative: This entity would be the same type entity as the non-profit, non-stock cooperative corporation described under the ISO legal structure alternatives.

(4) Mixed federal/state-chartered corporation: This entity would be a federally-chartered for-profit corporation created by a new federal statute. It is similar to the for-profit state-chartered corporation described in C. (1) above except that the federal government would take an equity interest in the Transco. The entity would be funded through the issuance of debt and of stock, and transmission owners (except municipal transmission owners) could exchange their assets for stock. In the case of BPA, its transmission assets would be exchanged in return for issuance of stock to the United States government or an agency thereof. Other transmission assets could be acquired through cash purchase (using the proceeds of debt and stock offerings). The governance of this entity could be as specified in the federal legislation – selection of the members of the governing body could be by appointment through the executive branch of the federal government, by stockholders' vote, or by a combination of federal appointment and stockholder vote.

(5) Federal wholly owned: This entity would be the same type entity as the federal wholly owned entity described under the ISO legal structure alternatives. This entity could be structured to later evolve, upon the occurrence of certain conditions, into a mixed federal/private stock corporation, a fully nonfederal for-profit corporation or a non-profit corporation.

We also considered the following Transco legal structures which we determined were not feasible or practicable: a municipal corporation, a for-profit cooperative corporation and an interstate compact agency. We did not include a for-profit cooperative corporation because we could not think of a way to make the cooperative membership and equity rights tradable; therefore, such cooperative membership and equity rights did not seem to be useful financial consideration for transmission assets. If on the other hand, cooperative equity were distributed to voting members from various representative groups, excess revenues could be distributed without regard to either contribution of assets or payments for transmission services. We attach as Appendix 1, a memorandum summarizing why the municipal corporation and interstate compact agency legal structures were found to be not feasible.

III. Matters Affecting Timing of RTO Implementation.

The Federal Energy Regulatory Commission (“FERC”) has required the jurisdictional public utilities that own, operate, or control interstate transmission facilities and that are not already in an RTO to file with the Commission by October 15, 2000, a proposal for an RTO with the minimum characteristics and functions, to be operational by December 15, 2001, or, alternately, a description of efforts to participate in an RTO, any existing obstacles to RTO participation, and any plans to work toward RTO participation. For the reasons described below, implementation by the December 15, 2001 deadline of an RTO that both meets FERC’s characteristics and functions and includes participation by BPA would be a challenge, and may well be impossible.

A. Legislative Action.

The matrices describe two potential types of legislative action that are either desirable or required prior to BPA’s participation through a Transmission Control Agreement (“TCA”) in an RTO that is a state-chartered non-profit corporation, state-chartered for-profit corporation, or state-chartered non-profit cooperative corporation. These are (1) a federal authorization of such participation and (2) state legislation preventing the RTO structure from triggering potential increases in the pre-existing level of state taxation. We think that these legislative actions may be achievable within the RTO implementation period established by the FERC, although we do not express an opinion as to the ease or difficulty of obtaining the necessary legislation.

The matrices also describe federal legislation necessary if a decision is made (1) to create a federal corporation or a federally-chartered corporation or (2) to transfer BPA’s transmission assets to an RTO. We do not think that the necessary legislation is reasonably achievable within the RTO implementation period established by the FERC. We do not express an opinion as to the ease or difficulty of obtaining the necessary legislation or as to the precise number of Congressional sessions required to obtain such legislation.

The matrices further note legislation that is needed for publicly-owned utilities and electric cooperatives to participate in an RTO. We think that these legislative actions may be

achievable within the RTO implementation period established by the FERC, although we do not express an opinion as to the ease or difficulty of obtaining the necessary legislation.

B. NEPA and Judicial Timetables.

BPA must complete review under the National Environmental Policy Act (“NEPA”) of a decision to participate in an RTO. If we assume that an RTO agreement were completed and ready for NEPA review as of the October 15, 2000, FERC reporting deadline, BPA’s NEPA review process could be completed within six months. Assuming that as a result of the NEPA process and of the federal and state legislative processes, BPA proceeded to go forward with implementation of the RTO agreement as reviewed, and assuming (1) no delay resulting from judicial review of BPA’s action and (2) a minimum implementation time of one year, the earliest implementation date for the resulting RTO would seem to be in the first half of 2002.

APPENDIX 1

ENTITY FORMS CONSIDERED BUT ULTIMATELY EXCLUDED AS PROSPECTIVE RTO CANDIDATES

After research and discussion, the Ad Hoc RTO Legal Committee decided to exclude certain forms of entity from further consideration as potential RTO candidates because those forms suffer from legal flaws that prevent them from serving effectively as a regional RTO entity. Those forms are:

1. Municipal Corporations

Municipal corporations, which include cities, towns, PUDs, and similar local government entities, are creatures of state statute, and require either specific or implied statutory authority to own or operate electric transmission facilities. The Legal Committee decided to exclude municipal corporations from consideration because no statute provides clear legal authority for a municipal corporation to operate the Northwest regional transmission grid. Although PUDs and municipal utilities are authorized by existing statutes to construct, own and operate transmission facilities, this authority is related to the principal statutory purpose of these utilities, which is providing electric service to their retail customers. No Northwest municipal corporation is currently authorized to own or operate a region-wide transmission grid that is independent of the municipal corporation's primary purpose of providing retail electric service.

Cities and PUDs might conceivably join together to form a joint operating agency ("JOA"), another kind of municipal corporation, to own or operate the transmission facilities of such utilities. Such an entity would probably not, however, have the authority to own or operate the transmission facilities of any non-governmental utilities. In addition, as currently written, the Washington State JOA statute, R.C.W. Chapter 43.52, requires ownership and voting rights in the JOA to be allocated to each participating entity in proportion to the amount of energy taken from the jointly owned facility by the entity. R.C.W. § 43.52.370. This requirement runs afoul of Order No. 2000's independent governance requirements.¹

As detailed in the matrix, PUDs, cities and other governmental entities are authorized under the Washington State Interlocal Cooperation Act, R.C.W. Chapter 39.34, to form and be members of a non-profit corporation or cooperative. Such a corporation or cooperative could be used by municipal corporations for purposes of facilitating their joint participation in a

¹ The "Centralia" statute, R.C.W. Chapter 54.44, which authorizes joint ownership of generation and transmission assets by PUDs, cities, and certain IOUs, was also considered as a potential RTO candidate, but rejected. That statute authorizes only a contractual joint ownership arrangement, and does not provide authority to form a separate legal entity. In addition, the Centralia statute, like the JOA statute, contains specific ownership and voting requirements that cannot be reconciled with the independent governance requirements of Order No. 2000.

Northwest RTO, subject to certain restrictions. However, non-governmental utilities would not be permitted to be members of any entity formed under the Interlocal Cooperation Act.

2. Interstate Compact Agencies

The Legal Committee also considered and rejected the possibility of using an interstate compact agency as the RTO entity. Interstate compacts are authorized by the U.S. Constitution and are sometimes used to address interstate problems such as regulation of shared water resources. Like municipal corporations, interstate compact agencies are creatures of statute, and no statute currently authorizes the formation of an interstate compact agency to operate the regional transmission system in the Northwest. Moreover, enacting such an interstate compact statute would be particularly cumbersome -- authorizing legislation would need to be passed by the U.S. Congress and by the legislatures of each of the states involved. Hence, it would be difficult to enact the required legislation in time to meet the filing deadlines specified in Order No. 2000. Similarly, any amendment to the statute governing an interstate compact agency would require adoption by both Congress and each applicable state legislature, making it difficult for such an agency to comply with Order No. 2000's "open architecture" requirement.

ISO AND TRANSCO ORGANIZATIONAL STRUCTURES



